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 XXII of XXII

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

*Counsel for Rickie Slaughter

ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

VOLUME I

Dated July 21, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

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

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

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

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

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

No. 78760

IN THE NEVADA SUPREME COURT

Rickie Slaughter,

Petitioner-Appellant,

v.

Renee Baker, et al.,

Respondents-Appellees.

On Appeal from the Order Denying Petition
For Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County
(A-18-784824-W | 04C204957)
Honorable Douglas W. Herndon, District Court Judge

Petitioner-Appellant's Reply Brief

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

*Counsel for Rickie Slaughter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

ARGUMENT

The State withheld critical evidence in Mr. Slaughter's case: evidence showing the eyewitnesses who purported to identify him didn't notice him in a second, non-suggestive photographic lineup, and evidence confirming his alibi. After Mr. Slaughter found this evidence in 2018, he promptly filed his third post-conviction petition in the lower court. He argued the lower court could hear his claims on the merits because the State withheld the evidence, and because the new evidence showed he was innocent. The lower court incorrectly rejected these arguments.

The State's answering brief attempts to defend the lower court's decision, but its reasoning is unpersuasive: among other things, it misunderstands its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and paints an unduly rosy picture of the State's case at trial. This Court should reverse.

I. Mr. Slaughter demonstrated good cause because the State withheld evidence.

The prosecution failed to turn over two categories of evidence: identification evidence and alibi evidence. Mr. Slaughter therefore had meritorious *Brady* claims, which necessarily meant he showed good cause

and prejudice, too. *See* Opening Brief ("OB") at 17-44. The State tries to downplay its *Brady* violations, but its arguments are unconvincing.

A. *Brady* claims don't depend on the defense's diligence.

As Mr. Slaughter explained in his opening brief (at pages 38-39), the lower court erroneously applied a due diligence requirement to Mr. Slaughter's *Brady* claims. In its brief, the State repeats the argument that the *Brady* claims lack merit because the defense attorneys made insufficiently diligent efforts to find all the withheld evidence. Answering Brief ("AB") at 25-27.

This argument is legally wrong. The prosecution has an obligation under *Brady* to disclose material exculpatory evidence, and the obligation doesn't vanish simply because the defense attorneys might conceivably find the information on their own.

Multiple cases make this point. For example, in *Banks v. Dretke*, 540 U.S. 668 (2004), the prosecution said it had provided complete discovery, but it failed to disclose impeachment evidence. Mr. Banks pursued a *Brady* claim, and the State faulted him for a "lack of appropriate diligence in pursuing" the claim. *Id.* at 695. The U.S. Supreme Court

disagreed. As it explained, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable." *Id.* To the contrary, "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation," regardless of whether the defense attorneys could've cured their misconduct by finding the hidden evidence sooner. *Id.* The Court therefore rejected a due diligence exception.

Likewise, in *Strickler v. Greene,* 527 U.S. 263 (1999), the State represented it had an open file policy but failed to disclose impeachment evidence. Mr. Strickler pursued a *Brady* claim; the federal court of appeals rejected it because he failed to litigate it in state court, even though the claim "was available to reasonably competent [post-conviction] counsel." *Id.* at 279. The U.S. Supreme Court disagreed. While the trial and post-conviction attorneys "must have known" the witness "had had multiple interviews with the police," and while the attorneys could've investigated whether those interviews contained impeachment material, they were nonetheless entitled to assume the prosecutor would've turned them over if they did. *Id.* at 285. Because there's no requirement a petitioner "conduct [a] 'reasonable and diligent investigation' . . . when the evidence is in the hands of the State," the U.S. Supreme Court held the State

suppressed the evidence, regardless of whether the defense attorneys should've looked harder. *Id.* at 287-88.

The Ninth Circuit reached a similar result in *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014). There, the prosecution failed to disclose impeachment information about its key witness. The court ordered the prosecution to make its witnesses available for interviews with defense counsel at the courthouse, but the defense attorney failed to interview this witness. Mr. Amado eventually raised a *Brady* claim, and the state court concluded he failed to exercise due diligence. The Ninth Circuit disagreed. As it explained, "The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence." *Id.* at 1135. In its view, a prosecutor can't "excuse" a non-disclosure "by arguing that defense counsel could have found the information himself." *Id.* at 1136.

Many other cases have reached the same conclusion. *See, e.g.*, *Dennis v. Sec'y*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc) ("[T]he United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*."); *Lewis v. Conn.*, 790 F.3d 109, 121-22 (2d Cir. 2015) ("[T]he state habeas court's imposition of such a due

diligence requirement plainly violated clearly established federal law under *Brady* and its progeny."); *Barton v. Warden*, 786 F.3d 450, 468 (6th Cir. 2015) (stating *Brady* "does not require the State simply to turn over *some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs").

Despite all this, the State insists the lower court correctly imposed a due diligence requirement. AB at 25-27. To that end, it cites *Steese v. State*, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). *Id.* at 26. That case rejected a *Brady* claim when the defendant had personal "knowledge" of the relevant evidence. *Id.* That rule doesn't apply here. Mr. Slaughter didn't personally know what happened when the witnesses saw the second photo lineup; he didn't know what time Mr. Means called 911; and while he might've known he got into an argument with Mr. Arbuckle, he wouldn't have known Mr. Arbuckle went so far as to call the cops on him. In any event, to the extent *Steese* might create a due diligence requirement that would apply here, its ruling predates the U.S. Supreme Court's binding decisions in *Banks* and *Strickler*.

The State also cites the Ninth Circuit's decision in *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991), in support of a due diligence

requirement. AB at 26. But *Aichele* stands for the unremarkable proposition that "the federal government's *Brady* obligation does not extend to files that were under the exclusive control of *state* officials." *Amado*, 758 F.3d at 1137 (cleaned up). Here, all the *Brady* evidence in this state prosecution was within the control of state officials, so the *Aichele* separate-sovereigns rule doesn't cover this case.

Finally, the State argues a defense attorney "cannot lay a trap for prosecutors by failing to use evidence of which defense counsel is reasonably aware." AB at 26 (cleaned up) (citing *Amado*, 758 F.3d at 1135). In other words, if a defense attorney makes a "strat[egic]" decision to turn a blind eye to potential exculpatory material in the hopes of setting up a *Brady* claim during post-conviction, that sort of sandbagging might defeat the *Brady* claim. *Amado*, 758 F.3d at 1135. Here, there's no indication Mr. Slaughter's defense attorneys were trying to sandbag the State, and subsequent factual development shows otherwise. *See infra* at pages 27-30. The Court should reject the State's position.

B. The State violated *Brady* by failing to disclose the outcome of the second photo lineup.

As Mr. Slaughter's opening brief explains (at pages 20-23 and 29-31), the State withheld material evidence about the outcome of the second photo lineup. The prosecution turned over some records memorializing the second photo lineup's existence, but it failed to disclose substantial details about what happened during the lineups—in particular, whether any of the witnesses identified Mr. Slaughter in that lineup.

In its brief, the State insists the non-disclosure didn't amount to a *Brady* violation, but this Court should conclude otherwise.

1. The State withheld and misrepresented the outcome.

To start, the State resists the notion it withheld anything. In the State's view, it didn't need to disclose the outcome of the lineup because the defense knew about the lineup and could've investigated the outcome themselves. AB at 27-29. But as Mr. Slaughter just explained, there's no due diligence exception to *Brady*, and the State's argument is a non-starter.

Indeed, this *Brady* violation is even more egregious—and a due diligence requirement would be even more inappropriate—given the misrepresentations the prosecutor made about this lineup. If the prosecution makes inaccurate statements about discovery, the defense can't be faulted for taking those statements at face value. *See Banks*, 540 U.S. at 693 (noting the prosecution "misleadingly represented that it had complied in full with its *Brady* disclosure obligations"); *Strickler*, 527 U.S. at 284 (stating defense attorneys can rely on "the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials," as well as any "implicit representation that such materials would be included in the open files tendered to defense counsel").

Here, the prosecutor in Mr. Slaughter's case stated at a pre-trial hearing that it would take "a giant leap . . . to say Rickie Slaughter wasn't picked out of [the second] photo lineups." IV.App.675; *cf.* V.App.1021-23 (Tr. at 60-67). By making this statement, the prosecutor implied he knew the second photo lineup was an *inculpatory* topic, and he signaled the defense attorneys would be best served by staying away from it. But the prosecutor's statement was false: the truth of the matter is that *none* of the witnesses identified Mr. Slaughter from the second photo lineup, and

thus it wouldn't take *any* leap, much less "a *giant* leap," to reach that conclusion. This misstatement compounded the State's *Brady* violation.

The Ninth Circuit's decision in *Gantt v. Roe*, 389 F.3d 908 (9th Cir. 2004), is instructive. There, the police found Mr. Gantt carrying a matchbook with a phone number on it. The prosecution argued Mr. Gantt took the matchbook from the victim, and the victim had a connection to the phone number. The State disclosed the matchbook and disclosed that the police had called the number and spoken to the person on the other line (who was from another country). But the State failed to disclose the person told the police he didn't recognize a photo of the victim. The State also told the defense the person had a son who lived in the same city as the victim. But it failed to disclose the son also told the police he didn't recognize the victim; to the contrary, the prosecution represented the police hadn't been able to contact the son.

The lower court rejected the *Brady* claim "because the defense could and should have discovered [the evidence] itself." *Gantt*, 389 F.3d at 912. The Ninth Circuit disagreed. It admitted the defense "could have been more diligent" in its investigation (*id.* at 913)—after all, they knew about the matchbook and could've contacted the person (and the person's son)

themselves. But the court rejected a due diligence exception to *Brady*. *Id.* It also noted the case presented "an even stronger argument for disclosure," because the prosecutor falsely represented "it was keeping the defense apprised of developments in the investigation," and the defense was "entitled to rely on the prosecution's representation." *Id.* at 913.

The same is true here. The State suppressed the outcome of the second photo lineup. While the defense could've conceivably investigated the issue, there's no due diligence exception to *Brady*. Indeed, this case involves "an even stronger argument for disclosure" (389 F.3d at 913) because the prosecution improperly implied the outcome of the second photo lineup was an *inculpatory* topic, one the defense would be ill-advised to investigate. IV.App.675; *cf.* V.App.1021-23 (Tr. at 60-67). The defense was "entitled to rely on" that statement (389 F.3d at 913), so it would be especially improper to impose a diligence requirement in these circumstances. *See also Mazzan v. Warden*, 116 Nev. 48, 74, 993 P.2d 25, 41 (2000) (noting the defense attorney "accepted the prosecutors' assessments that [undisclosed] reports were unimportant").

The State insists the prosecutor's statements were legitimate, since he was accurately stating the relevant police report was ambiguous, and

he was justifiably encouraging the defense to conduct their own investigation. AB at 28-29. In truth, the prosecutor was disputing the idea that none of the eyewitnesses identified Mr. Slaughter from the second photo lineup; instead, he implied the outcome of the lineup was inculpatory. Similarly, the State suggests the prosecutor didn't know much about the lineup when the hearing occurred: in its words, "the State and Defendant's counsel possessed the same information regarding the second photographic lineup," so the prosecutor wasn't intentionally misrepresenting anything. *Id.* at 29. But the prosecutor had "a duty to learn" about the second photo lineup and accurately communicate the outcome. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). In any event, subsequent factual development shows the prosecutor did, in fact, know at the time that the outcome of the second photo lineup was exculpatory. *See infra* at pages 27-30.

Similarly, the federal good cause analysis looks at whether the prosecution previously misrepresented evidence during the *post-conviction* stage. *See Banks*, 540 U.S. at 693; *Strickler*, 527 U.S. at 284. Here, in his first post-conviction proceedings, Mr. Slaughter raised a trial-counsel-ineffectiveness claim under *Strickland v. Washington*, 466 U.S. 668

(1984), about the second photo lineup. VII.App.1284-89, 1296-99. But the State disputed his allegation that none of the witnesses identified him from the second photo lineup. VII.App.1454. That misrepresentation provides additional reason to find good cause here.

Next, the State argues Mr. Slaughter's opening brief "blatantly misrepresents" Detective Prieto's testimony about the second photo lineup. AB at 29. But Detective Prieto's testimony is straightforward. Mr. Slaughter asked, "Did any of the victims identify anyone from [the second photo] lineups?" IX.App.1722. Detective Prieto answered, "If my report reflects that they didn't, then they didn't." *Id.* Mr. Slaughter continued, "So to the best of your knowledge, none of the victims or witnesses identified Rickie Slaughter from [the] second photo lineup . . . ?" IX.App.1722. Detective Prieto responded, "No. I showed you, or you have the ones that they identified him from" (i.e., the first photo lineup). *Id.* Just to be sure, Mr. Slaughter asked whether any of the eyewitnesses wrote anything on the lineup forms. IX.App.1722-23. Detective Prieto responded, "No. If they say they didn't, they are not able to pick any[one], I just notate it in my report." IX.App.1723.

To summarize, Detective Prieto testified none of the witnesses identified Mr. Slaughter from the second photo lineup, and if they had, he would've had them make a note on the lineup form and would've mentioned it in his report.

In truth, the State isn't trying to dispute what Detective Prieto said—rather, it suggests his *memory* wasn't crystal clear, so he wasn't credible. AB at 31. But his testimony makes perfect sense. His report doesn't mention anyone identifying Mr. Slaughter from the second photo lineup, and the lineup forms don't contain any notes. Detective Prieto testified based on these facts (as well as his memory) that none of the witnesses identified Mr. Slaughter from the second photo lineup. The State (via the Attorney General's office) had a full opportunity to cross-examine Detective Prieto on that point, but it failed to undercut his testimony. Thus, the State's attacks on Detective Prieto's memory fall flat. But if the State insists on challenging Detective Prieto's credibility, or if it wants to dispute his testimony, then the lower court should've set an evidentiary hearing. *See, e.g.*, *Marshall v. State*, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994) (discussing the standards for an evidentiary hearing). In any event, subsequent factual development underscores the

conclusion none of the witness identified Mr. Slaughter to Detective Prieto from the second photo lineup. *See infra* at pages 27-30.

Finally, the State notes the point of the second photo lineup was to see if the witnesses could identify a different suspect (Jaquan Richard), as opposed to Mr. Slaughter. AB at 29. That's precisely why the second lineup is more reliable—Detective Prieto didn't realize Mr. Slaughter's photo was in it, so it was in effect a double-blind lineup, unlike the suggestive first lineup. When the police followed a better lineup procedure, the eyewitnesses didn't identify Mr. Slaughter, which is a highly exculpatory fact.

2. The outcome of the second photo lineup would've been material.

It's material that none of the eyewitness identified Mr. Slaughter from the second photo lineup. This trial was about the eyewitness identifications, plain and simple. If the jury knew the eyewitnesses who purported to identify Mr. Slaughter had failed to identify him from a non-suggestive second photo lineup, it would've had ample doubt—and at the very least reasonable doubt—about the identifications. There's therefore

a reasonable probability, and certainly a reasonable *possibility*, the non-disclosure affected the jury's verdict. *See* OB at 29-31.

The State disagrees. It argues three of the witnesses identified him in court, and four of them identified him from the first photo lineup, so the evidence against him was overwhelming. AB at 31-32. The premise is right, but the argument completely misses the point. As the State apparently recognizes, its strongest evidence at trial was the three (or four) purported identifications. If the jury knew those same eyewitnesses failed to identify Mr. Slaughter from a *second*, non-suggestive lineup, it would've had serious questions about the accuracy of the identifications. The evidence is material *precisely* because it would've eviscerated what the State seems to realize was its most persuasive evidence.

The State also accuses Mr. Slaughter of speculating about what would've happened at trial if the defense put on evidence about the second photo lineup. AB at 32. But we know what Detective Prieto would've said in his testimony—he would've admitted none of the eyewitnesses identified Mr. Slaughter from the second photo lineup. IX.App.1722-23. Nonetheless, the State posits the eyewitnesses might've testified they *recognized* Mr. Slaughter in the second photo lineup but simply failed to

identify him to Detective Prieto. AB at 32. It would be a very counterintuitive for an eyewitness to spot a suspect in a photo lineup but fail to mention that to the police. But if the State insists it could present evidence that one of the eyewitnesses *recognized* Mr. Slaughter from the second photo lineup, the Court should remand this case for an evidentiary hearing. (As a matter of fact, there's been subsequent factual development on this very point. *See infra* at pages 27-30.)

Finally, the State argues the trial attorneys might've had a strategic reason not to present this evidence. AB at 32. As Mr. Slaughter explained above (at page 6), there's no indication that's the case. But if the State insists on making this argument, the Court should remand for a hearing. (There's been subsequent factual development on this point as well. *See infra* at pages 27-30.)

C. The State violated *Brady* by failing to disclose the 911 call time.

As Mr. Slaughter's opening brief explains (at pages 24-27 and 31-33), the State withheld material evidence about the 911 call time. The prosecution turned over police reports mentioning the time "19:11" in connection with the incident and/or the dispatch, but it failed to disclose

any records confirming Mr. Means called 911 at 7:11 p.m. That would've been critical evidence for Mr. Slaughter's alibi. Once again, the State insists it didn't violate *Brady*, but this Court should conclude otherwise.

First, the State argues it didn't withhold anything because the police reports mentioned the officers were dispatched at 7:11 p.m. AB at 33. But the dispatch time isn't necessarily the 911 call time, and the reports don't say when Mr. Means called 911. Indeed, when Mr. Slaughter previously litigated a trial-counsel-ineffectiveness claim about the 911 call time, the State faulted him for failing to present "any evidence showing that the 911 call was in fact made at 7:11 p.m." VII.App.1450. Now that Mr. Slaughter has found the evidence, the State has shifted gears, arguing the existing evidence proved all along the 911 call time was 7:11 p.m. AB at 33. The Court should reject this revised position.

Second, the State again blames defense counsel for failing to investigate. AB at 33. But there's no due diligence exception to *Brady*. *See supra* at pages 2-6. The State also argues the defense attorneys knew the call time was 7:11 p.m., since they tried to use that time in their closing arguments. AB at 33-34. But the prosecutor blocked them from making that argument because the defense hadn't proven the call time—

which they weren't able to prove precisely because the State withheld the relevant document. *See* OB at 25-27. (Notably, the audio recording itself doesn't have a time stamp on it.) Meanwhile, and contrary to the State's arguments (AB at 33-34), the prosecutor misleadingly suggested the suspects probably called 911 no later than 7:00 p.m., when in fact he knew (or should've known) the call came in at 7:11 p.m. *See* OB at 25-27. Those inaccurate statements compounded the *Brady* violation.

Third, the State argues the evidence wasn't material. AB at 34-35. But it doesn't seriously engage with Mr. Slaughter's alibi timeline. *See* OB at 31-33. In brief, Ms. Johnson testified Mr. Slaughter picked her up from work between 7:00 p.m. and 7:15 p.m., and no later than 7:20 p.m. Meanwhile, it would've taken at least 20 minutes at a bare minimum for a suspect to get from the crime scene to Ms. Johnson's workplace. There's no way Mr. Slaughter could've left the scene at 7:08 p.m. and picked Ms. Johnson up by 7:20 p.m. That means he couldn't have been one of the perpetrators.

The State doesn't dispute that the suspects left the scene at 7:08 p.m., or that it would've taken Mr. Slaughter at least 20 minutes to get to Ms. Johnson's workplace. Instead, it simply attacks Ms. Johnson's

credibility. According to the State, Ms. Johnson previously dated Mr. Slaughter, so she would've had a motive to lie. AB at 34-35. But Ms. Johnson stopped dating Mr. Slaughter in about 2005 (V.App.1058 (Tr. at 56)), and by the 2011 trial, she had married someone else (V.App.1046 (Tr. at 8)). It's quite a stretch to suggest Ms. Johnson committed perjury to protect someone she dated six years ago, especially when she was already married to someone else.

The State also suggests the jury would've found Ms. Johnson incredible given a jail call between Mr. Slaughter and Ms. Johnson. AB at 35. In the State's view, the call memorializes Mr. Slaughter trying to manufacture an alibi. *Id.* But as Mr. Slaughter explained in his opening brief (at pages 40-41), the call reflects Mr. Slaughter correcting Ms. Johnson about when she told the police she got off work—it doesn't suggest Mr. Slaughter was trying to create an alibi out of whole cloth.

In truth, there should've been plenty of reason to believe Ms. Johnson. While Jeffrey Arbuckle testified he left work at 7:30 p.m. and Mr. Slaughter still hadn't shown up, he previously told the police he left at *7:15 p.m.* (the jury didn't hear about that prior inconsistent statement). That's roughly the same time Ms. Johnson said Mr. Slaughter picked her

up. Meanwhile, the two witnesses agreed Mr. Slaughter showed up right when Mr. Arbuckle left. *See* OB at 54. Had the jury known about Mr. Arbuckle's prior inconsistent statement (and his motive for bias, *see infra* at pages 20-24), there's a reasonable probability it would've concluded Mr. Slaughter showed up right around 7:15 p.m. And if the jury knew the suspects left at 7:08 p.m., it probably would've considered the alibi airtight and would've voted to acquit.

D. The State violated *Brady* by failing to disclose Mr. Arbuckle's trespassing complaint.

As Mr. Slaughter's opening brief explains (at pages 27-28 and 31-33), the State withheld evidence that Mr. Arbuckle had previously called the police against Mr. Slaughter. That fact was relevant to Mr. Slaughter's alibi, since Mr. Arbuckle and Ms. Johnson provided conflicting testimony about when Mr. Slaughter came to pick up Ms. Johnson. Had the jury known Mr. Arbuckle was biased against Mr. Slaughter, there's a reasonable probability it would've believed the alibi and voted to acquit. Once again, the State downplays the *Brady* violation, but the Court shouldn't credit its arguments.

First, the State maintains its *Brady* obligations didn't extend to the trespassing report, since Las Vegas Metropolitan Police Department took the report, and North Las Vegas Police Department was the main investigating entity in this case. AB at 36-38. In the State's view, its duty under *Brady* extends only to police departments that substantially aid the investigation. *Id.* But *Brady* covers evidence held by any "local police department" that constitutes "an agent of the State." *Wade v. State*, 114 Nev. 914, 919, 966 P.2d 160, 163 (1998), *opinion modified on denial of reh'g*, 115 Nev. 290, 986 P.2d 438 (1999); *see also Browning v. Baker*, 875 F.3d 444, 460 (9th Cir. 2017) (stating *Brady* applies to evidence "in the possession of state agents"). Here, Metro was a local police department and a state agent, even if it wasn't the primary investigating agency. The prosecutor therefore had constructive knowledge of the documents in Metro's possession.

Second, the State argues the trespassing complaint isn't material because the jury probably disbelieved Ms. Johnson. AB at 38-39. That view is misguided. *See supra* at pages 18-19. But if the State's right that the jury thought Ms. Johnson had a motive for bias, then the trespassing complaint would've been even more important, since it shows *Mr.*

Arbuckle had a motive for bias, too. If the jury knew *both* witnesses had possible ulterior reasons for their testimony, it would've had reasonable doubt about whether to believe Mr. Arbuckle or Ms. Johnson about the pickup time, and there's a reasonable probability the indeterminacy would've produced an acquittal.

Similarly, the State speculates the jury found Mr. Arbuckle credible and Ms. Johnson incredible, and it argues the Court can't second guess the jury's supposed credibility determinations. AB at 38-39. But we don't know what credibility determinations the jury did or didn't make. Thus, it's improper for the State to insist the jury believed its witnesses, and it's misguided to argue a reviewing court must respect those hypothetical credibility determinations. Rather, the materiality analysis requires courts to consider the "totality of the circumstances" and evaluate the withheld evidence and the trial evidence in an objective manner. *United States v. Bagley*, 473 U.S. 667, 683 (1985). Here, the State withheld *Brady* evidence that would've impeached Mr. Arbuckle, and there's a reasonable probability that evidence would've impacted whatever credibility determinations the jury did (or didn't) draw.

The State argues the trespassing complaint isn't material because the prosecution's case was otherwise strong. AB at 39. But Mr. Slaughter has already explained the weaknesses in the State's case. OB at 55-57. The State's evidence consisted of the following: (1) eyewitness identifications, which we now know aren't reliable given the second photo lineup; (2) equivocal ballistics evidence; (3) a poor-quality surveillance video from a 7-Eleven possibly showing a suspect whose facial features are impossible to discern; and (4) evidence Mr. Slaughter had access to a car that matched some of the eyewitnesses' varying descriptions of the getaway car's make and color.

Once again, the State insists the Court must assume the jury found all this evidence compelling. AB at 39. But again, the materiality analysis would break down entirely if courts necessarily had to assume the jury believed the prosecution's case was airtight. To the contrary, courts need to take an objective view of the trial evidence and decide whether there's a reasonable probability the withheld evidence would've affected the outcome. Here, the only reasonable view is that the State's evidence was weak and circumstantial—except for the eyewitness identifications,

which we now know were untrustworthy. Thus, it's even more likely the omitted alibi evidence would've swayed the jury's verdict.

Even assuming the State presented strong evidence at trial (which it didn't), the trespassing complaint would still be material. If Mr. Slaughter could prove he was somewhere else when the crime took place, the jury necessarily would've had reasonable doubt, no matter how compelling the prosecution's evidence was. The trespassing complaint would've helped established an indisputable alibi, so it was necessarily material, even if the State's evidence was otherwise persuasive.

Finally, the State insinuates the trespassing complaint was a double-edged sword because Mr. Slaughter might've prompted Mr. Arbuckle's complaint by doing something unflattering. AB at 46. But the circumstances leading up to the trespassing complaint aren't in the record. If the State believes those circumstances might've hurt the defense, the Court should remand the case to allow the State to put on the relevant evidence. In any event, no matter what the complaint was about, it was critical impeachment material supporting a solid alibi, so it would've benefitted the defense on balance.

E. Mr. Slaughter can show good cause for his related claims.

In addition to these *Brady* claims, Mr. Slaughter re-raised related trial-counsel-ineffectiveness claims under *Strickland v. Washington*, 466 U.S. 668 (1984), as well as other claims. As his opening brief explains (at pages 44-50), he had good cause to raise those other claims as well.

The State disagrees. To start, it faults Mr. Slaughter for raising trial-counsel-ineffectiveness claims in the alternative to his *Brady* claims. AB at 40. But the lower court and the State both believe the *Brady* claims lack merit because Mr. Slaughter's defense attorneys should've found the evidence on their own. If that view is legally accurate (which it isn't), then the defense attorneys provided ineffective assistance, and Mr. Slaughter should still be entitled to relief.

As Mr. Slaughter's opening brief explains, he has good cause to litigate these claims now. In particular, he raised trial-counsel-ineffectiveness variants of these *Brady* claims in his timely first post-conviction petition, which he litigated pro se. In response to that petition, the State argued those claims lacked merit because Mr. Slaughter couldn't prove his allegations. Of course, the reason Mr. Slaughter couldn't prove his

allegations is because (1) his trial attorneys ineffectively failed to get the information, and (2) the State refused to disclose the evidence on collateral review. Those two factors combined provide good cause to relitigate those claims now. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (stating trial-counsel-ineffectiveness can serve as good cause); *State v. Bennett*, 119 Nev. 589, 601, 81 P.3d 1, 9 (2003) (stating the *Brady* obligation "exists regardless of whether the State uncovers the evidence before trial, during trial, or after the defendant has been convicted"); *Mazzan*, 116 Nev. at 73, 993 P.2d at 41 (stating a "post-trial refusal" to disclose "also constitutes a *Brady* violation in its own right").

Next, the State argues the law of the case doctrine precludes some of the claims. AB at 40-42. But as Mr. Slaughter explained in his opening brief (at page 48), the doctrine doesn't apply when a petitioner provides "substantially new or different" evidence in support of a claim. *Rippo v. State*, 134 Nev. 411, 427, 423 P.3d 1084, 1101 (2018). The State recognizes this exception, but it insists certain claims don't meet it. AB at 40-42. Those arguments are off base. Ground One alleges the first photographic lineup was impermissibly suggestive, and the eyewitnesses' identifications weren't otherwise reliable. The new evidence about the second

photo lineup substantially improves that claim: it's even easier to conclude the first lineup must've been impermissibly suggestive if the eyewitnesses failed to identify Mr. Slaughter from a second, non-suggestive photo lineup. Grounds Six, Seven, and Nine all involve improper statements by the prosecutor during closing arguments, including improper statements about Mr. Slaughter's alibi. The new evidence shows that, in fact, the alibi was solid, which makes the improper statements much more inappropriate. The new evidence therefore strengthens these claims, so law of the case doesn't apply.

The State also observes some of the claims aren't connected to the new evidence. AB at 42-43. But as Mr. Slaughter explained in his opening brief (at pages 50-61), he's innocent, so the lower court should've considered all his claims on the merits.

F. The Court should consider remanding this case.

As Mr. Slaughter explained in his opening brief (at pages 43-44), the Court should consider remanding this case. After the lower court orally announced its intent to dismiss Mr. Slaughter's petition, the federal court granted Mr. Slaughter leave to depose Marc DiGiacomo, the

lead prosecutor. Since that time, Mr. Slaughter has conducted the deposition as well as follow-up investigation prompted by the deposition. The deposition and the additional investigation weren't part of the record below, so Mr. Slaughter doesn't discuss the substance in his briefing. However, if the Court were to order supplemental briefing, Mr. Slaughter would explain how the deposition and subsequent investigation further prove the *Brady* violations, especially the violation involving the second photo lineup. Because this evidence is highly probative, it would be premature for this Court to decide this appeal on an incomplete record, so a remand for additional proceedings would be appropriate.

The State suggests the Court lacks authority to remand (AB at 43), but it doesn't provide any legal authority on that front. The Court should conclude it has this authority. By analogy, if Mr. Slaughter had filed a motion for reconsideration based on newly discovered evidence below, and if the lower court were inclined to grant the motion, this Court could remand the case. *See Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010). (Notably, Mr. Slaughter was unable to file a timely motion for reconsideration because Mr. DiGiacomo's deposition didn't take place until after the deadline.) Likewise, if the Court believes it would be

premature to decide the case on an incomplete record, it has the authority to remand the case.

A remand is particularly warranted given some of the statements in the State's answering brief. For example, the State argues the prosecutor and the defense had the same information about the second photo lineup when the prosecutor made misleading statements at a pre-trial hearing. *See supra* at pages 10-11. It argues the defense attorneys might've made a strategic decision not to discuss the lineup at trial. *See supra* at pages 6, 16. It disputes Detective Prieto's testimony that none of the witnesses identified Mr. Slaughter from the lineup. *See supra* at pages 12-14. And it argues that even if the eyewitnesses didn't *identify* Mr. Slaughter from the lineup, they might've nonetheless *recognized* Mr. Slaughter in the lineup and simply failed to mention that fact to Detective Prieto. *See supra* at pages 15-16. The new evidence undercuts each of those assertions, so the Court shouldn't resolve this appeal based on those arguments.

Again, the relevant evidence isn't part of the record on appeal, so Mr. Slaughter isn't discussing the evidence in his briefing; rather, his arguments focus on the current record on appeal. However, he would be

willing to file supplemental briefing regarding the new evidence. And in an abundance of caution, to ensure the Court can consider the full record, Mr. Slaughter is filing a contemporaneous motion for leave to expand the record on appeal and/or for a remand.

II. Mr. Slaughter is innocent.

As Mr. Slaughter's opening brief explains (at pages 50-61), he's innocent. Given what we know now, it's more likely than not any reasonable jury wouldn't have convicted him. The lower court therefore should've considered Mr. Slaughter's claims on the merits.

The State resists this conclusion, but many of its arguments simply rehash the previous parts of its brief. AB at 44-46. For example, the State suggests Detective Prieto's testimony about the second photo lineup was equivocal. It wasn't: he testified credibly that none of the eyewitnesses identified Mr. Slaughter from the second photo lineup. *See supra* at pages 12-14. Similarly, the State suggests it's not clear what would've happened if the attorneys had examined the eyewitnesses about the second photo lineup at trial. But if the State wants to try and prove this topic would've been inculpatory, the Court should remand for a

hearing. *See supra* at pages 15-16. The State says the 911 call time is new, but the State never disclosed the relevant document. *See supra* at pages 16-18. The State argues Ms. Johnson is an incredible alibi witness, but its rationale is flawed. *See supra* at pages 18-20. The State also suggests Mr. Arbuckle's trespassing complaint isn't relevant, but the complaint shows why Mr. Arbuckle had a motive to provide unfavorable testimony. *See supra* at pages 21-24.

Additionally, the State repeats its claim that the jury must've found all the prosecution's evidence persuasive, and it argues the Court can't second-guess the jury. AB at 46. But again, it would eviscerate the innocence analysis if a court had to assume the jury thought the State's case was airtight. *Cf. supra* at page 22. Instead, the innocence inquiry requires courts to take an objective view of all the evidence—the trial evidence and the new evidence—and make a "probabilistic determination" about what reasonable jurors would've done had they known everything. *Lee v. Lampert*, 653 F.3d 929, 938 (9th Cir. 2011) (cleaned up). The only reasonable conclusion here is that the State's case was weak, except for the eyewitness identifications. Had the jury known those

identifications were questionable, and had it heard all the facts about Mr. Slaughter's alibi, it's more likely than not it would've declined to convict.

Finally, the State complains about Mr. Slaughter having filed multiple petitions, and it argues the procedural bars are designed to prevent multiple petitions. AB at 47. But Mr. Slaughter wouldn't have had to file multiple petitions if the State had simply met its *Brady* obligations before trial or during Mr. Slaughter's first post-conviction proceedings. When the State fails to disclose evidence, or when new evidence shows a petitioner is innocent, Nevada law allows a petitioner to file a successive petition. The State's complaints about the procedural bars therefore miss the mark.

III. The Court should reconsider *Brown v. McDaniel*.

Finally, as Mr. Slaughter explained in his opening brief (at pages 61-66), the State should reconsider and overrule *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014). Instead, the Court should follow federal law and conclude a petitioner can show good cause to litigate a trial-counsel-ineffectiveness claim in an otherwise untimely and successive petition if the petitioner didn't have adequate assistance from counsel during

the first post-conviction proceedings. *See Martinez v. Ryan*, 566 U.S. 1 (2012).

The State urges the Court to stick with *Brown*, but its reasoning is off base. First, the State observes *Martinez* didn't create a federal constitutional right to state post-conviction counsel, so its holding isn't binding on state courts. AB at 49-50. That's beside the point. *See* OB at 65. While this Court isn't bound to follow *Martinez*, it's still a correctly reasoned and persuasive decision from the U.S. Supreme Court about analogous federal law principles, and the Court should treat it as instructive when it comes to Nevada's similar procedural rules.

Second, the State invokes stare decisis. AB at 51. But the Court can "depart from the doctrine of stare decisis where such departure is necessary to avoid the perpetuation of error." *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (cleaned up). For example, stare decisis shouldn't apply when a previous decision from this Court conflicts with a relevant U.S. Supreme Court decision. *See Armento-Carpio v. State*, 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013). Here, the Court's decision in *Brown* created tension with the U.S. Supreme Court's reasoning in *Martinez*, and the Court should depart from stare decisis to

resolve that tension. *See also Matter of Estate of Sarge*, 134 Nev. 866, 870, 432 P.3d 718, 722 (2018) (departing from stare decisis in part because of "'strong persuasive authority'" from the U.S. Supreme Court).

In addition, the Court should depart from stare decisis when there are "compelling reasons" that are "weighty and conclusive." *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (cleaned up). Here, the good cause exception described in *Martinez* is an essential federal safeguard that ensures at least one court will review a defaulted but substantial trial-counsel-ineffectiveness claim. The same reasoning applies in state court. If the Court stands by *Brown*, then the Nevada courts will remain closed to substantial Sixth Amendment claims, simply because the petitioner didn't have an adequate state post-conviction attorney. That would be an unjust result, and the need to avoid such a result is a "compelling" and "weighty" reason why the Court should depart from stare decisis. The Court should therefore overrule *Brown* and remand for further proceedings.

CONCLUSION

The Court should reverse and remand with instructions to consider all of Mr. Slaughter's claims on the merits.

Dated February 20, 2020.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF COMPLIANCE

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

2. I further certify this brief complies with the page- or type-volume limitations of Rule 32(a)(7) because, excluding the parts of the brief exempted by Rule 32(a)(7)(c), it has been prepared with a proportionally spaced font and contains only 6,773 words.

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

Dated February 20, 2020.

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 February 20, 2020, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Karen Mishler.

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

Rickie Slaughter NDOC #85902 Saguaro Correctional Center 1252 E. Arica Road Eloy, AZ 85131	Michael Bongard Senior Deputy Attorney General Office of the Attorney General 1539 Avenue F Suite 2 Ely, NV 89301

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78760

ORDER DENYING MOTION

Appellant has filed a motion to supplement the record with evidence from a post-trial deposition and investigation that appellant contends is relevant to the proceedings below, but was not presented to the district court for consideration. This court's review on appeal is limited to the documents filed in or considered by the district court in the underlying proceedings. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981); NRAP 10(a) and (b) (together indicating that the record on appeal consists of documents and exhibits filed in the district court, transcripts, minutes, and docket entries). The motion is denied.

In the alternative, appellant requests a limited remand to allow the district court to consider the evidence from the post-trial deposition and investigation and to reconsider its decision to dismiss appellant's petition. This court has established procedures for parties to follow in seeking a limited remand for the district court to reconsider an order on appeal, and

it does not appear that those procedures were followed here. *See* NRAP 12A. Accordingly, the alternative request for remand is denied without prejudice. The clerk shall detach the exhibits attached to the motion and return them unfiled, and strike exhibit B to the motion, filed separately on February 21, 2020.

It is so ORDERED.

Pickering, C.J.

cc: Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney

MOT
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. CHARLES DANIELS, Director, Nevada Department of Corrections; MARTIN L. FRINK, Warden, Saguaro Correctional Center; RENEE BAKER, ex-Warden, Ely State Prison; and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. A-20-812949-W (04C204957) Dept. No. III Hearing Not Requested

MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE FILINGS IN MR. SLAUGHTER'S PRIOR CASES

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) and in his third post-conviction proceedings in this Court (A-18-787824-W).

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 procedure in this Court's clerk's office of requiring new post-conviction habeas petitions to be filed in new civil case numbers. 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.

Likewise, Mr. Slaughter requests the Court formally take judicial notice of the documents filed in his original criminal case number and in his third post-conviction proceedings (Case No. A-18-787824-W). 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. Meanwhile, Mr. Slaughter's instant (fourth) post-conviction petition references many of the exhibits filed in his prior (third) post-conviction proceedings. It is hard to imagine a closer relationship between cases, so the Court should take judicial notice of the documents filed in the original criminal case number and the third post-conviction proceedings. Mr. Slaughter has already filed multiple documents that haven't previously been filed in either 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 and the third post-conviction proceedings, 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

The Court should take judicial notice of the documents filed in his criminal case number and in his third post-conviction proceedings.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated March 27, 2020.

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 March 27, 2020, 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 will mail a copy of the foregoing document to the following people:

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
Eloy, AZ 85131

/s/ Richard Chavez
An Employee of the Federal Public Defender, District of Nevada

PWHC
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER,

Petitioner,

v.

CHARLES DANIELS, Director, Nevada Department of Corrections; MARTIN L. FRINK, Warden, Saguaro Correctional Center; RENEE BAKER, ex-Warden, Ely State Prison; and AARON FORD, Attorney General of the State of Nevada,

Respondents.

Case No. _____
(04C204957)

Dept. No. III

Hearing Requested

(Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

PRELIMINARY MATTERS

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Saguaro Correctional Center, Eloy, Pinal County, Arizona. (In the custody of the Nevada Department of Corrections; transferred to an out-of-state institution pursuant to a contract with a private corrections company. Previously housed at Ely State Prison, Ely, White Pine County, Nevada.)

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada.

3. Date of judgment of conviction: Filed October 22, 2012.

4. Case Number: C204957.

5. (a) Length of Sentence: Total aggregate sentence of 52 years to life:

Count	Charge	Term of imprisonment
1	Conspiracy to commit kidnapping	24 to 60 months
2	Conspiracy to commit robbery	24 to 60 months, consecutive to Count 1
3	Attempted murder with use of a deadly weapon	60 to 180 months, plus an equal and consecutive 60 to 180 months, consecutive to Count 2
4	Battery with use of a deadly weapon	The court did not adjudicate Mr. Slaughter on this count, since it was an alternative count to Count 3
5	Attempted robbery with use of a deadly weapon	48 to 120 months, with an equal and consecutive 48 to 120 months, concurrent with Count 3
6	Robbery with use of a deadly weapon	48 to 120 months, with an equal and consecutive 48 to 120 months, consecutive to Count 3
7	Burglary while in possession of a firearm	48 to 120 months, concurrent with Count 6
8	Burglary	24 to 60 months, concurrent with Count 7
9	First-degree kidnapping with substantial bodily harm with use of a deadly weapon	15 years to life, plus an equal and consecutive 15 years to life, consecutive to Count 6
10	First-degree kidnapping with use of a deadly weapon	5 years to life, plus an equal and consecutive 5 years to life, concurrent with Count 9
11	First-degree kidnapping with use of a deadly weapon	5 years to life, plus an equal and consecutive 5 years to life, concurrent with Count 9

12	First-degree kidnapping with use of a deadly weapon	5 years to life, plus an equal and consecutive 5 years to life, concurrent with Count 9
13	First-degree kidnapping with use of a deadly weapon	5 years to life, plus an equal and consecutive 5 years to life, concurrent with Count 9
14	First-degree kidnapping with use of a deadly weapon	5 years to life, plus an equal and consecutive 5 years to life, concurrent with Count 9

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [x]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged: N/A

7. Nature of offense involved in conviction being challenged: Attempted murder with use of a deadly weapon, first-degree kidnapping with substantial bodily harm with use of a deadly weapon, robbery with use of a deadly weapon, and other charges associated with an alleged home invasion and robbery.

8. What was your plea?

(a) Not guilty X (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: Mr. Slaughter originally pled guilty but was allowed to withdraw his plea and proceeded to trial.

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury x (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No x

12. Did you appeal from the judgment of conviction? Yes x No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: No. 61991

(c) Result: Judgment of conviction affirmed.

14. If you did not appeal, explain briefly why you did not: Not applicable.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes x No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: Eighth Judicial District Court

(2) Nature of proceeding: First state post-conviction petition for a writ of habeas corpus.

(3) Grounds raised:

1. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to subpoena and/or call Detective Jesus Prieto to testify as a witness at trial to elicit several key pieces of evidence critical to the defense, such as: prior, inconsistent statements; exculpatory photo lineup evidence; and evidence that impeached the integrity of the police investigation.

2. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to subpoena and call Officer Anthony Bailey as a witness to elicit prior, inconsistent statements made by victim Ivan Young regarding the crimes and descriptions of the perpetrators.

3. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to adequately cross-examine the state's eyewitnesses regarding crucial information that would have impeached their overall memory and prior identifications of petitioner.

4. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to subpoena and call eyewitness Destiny Waddy to testify at trial to elicit her description of the perpetrator's "get away" vehicle as being a Pontiac Grand Am, not a Ford Taurus.

5. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to subpoena and/or call the records custodians for 9-1-1 dispatch records for the North Las Vegas and Las Vegas Metropolitan Police Departments as witnesses to testify regarding the actual time victim Jermaun Means called 9-1-1. Said testimony would have bolstered petitioner's defense that he was on the opposite side of town, away from the crime scene, when the crimes occurred.

6. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to call defense investigator Craig Retke to elicit testimony regarding the amount of time it would take a person to drive the distance between the crime scene and Mrs. Holly's work place, using the fastest routes available.

7. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to investigate and discover that critical state witness Jeff Arbuckle had an extensive criminal background/record, received benefits from the state, and had a personal bias against petitioner which constituted material impeachment evidence to impeach his credibility.

8. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to subpoena and call Officer Mark Hoyt to elicit prior, inconsistent statements made by eyewitnesses.

9. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to exercise due diligence to investigate and discover material impeachment evidence

against the state's eyewitnesses. The prosecutors provided witnesses with monetary compensation each time they attended private pre-trial meetings with the prosecutors to discuss their testimonies.

10. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his attorneys provided ineffective assistance of counsel when they failed to investigate and discover that petitioner's photo, used in the first set of lineups from which petitioner was identified, had been obtained during an illegal field interview in violation of petitioner's Fourth Amendment rights. The picture and photo lineups should have been suppressed.

11. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his appellate attorney provided ineffective assistance of counsel when he failed to raise a valid and preserved *Batson* claim that had a reasonable probability of reversing petitioner's conviction.

12. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his appellate attorney provided ineffective assistance of counsel when he failed to raise a preserved, valid claim regarding the state's failure to preserve exculpatory evidence that had a reasonable probability of reversing petitioner's conviction.

13. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial attorneys provided ineffective assistance of trial counsel when they called, against petitioner's wishes, witness Noyan Westbrook, knowing that she did not recall the alibi facts on which they planned to examine her. Defense counsel attempted to have the witness lie on the stand, and that opened the door for the state's attack and undermined the credibility of the defense.

14. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial attorneys provided ineffective assistance of counsel when they committed a chain of errors that, when viewed cumulatively, resulted in extreme prejudice and a denial of petitioner's constitutional rights to due process and fair trial.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __x____

(5) Result: Petition denied.

(6) Date of Result: The district court issued a notice of entry of a written order denying the petition on July 24, 2015. The Nevada Supreme Court issued an order of affirmance on July 13, 2016.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: See paragraph (6), above.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Second state post-conviction petition for a writ of habeas corpus.

(3) Grounds raised:

1. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial counsel provided ineffective assistance of counsel when they failed to adequately investigate information that the bullet shot into victim Ivan Young had a high probability of being a different caliber than a .357 magnum. Alternatively, petitioner's trial counsel was ineffective for failing to cross-examine and test the state's firearm expert on this point.

2. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial and appellate counsel failed to challenge numerous instances of prosecutorial misconduct at trial and on direct appeal which were plain error.

3. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial counsel provided ineffective assistance of counsel when they failed to develop testimony and evidence regarding the relationship between the perpetrator's time of departure from the crime scene and the time that Jermaun Means called 9-1-1.

4. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial counsel provided ineffective assistance of counsel when in the opening statement, they promised the jury favorable testimony that was never produced.

5. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his trial counsel provided ineffective assistance of counsel when they failed to adequately investigate, view, and/or obtain the original documents of the second set of photo lineups.

6. Petitioner is in custody in violation of his Sixth, Fourteenth, and Fifth Amendment rights of the U.S. Constitution because his appellate attorney provided ineffective assistance of counsel when he failed to challenge the consecutive nature and failure to aggregate the sentences as violating the cruel and unusual punishment and equal protection clauses of the law in light of evolving standards of decency in Nevada.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __x_____

(5) Result: Petition denied.

(6) Date of result: The district court issued a notice of entry of a written order denying the petition on June 13, 2016. The Nevada Court of Appeals issued an order of affirmance on April 19, 2017.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: See paragraph (6) above.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Third state post-conviction petition for a writ of habeas corpus.

(3) Grounds raised: Substantially the same grounds as raised in this petition.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __x_____

(5) Result: Petition denied; appeal pending.

(6) Date of result: The district court issued a notice of entry of a written order denying the petition on April 15, 2019. An appeal is pending.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: See paragraph (6) above.

(d) As to any fourth petition, application or motion, give the same information:

(1) Name of court: United States District Court, District of Nevada, Case No. 3:16-cv-00721-RCJ-WGC.

(2) Nature of proceeding: Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

(3) Grounds raised: Substantially the same grounds as raised in this petition.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __x_____

(5) Result: Pending.

(6) Date of result: N/A.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: N/A.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes. If so, identify:

a. Which of the grounds is the same: *See* statement regarding cause and prejudice, *infra.*

b. The proceedings in which these grounds were raised: *See* statement regarding cause and prejudice, *infra.*

c. Briefly explain why you are again raising these grounds. *See* statement regarding cause and prejudice, *infra.*

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). *See* statement regarding cause and prejudice, *infra.*

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? Yes If so, state briefly the reasons for the delay. (You must relate specific facts in response to this

question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) *See* statement regarding cause and prejudice, *infra.*

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes x No _____

If yes, state what court and the case number: *Slaughter v. Baker*, Case No. 78760 (Nev. Sup. Ct.); *Slaughter v. Baker et al.*, Case No. 3:16-cv-0072-RCJ-WGC (D. Nev.).

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Various attorneys represented Mr. Slaughter in the trial court, but he was ultimately represented by Osvaldo Fumo and Dustin Marcello at trial. He was represented by William Gamage on direct appeal.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes __ No __x____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

STATEMENT REGARDING CAUSE AND PREJUDICE

This is Mr. Slaughter's fourth post-conviction petition in this Court, and it follows his third post-conviction petition in this Court. (His third post-conviction proceeding in this Court took place in Case No. A-18-784824-W.) He filed his third post-conviction petition on November 20, 2018, after he conducted an initial round of discovery in federal court, which included deposing the lead detective in his case, Detective Prieto. As he explained in the pleadings involving his third post-conviction petition (which Mr. Slaughter respectfully incorporates by reference here), the new evidence he received in the federal discovery process gave him good cause to re-raise certain claims and to raise new claims for the first time, including claims under *Brady*

v. Maryland, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264, 266 (1959). Mr. Slaughter also explained the new evidence proved he was actually innocent of the home invasion at issue in this case. He therefore urged the Court to consider the claims in his otherwise untimely and successive petition on the merits.

The Court held argument on the petition on March 7, 2019, and announced its decision to dismiss the petition as procedurally barred. Then, on March 29, 2019, the federal court issued an order granting Mr. Slaughter's request to depose the lead prosecutor in his case, Marc DiGiacomo. *See* Exhibit 22.[1] Mr. Slaughter responded by filing a motion to stay the third post-conviction proceedings on April 4, 2019. He explained he would be deposing Mr. DiGiacomo soon, and the deposition would probably lead to additional evidence supporting his claims. He therefore proposed the Court abstain from entering a written order dismissing the petition and instead allow Mr. Slaughter to supplement his third petition once the deposition was complete.

The State filed an opposition to the motion to stay on April 8, 2019. It argued the Court shouldn't say the case, and it suggested "the proper remedy" for Mr. Slaughter "would be to file a brand-new petition for writ of habeas corpus" after the deposition. 4/8/19 Opposition at 6. Mr. Slaughter filed a reply on April 15, 2019. He explained it would "be a more complicated and judicially inefficient process" for Mr. Slaughter to file "another complete petition and potentially another round of briefing in this Court," especially when the third post-conviction petition would probably still be "pending in the Nevada appellate courts." 4/15/19 Reply at 3. He therefore suggested the Court should "allow Mr. Slaughter an opportunity to supplement" the third

---

[1] Mr. Slaughter submitted 22 exhibits during his third post-conviction proceedings. Rather than re-filing those exhibits in this case (and the pleadings from the third post-conviction proceedings), Mr. Slaughter is filing a separate motion asking the Court to take judicial notice of the documents and exhibits filed in his third post-conviction proceedings, as well as the documents and exhibits filed in his original criminal case (Case No. 04C204957). Mr. Slaughter is submitting additional new exhibits along with this petition.

petition after the deposition, "resolve the supplemented petition, and allow the parties to litigate a single appeal from that decision." *Id.*

The Court issued a formal notice of entry of a written order denying the petition on April 15, 2019. 4/15/19 Notice of Entry. It didn't specifically resolve Mr. Slaughter's motion for a stay. Mr. Slaughter appealed the order denying the petition. 5/6/19 Notice of Appeal. The appeal remains pending in the Nevada Supreme Court. Mr. Slaughter asked the court to expand the record on appeal to include Mr. DiGiacomo's deposition transcript, or in the alternative to remand the appeal for further proceedings; the court has denied those requests, and the appeal is ripe for decision.

In the meantime, Mr. Slaughter is now filing this fourth petition, as the State suggested in its April 8, 2019, opposition. Mr. Slaughter conducted Mr. DiGiacomo's deposition on July 26, 2019, and the deposition produced new evidence supporting some of the claims in Mr. Slaughter's petition, and in particular Ground Eleven, which raises a claim under *Brady v. Maryland* and *Napue v. Illinois*. The deposition also produced new evidence supporting Mr. Slaughter's innocence argument. Finally, the deposition prompted Mr. Slaughter to conduct additional relevant investigation, which led to additional relevant evidence. Thus, Mr. Slaughter is submitting this new petition to incorporate the information he learned from Mr. DiGiacomo's deposition and the ensuing investigation. While the claims in this petition essentially track the claims from the third petition, and while the Court previously dismissed the third petition as procedurally barred, Mr. Slaughter respectfully disagrees with that decision. In any event, Mr. Slaughter maintains the new evidence from Mr. DiGiacomo's deposition provides good cause for some of these claims and also supports his innocence argument. Mr. Slaughter therefore respectfully asks this Court to set this case for an evidentiary hearing so the parties can develop additional evidence regarding the claims in this petition and Mr. Slaughter's innocence.

Assuming the State files a motion asking the Court to dismiss this petition under the procedural bars, Mr. Slaughter intends to brief these issues in greater detail in an opposition to the motion. However, Mr. Slaughter provides a summary of the arguments here, and he respectfully incorporates by reference the related arguments he made during his third post-conviction proceedings.

A. Many of the claims in this petition rely on Mr. DiGiacomo's deposition and Mr. Slaughter's ensuing investigation.

Some of the claims in this petition rely on new evidence Mr. Slaughter recently received through Mr. DiGiacomo's deposition and the investigation prompted by the deposition. The Court should therefore consider these claims on the merits.

Although Nevada law places procedural restrictions on petitions—for example, the one-year statute of limitations in NRS 34.726, and the restrictions on successive petitions in NRS 34.810—a petitioner can avoid those procedural bars by showing "that the factual or legal basis for a claim was not reasonably available to counsel" earlier. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

This scenario often arises for *Brady* claims: a petitioner may find new exculpatory evidence the State previously suppressed prior to trial (and prior to previous post-conviction proceedings). When it comes to those claims, the issues of good cause and prejudice overlap with the merits of the claim. *See Lisle v. State*, 131 Nev. 356, 359-60, 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.'" 131 Nev. at 360, 351 P.3d at 728 (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).

Many of the claims in this petition rely on Mr. DiGiacomo's deposition and the ensuing investigation. The new evidence Mr. Slaughter received therefore supports a showing of good cause for these claims, including the *Brady* and *Napue* claims in Ground Eleven.

Ground One alleges the victims' identifications of Mr. Slaughter were tainted because the initial photo lineup the police showed the victims was unduly suggestive. Mr. Slaughter argued in his third petition he had good cause to raise this claim because the evidence he'd developed in federal court at that point confirmed for the first time the victims saw a second, non-suggestive photo lineup and failed to identify Mr. Slaughter from the second photo lineup. The fact the victims failed to identify him from the second, non-suggestive lineup illustrates how the first photo lineup was unduly suggestive. Mr. DiGiacomo's deposition and the ensuing investigation produced additional relevant information about the second photo lineup, so Mr. Slaughter is re-raising that claim in this fourth petition. The Court should find good cause for this claim based on the additional evidence Mr. Slaughter developed since the time he filed his third petition.

Grounds Two(A) through Two(D) allege trial counsel provided ineffective assistance by failing to introduce foundational evidence about Mr. Slaughter's alibi. Mr. Slaughter argued in his third petition he had good cause to raise this claim because the evidence he'd developed in federal court at that point confirmed for the first time a few key points about his alibi, including: (1) the victims called 911 at 7:11 p.m., and (2) one of the State's witnesses who provided unhelpful testimony about the alibi had a motive for bias against Mr. Slaughter. Mr. DiGiacomo's deposition produced relevant information about the alibi, so Mr. Slaughter is re-raising that claim in this

fourth petition. The Court should find good cause for this claim based on the additional evidence Mr. Slaughter developed since the time he filed his third petition.

Ground Three(A) alleges trial counsel provided ineffective assistance by failing to ask the victims about the second, non-suggestive lineup, in which none of the witnesses identified Mr. Slaughter. Mr. Slaughter argued in his third petition he had good cause to raise this claim because the evidence he'd developed in federal court at that point confirmed for the first time the victims saw the second photo lineup and failed to identify Mr. Slaughter from that lineup. Mr. DiGiacomo's deposition and the ensuing investigation produced relevant information about the second photo lineup, so Mr. Slaughter is re-raising that claim in this fourth petition. The Court should find good cause for this claim based on the additional evidence Mr. Slaughter developed since the time he filed his third petition.

Ground Four(A) alleges trial counsel provided ineffective assistance by failing to call Detective Jesus Prieto, the lead detective, as a defense witness. Mr. Slaughter argued in his third petition he had good cause to raise this claim because he had deposed Detective Prieto through the federal discovery process and therefore could illustrate how Detective Prieto would've testified had the defense called him at trial. Mr. DiGiacomo's deposition produced relevant information about why he decided not to call Detective Prieto in the first place, so Mr. Slaughter is re-raising that claim in this fourth petition. The Court should find good cause for this claim based on the additional evidence Mr. Slaughter developed since the time he filed his third petition.

Ground Eleven alleges the prosecution withheld material exculpatory evidence about the second photo lineup and Mr. Slaughter's alibi. Mr. Slaughter argued in his third petition he had good cause to raise this claim because the previously undisclosed evidence he'd developed in federal court at that point (1) confirmed for the first time the victims didn't identify him from the second photo lineup, and (2) strengthened

Mr. Slaughter's alibi. Mr. DiGiacomo's deposition and the ensuing investigation produced relevant information about the second photo lineup and the alibi, so Mr. Slaughter is re-raising that claim in this fourth petition. The Court should find good cause for this claim based on the additional evidence Mr. Slaughter developed since the time he filed his third petition.

B. Mr. Slaughter is actually innocent.

Mr. Slaughter did not participate in the home invasion. As his new evidence helps show, he is actually innocent of the charged crimes. The Court may therefore consider (or reconsider) all the claims in this petition, new and old, on the merits.

As Mr. Slaughter explained in his third petition, if an otherwise procedurally barred petitioner can establish that he or she is actually innocent of the crimes of conviction, the state courts may reach the merits of procedurally barred claims in order to prevent a fundamental miscarriage of justice. *See, e.g.*, *Mitchell v. State*, 122 Nev. 1269, 1273-75, 149 P.3d 33, 35-37 (2006). 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.'" *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

In his third post-conviction proceedings, Mr. Slaughter argued he met this standard. First, he explained how the victims saw two lineups with his picture in them. The first lineup was a suggestive photo lineup. The second photo lineup was non-suggestive, and indeed the detective didn't even realize Mr. Slaughter's photo was in that lineup at the time. But the State failed to disclose the results of the second photo lineup to the defense, and the jury didn't hear about the second lineup. Through the federal discovery process, Mr. Slaughter was able to prove for the first time that none of the witnesses identified him from the second photo lineup. Had the jury known the witnesses hadn't been able to identify Mr. Slaughter from a second,

non-suggestive lineup, the jury invariably would've had reasonable doubt about their purported identifications.

Second, Mr. Slaughter explained how new evidence (including previously undisclosed evidence) helped shore up his alibi: the crime stopped at about 7:08 p.m.; Mr. Slaughter picked his girlfriend up from work no later than 7:20 p.m.; and it would've taken someone at least 20 minutes at the absolute bare minimum to get from the crime scene to his girlfriend's workplace. Had the jury heard that version of the alibi (as opposed to the weak version trial counsel presented), it again invariably would've had reasonable doubt.

Meanwhile, the other evidence the State presented (aside from the eyewitness identifications) was hardly compelling. Thus, on balance, it's more likely than not no reasonable trier of fact would have convicted Mr. Slaughter in light of the new evidence Mr. Slaughter has now developed.

Mr. Slaughter presented this argument in his third petition based on the evidence he'd developed in federal court at that point. Mr. DiGiacomo's deposition and the ensuing investigation developed additional evidence relevant to Mr. Slaughter's innocence argument (*see, e.g.*, Ground Eleven, *infra*) (discussing Mr. DiGiacomo's testimony), so Mr. Slaughter is presenting this argument again for the Court to consider in light of the additional evidence Mr. Slaughter developed since the time he filed his third petition. The Court should conclude Mr. Slaughter has demonstrated his innocence; at the very least, Mr. Slaughter has a colorable innocence claim, and the Court should set a hearing to allow the parties to develop additional evidence on the issue.

C. The inadequate assistance of post-conviction counsel should provide good cause.

Mr. Slaughter did not have counsel to assist him with his first post-conviction petition. He maintains Nevada law should recognize this as good cause to overcome the default of any claims that he couldn't have reasonably raised on direct appeal,

including but not limited to his ineffective assistance of trial and appellate counsel claims and his claims under *Brady* and *Napue*.

The Nevada courts—unlike the federal courts—do not recognize ineffective assistance of post-conviction counsel as good cause to excuse non-compliance with state procedural bars, at least in non-capital cases. *See Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (Nev. 2014). However, Mr. Slaughter respectfully suggests *Brown* was wrongly decided. Mr. Slaughter presented this argument in his third post-conviction petition, and in the pending appeal, he is asking the Nevada Supreme Court to overrule *Brown*. Out of an abundance of caution, he is reasserting the argument here.

GROUNDS FOR RELIEF

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

The State's case rose and fell with three victims' in-court identifications of Mr. Slaughter as a perpetrator. But those identifications were the product of an impermissibly suggestive photographic lineup. In that lineup, the background of Mr. Slaughter's photo was transparent, while the other five headshots had blue backgrounds. Because the background of Mr. Slaughter's photo is so different from the backgrounds of the other photos (among other reasons), Mr. Slaughter's photo stands out from the rest. That lineup created a grave risk that the victims would mistakenly pick Mr. Slaughter's photograph from the lineup. Meanwhile, the victims' identifications were not otherwise reliable—indeed, they saw a *second* lineup with Mr. Slaughter's photo and were unable to identify him from that lineup. The admission of the identifications violated Mr. Slaughter's due process rights (*see, e.g.*, *Simmons v. United States*, 390 U.S. 377 (1968)) and the error was not harmless—quite the opposite, it had a substantial and injurious effect on the verdict.

A. The lineup was suggestive.

Detective Jesus Prieto created the first photographic lineup used in this case. *See* Ex. 9 (color copy). That lineup included a photograph of Mr. Slaughter taken a couple months before the incident. The background of Mr. Slaughter's picture is near-white, to the point that it appears transparent. By comparison, the lineup includes five pictures of other individuals. Those five other photographs have blue backgrounds. Because the background of Mr. Slaughter's picture does not match the others, it is distinctive. For that reason, and for other reasons related to the condition, age, and composition of the photographs, Mr. Slaughter's photograph stands out from among the rest. *See, e.g.*, Ex. 14 at 34-37, 192-95, 205-09. These factors and others rendered the lineup suggestive. The lineup suggests, for example, that the five blue photographs are stock images that come from the same source, so the non-conforming photograph must be the actual photograph of the suspect.

The police had no need to design the photo lineup in this way. For one, they had other booking photos of Mr. Slaughter. *See* 2/25/11 Reply re: Motion to Preclude Identification (document internally marked "Exhibit D"); *see also* Ex. 14 at 41-47; Ex. 19. The backgrounds of many of those photographs better match the other photographs in the lineup and wouldn't have stood out in the same way. However, the police instead used a photograph with a drastically different background. Similarly, the police could've ran a black-and-white version of the lineup, which would've minimized some of the differences. *See, e.g.* Ex. 14 at 84-86. Instead, they insisted on using the suggestive color version.

The lineup in this case was unnecessarily and impermissibly suggestive, and it gave rise to a substantial likelihood of irreparable misidentification. The Court should have suppressed the victims' identifications.

B. The victims' identifications were not otherwise reliable.

The suggestive lineup rendered the victims' identifications untrustworthy, and the circumstances do not suggest that their recollections were nonetheless reliable.

1. Ivan Young.

Mr. Young purported to identify Mr. Slaughter from the photo lineup as the shooter. But there is ample reason to doubt his ability to make a valid identification. The police showed him the lineup while he was still in the hospital, recovering from various procedures related to his facial injuries. Mr. Young admitted that he "couldn't really see good" at the time the police showed him the lineup. Tr. 5/16/11 at 60. That is not surprising, since he had received facial wounds and had lost an eye during the incident. He also was unable to see well during the ordeal, since he had his head covered throughout much of it. *Id.* at 51.

Meanwhile, his account of the incident shifted in material ways over time, from his initial interviews with the police, to the preliminary hearing, and to the trial. *See* Ground Three, Section B, *infra*. Most critically, his description of the assailants went through multiple iterations. At first, he told the police that one suspect was bald, wearing shorts and a blue shirt, while the other suspect—the shooter—had dreadlocks and a Jamaican accent. Ex. 4 at 2. Then, at the preliminary hearing, he stated that one suspect wore a sports jersey and had dreadlocks; he identified the other suspect as Mr. Slaughter, claimed he was the shooter, and said he wore a hat, a blue shirt, and maybe shorts. Tr. 9/21/04 at 13-14, 20-21, 28. That was a big change; at first, Mr. Young identified the suspect with dreadlocks as the shooter, but then, Mr. Young said it was the *other* suspect (supposedly Mr. Slaughter) who was the shooter. In addition, at the preliminary hearing, Mr. Young said only one of the suspects had a Jamaican accent. *Id.* at 28-29. Finally, at trial, he testified that both suspects were wearing hats and wigs, and that they both had Jamaican accents. Tr. 5/16/11 at 49.

His ever-changing description of the suspects suggests that he cannot remember what they actually looked like.

In addition, Mr. Young claimed at the preliminary hearing that he had met Mr. Slaughter before the incident (*see* Tr. 9/21/04 at 19), but he did not initially report that fact to the police (*see, e.g.*, Ex. 4 at 2; 3/25/15 Exhibits (interview transcript internally marked "Exhibit A")). The fact that he did not initially claim to have known one of the assailants suggests that his memory was altered by the suggestive lineup.

For these reasons and others, Mr. Young's recollection cannot be trusted.

2. Joey Posada.

Mr. Posada was a 12-year-old child who was put through a traumatic experience during the incident. He did not have a good opportunity to see the perpetrators, and he gave only vague descriptions of them to the police after the incident: he described them as black males, with one suspect wearing braids, and the other with a dark afro; one of those two apparently wore a "tuxedo shirt." Ex. 2 at 11. His view of the suspects was obstructed during the ordeal, and he took only brief glances toward them. Tr. 9/21/04 at 88-89. He did not see who the shooter was. Tr. 5/18/11 at 43, 56. Moreover, when the police asked Mr. Posada to come to the station for the lineup, they told him that they already had a suspect in custody, and that a picture of the suspect was in the lineup. *Id.* at 53. Telling Mr. Posada that information made it much more likely he would make an identification—even a mistaken one—as opposed to telling the police he could not identify anyone. For these reasons and others, Mr. Posada's identification is not reliable.

3. Ryan John.

After entering the house, the perpetrators immediately tied up Mr. John and put a jacket over his head to block his view. Ex. 2 at 9. As a result, he had little opportunity to view the suspects. Perhaps for that reason, he could only vaguely describe the robbers to the police as two black males, one with a Jamaican accent. *Id.*

at 9-10. Unsurprisingly, when he participated in the photo lineup, his identification was ambiguous—he wrote, "This is the guy that *I think* called me over to Ivan [Young]'s house and tied me up and shot Ivan." 10/27/09 Motion to Dismiss at 46 (emphasis added). For these reasons and others, Mr. John's identification is untrustworthy as well.

4. Jermaun Means.

When confronted with the police's suggestive lineup, Mr. Means selected Mr. Slaughter's picture, writing, "The face just stand out to me." 10/27/09 Motion to Dismiss at 45. That is an apt description, because Mr. Slaughter's photograph literally stands out from all the rest. At trial, however, Mr. Means did not identify Mr. Slaughter as a participant in the robbery. Tr. 5/16/11 at 37. Nonetheless, the State introduced his prior "identification" of Mr. Slaughter into evidence. *Id.* at 36. Meanwhile, his initial description of the suspects—one wearing a beige suit jacket, and the other with a dreadlocks wig—was yet again vague. Ex. 2 at 10. His initial identification of Mr. Slaughter, which he did not confirm at trial, should not be trusted.

5. Jennifer and Aaron Dennis.

Neither Jennifer nor Aaron Dennis identified Mr. Slaughter in a lineup or at trial. Jennifer described one suspect to the police as 5'10" and 170 pounds, and the other as 5'11" and 190 pounds. One was wearing a blue shirt with jeans, and the other was wearing a red shirt and blue jeans. Ex. 3 at 4. Aaron told the police that one of the suspects was wearing a black jacket. Ex. 2 at 11.

6. Destiny Waddy.

Destiny Waddy was sitting in a car outside Mr. Young's house during the ordeal. She reported to the police that she saw two black males, one 5'8" and wearing a wig, the other 5'11"; both were wearing blue and white clothing. Ex. 2 at 10. Ms. Waddy was not able to identify anyone from the photo lineup, and she did not testify at trial.

7. The second photographic lineup.

Finally, as Grounds Three(A) and Four(A) explain, the police showed the victims a second photographic lineup with Mr. Slaughter's picture in it. That lineup was much less suggestive; the police didn't even realize Mr. Slaughter was in it. None of the victims identified Mr. Slaughter from that lineup. Their failure to recognize Mr. Slaughter in a non-suggestive lineup erodes whatever faith the Court could otherwise have in their identifications.

* * *

In sum, out of seven witnesses, only four picked Mr. Slaughter from the State's suggestive lineup, and only three identified Mr. Slaughter at trial. Of the three who testified against Mr. Slaughter, there are substantial reasons to doubt the accuracy of their accounts. Meanwhile, there are numerous inconsistencies in the witnesses' descriptions of the suspects—each person's recollection differs in some respect from the others, and some of the witnesses' descriptions changed over time as well. And none of the victims picked Mr. Slaughter from a non-suggestive second photo lineup. All told, these circumstances show the suggestive nature of the first lineup influenced the identifications.

C. The error wasn't harmless.

The introduction of the witnesses' tainted identifications was not harmless error—to the contrary, those identifications were at the core of the State's case. The other evidence of Mr. Slaughter's guilt was weak, and without the witnesses' identifications the State could not have proved Mr. Slaughter's involvement in the incident.

In brief, the State's other evidence chiefly involved two guns, a bullet core, and a bullet casing that were found in a car owned by Mr. Slaughter's girlfriend. (The make and color of the car was consistent with some, but not all, of the witnesses' descriptions of the car.) According to the State, the robbers brandished three guns during the incident. Two of those guns, the State said, were the two guns the police

found in the car. But there was very little proof of that. The witnesses gave only vague descriptions of those two guns, and there was no physical evidence to link those guns to the crime scene. Crucially, the police did *not* find a gun that could have fired the bullet that injured Mr. Young. While the caliber of the bullet fragments that injured Mr. Young could have been consistent with the shell casing and the lead core the police found in the car, those fragments could have been consistent with many other calibers of bullets as well. *See* Ground Three, Section D, *infra*.

The State also submitted a surveillance videotape from a 7-Eleven store. The videotape, which was recorded about an hour after the incident, shows someone standing near an ATM in the store. Mr. John testified at trial that he had heard someone had used his stolen debit card at a 7-Eleven soon after the incident (but he did not specify which of the scores of 7-Eleven stores in Las Vegas). From that, the State argued that the tape showed Mr. Slaughter using Mr. John's ATM card. *See* Ground Eight, *infra*. But the tape itself hardly shows anything, and the State was grasping at straws when they introduced it.

In sum, the State had no physical evidence linking Mr. Slaughter to the crime. Mr. Slaughter did not confess to the crime; to the contrary, he had a solid alibi. The State had some inconclusive ballistics evidence and a 7-Eleven video of questionable relevance, but aside from the tainted identifications, the State's case lacked convincing proof of Mr. Slaughter's guilt. The introduction of those tainted identifications had a substantial and injurious effect on the outcome of the trial. Mr. Slaughter should receive a new trial, where the State can try to prove its case without relying on its flawed lineup.

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

The State claimed that Mr. Slaughter was in Mr. Young's house committing various crimes on the evening of June 26, 2004. But as Mr. Slaughter's girlfriend (Tiffany Johnson) testified, Mr. Slaughter was halfway across town at that time, picking her up from work. That gave him a strong alibi. Unfortunately, Mr. Slaughter's trial attorneys made only a half-hearted attempt at proving that alibi.

In order to establish the alibi, defense counsel needed to prove three things. First, when exactly did the incident take place? Second, when exactly did Mr. Slaughter pick up his girlfriend from work? Third, how long would it have taken Mr. Slaughter to get from the crime scene to his girlfriend's workplace? Defense counsel failed to introduce specific evidence on all three issues. Had they done so, Mr. Slaughter's alibi would have been airtight. But as it stood, the defense timeline was ambiguous enough that the jury voted to convict.

Mr. Slaughter's attorneys provided ineffective assistance in this area. His attorneys should have done five things to shore up Mr. Slaughter's alibi. First, they should have subpoenaed the 911 records to pin down when the victims first called the police. Second, they should have drawn the jury's attention to evidence about how much time elapsed between when the culprits left the house and when the victims called the police. Put together, those pieces of evidence would precisely establish when the culprits left the crime scene. Third, the attorneys should have called witnesses or introduced evidence to prove exactly how long it would take to get from the crime scene to Ms. Johnson's workplace. Fourth, while Ms. Johnson testified that Mr. Slaughter arrived at about 7:15 p.m., her coworker suggested it was after 7:30 p.m., which better fit the State's timeline. Defense counsel should have introduced evidence to impeach the coworker's credibility. Finally, defense counsel should have

refrained from calling a witness who provided inconsistent and confusing testimony regarding Mr. Slaughter's alibi.

Counsel provided deficient performance in each of these respects. There could be no strategic reason for failing to prove up Mr. Slaughter's alibi. In fact, defense counsel promised the jury it would get that proof, but the attorneys failed to deliver. In their opening statement, counsel said that "[t]here's no way" Mr. Slaughter could "drive from the [crime scene] all the way to where [Ms. Johnson] worked in four minutes. It just [isn't] possible." Tr. 5/16/11 at 18-19. Despite setting up that key point during the opening, defense counsel failed to put in the work to lay the foundation for that conclusion.

Had Mr. Slaughter's lawyers taken any of the steps outlined below—and certainly if they had taken all of them—there is a reasonable probability the alibi would've given the jury reasonable doubt, and it would've voted to acquit. As a result, Mr. Slaughter received ineffective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Counsel should've subpoenaed the 911 records.

In order to establish Mr. Slaughter's alibi, defense counsel needed to prove, as precisely as possible, the time that the crime took place. One of the victims, Jermaun Means, had called 911, so the best way to prove when the offense occurred was to subpoena the 911 records. So long as Mr. Means called 911 immediately after the crime ended (*see* Section B, *infra*), the 911 call records would provide a firm indication of when the suspects left. If Mr. Slaughter could prove he was somewhere else when the incident ended, his alibi would have been complete.

Mr. Slaughter's attorneys did not get copies of the 911 call records, so they were unable to state with specificity when the culprits left the crime scene. Those records would've indicated the calls were placed at about 7:11 p.m. *See* Ex. 6; Ex. 14 at 100; Ex. 23 at 139-52. While the police reports associated with the robbery at Mr.

Young's house suggest the incident occurred at some point before 7:11 p.m., they don't confirm the 911 call time. Ex. 2 at 1 ("date / time" of "6/26/04 / 19:11"), 9 ("On Saturday, 06-26-04 at 1911 hours, officers were dispatched to 2612 Glory View . . . ."); *see also* Ex. 3 at 1, 4 (similar); Ex. 4 at 1, 2 (similar); Ex. 5 at 1, 5 (stating that officer responded at 7:15 p.m.).

This failure made itself plain toward the end of trial. The defense had submitted a PowerPoint presentation they proposed to use during their closing argument. Their presentation said Mr. Means placed the 911 call at 7:11 p.m. But the State objected to that statement, because the defense had failed to introduce evidence that the 911 calls in fact took place at 7:11 p.m. Tr. 5/20/11 at 77-78. According to the State and the Court, the defense could say only that the call came in at "about 7:00." *Id.* at 82. That objection shifted the timeframe in the State's favor by about eight to 11 minutes and introduced a level of ambiguity in the timeline that should not have existed. The defense understood the precise time of the 911 calls was an important issue, but they boxed themselves out of presenting that information to the jury.

B. Counsel should've proven how long it took Mr. Means to call 911.

Once they had pinned down the time of the 911 calls, the next step in establishing Mr. Slaughter's alibi was to figure out how quickly the victims called 911 after the incident ended. For example, if Mr. Means had called 911 at 7:11 p.m., and if only a few minutes elapsed between when the culprits left and when he got to the phone, then Mr. Slaughter could prove the robbers did not leave until about 7:08 p.m.

Mr. Means called the police at 7:11 p.m. One minute and 38 seconds into the call, Mr. Means told the 911 dispatcher the incident occurred "about five . . . five minutes ago." Ex. 20 at 1:38-1:40. As a matter of arithmetic, Mr. Means's statement indicates the suspects left a few minutes before 7:11 p.m.—at about 7:08 p.m.

Trial counsel failed to make this point during cross-examination of Mr. Means. His trial testimony suggested there was a short gap between the incident and the 911 call (Tr. 5/16/11 at 30), but he did not testify with any precision on that issue. Similarly, while the State played the 911 call during trial, the defense lawyers didn't highlight Mr. Means's statement (which he made about a couple minutes into the call) that the incident occurred "about five minutes ago."

Had defense counsel elicited this information from Mr. Means and pointed the jury toward his comment to 911 about the timing of the incident, the jury would have learned the robbers left about three minutes before Mr. Means placed his call. As it was, counsel deprived the jury of this important piece of the puzzle. Instead, due to the State's objection, counsel was stuck arguing the suspects left earlier, at 7:00 p.m. *See* Tr. 5/20/11 at 77-82. Because counsel failed to obtain the 911 records and failed to pin down how soon after the incident Mr. Means called 911, the State was able to force a shift in the defense timeline of about eight to 11 minutes on the front end—a crucial, prosecution-friendly shift, in a case where every minute mattered.

C. Counsel should've established the time it took to drive between the crime scene and Ms. Johnson's workplace.

Mr. Slaughter maintains that during the time of the crime, he was halfway across town picking up his girlfriend, Tiffany Johnson, from work. The State agreed Mr. Slaughter had picked up Ms. Johnson sometime after 7:00 p.m. The question was whether Mr. Slaughter could have been in both places that evening. Could he have left the crime scene at about 7:08 p.m. and then driven to Ms. Johnson's workplace in time to pick her up?

For the defense to answer that question, it needed to show how far the crime scene was from Ms. Johnson's workplace. Ms. Johnson testified Mr. Slaughter picked her up between 7:00 and 7:15 p.m., but in no event was it later than 7:20 p.m. Tr. 5/19/11 at 21-22. (By the time of trial, Ms. Johnson had gotten married and changed

her last name, but for the sake of simplicity, this petition will refer to her as Ms. Johnson.) If the robbery ended at about 7:08 p.m., could Mr. Slaughter have gotten to Ms. Johnson's workplace in twelve minutes or less?

The answer to that question was no—it would have taken at least 20 minutes if not longer (more like 30 minutes) to make that drive. *See* 3/25/15 Exhibits (documents internally marked "Exhibit H"); Ex. 14 at 123-24; Ex. 23 at 157-58. But the jury never learned the answer to that crucial question. That is because the attorneys incorrectly assumed they could simply add the drive-times to their closing presentation; the court rejected that proposal in an off-the-record discussion. 3/25/15 Petition at 45-46. The attorneys should have laid an evidentiary foundation regarding the drive-times.

D. Counsel should've impeached Mr. Arbuckle's testimony.

The last piece of Mr. Slaughter's alibi depended on when he arrived at Ms. Johnson's workplace. Ms. Johnson testified that he showed up between 7:00 and 7:15 p.m., but in no event was it later than 7:20 p.m. Tr. 5/19/11 at 21-22. However, Jeffrey Arbuckle (Ms. Johnson's coworker) testified Mr. Slaughter did not show up until 7:30 p.m. at the earliest. Tr. 5/17/11 at 42. That testimony created a potential problem for Mr. Slaughter's alibi. Defense counsel should have impeached Mr. Arbuckle's recollection in order to shore up their timeline.

First, Mr. Arbuckle had previously told the police that he had left work at 7:15 p.m., and that Ms. Johnson was still waiting for Mr. Slaughter at that point. Ex. 9 3-4; Ex. 14 at 139. That prior statement to the police is inconsistent with Mr. Arbuckle's trial testimony that he was sure Mr. Slaughter did not arrive to pick up Ms. Johnson until 7:30 p.m. at the earliest. But his prior statement—that Mr. Arbuckle left work at 7:15 p.m.—is consistent with Ms. Johnson's testimony that Mr. Slaughter arrived between 7:00 and 7:15 p.m., and no later than 7:20 p.m. Significantly, Mr. Arbuckle and Ms. Johnson's testimony matched on a key point: Mr. Slaughter pulled

in right as Mr. Arbuckle was leaving. *See* Tr. 5/19/11 at 60 ("When [Mr. Arbuckle] was leaving the parking lot, Rickie was coming in the parking lot"); Tr. 5/17/11 at 42 (similar). If Mr. Arbuckle left work at 7:15 p.m., as he originally said, then the witnesses' testimony would've matched perfectly: Mr. Slaughter showed up right as Mr. Arbuckle left, probably right at 7:15 p.m.

Defense counsel knew this prior inconsistent statement was important. Indeed, counsel tried to ask Mr. Arbuckle about it on cross. The State objected to the question because Detective Prieto had not testified about Mr. Arbuckle's prior inconsistent statement, and the court sustained the objection. Tr. 5/17/11 at 46.[2] Defense counsel should have called Detective Prieto to verify that statement (*see* Ground Four, Section A, *infra*) and should have thereby impeached Mr. Arbuckle with it.

Second, Mr. Arbuckle held bias against Mr. Slaughter. The two had a verbal argument at the El Dorado Cleaners (where Mr. Arbuckle and Ms. Johnson worked) in late May 2004 or early June 2004. 3/25/15 Petition at 52. Soon after that argument, on June 3, 2004, Mr. Arbuckle filed a complaint or a report with the police regarding Mr. Slaughter allegedly trespassing at 715 N. Nellis Boulevard, the location of the El Dorado Cleaners. 3/25/15 Exhibits (document internally marked as "Exhibit M"); Ex. 1. If Mr. Arbuckle wanted Mr. Slaughter locked up, that suggests he had a motive to shade his testimony in a way that would conform to the State's timeline. Defense counsel should have asked Mr. Arbuckle about this argument and about whether he pursued related criminal charges against Mr. Slaughter.

Finally, on information and belief, Mr. Arbuckle received payments from the State in exchange for his participation in pre-trial conferences. Trial counsel should have asked Mr. Arbuckle whether he had received any funds from the State for pre-

---

[2] The official copy of the trial transcript for this day is missing four pages (45-48), including the pages where this exchange took place. The court reporter has prepared replacement copies of three of those pages. Those replacement pages are Ex. 10.

trial preparation. That would have given the jury another reason to question his motives for testifying.

E. Counsel shouldn't have called Ms. Westbrook.

As detailed above, Mr. Slaughter had a legitimate alibi. Defense counsel failed to take the necessary steps to prove that alibi. Instead, the attorneys tried to establish Mr. Slaughter's alibi by calling a different witness, Noyan ("Monique") Westbrook. But her testimony was unhelpful and undermined the defense's credibility. Mr. Slaughter's attorneys should not have called Ms. Westbrook.

Mr. Slaughter's defense investigator spoke with Ms. Westbrook before the trial. Mr. Slaughter claimed that he was with Ms. Westbrook before picking up Ms. Johnson. While Ms. Westbrook did recall spending time with Mr. Slaughter in the past, she did not remember the specific days and times they were together. 3/25/15 Exhibits (documents internally marked as "Exhibit O"). Notwithstanding her shaky memory, defense counsel had Ms. Westbrook fly from Arkansas to Las Vegas so she could be available at trial. Defense counsel also prepared a script of proposed testimony for her in advance. *Id.* Mr. Slaughter told his lawyers that he did not want Ms. Westbrook to testify if she did not have an independent recollection of the day of the incident, but his lawyers were insistent on calling her as a witness. Mr. Slaughter and defense counsel had multiple arguments about this subject. 3/25/15 Petition at 73-76. Their arguments were substantial enough that Mr. Slaughter made a record of the issue during his trial. Outside the presence of the jury, Mr. Slaughter told the court he had asked his lawyers "not to present Ms. Westbrook," although defense counsel disputed his account. Tr. 5/20/11 at 68-77.

Just as Mr. Slaughter predicted, Ms. Westbrook's testimony did not go well. While she recalled being with Mr. Slaughter at some point in time, she could not specify the date, and she provided testimony that suggested she remembered spend-

ing time with Mr. Slaughter in 2005—a year after the incident, well after Mr. Slaughter had been taken into custody. Tr. 5/18/11 at 80-81, 88. Her weakness as a witness allowed the prosecutor to attack the credibility of Mr. Slaughter's alibi and opened the door to additional evidence that suggested he was attempting to fabricate an alibi. It certainly did not help matters that counsel had previewed Ms. Westbrook as a star alibi witness during opening statements. Tr. 5/16/11 at 17.

Ms. Westbrook provided little upside as a defense witness and substantial downside. Reasonable attorneys would not have called her. Had Ms. Westbrook not testified, there is a reasonable probability that the jury would have believed Mr. Slaughter's alibi and voted to acquit.

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

Three of the State's witnesses purported to identify Mr. Slaughter as one of the assailants. But they failed to identify him from a non-suggestive lineup. Meanwhile, their accounts had shifted over time in significant ways, suggesting that their recollections were faulty. A reasonable defense lawyer would have seized on these inconsistencies during cross-examination. But Mr. Slaughter's attorneys did not follow these lines of questioning. Similarly, the attorneys did not engage in a fulsome cross-examination of the State's firearms expert. Counsel provided deficient performance in each of these respects. There could be no strategic reason for failing to undercut the testimony of the State's witnesses. Had Mr. Slaughter's lawyers taken any or all of these steps, there is a reasonable probability that the jury would have voted to acquit. As a result, Mr. Slaughter received ineffective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Counsel failed to ask the victims about the second photo lineup.

The victims based their identifications of Mr. Slaughter on an initial, highly suggestive photo lineup. *See* Ground One, *supra*. But the witnesses were shown a second photo lineup that included a different picture of Mr. Slaughter, taken only days after his arrest. This time, the victims did not identify him as a suspect. Ex. 14 at 87-88; *see also* Ground Eleven(B), *infra*. This second photo lineup was the subject of a pre-trial motion (10/27/09 Motion to Dismiss), and both the State and the court suggested that it would be a suitable subject for cross-examination (11/9/09 Opposition to Motion to Dismiss at 2; Tr. 12/1/09 at 10-11). But defense counsel did not take the hint. They didn't call any police officers to testify about it, nor did they ask the victims whether they had seen this second photo lineup (the State conceded they had), nor did they ask the victims whether they had contemporaneously identified Mr. Slaughter in this second photo lineup (they didn't).

Defense counsel's failure to develop evidence regarding this second lineup is all the more puzzling given their odd mid-trial request for a jury instruction on this issue. After the State rested, one of Mr. Slaughter's attorneys discussed the second lineup with the Court outside the presence of the jury. The attorney explained that the police had shown these lineups to the witnesses and none of them had identified Mr. Slaughter as one of the assailants in that lineup. Tr. 5/18/11 at 60. He asked for "jury instructions that these lineups were in fact [shown] and nobody selected Mr. Slaughter on them." *Id.* at 61. The court responded, "Jury instructions are based on the evidence presented at trial," so the defense ought to present evidence regarding that second lineup. *Id.* But the attorneys did not get the message, and they did not develop any evidence regarding this second lineup.

There was no reason for defense counsel not to present evidence on this topic. Undercutting the witnesses' identifications of Mr. Slaughter was a crucial task at

trial. Part of that task involved establishing that the first lineup was suggestive. The fact that the witnesses failed to identify Mr. Slaughter in a later non-suggestive lineup would substantially undercut the reliability of the first identifications. But defense counsel did nothing to elicit that fact, depriving the jury of a substantial reason to doubt the witnesses' testimony. Defense counsel also didn't bother trying to ask the victims about the second photo lineup informally before trial. *See* Ex. 25 ¶ 4.

B. Counsel failed to fully cross-examine Mr. Young.

Over time, Mr. Young's story changed in many key respects. Defense counsel failed to illustrate that for the jury. For example, he initially told the police that the two culprits were black males, one of whom "was bald and wearing shorts and a blue shirt," the other of whom had "dreadlocks and spoke with a Jamaican accent." Ex. 4 at 2. He said he "kn[ew] for a fact" that the individual with dreadlocks was the shooter. *Id.* But Mr. Young changed his mind at the preliminary hearing. The shooter, he said, was Mr. Slaughter, who was wearing a hat; it was the other suspect who had the dreadlocks. Tr. 9/21/04 at 20-21, 28. That was a dramatic shift. At first, Mr. Young was sure the individual with dreadlocks was the shooter. By the preliminary hearing, though, he reversed course—it was the *other* assailant (not the one with dreadlocks) who fired the gun. Then, at trial, his recollection changed again; this time, he said both suspects were wearing wigs. Tr. 5/16/11 at 49. And while he had previously said that only one assailant had a Jamaican accent (Tr. 9/21/04 at 28-29), at trial he said both suspects had Jamaican accents (Tr. 5/16/11 at 49). Mr. Slaughter's attorneys should have cross-examined Mr. Young about his shifting recollection regarding the assailants' and the shooter's appearance. Effective cross-examination would have eroded his credibility.

There were other shifts in Mr. Young's statements that would have given the jury additional reasons to doubt his identification. For one, he described the shooter at the preliminary hearing as being around 5'5" or 5'6" (Tr. 9/21/04 at 21), even though

Mr. Slaughter is 5'9" (Ex. 11). In addition, during his initial police interview Mr. Young did not mention seeing the perpetrators' car (3/25/15 Exhibits (interview transcript internally marked "Exhibit A")), but at trial he claimed to have seen a green Ford Taurus (Tr. 5/16/11 at 46). Mr. Young provided similarly conflicting accounts regarding his opportunity to see the culprits and his family during the incident, and on other topics. *Compare, e.g.*, Tr. 9/21/04 at 12-13; *with, e.g.*, Tr. 5/16/11 at 51. Defense counsel failed to elicit additional useful details, including the fact that Mr. Young testified at the preliminary hearing that "there wasn't really much chance" for him to see the perpetrators during their initial contact outside his house, since Mr. Young was distracted with buffing his car. Tr. 9/21/04 at 25.

A reasonable defense attorney would have seized on these various inconsistencies and other flaws in Mr. Young's account in order to create doubt regarding his recollection. But defense counsel's cross-examination of Mr. Young at trial was cursory at best, leaving the jury with few reasons to doubt Mr. Young's testimony.

C. Counsel failed to fully cross-examine Mr. John.

Like Mr. Young, Mr. John's version of events evolved over time and included various inconsistencies. Most significantly, Mr. John testified at trial that he was able to see the perpetrators throughout most of the incident, including during the shooting. Tr. 5/17/11 at 58-59. However, at the preliminary hearing, Mr. John testified that the suspects had placed a jacket over his head immediately after he entered Mr. Young's house. Tr. 9/21/04 at 54-55. That account is consistent with what Mr. John initially told the police. Ex. 2 at 9.

Just as with Mr. Young, a reasonable defense attorney would have drawn out this inconsistency and others during Mr. John's cross-examination. But defense counsel did not cover these topics with Mr. John. Had the attorneys made this point, the jury would have had additional reason to be skeptical of whether Mr. John had a decent chance to view the perpetrators.

D. Counsel failed to fully cross-examine the State's firearm expert.

Under the State's theory of the case, Mr. Slaughter had injured Mr. Young with a .357 caliber bullet. That detail fit the State's narrative because the police subsequently found a .357 shell casing in the car Mr. Slaughter allegedly drove to and from the incident. The prosecution wanted to prove to the jury the bullet jacket fragments found in Mr. Young's face and at the crime scene came from the same type of bullet as the casing found in Mr. Slaughter's car, because the jury could then conclude the casing and the fragments came from the same type (or perhaps even the same piece) of ammunition.

At this point, some background information about ammunition may be useful. In simplified terms, a "bullet" has two components: a metal "core," and a metal "jacket," which surrounds the core. In turn, a round of ammunition comprises the bullet (its core and its jacket), some form of propellant, and a "shell casing," which encloses the bullet and the propellant. When a round is fired, the bullet shoots out of the gun at high speed, and the shell casing is expelled with much less force. What likely happened in this case is that the perpetrator shot the gun at the floor near Mr. Young, the bullet jacket fragmented on impact, and some of the fragments shredded into Mr. Young's face. Under the State's theory, the jacket fragments found in Mr. Young's face and at the crime scene came from the same brand and caliber of ammunition (if not the same exact round of ammunition) as the .357 shell casing found in Ms. Johnson's car.

In an attempt to link the jacket fragments to the shell casing, the State called Angel Moses as an expert witness. Ms. Moses had analyzed the jacket fragments the police recovered from Mr. Young and his house. In her opinion, those fragments were made of materials that were consistent with the materials that are used to make a Winchester .357 Magnum silver tip hollow point bullet. Tr. 5/17/11 at 131. That

testimony gave the jury the impression that the bullet used to shoot Mr. Young was in fact a .357 caliber bullet, which would be consistent with the .357 shell casing the police found in the car. But there were reasons to doubt that conclusion. The defense had originally hired an expert to review the ballistics information, and that expert concluded at least nine other bullet calibers and brands could be consistent with the fragments. The expert even sent an email to one of Mr. Slaughter's defense lawyers explaining his analysis and suggesting potential topics "to consider for cross." 2/12/16 Exhibits (document internally marked "Exhibit B").

Despite that suggestion, defense counsel did not adequately cross-examine Ms. Moses on this subject. Rather, the attorney focused on the expert's views regarding whether a generic lead bullet core that the police also found in the car could be linked to a .357 round. That line of questioning missed the mark. It did not make much difference whether the core came from a .357 round or some other round. The shell casing in the car was obviously from a .357 round, so it would be no surprise if the core in the car came from a .357 round. Based on the shell casing alone, the State could easily prove the car's association with a .357 round. The real question was whether the State could prove that the *jacket fragments* from the crime scene were from a .357 round, and thus establish a connection between the jacket fragments and the car. Defense counsel's cross examination did not address that issue and left the jury with the mistaken impression that the jacket fragments had the same caliber as the shell casing found in the car. The prosecutor emphasized that mistaken impression during his closing rebuttal, arguing to the jury that his expert was "able to determine . . . that the jacketing that was in [Mr. Young's] face was a .357, and it was manufactured by Winchester. We know [Mr. Slaughter] has a little casing to a Winchester 357 in the trunk of his car." Tr. 5/20/11 at 136. Defense counsel should have addressed that incorrect inference during cross-examination.

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

Mr. Slaughter's defense counsel provided ineffective assistance when they failed to call additional witnesses in Mr. Slaughter's favor. The police investigation was flawed in critical respects, but defense counsel did not call the lead detective to highlight the errors. Nor did the attorneys call the lead detective or other investigating officers to testify about some of the witnesses' exculpatory statements. And defense counsel did not call Destiny Waddy, whose description of the getaway car conflicted with the State's evidence.

Trial counsel provided deficient performance in each of these respects. There could be no strategic reason for failing to introduce this exculpatory evidence. Indeed, defense counsel didn't bother trying to speak to any of these potential witnesses informally before trial. Ex. 25 ¶ 4. Had Mr. Slaughter's lawyers taken any or all of these steps, there is a reasonable probability that the jury would have voted to acquit. As a result, Mr. Slaughter received ineffective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Counsel failed to call Detective Jesus Prieto.

Detective Jesus Prieto was the lead detective regarding the incident at Mr. Young's home. He testified at the preliminary hearing, but he did not testify at trial. That was a problem, because his investigation suffered from critical flaws, and the jury should have heard about those flaws. Defense counsel provided ineffective assistance when they failed to call him. The attorneys fully expected the State to call Detective Prieto, and they planned to cross-examine him during the State's case. Tellingly, the State chose not to call Detective Prieto. Because Mr. Slaughter's lawyers thought the State would call him as a matter of course, they did not bother to

subpoena him, so they did not get to call him as part of their case. That oversight was a serious mistake that had a detrimental effect on Mr. Slaughter's defense.

Had defense counsel called Detective Prieto, they could have elicited numerous damning facts. First, he failed to collect surveillance footage from the area near Ms. Johnson's workplace. Mr. Slaughter had an alibi—he had picked up Ms. Johnson (his girlfriend) after work, at about the same time the perpetrators were leaving the crime scene. Detective Prieto knew that if he could nail down the time when Mr. Slaughter arrived to pick her up, it would go a long way toward proving his guilt or innocence. He spoke to witnesses on numerous occasions in an attempt to establish that timeframe. But he did not collect available surveillance footage that could have shown exactly when Mr. Slaughter showed up. Ex. 14 at 143; *see also* Tr. 5/17/11 at 45-46 (Jeffrey Arbuckle testifying that footage was available).[3] Defense counsel should have asked Detective Prieto why he failed to take this obvious step.

Second, and relatedly, Detective Prieto repeatedly tried to manipulate Ms. Johnson regarding the exact time when Mr. Slaughter picked her up. At first, Ms. Johnson told the police that Mr. Slaughter arrived at 7:00 p.m. Tr. 5/19/11 at 14. Detective Prieto responded that Ms. Johnson must have been lying, because Mr. Slaughter was somewhere else committing a crime at 7:00 p.m. *Id.* at 16. After that interview, Detective Prieto called her and threatened to arrest her if she did not tell him that Mr. Slaughter "picked [her] up at a later time." *Id.* at 18. Detective Prieto made good on that threat and arrested her at work, for allegedly "obstructing justice." *Id.* at 18, 42. As he interviewed her again, he implied that if Ms. Johnson did not cooperate with the police, her arrest would make it hard for her to get a job in the

---

[3] The official copy of the trial transcript is missing four pages (45-48), including the pages where this exchange took place. The court reporter has prepared replacement copies of three of those pages, which are at Ex. 10.

future. *Id.* at 47-48. Ms. Johnson felt she was being coerced to change her story. *Id.* at 48-49; *see also* 2/25/11 Reply re Motion to Preclude Involuntary Statement (documents internally marked "Exhibit A" and "Exhibit C"). In light of the pressure, she said that Mr. Slaughter picked her up at 7:30 p.m. Tr. 5/19/11 at 19. At trial, she confirmed that Mr. Slaughter arrived "between 7:00 to 7:15; no later than 7:20." *Id.* at 21. Defense counsel should have called Detective Prieto and asked him about his attempts to manipulate Ms. Johnson's testimony. *See* Tr. 5/19/11 (11:00 a.m.) at 37 (the prosecutor acknowledges defense counsel could argue Mr. Prieto "was inappropriate with" Ms. Johnson); Ex. 14 at 104-37.

Third, Detective Prieto could've confirmed Mr. Arbuckle told him he left work at 7:15 p.m.—not at 7:30 p.m., as Mr. Arbuckle testified at trial. Ex. 14 at 139.

Fourth, Detective Prieto put together the suggestive photo lineup that led to the witnesses' faulty identifications. Tr. 9/21/04 at 103-04. Detective Prieto also put together the second photo lineup, which he also showed to the victims; none of the victims identified Mr. Slaughter in that second lineup. Ex. 14 at 87-88. Defense counsel should have called Detective Prieto and asked him about the second photo lineup; his testimony could've established none of the victims had picked Mr. Slaughter from that lineup.

Fifth, Destiny Waddy had told the police that the getaway car was "possibly a Pontiac Grand Am." Ex. 2 at 10; *see also* Tr. 5/16/11 at 19 (Jennifer Dennis testifies one of the suspects was talking about a Pontiac). But in his affidavit in support of a search warrant, Detective Prieto represented that the witnesses described the getaway car as a Pontiac *or* a Ford, which conveniently happened to be the make of Ms. Johnson's car. 10/27/09 Motion to Suppress; *see* Ex. 14 at 161-64. Defense counsel should have asked Detective Prieto why he made that change in the search warrant affidavit.

Sixth, Detective Prieto's testimony could've helped draw attention to the suggestive nature of the first photo lineup and given other relevant information about that lineup specifically, the lineups in this case, and lineups more generally. *See* Ex. 14 at 34-37, 84-86, 192-95, 205-09.

Seventh, the police seized shoes from Mr. Slaughter's apartment. They thought they saw blood on them, so they wanted to test whether Mr. Young's blood was present on it. In 2009, Detective Prieto signed an application for a search warrant to get a buccal swab from Mr. Slaughter, since the crime lab wanted to compare the blood against a sample from Mr. Slaughter (in addition to Mr. Young). In his application, he stated the lab previously tried to test the blood, but they "appeared to have been covered by some type of polish," so they "were not able to test the substance due to the polish." Ex. 17. But in a police report from 2004, he didn't mention anything about polish; he simply stated the lab had tested the shoes for blood and gotten "negative results." Ex. 8. Had the attorneys called Detective Prieto, they could've asked him questions about this inconsistency: in 2004, he stated there was no blood on the shoes, but in his 2009 search warrant application, he said the substance he thought was blood was covered by polish. *See also* Ex. 14 at 164-71.

Eighth, by calling Detective Prieto, the trial lawyers could've painted a picture of a lead detective who rushed to judgment and failed to conduct a proper investigation. Once he got a tip from a confidential informant that Mr. Slaughter was responsible, Detective Prieto automatically assumed Mr. Slaughter was guilty; in response, the police did just enough work to justify an arrest and spent little time trying to get the bottom of who was actually responsible. *See, e.g.*, Ex. 14 at 101-03, 124-25 (Detective Prieto states that even if Mr. Slaughter could've proved his alibi to a 100 percent certainty, he would still think Mr. Slaughter was guilty). The police also never identified the alleged co-conspirator. Indeed, the lead prosecutor (Marc DiGiacomo) admits that if Detective Prieto had testified at trial—especially about the second

photo lineup—he was likely to give the jury the impression he was a bad detective. Ex. 23 at 184; *see also id.* at 32-35.

Had defense counsel called Detective Prieto and asked questions on any or all of these topics and others, the jury would've had serious reasons to question the integrity and accuracy of the police investigation. In turn, the jury would have had reasonable doubt about whether the State had charged the right man.

In addition, Detective Prieto could have laid the foundation for prior inconsistent statements by various witnesses. For example, he could have testified about various inconsistencies in Mr. Young's accounts. *See* Ground Three, Section B, *supra*; *see also*, *e.g.*, 3/25/15 Exhibits (document internally marked "Exhibit A"). He could have also testified about Mr. Arbuckle's prior inconsistent statements about when Mr. Slaughter picked up Ms. Johnson. *See* Ground Two, Section D, *supra*; *see also* Ex. 9 at 3-4. Counsel should have called Detective Prieto to lay the foundation for those material prior inconsistent statements.

For all these reasons and more, defense counsel provided ineffective assistance when they failed to call Detective Prieto. Mr. Slaughter's trial attorneys knew that Detective Prieto was a crucial witness. In fact, they anticipated cross-examining him, and they mentioned Detective Prieto repeatedly in their opening statement. Tr. 5/16/11 at 20-22. But they were not able to deliver because the State did not call him, and they had forgotten to subpoena him. 3/25/15 Petition at 7. They wanted to remedy that mistake by arguing during closing that the State's failure to call the lead detective should make the jury skeptical about the quality of the police investigation. But the prosecutor argued that the court should bar that argument, and the court agreed. Tr. 5/19/11 (11:00 a.m.) at 37-45. Defense counsel knew they needed to make that argument. In order to make that argument, they needed to call Detective Prieto. They should've done so.

B. Counsel failed to call Officer Anthony Bailey.

Just as defense counsel should have called Detective Prieto to lay the foundation for some of Mr. Young's prior inconsistent statements, defense counsel should have called Officer Anthony Bailey to lay the foundation for certain of Mr. Young's other prior inconsistent statements. Mr. Young had told Officer Bailey that one of the robbers was bald and wearing shorts and a blue shirt, while the other had dreadlocks and spoke with a Jamaican accent. Ex. 4 at 2. According to Mr. Young, he was sure the assailant with dreadlocks had shot him. *Id.* At the preliminary hearing, Mr. Young specified that Mr. Slaughter was not the one with the dreadlocks. Tr. 9/21/04 at 28. But he changed his mind and said that Mr. Slaughter *was* the shooter (*id.* at 39)—even though he previously said the robber *with* the dreadlocks was the shooter. (Ex. 4 at 2). Defense counsel should have called Officer Bailey to help rebut that claim. *See also* Ground Three, Section B, *supra*. In addition, there is no indication in the police reports that Mr. Young said he saw the getaway car. But when he testified, he said he had seen it. Tr. 5/16/11 at 46. Had counsel called Officer Bailey, counsel could've confirmed he hadn't mentioned that at the time.

Defense counsel did not make a strategic decision not to call Officer Bailey. The attorneys made the same mistake that they made with Detective Prieto—they assumed the State would call Officer Bailey, so they did not bother to subpoena him. 3/25/15 Petition at 20. In fact, Mr. Slaughter told the court he had asked his lawyers to call Officer Bailey, and they had neglected to do so. Tr. 5/20/11 at 66. The attorneys' failure to secure Officer Bailey's testimony constituted deficient performance, and it prejudiced the defense's case.

C. Counsel failed to call Destiny Waddy.

Destiny Waddy was waiting in Mr. Means's car while Mr. Means and the other victims were tied up. She told Officer Mark Hoyt that the assailants left in a car that she described as possibly a Pontiac Grand Am. Ex. 2 at 10. That conflicted with the

State's version of events, namely that the assailants were driving Ms. Johnson's Ford Taurus. Defense counsel should have called Ms. Waddy to testify about the getaway car. Her testimony would have gone a long way toward undercutting the State's theory, in part because Ms. Dennis recalled that the perpetrators mentioned a Pontiac. Tr. 5/16/11 at 149. That detail would have corroborated Ms. Waddy's recollection that the getaway car was a Pontiac, not a Ford.

Mr. Slaughter's attorneys knew this testimony was important. In fact, they promised the jurors they would hear it in their opening. Tr. 5/16/11 at 20-21. But the attorneys yet again made the same mistake that they made with Detective Prieto and Officer Bailey—they assumed the State would call Ms. Waddy, so they did not bother to subpoena her. 3/25/15 Petition at 33. Again, Mr. Slaughter told the court that he had asked his lawyers to call Ms. Waddy, and they had neglected to do so. Tr. 5/20/11 at 66. The attorneys' failure to secure Ms. Waddy's testimony constituted deficient performance, and it prejudiced the defense's case.

D. Counsel failed to call Officer Mark Hoyt.

Just as defense counsel should have called Ms. Waddy to testify about the getaway car, counsel should have called Officer Hoyt, who could have confirmed that Ms. Waddy described the car as a Pontiac. Ex. 2 at 10. That testimony would've helped show why Ms. Johnson's car wasn't the car used in the home invasion. It also would've contradicted Detective Prieto, who wrote in a search warrant affidavit that the witnesses described the car as a Pontiac *or* a Ford. *See* Ground Four, Section A, *supra*. In addition, Officer Hoyt could have described Mr. John's initial statement to the police that his head had been covered for much of the incident, which contradicted his account at trial that his head was uncovered until after the shooting. *Id.* at 9; *see also* Ground Three, Section C, *supra*. The only reason the attorneys did not call Officer Hoyt is because they made the same mistake that they made with Detective Prieto, Officer Bailey, and Ms. Waddy—they assumed the State would call Officer

Hoyt, so they did not bother to subpoena him. 3/25/15 Petition at 56. Yet again, Mr. Slaughter told the court that he had asked his lawyers to call Officer Hoyt, and they had neglected to do so. Tr. 5/20/11 at 66. Once again, this constituted deficient performance, and it prejudiced Mr. Slaughter.

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

As described in certain of Mr. Slaughter's grounds for relief above, Mr. Slaughter's defense counsel made multiple unfulfilled promises during opening statements. For one, counsel promised that the jury would learn about Mr. Slaughter's alibi—based on the timeline of events, he would have had four minutes to get from the crime scene to Ms. Johnson's workplace, and that was not nearly enough time. But counsel failed to introduce that evidence. *See* Ground Two, Sections A, B, C, and D, *supra*. Meanwhile, counsel promised that Ms. Westbrook would be a star alibi witness, but her testimony was underwhelming and counterproductive, just as Mr. Slaughter had anticipated. *See* Ground Two, Section E, *supra*.

Counsel made other bad promises as well. Counsel suggested that the jury would hear from Detective Prieto, but he never appeared at trial. *See* Ground Four, Section A, *supra*. Counsel also suggested that the jury would hear from Destiny Waddy, but she did not appear, either. *See* Ground Four, Section C, *supra*. In these respects and others, counsel made various unfulfilled promises during opening statements. There could be no strategic reason for making those promises and then failing to deliver. The defense was prejudiced as a result, both because the unfulfilled promises damaged the defense's credibility, and because the evidence counsel alluded to would have been material and exculpatory. As a result, Mr. Slaughter received ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

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

The prosecutors made multiple inappropriate comments during the initial closing argument and the rebuttal. These comments constituted prosecutorial misconduct. But Mr. Slaughter's attorneys failed to object to these comments. That failure constituted deficient performance for which there is no strategic justification. Had defense counsel objected to any or all of these comments, and had the jury been appropriately admonished, there is a reasonable probability it would have voted to acquit. As a result, Mr. Slaughter received ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

To be clear, Mr. Slaughter's trial attorneys were ineffective in numerous respects. They were ineffective for all the specific reasons explained in this Ground and Grounds Two through Six. Had his attorneys performed effectively in *any* of these numerous respects, there would have been a reasonable probability of a different outcome. And had his attorneys performed effectively in *all* of the ways described in this Ground and Grounds Two through Six, there would have been an overwhelming likelihood of a different outcome. For all the reasons explained in this amended petition, both individually and cumulatively, Mr. Slaughter received ineffective assistance of counsel. He is therefore entitled to a new trial.

A. The prosecutor inappropriately suggested Mr. Slaughter had attempted to fake a Jamaican accent.

During trial, three witnesses—Ivan Young, Jennifer Dennis, and Ryan John—testified that the suspects had Jamaican accents. Tr. 5/16/11 at 49 (Mr. Young), 140 (Ms. Dennis); Tr. 5/17/11 at 52 (Mr. John). None of them testified at trial that the accents sounded fake (although Ms. Dennis said she could not tell whether the accent

was authentic). That fact was exculpatory, since Mr. Slaughter does not have a Jamaican accent, and the jury heard jail house phone calls that Mr. Slaughter allegedly placed; those calls confirm that Mr. Slaughter does not have a Jamaican accent. *E.g.*, Tr. 5/18/11 at 86 (prosecutor plays phone calls to jury).

During the State's initial closing argument, one of the prosecutors told the jury that the suspects "used fake accents." Tr. 5/20/11 at 13. According to her, "Ivan Young said it appeared they were trying to talk Jamaican." *Id.* So too with Mr. John: he said "it sounded like a fake accent." *Id.* Ms. Dennis supposedly agreed—she supposedly said that "it sounded like they were putting on an act." *Id.* Thus, the prosecutor concluded, the evidence showed the suspects "were putting on an act [by] using a different voice to disguise their identity." *Id.* But none of those witnesses said anything of the sort, except perhaps Ms. Dennis, who said she did not know whether the accents were authentic (not that she believed the perpetrators were putting on an act). Aside from that minor caveat, the three witnesses testified that the suspects had Jamaican accents—not that it seemed as if the suspects were trying to fake an accent or put on an act. The prosecutor therefore misrepresented the trial testimony, and defense counsel should have objected.

B. The prosecutor inappropriately said there was "no question" Mr. Slaughter "put a gun to" Mr. Young's "face."

The other prosecutor began his rebuttal argument by stating that "this man," i.e., Mr. Slaughter, "put a 357 to a guy's face that he shot. There's no question about that." Tr. 5/20/11 at 130. Of course, that was one of the key questions for the jury to resolve. Defense counsel should have objected to that improper remark.

C. The prosecutor inappropriately vouched for Mr. Arbuckle.

Next, the prosecutor tried to smear the defense's alibi witnesses. He told the jury it should credit Mr. Arbuckle, who said Mr. Slaughter did not arrive to pick up

Ms. Johnson until after 7:30 p.m. According to the prosecutor, the jury should "believe Mr. Arbuckle [because he] has no reason to lie." Tr. 5/20/11 at 132. With that remark, the prosecutor inappropriately vouched for Mr. Arbuckle as a witness. In fact, as Ground Two(D) explains, Mr. Arbuckle disliked Mr. Slaughter—to the point of calling the cops on him a month before the incident—and therefore had a motive to lie. Relatedly, the prosecution suggested the jury should believe Mr. Arbuckle and disbelieve Ms. Johnson in part because "We didn't call Tiffany Johnson." *Id.* That comment was improper, too. Defense counsel should have objected to the prosecution's vouching.

D. The prosecutor inappropriately suggested Mr. Slaughter knew the time of the crime, so he must've been there.

Later on in his rebuttal, the prosecutor argued that Mr. Slaughter had tried to manufacture an alibi for himself for 7:00 p.m. on the night of the incident. But, the prosecutor asked rhetorically, "How does he know that fact that that's when the crime occurred. Ask yourself that question." Tr. 5/20/11 at 141; *see also id.* at 142. The prosecutor's tacit answer was that Mr. Slaughter knew what time the incident occurred because he was there. But, in fact, Detective Prieto had discussed the timing of the robbery with Mr. Slaughter soon after his arrest. Ex. 7 at 6. Defense counsel should have objected to the prosecutor's improper insinuation.

E. The prosecutor inappropriately suggested Mr. Slaughter's use of an alibi defense illustrated his guilt.

Later, the prosecutor returned to this theme; he stated that if Mr. Slaughter had a real alibi, he would not need witnesses to lie for him, and "[t]hat alone would make him guilty." Tr. 5/20/11 at 142. Once again, the comment inappropriately suggested that Mr. Slaughter had manufactured an alibi and was guilty as a result. Defense counsel should have objected to this insinuation as well.

F. The prosecutor inappropriately stated, "You shoot a guy in the face, you don't just get 10 years."

Next, the prosecutor suggested that soon after his arrest, Mr. Slaughter indicated during jail house phone calls that he might be willing to take a plea deal for eight or nine years to resolve this case. The prosecutor then dramatically turned toward Mr. Slaughter and said, "I got to tell Mr. Slaughter this, too, you shoot a guy in the face, you don't just get 10 years." Tr. 5/20/11 at 143. Defense counsel should have objected to this flagrant commentary.

G. The prosecutor inappropriately told the jury, "If you are doing the job," it will convict.

Toward the end of his rebuttal, the prosecutor suggested Mr. Slaughter knew he was responsible for the alleged crimes. He then closed with these remarks: "I suggest to you, if you are doing the job, 12 of you will go back in that room, you will talk about it and come back here and tell him you know, too." Tr. 5/20/11 at 150. Those were the final words the jury heard before retiring for deliberations. The prosecutor in effect told the jury it had a duty to reach a guilty verdict, and defense counsel should have objected to that improper statement.

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

As described in Ground Six, *supra*, the prosecutors made a series of improper remarks during closing argument and rebuttal. For reference, those remarks are as follows:

A. The prosecutor inappropriately suggested Mr. Slaughter had attempted to fake a Jamaican accent.

B. The prosecutor inappropriately said there was "no question" that Mr. Slaughter "put a gun to" Mr. Young's "face."

C. The prosecutor inappropriately vouched for Mr. Arbuckle.

D. The prosecutor inappropriately suggested Mr. Slaughter knew the time of the crime, so he must have been there.

E. The prosecutor inappropriately suggested Mr. Slaughter's use of an alibi defense illustrated his guilt.

F. The prosecutor inappropriately stated, "You shoot a guy in the face, you don't just get 10 years."

G. The prosecutor inappropriately told the jury, "if you are doing the job," it will convict.

Each of these remarks, individually and cumulatively, were so unfair that they denied Mr. Slaughter due process. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Each of these instances of misconduct had a substantial and injurious effect on the verdict. Mr. Slaughter is therefore entitled to a new trial.

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

The State introduced into evidence a surveillance videotape from a 7-Eleven store at 3051 E. Charleston Ave. in Las Vegas. It then played for the jury a snippet of the video, taken at about 8:00 p.m. the night of the incident. In the video, a black male can be seen standing near an ATM. According to the State, the man was Mr. Slaughter, using the ATM card he stole from Mr. John. But the only evidence the State presented that tended to prove that conclusion was hearsay evidence. Mr. John testified that after the robbery, he called his bank to report the stolen card, and someone at the bank told him his card had been used "at a 7-11 just after 8 p.m." Tr. 5/17/11 at 61. That testimony was the only link between the video and the incident. But that testimony was hearsay—Mr. John was recounting the bank employee's testimonial, out-of-court statement. The introduction of that hearsay testimony denied

Mr. Slaughter the right to confront the witnesses against him. *See Crawford v. Washington*, 541 U.S. 36 (2004). The error had a substantial and injurious effect on the verdict, since the jury was allowed to infer that the video showed Mr. Slaughter with the proceeds of the robbery. Indeed, the prosecutors repeatedly stressed this point during closing arguments. Tr. 5/20/11 at 25, 39-40, 53. Mr. Slaughter is therefore entitled to a new trial.

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

Mr. Slaughter's appellate attorney omitted crucial issues from his appeal: a solid *Batson* claim, the police's failure to document the second photographic lineup, and prosecutorial misconduct issues. These issues are plainly meritorious, and counsel should have included them in addition to or in lieu of some of the weaker claims in the appeal. These failures denied Mr. Slaughter the right to the effective assistance of appellate counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985).

A. Direct appeal counsel failed to litigate a *Batson* challenge.

During jury selection, and after pursuing a disparate line of questioning, the State used a peremptory challenge to strike the last remaining African-American in the venire, Kendra Rhines (juror number 242). Defense counsel raised a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), regarding the State's use of the strike. The prosecutor explained he struck the juror because of her supposed distrust of the police, but that was a pretextual explanation. Ms. Rhines explained during voir dire that she could be fair to both the State and the defense, and the State's decision to strike her rested on her race. *See* Tr. 5/13/11 (afternoon) at 1-19.

Despite this viable *Batson* claim, direct appeal counsel did not raise this issue. Counsel told Mr. Slaughter he chose not raise this claim because the juror was "not

[a] member[] of your race." 3/25/15 Exhibits (document internally marked "Exhibit N"). That explanation defies both law and fact. As for the law, *Batson* does not require that the juror at issue be the same race as the defendant. As for the facts, Mr. Slaughter and Ms. Rhines are both African-American. Counsel should have brought this claim, which was plainly stronger than at least some of the other claims in the direct appeal. Had the attorney raised this issue, there is a reasonable probability that the Nevada Supreme Court would have granted relief on that basis.

B. Direct appeal counsel failed to litigate the State's failure to preserve the second photographic lineup.

As discussed elsewhere in this petition (*e.g.*, Ground Three, Section A, *supra*; Ground Eleven, Section B, *infra*), the police had shown the victims a second photo lineup with Mr. Slaughter's picture in it; none of the victims identified Mr. Slaughter in that lineup. However, the police did not keep proper records of this photo lineup, including exactly who was involved in its creation, who was shown it when, and what the victims said in response to the lineup. As a result, initial trial counsel filed a motion asking the court to take corrective action in light of this failure to preserve evidence. 10/27/09 Motion to Dismiss. The court denied that motion. Direct appeal counsel should have renewed the issue on appeal. This issue was plainly stronger than at least some of the other claims in the direct appeal. Had the attorney raised this issue, there is a reasonable probability that the Nevada Supreme Court would have granted relief on that basis.

C. Direct appeal counsel failed to litigate prosecutorial misconduct issues.

As Grounds Six and Seven explain, the State made multiple inappropriate comments during closing arguments. While direct appeal counsel raised some of these comments as issues on appeal, counsel did not raise all of these issues: (1) the issue described in Ground Six(A); (2) the issue described in Ground Six(B); (3) the

issue described in Ground Six(C); and (4) the issue described in Ground Six(D). Counsel should've raised all of them, which would've substantially improved the prosecutorial misconduct claims counsel did raise. Had the attorney litigated each of the improper remarks, there is a reasonable probability the Nevada Supreme Court would've granted relief.

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

As described above in Ground Nine, Section A, *supra*, the prosecutors used a peremptory challenge to strike an African-American juror after employing a disparate line of questioning. Their purportedly race-neutral explanation for why they exercised the strike was pretextual. As a result, the use of the peremptory strike violated the Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

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

The State failed to disclose significant information about Mr. Slaughter's alibi and the second photo lineup, and the prosecution made substantial misrepresentations on the record about those topics. The State also failed to turn over impeachment evidence about Mr. Arbuckle and failed to correct his false testimony related to Mr. Slaughter's alibi. It therefore violated Mr. Slaughter's right to due process. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264, 266 (1959).

A. The prosecution didn't disclose evidence regarding Mr. Means's 911 call and misrepresented the timing.

As Ground Two(A) explains, a crucial part of Mr. Slaughter's alibi involved when the incident at Mr. Young's house ended. Based on the 911 records, the call came in at 7:11 p.m. But the prosecution didn't turn over those records to the defense.

See Ex. 16; Ex. 17; Ex. 23 at 138; Ex. 24 ¶ 7; Ex. 25 ¶ 16. While the prosecution disclosed police reports associated with the robbery at Mr. Young's house that suggested the incident occurred at some point before 7:11 p.m., those reports don't confirm the 911 call time. Ex. 2 at 1 ("date / time" of "6/26/04 / 19:11"), 9 ("On Saturday, 06-26-04 at 1911 hours, officers were dispatched to 2612 Glory View . . . ."); *see also* Ex. 3 at 1, 4 (similar); Ex. 4 at 1, 2 (similar); Ex. 5 at 1, 5 (stating that officer responded at 7:15 p.m.).

That issue—when the 911 call was placed, which helps pin down when the robbers left the crime scene—was a key component of Mr. Slaughter's case. Meanwhile, the State knew or should've known this was an important issue, because Detective Prieto interrogated Ms. Johnson repeatedly and at length regarding Mr. Slaughter's alibi (and even arrested her in connection with those interrogations). Ex. 14 at 104-37. It would've been obvious the defense was going to need to establish a concrete timeline of the evening's events, and the State knowingly held back a material piece of that puzzle.

Making matters worse, the prosecutor (Marc DiGiacomo) criticized the defense for failing to introduce this sort of evidence about the 911 call time, and he also made misleading comments about the issue. The problem arose when the defense proposed using a closing PowerPoint that stated the 911 call took place at 7:11 p.m. Mr. DiGiacomo objected. Tr. 5/20/11 at 77-78. He said the 911 call would have "gone to Metro first" and would have been transferred from Metro to North Las Vegas. *Id.* at 79. Although 7:11 p.m. was "the time the call was transferred from Metro to North Las Vegas," Mr. Means would have actually placed the 911 call earlier. *Id.*; *but see* Ex. 23 at 151-52 (Mr. DiGiacomo testifies the call would've been transferred to North Las Vegas contemporaneously with its placement). Mr. DiGiacomo objected that none of the call times were "in evidence" anyway. Tr. 5/20/11 at 79. Mr. DiGiacomo argued the defense could say only that Mr. Means placed the call at 7:00 p.m., not 7:11 p.m.,

and the Court agreed. *Id.* at 82; *see id.* at 84 (defense's closing argument) ("[T]he suspects left about 7:00 . . . [the victims] called [the police] after 7:00 p.m.").

Mr. DiGiacomo misled the court and the defense when he argued Mr. Means called the police as early as 7:00 p.m. To his credit, Mr. DiGiacomo correctly said Metro transferred the call to North Las Vegas at about 7:11 p.m. Tr. 5/20/11 at 79; *see* Ex. 6 (North Las Vegas ticket for 911 call listing "time received" of 7:11 p.m.); Ex. 14 at 100 (Detective Prieto says North Las Vegas picked up the call at 7:11 p.m.); Ex. 20 at 0:00-0:12 (audio recording of 911 call) (Metro dispatcher explains to North Las Vegas dispatcher that she is transferring the call); Ex. 23 at 139-40. But that transfer gave Mr. DiGiacomo no basis to shift the initial call time all the way down to 7:00 p.m. In fact, one minute and 38 seconds into the call with North Las Vegas, Mr. Means told the dispatcher the incident occurred "about five . . . five minutes ago." Ex. 20 at 1:38-1:40. As a matter of arithmetic, Mr. Means's statement indicates the suspects left at about 7:08 p.m.—but Mr. DiGiacomo misleadingly said Mr. Means would've placed his call no later than 7:00 p.m.

This was a material change in the timeline because every minute mattered to the defense's alibi, and Mr. DiGiacomo's comments convinced the court to erroneously shift the timeline by about eight to 11 minutes in the State's favor. Had Mr. DiGiacomo turned over the 911 records to the defense and been candid with the court, the defense would've been able to conclusively show the 911 call came in to North Las Vegas at 7:11 p.m. and, in turn, that the robbers left at about 7:08 p.m. In turn, that would've given the jury more reason to believe Mr. Slaughter's alibi and disbelieve the State's case. But as it stood, the jury was led to believe the 911 call came in at 7:00 p.m., so the robbers must've left before then—which would make it more likely Mr. Slaughter could've made it to Ms. Johnson's workplace by 7:20 p.m. The State's failure to turn this information over and its related misstatements during trial were prejudicial, and they violated Mr. Slaughter's rights.

B. The prosecution failed to turn over information about the second photo lineup and misrepresented its outcome.

As Grounds Three(A) and Four(A) explains, the police showed the victims a second lineup with Mr. Slaughter in it, and none of the victims identified Mr. Slaughter from that lineup. That would've given the jury a big reason to disbelieve the victims' purported identifications. But the prosecution did not tell the defense the outcome of this failed second lineup. To the contrary, Mr. DiGiacomo misleadingly suggested some of the victims had, in fact, identified Mr. Slaughter from the lineup. The State should've been honest with the defense and the Court and explained what really happened when the police showed the victims this lineup.

Mr. Slaughter maintains none of the eyewitnesses identified him or recognized him from the second photo lineup. Mr. DiGiacomo recently gave testimony suggesting a different version of events. According to Mr. DiGiacomo, while it might be true none of the eyewitnesses identified Mr. Slaughter at the time *Detective Prieto* showed them the lineup, at least one of the eyewitnesses nonetheless recognized Mr. Slaughter in the lineup and told that to *Mr. DiGiacomo* later. Mr. Slaughter disagrees with that narrative: none of the eyewitnesses identified him (or failed to identify him but nonetheless recognized him) from the second photo lineup, and the State committed a *Brady* violation by failing to disclose that fact before trial. But even if Mr. DiGiacomo's version of events is true, the State *still* committed a *Brady* violation. Mr. Slaughter is therefore entitled to relief.

1. No eyewitnesses identified Mr. Slaughter from the second photo lineup; the State didn't disclose that.

As Detective Prieto testified, none of the eyewitnesses identified Mr. Slaughter from the second photo lineup. Ex. 14 at 87-88. But the State never disclosed that to the defense. *See, e.g.*, Ex. 24 ¶¶ 4-5; Ex. 25 ¶ 16. To the contrary, the prosecution misrepresented the results of the lineup. For example, during a pre-trial hearing, Mr. DiGiacomo admitted Detective Prieto had shown the second photo lineup to the

victims. But he 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. That statement implies at least one of the victims *had* identified Mr. Slaughter from that lineup. But, as a matter of fact, *none* of the victims picked out Mr. Slaughter from that lineup. Mr. DiGiacomo's comments thus failed to accurately convey the outcome of this lineup to the defense and to the Court. Mr. DiGiacomo made similar statements in a pre-trial pleading and at trial (11/9/09 Opposition; Tr. 5/18/11 at 61-62)); at no point did he tell the defense about the non-identifications.

This withheld information—that none of the eyewitnesses recognized Mr. Slaughter from the second photo lineup—was substantial exculpatory or impeachment evidence because the non-identifications undercut the reliability of the eyewitnesses' purported identifications of Mr. Slaughter. If those eyewitnesses weren't able to identify him from the second photo lineup (which was a less suggestive lineup than the first photo lineup, and which featured a more contemporaneous photo of Mr. Slaughter), then there's good reason to be skeptical about their purported ability to recognize Mr. Slaughter as one of the culprits. That information would've materially changed the trial. As Ground One explains in greater detail, the prosecution's case rose and fell with the eyewitness identifications: the State's remaining evidence against Mr. Slaughter was circumstantial and weak. If the jury knew about the non-identifications from the second photo lineup, the jury would've had ample reason to disbelieve the eyewitnesses' in-court identifications, and there's a reasonable probability the jury would've acquitted Mr. Slaughter. He is therefore entitled to relief.

2. Mr. DiGiacomo claims at least one witness recognized Mr. Slaughter in the second photo lineup.

At a recent federal deposition, Mr. DiGiacomo provided a different version of events. According to Mr. DiGiacomo, he wasn't aware of the second photo lineup until he conducted a pre-trial interview with one of the witnesses at some point during or

before 2005. Mr. DiGiacomo couldn't recall precisely who was present, but he guessed it was Mr. Young, Ms. Dennis, and maybe Aaron Dennis. Ex. 23 at 69-70. Mr. DiGiacomo was asking the witnesses about the photo lineups they saw, and someone—perhaps Mr. Young—said he recalled seeing a second photo lineup with Mr. Slaughter's photo in it. *Id.* at 70, 73, 77. That was news to Mr. DiGiacomo. After the meeting, he called Detective Prieto at least once (possibly twice) and expressed his displeasure that Detective Prieto had shown the witnesses a second lineup with Mr. Slaughter's photo alongside another suspect's photo. *Id.* at 79, 201. During this conversation, Detective Prieto seemed surprised to learn Mr. Slaughter's photo was in the second photo lineup. *Id.*

After speaking with Detective Prieto, Mr. DiGiacomo tried to talk to all of the relevant witnesses about the second photo lineup. Ex. 23 at 86. Mr. DiGiacomo couldn't say whether any of the other witnesses, aside from the initial witness (who, based on Mr. DiGiacomo's account, would've probably been Mr. Young), reported recognizing Mr. Slaughter's photo in the second photo lineup. *Id.* at 86-88, 195-97. All Mr. DiGiacomo could say is at least one witness told him he (or she) recognized Mr. Slaughter in the second photo lineup. *Id.*

Mr. DiGiacomo stated he disclosed to the defense—specifically, Paul Wommer—the existence of the second photo lineup and Mr. Slaughter's presence in it. Ex. 23 at 85-86, 120-21, 187. Mr. DiGiacomo admitted he didn't specifically tell Mr. Slaughter's attorneys that one of the witnesses recognized Mr. Slaughter from the second photo lineup while the others didn't. *Id.* at 117, 120-22.

3. Mr. DiGiacomo's version of events is doubtful.

Mr. Slaughter disputes the account Mr. DiGiacomo gave during his deposition. It's exceedingly unlikely Mr. DiGiacomo conducted a pre-trial interview with a wit-

ness who claimed to have recognized Mr. Slaughter in the second photo lineup. Rather, Mr. Slaughter maintains none of the witnesses recognized him from the second photo lineup.

To start, it would be very odd for a witness to have acted in the way Mr. DiGiacomo suggests. Detective Prieto testified no one identified Mr. Slaughter from the second photo lineup when Detective Prieto showed the witnesses the lineup. Ex. 14 at 87-88. Mr. DiGiacomo is apparently claiming that even if the witnesses didn't identify Mr. Slaughter when *Detective Prieto* showed them the second photo lineup, at least one witness (probably Mr. Young) nonetheless recognized Mr. Slaughter in the lineup, stayed silent during the lineup viewing, then told *Mr. DiGiacomo*, months later, that he (or she) recognized Mr. Slaughter in that lineup. That doesn't make much sense. It's hard to imagine a witness looking at a lineup, recognizing a previously identified suspect, deciding not to mention that suspect to the police officer at the time, but then sharing the information with the prosecutor months later. It's even harder to imagine a witness staying silent when the lineup instructions told the witnesses, "If previously you have seen one or more of the persons in this photo spread, write your initials in the 'INITIALS' space(s) beside the photo(s) of the person(s) you have seen." 10/27/09 Motion Exhibit 5-A; *see also id.* Exhibits 5-B through 5-E (similar). A witness who followed those instructions and noticed Mr. Slaughter's photo would've initialed his photo, but none of the copies of the second photo lineup contain initials (aside from the version Mr. DiGiacomo showed Kenny Marks, who wasn't an eyewitness and whose testimony had little relevance). Even if the witnesses didn't read the instructions, it would still be natural for a witness to tell a detective if the witness spotted someone he or she recognized in a lineup. It defies common sense to think a witness would've behaved in the manner Mr. DiGiacomo suggests, which means Mr. DiGiacomo's account is probably wrong.

Mr. DiGiacomo's story also doesn't line up with what other witnesses remember. For example, at his deposition, Detective Prieto didn't recall much about the second photo lineup or how he showed it to the witnesses (although he did confirm none of the witnesses identified Mr. Slaughter). *See, e.g.*, Ex. 14 at 83-84. But Mr. DiGiacomo claimed that once the witness in question told him Mr. Slaughter's photo was in a second lineup, Mr. DiGiacomo called Detective Prieto; Mr. DiGiacomo said he was "very unhappy," and he "express[ed]" to Detective Prieto his "displeasure that this had occurred in this particular case." Ex. 23 at 79. (Notably, Mr. DiGiacomo said it seemed to him on this call that Detective Prieto hadn't yet realized Mr. Slaughter was in the second photo lineup (*id.* at 79), which again helps prove none of the witnesses told Detective Prieto they recognized Mr. Slaughter's photo in the lineup.) If such a dramatic phone call had taken place, this "unusual situation" probably would've been "seared in" Detective Prieto's mind. *Cf. id.* at 78. But Detective Prieto didn't testify about this phone call and didn't appear to have much independent recollection of the second photo lineup. Detective Prieto's lack of memory suggests this telephone call didn't happen, which in turn suggests Mr. DiGiacomo's testimony is inaccurate.

A similar observation applies to other witnesses. According to Mr. DiGiacomo, the original lead prosecutor on the case (Susan Krisko) would be able to confirm his account. Ex. 23 at 75, 95. But Ms. Krisko doesn't remember anything about the photo lineups in this case. Ex. 25 ¶ 22. One of the eyewitnesses who identified Mr. Slaughter from the first photo lineup, Ryan John, remembers seeing a second photo lineup but doesn't remember recognizing anyone from that lineup and doesn't remember talking to Mr. DiGiacomo about the lineups before trial. *Id.* ¶¶ 5-8. Another of the eyewitnesses who identified Mr. Slaughter from the first photo lineup, Jermaun Means, remembers the first photo lineup but doesn't remember being shown a second

photo lineup and doesn't remember talking to Mr. DiGiacomo about the lineups before trial. *Id.* ¶¶ 9-13. Mr. DiGiacomo thought Mr. Slaughter's trial lawyers would be able to confirm Mr. DiGiacomo's story (Ex. 23 at 95, 117-19), but the trial lawyers disagree (Ex. 24 ¶¶ 4-5; Ex. 25 ¶ 16). Indeed, despite extensive investigation, Mr. Slaughter hasn't spoken to any witnesses—lay witnesses, police officers, prosecutors, or defense attorneys—who verified Mr. DiGiacomo's story. That raises questions about whether his testimony is correct.

Making matters worse, there's no written evidence to corroborate Mr. DiGiacomo's version of events. Mr. DiGiacomo stated he didn't take any notes memorializing the purported pre-trial interview where this conversation about the second photo lineup took place, nor is he aware of anyone else taking any notes about the conversation. Ex. 23 at 90-92. As Mr. DiGiacomo put it, he didn't memorialize the interview because the situation "didn't seem to be of much moment to me" (*id.* at 92)—even though the situation made him "very unhappy," even though he called Detective Prieto to "express[] [his] displeasure," and even though the incident remains "seared in [his] mind" because it was such an "unusual situation" (*id.* at 78-79). As far as Mr. Slaughter is aware, Mr. DiGiacomo is right that there aren't any notes in the prosecutor's file corresponding to this supposed interview: at no point in time (before, during, or after trial, or during either of the previous rounds of the federal discovery process) did the District Attorney's office turn over any corresponding notes or memos to Mr. Slaughter. The lack of any written work product memorializing this "unusual situation" (*id.* at 78) sheds doubt on whether it actually occurred.

The same goes for statements Mr. DiGiacomo made in written filings and in open court: at no point did Mr. DiGiacomo ever tell this story on the record until his deposition. That's not for lack of opportunity; rather, the subject of the second photo lineup has come up many times before. For example, the defense filed a motion related to the second photo lineup in 2009, and Mr. DiGiacomo personally authored an

opposition. 11/9/09 Opposition. He didn't explain in the opposition that a witness mentioned recognizing Mr. Slaughter in the second photo lineup. Instead, he said the defense was merely "speculat[ing]" that "none of the witnesses identified [Mr. Slaughter] in those photo lineups." *Id.* at 3 n.1. Mr. DiGiacomo's statements at the relevant pre-trial hearing were similar. Tr. 12/1/09. Mr. DiGiacomo didn't tell the court and the defense that one of the witnesses told him in a pre-trial interview the witness recognized Mr. Slaughter in the second photo lineup. Instead, Mr. DiGiacomo represented it would take a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups." *Id.* at 9. Once again, Mr. DiGiacomo made similarly vague statements at trial. The defense attorneys brought up the issue of the second photo lineup, and Mr. DiGiacomo made various representations about the lineup, but he didn't give the account he gave in his deposition. Tr. 5/18/11 at 61-62. This conclusion even applies to an email exchange between undersigned counsel and the DA's office. *See* Ex. 23 at 104-05 (discussing Exhibit 25, deposition exhibit 27). Indeed, the first time Mr. DiGiacomo hinted at this story on the record was at a March 7, 2019, hearing, after Mr. Slaughter filed his third state post-conviction petition (which raises a version of this claim). Even then, Mr. DiGiacomo still didn't tell this story. Tr. 3/7/19 at 10. The fact Mr. DiGiacomo made on-the-record statements about the second photo lineup but never gave the details he provided in his testimony creates a question about those details.

The vagueness of Mr. DiGiacomo's account also raises questions. Mr. DiGiacomo was unable to give any concrete details about the witness's identification. For example, he couldn't remember which eyewitness reported recognizing Mr. Slaughter's photo from the second photo lineup. He couldn't say how many eyewitnesses reported recognizing Mr. Slaughter's photo from the second photo lineup. He doesn't recall the specifics of the conversation with the eyewitness, the ensuing conversations with Detective Prieto, and the ensuing conversations with the other eyewitnesses.

He was confused about when, exactly, this discussion happened: he originally said he first got involved in the case right before Mr. Slaughter entered his guilty plea in April 2005 (Ex. 23 at 28, 71, 74-75), but then he suggested this pre-trial interview might've happened much earlier, before December 2004 (*id.* at 126-27, 186), which contradicts when he said he originally got involved in the case. The lack of detail is surprising for such an "unusual situation" that still supposedly remains "seared in [Mr. DiGiacomo's] mind." *Id.* at 78.

In all, Mr. DiGiacomo's version of events shouldn't be credited. Rather, the most logical conclusion is that none of the eyewitnesses ever identified or recognized Mr. Slaughter from the second photo lineup; Mr. DiGiacomo knew that fact; and he failed to disclose it to the defense. Mr. Slaughter is therefore entitled to relief.

4. Even if Mr. DiGiacomo's version of events is true, the State still committed a *Brady* violation.

Assuming for the sake of argument Mr. DiGiacomo's testimony is accurate, it still reveals a *Brady* violation, because the State failed to disclose multiple witnesses' non-identifications.

According to Mr. DiGiacomo, at least one eyewitness told him the eyewitness recognized Mr. Slaughter from the second photo lineup. Taking Mr. DiGiacomo's account at face value, the most plausible interpretation of his testimony is that the eyewitness was Ivan Young (Ex. 23 at 77, 86-88), and he was probably the only one to notice Mr. Slaughter in the second photo lineup (*see id.* at 202). Mr. DiGiacomo's failure to tell that to the defense was a *Brady* violation in its own right.

As for Mr. Young, the relevant circumstances don't seem to add up. If in fact he actually recognized Mr. Slaughter in multiple lineups, that might in theory strengthen the reliability of his identification. But Mr. Young didn't tell *Detective Prieto* he recognized Mr. Slaughter when Detective Prieto showed him the second photo lineup. Rather, Mr. Young apparently told Detective Prieto nothing, but then

saw fit to share his identification with Mr. DiGiacomo months later. If Mr. Young hadn't bothered to share his identification with *Detective Prieto*, that would've raised red flags about the purported identification in the juror's minds. Thus, the information about the second photo lineup would've ultimately *undermined* Mr. Young's identification, despite his supposed ability to recognize Mr. Slaughter in the second photo lineup.

As for the other witnesses who purported to identify Mr. Slaughter—Ryan John, Joey Posada, and Jermaun Means (who failed to identify Mr. Slaughter in court, but whose prior identification of Mr. Slaughter the State admitted into evidence)—the results of the second photo lineup was undoubtedly exculpatory. Ex. 23 at 48-49, 57, 98, 119-20, 195-98. Even taking Mr. DiGiacomo's testimony at face value, it's highly unlikely any of those witnesses ever claimed to have recognized Mr. Slaughter from the second photo lineup: it was probably just Mr. Young who did. *Id.* at 117; *see also* Ex. 25 ¶¶ 5-8 (Mr. John); *id.* ¶¶ 9-13 (Mr. Means). But Mr. DiGiacomo never disclosed to the defense those three eyewitnesses failed to identify Mr. Slaughter from the second photo lineup. Ex. 23 at 120-22. If the jury knew these three other witnesses failed to spot Mr. Slaughter in that lineup, those witnesses' purported identifications would lose all credibility. At that point, the jury would be left with Mr. Young's supposed identification (coupled with the odd fact he didn't share with Detective Prieto that he recognized Mr. Slaughter in the second photo lineup), along with three witnesses who failed to pick out Mr. Slaughter from a non-suggestive photo lineup. Had the jury known that, it would've had reasonable doubt about the circumstances of Mr. Young's prior identifications, and it would've had substantial doubt about whether the other three witnesses made accurate identifications. In that scenario, there's at least a reasonable probability (and certainly a reasonable possibility) the jury would've reached a different verdict. Indeed, even Mr. DiGiacomo admitted

it probably would've hurt his case if the jury learned about the second photo lineup. *Id.* at 97, 184.

In short, even if Mr. DiGiacomo's deposition testimony is entirely accurate, the State still committed a *Brady* violation. Mr. Slaughter is entitled to relief under this scenario as well.

C. The prosecution failed to turn over impeachment information about Mr. Arbuckle.

As Grounds Two(D) and Four(A) explain, Mr. Arbuckle testified he left work at 7:30 p.m., and Mr. Slaughter hadn't arrived yet; that testimony hurt the defense's alibi. But Mr. Arbuckle had a motive to lie about the timing: he had it out for Mr. Slaughter and had called the cops on him for trespassing mere weeks before the incident. Ex. 1. The State did not turn that information over to the defense before trial. *See* Ex. 16; Ex. 17; Ex. 23 at 175; Ex. 24 ¶¶ 6-9; Ex. 25 ¶ 16. Had the defense known about the call, it would've been able to impeach Mr. Arbuckle about his motive to lie, which would've helped the defense discredit his testimony about the timing. The information was also important because it suggested Mr. Slaughter had a reason to avoid Mr. Arbuckle seeing him. The two had gotten into an argument, which caused Mr. Arbuckle to file a trespassing complaint against him. That is one explanation for why Mr. Slaughter arrived just as Mr. Arbuckle was leaving; perhaps Mr. Slaughter had gotten there even earlier, but he waited to pull in until Mr. Arbuckle left, to avoid another squabble. The failure to turn over this information therefore violated Mr. Slaughter's rights.

The State also failed to correct false testimony from Mr. Arbuckle. On direct examination, Mr. Arbuckle maintained he left work no earlier than 7:30 p.m. Tr. 5/17/11 at 41-42. On cross-examination, the defense attorney asked him if recalled telling the police he left at 7:15, not 7:30 p.m. *Id.* at 46. Mr. Arbuckle said, "No, I waited for about 30 minutes." *Id.* The defense attorney tried to pin him down further,

but the prosecutor objected to further questioning on this topic, and the Court sustained the objection. *Id.*; Ex. 23 at 167-74. Rather than objecting, the prosecution should've corrected Mr. Arbuckle's false testimony and allowed Mr. Arbuckle to clarify that he did, in fact, previously tell the police he left at 7:15 p.m. That information was crucial for the jury's understanding of the alibi timeline, and the prosecution's failure to correct the false testimony therefore caused prejudice.

Request for Evidentiary Hearing

As the Statement regarding Cause and Prejudice explains, the Court should set this case for an evidentiary hearing. A hearing is necessary so the parties can present additional evidence regarding, among other things, the outcome of the second photo lineup and Mr. Slaughter's innocence. The Court should therefore schedule this case for an evidentiary hearing at its earliest convenience.

Prayer For Relief

Accordingly, Mr. Slaughter respectfully requests this Court:

1. Issue a writ of habeas corpus to have Mr. Slaughter brought before the Court so he may be discharged from his unconstitutional confinement;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this petition and any defenses that may be raised by the State; and

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

VERIFICATION

Under penalty of perjury, the undersigned declares he is counsel for Mr. Slaughter and has read this petition. Undersigned counsel believes this petition is true based on his own knowledge, except as to those matters stated on information and belief, and as to those matters, he believes them to be true. Mr. Slaughter personally authorized undersigned counsel to commence this action. The undersigned also affirms this document does not contain the social security number of any person.

Dated March 27, 2020.

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 March 27, 2020, 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 will mail a copy of the foregoing document to the following people:

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
Eloy, AZ 85131

/s/ Richard Chavez
An Employee of the Federal Public Defender, District of Nevada

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. CHARLES DANIELS, Director, Nevada Department of Corrections; MARTIN L. FRINK, Warden, Saguaro Correctional Center; RENEE BAKER, ex-Warden, Ely State Prison; and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. _____ Dept. No. III (Not a Death Penalty Case)

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. CHARLES DANIELS, Director, Nevada Department of Corrections; MARTIN L. FRINK, Warden, Saguaro Correctional Center; RENEE BAKER, ex-Warden, Ely State Prison; and AARON FORD, Attorney General of the State of Nevada, Respondents.	Case No. A-20-812949-W (04C204957) Dept. No. III (Not a Death Penalty Case)

INDEX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

No.	DATE	DOCUMENT	COURT	CASE #
23.	07/26/2019	Deposition Transcript of Marc DiGiacomo	United States District Court	3:16-CV-00721-RCJ-WGC
24.	07/26/2019	Exhibits to Deposition of Marc DiGiacomo	N/A	N/A
25.	10/16/2019	Declaration of Osvaldo Fumo	N/A	N/A
26.	10/24/2019	Declaration of Maribel Yanez	N/A	N/A
27.	(undated)	Unsigned Declaration of Rickie Slaughter[1]	N/A	N/A

DATED March 27, 2020.

Respectfully Submitted,

RENE L. VALLADARES
Federal Public Defender

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

[1] Mr. Slaughter has stated this declaration is entirely truthful and that he intends to sign it. However, undersigned counsel has not been able to get a signed version of this declaration in time for this filing. Undersigned counsel will file a signed version promptly.

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2020, 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 will mail a copy of the foregoing document to the following people:

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
Eloy, AZ 85131

/s/ Richard Chavez
An Employee of the Federal Public Defender, District of Nevada

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Deputy District Attorney
Nevada Bar #013730
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

Petitioner.

CASE NO: A-20-812949-W/
04C204957

DEPT NO: III

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO DISMISS PETITION PURSUANT TO NRS 34.800

DATE OF HEARING: 5/14/2020
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Deputy District Attorney, and moves this Honorable Court for an order denying the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) heretofore filed in the above entitled matter.

This Response 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 ("Petitioner") with the following: 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); Counts 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, Petititioner entered into a Guilty Plea Agreement, wherein he agreed to plead guilty to the following: 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, Petitioner 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 and 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. Petitioner received no credit for time served. The Judgment of Conviction was filed on August 31, 2005. Petitioner did not file a direct appeal.

On August 7, 2006, Petitioner filed a Petition for Writ of Habeas Corpus. Among other claims, Petitioner 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 the Petition on December 18, 2006. The Findings of Fact, Conclusions of Law and Order were filed on January 29, 2007. On January 11, 2007, Petitioner filed a Notice of Appeal. On July 24, 2007, the Nevada Supreme Court affirmed the denial of several of the claims raised in the Petition, but reversed the denial of Petitioner'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 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 Petitioner, who later elected to proceed pro per. On June 19, 2008, this Court held an evidentiary hearing. Afterward, this Court denied Petitioner's claim that his guilty plea was involuntarily entered, but ordered the Nevada Department of Corrections to parole Petitioner from sentences for the deadly weapon enhancements for Counts 1, 2, and 4 at the same time as the sentences for the primary counts. Petitioner 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 Petitioner 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).

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

On October 16, 2012, Petitioner 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 10-14 – 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. Petitioner received 2,626 days for credit time served. Petitioner was not adjudicated on Count 4.

The Judgment of Conviction was filed on October 22, 2012. Petitioner 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, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed its Response on June 2, 2015. This Court denied Petitioner'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, Petitioner 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, Petitioner 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. Petitioner 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, Petitioner 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 Petitioner raises in the instant matter. Petitioner has filed a total of three separate Petitions in the federal case, and this matter appears to be ongoing.

Petitioner filed a third Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") on November 20, 2018, in case A-18-784824-W. The State filed its Response on December 19, 2018. On March 7, 2019, this Court denied the Petition. The Findings of Fact, Conclusions of Law, were filed on April 11, 2019. On May 6, 2019, Petitioner filed a Notice of Appeal. Briefing has been completed, and this appeal is currently pending before the Nevada Supreme Court. Slaughter v. Baker, No. 78760.

On March 27, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) ("Fourth Petition"). The State responds as follows.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO RULE UPON THIS PETITION

The appeal of Petitioner's Third Petition is currently pending before the Nevada Supreme Court, and therefore this Court lacks jurisdiction to rule upon Petitioner's claims. "Jurisdiction in an appeal is vested *solely* in the supreme court until the remittitur issues to the district court." Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994) (emphasis added). While an appeal is pending, district courts do not have jurisdiction over the case until remittitur has issued. Id. The Nevada Supreme Court "has repeatedly held that the timely filing of a notice of appeal 'divests the district court of jurisdiction to act and vests jurisdiction in [the appellate] court.'" Foster v. Dingwall, 126 Nev. 49, 52, 228 P.3d 453, 454-55 (2006) (quoting Mack-Manley v. Manley, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006)).

Only a remittitur will return jurisdiction from an appellate court of competent jurisdiction to the district court. See NRS 177.305 ("After the certificate of judgment has been remitted, the appellate court of competent jurisdiction shall have no further jurisdiction of the appeal or of the proceedings thereon, and all order which may be necessary to carry the

judgment into effect shall be made by the court to which the certificate is remitted."). Until a remittitur is received, a district court lacks jurisdiction over a particular case. Buffington, 110 Nev. at 126, 868 P.2d at 644.

Here, Petitioner has appealed this Court's denial of his Third Petition, filed in A-18-784824-W. Slaughter v. Baker, No. 78760. Upon the filing of the Notice of Appeal, this Court was divested of jurisdiction to rule upon the claims contained within the Third Petition. The Nevada Supreme Court has not yet issued remittitur, and jurisdiction will not be returned to this Court until such occurs. Petitioner's Fourth Petition presents claims *identical* to those contained in Petitioner's Third Petition. Petitioner raises precisely the same eleven claims that were raised previously. Shockingly, throughout his Fourth Petition Petitioner notes that he presented the same arguments in his Third Petition. As the Fourth Petition re-raises the precise claims that the Nevada Supreme Court is currently reviewing upon appeal, this Court lacks jurisdiction to rule upon these claims. Thus, this Court cannot hear the claims raised in the Fourth Petition, and it must be dismissed.

II. THIS PETITION IS PROCEDURALLY BARRED

Even were the Court to have jurisdiction over the Fourth Petition, consideration of Petitioner's claims is procedurally barred. As was Petitioner's Third Petition, Petitioner's Fourth Petition is also procedurally barred from consideration by this Court.

a. The Petition is Time-Barred

The Fourth Petition is time-barred with no good cause demonstrated for the substantial delay in filing. Pursuant to NRS 34.726(1):

> 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 Supreme Court of Nevada 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).

Further, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a Petitioner'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 held "the statutory rules regarding procedural default are mandatory and cannot be ignored [by the district court] when properly raised by the State." 121 Nev. 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.

Here, Petitioner filed a direct appeal, and the Nevada Supreme Court affirmed his convictions. Remittitur issued on April 30, 2014. Thus, pursuant to NRS 34.726, Petitioner had until April 30, 2015 to file his Petition. Petitioner filed the Fourth Petition on March 27, 2020, well outside of the time allotted for filing such a petition. The Fourth Petition was filed nearly six years after remittitur issued. Absent a showing of good cause for this delay and undue prejudice, the Petition must be dismissed because of its tardy filing.

b. This Petition is Successive Because It Fails to Allege New Grounds For Relief

The Fourth Petition is also procedurally barred due to being successive. NRS 34.810(2) reads:

> 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 constituted an abuse of the writ**.

(emphasis added).

Thus, petitions that fail to allege new or different grounds for relief and the grounds have already been decided on the merits are procedurally barred. 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).

Application of NRS 34.810 is mandatory. See, e.g., Riker, 121 Nev. at 231, 112 P.3d at 1074. NRS 34.810 substantially limits the judicial review of second or successive habeas petitions. "Unlike 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) (emphasis added). The Nevada Supreme Court has stated, "[w]ithout 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.

Here, in this Fourth Petition, *all* of Petitioner's claims were raised in Petitioner's Third Petition. Petitioner acknowledges that "the claims in this petition essentially track the claims in the third petition…" Fourth Petition, at 13. Though Petitioner has added some argument to his claims based upon the additional exhibits attached, his claims are substantively the same, and are plead in a substantially similar manner as in the Third Petition. Clearly, the Fourth Petition is successive as it only raises previously-raised claims. Therefore, it **must** be dismissed pursuant to NRS 34.810(2).[1]

III. THE PETITIONER HAS FAILED TO DEMONSTRATE GOOD CAUSE AND PREJUDICE, OR A FUNDAMENTAL MISCARRIAGE OF JUSTICE, TO OVERCOME THE PROCEDURAL BARS TO THE PETITION

The Petitioner has failed to establish good cause and prejudice sufficient to overcome the procedural bars to his Fourth Petition. To avoid procedural default under NRS 34.726, a Petitioner has the burden of pleading and proving specific facts that demonstrate good cause

[1] As addressed more specifically *infra*, the Petition is also procedurally barred from consideration pursuant to NRS 34.810(1)(b), due to raising certain claims that could have been raised, or were raised, on direct appeal.

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 for a claim. 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).

In order to establish prejudice, a petitioner 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. Petitioner's Claims Are Not Based Upon New Evidence

Presumably in an attempt to argue that the factual basis for his claims was not available earlier, Petitioner alleges that his claims are based upon "new evidence." Fourth Petition, at 14. This is obviously and patently false for numerous reasons. First, the claims in his Fourth Petition are the same claims Petitioner has raised in his Third Petition, as well as in other proceedings, so they obviously are not based upon recently-discovered evidence. Second, several of Petitioner's claims are factually unrelated to what Petitioner claims is new evidence. Third, Petitioner audaciously disputes the truth and accuracy of what he claims is new evidence. It is not in fact new evidence that Petitioner wishes this Court to consider, but Petitioner's own self-serving *ipse dixit* that this evidence is not to be believed.

Petitioner contends that "some" of his claims are based upon Marc Digiacamo's deposition given pursuant to Petitioner's federal habeas petition and the "ensuing investigation." Fourth Petition, at 14. As discussed more fully *infra*, Marc Digiacamo's deposition testimony was not factually related to many of Petitioner's procedurally-barred claims, and therefore cannot possibly serve as good cause for raising them. Petitioner also disputes the statements made by Marc Digiacamo during his testimony, and therefore Petitioner does not present the testimony itself as new evidence, as he urges this Court to discredit it. Fourth Petition, at 59-64.

Marc Digiacamo's deposition testimony primarily concerned three topics: the second photographic lineup which mistakenly contained a photograph of Petitioner, the timing of the offense and related 911 call, and the so-called "impeachment" information regarding Jeffrey Arbuckle having once reported Petitioner to the police for trespassing. Fourth Petition, Exhibit 23. Regarding the photographic lineup, it is not disputed that trial counsel was in possession of this photographic lineup at the time of trial, was aware that Detective Prieto was the individual who prepared the photographic lineup, and was aware of which witnesses were shown the lineup. Fourth Petition, Part 1 of Exhibit 24, Motion to Dismiss Case for Failure to Preserve or Destruction of Exculpatory Photo Lineup Identification Evidence filed Oct. 27, 2009; Exhibit 14 to Marc Digiacamo's deposition. Petitioner, throughout his Third and Fourth

Petitions, repeatedly misrepresents the facts by claiming that none of the witnesses identified Petitioner from this second lineup. Petitioner has never presented this Court with a shred of evidence that shows this to be true. When Detective Prieto presented this second photo lineup,[2] the witnesses had not been asked to identify Petitioner but rather *another* suspect-- Richard Jacquan—in that lineup. Fourth Petition, part 1 of Exhibit 24, Exhibit 17 from Marc Digiacamo's deposition at 60-85; Third Petition, Exhibit 14 at 60–85. Petitioner'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 Petitioner. Id. at 86–87. Detective Prieto testified that he did not remember giving the second photographic lineup to the witnesses, or what the witnesses said upon viewing the photo lineup. When asked "Do you recall showing the second photo lineup to the seven witnesses?" Detective Prieto responded "I don't recall showing it." Id. at 83. Detective Prieto's repeated statements that he did not remember showing the second photo lineup to the witnesses clearly do not establish that none of the witnesses recognized Petitioner in this second lineup. Detective Prieto's deposition testimony is the only evidence ever presented by Petitioner pertaining to this claim, and it establishes nothing beyond Detective Prieto's inability to recall showing the second photo lineup, approximately 14 years after the fact. Petitioner's misrepresentations should not be tolerated by this Court.

Marc Digiacamo was not present when Detective Prieto showed the second photo lineup to the eyewitnesses. Fourth Petition, Exhibit 23 at 63-64. During his deposition, Marc Digiacamo testified that he learned of this second photographic lineup in 2005, when during a

---

[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.

pretrial interview some of the witnesses informed him that they had been shown a second lineup that contained a photograph of Petitioner. Fourth Petition, Exhibit 23, at 69-70. Thus, Marc Digiacamo's testimony directly contradicts what Petitioner is claiming is new evidence. Therefore, Marc Digiacamo's deposition testimony cannot possibly serve as a basis for raising this procedurally barred claim.

Regarding the timing of the 911 call, which Petitioner contends supports his alibi defense, no new evidence regarding this claim was obtained through Marc Digiacamo's deposition testimony, other than that, upon review of the trial transcript, it appears that trial counsel may have had possession of the incident documentation showing the time the 911 call was received. Id. at 147. This directly contradicts Petitioner's claim that this is new evidence.

Regarding the incident report showing that State's witness Jeffrey Arbuckle had previously reported Petitioner to the Las Vegas Metropolitan Police Department for trespassing, no new relevant information was obtained from Marc Digiacamo's testimony. Marc Digiacamo testified that he was unaware of the trespassing incident at the time of trial, and did not have the related documentation in his possession. Id. at 175. This is unsurprising, as the offenses in this case were investigated by a different agency – the North Las Vegas Police Department. Additionally, as discussed further *infra*, Petitioner is being disingenuous by referring to this information as "impeachment" evidence.

Lacking new evidence supporting his claims, Petitioner cannot demonstrate good cause for re-raising all of the claims from his Third Petition in his Fourth Petition. 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, the State specifically examines each claim, Sections III(D)–(M), *infra*.

B. Ineffective Assistance of Post-Conviction Counsel Is Not Good Cause

Petitioner also contends that his claims are supported by "good cause" in that he "did not have counsel to assist him with his first post-conviction petition." Fourth Petition at 18. However, as even Petitioner correctly notes, Nevada does "not recognize ineffective assistance of post-conviction course as good cause to excuse non-compliance with state procedural bars."

Fourth Petition at 19; Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014).[3] 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 III(D)–(M), *infra*. Furthermore, Petitioner did have counsel to assist him with his Third Petition.

As the Nevada Supreme Court has stated, "[this court has] consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute 'good cause' to excuse procedural defaults." Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014). "This is because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and '[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.'" Id. (quoting McKague v. Whitley, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)). This principle was recently reiterated by the Nevada Court of Appeals. "Harris [the petitioner[was not entitled to the effective assistance of postconviction counsel and he could not establish good cause to excuse the delay in filing his petition based on a claim of ineffective assistance of counsel." Harris v. State, 133 Nev. 683, 686, 407 P.3d 348, 351 (Nev. App. 2017).

Even if this Court were to agree with Petitioner that ineffective assistance of post-conviction counsel counsel should be good cause for filing a procedurally-barred post-conviction petition, this Court could not issue such a ruling, as this would require this Court to overrule the Nevada Supreme Court, which it lacks the authority to do. Nev. Const. Art. VI § 6. Petitioner appears aware of this fact, and acknowledges that this claim must be presented to the Nevada Supreme Court. Fourth Petition, at 19. It is improper for Petitioner to present a claim to this Court when he is fully aware this Court lacks jurisdiction to rule upon it, for the sole purpose of raising it on a future appeal. Shockingly, Petitioner acknowledges that he already raised this claim in his Third Petition, and that the Nevada Supreme Court's ruling on this claim is currently pending. Id. The Nevada Supreme Court's ruling on this claim will be

---

[3]Petitioner made this identical claim in his Third Petition. Third Petition, at 30.

the law of the case, and therefore repeatedly presenting this claim to this Court is improper. Under the law of the case doctrine, issues previously decided by the appellate court may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) ("[o]ur determinations on appeal are the law of the case.") (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Accordingly, this Court cannot rule on these claims.

C. Petitioner Has Not Demonstrated a Fundamental Miscarriage of Justice

In an attempt to overcome the mandatory procedural bars to his Fourth Petition, Petitioner alleges he is "actually innocent" and therefore all of his claims may be considered by this court to prevent a fundamental miscarriage of justice. Fourth Petition, at 17.[4] The United States Supreme Court has held that a petitioner 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. Accordingly, the petitioner must demonstrate that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "The conviction of a petitioner who was actually innocent would be a fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006).

However, "actual innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at 1273–74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct. 1604 (1998)). A fundamental miscarriage of justice

---

[4]Petitioner made this same claim in his Third Petition. Third Petition at 10–31.

requires "a colorable showing" that the petitioner is "actually innocent of the crime." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This requires that the petitioner present *new* evidence of his innocence. See, e.g., House v. Bell, 547 U.S. 518, 537, 126 S.Ct. 2064, 2077 (2006) ("a gateway claim requires 'new reliable evidence—whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" (quoting Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995)). "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." Schlup, 513 U.S. at 316, 115 S.Ct. at 861.

Here, Petitioner has provided no new evidence in support of his claim of actual innocence. Petitioner presents no substantive, documentary evidence that was not presented in his Third Petition, other than Marc Digiacamo's testimony and the attached affidavits. The affidavits establish only that trial counsel and others involved in the case have little recollection of the events in this case. Marc Digiacamo's testimony provided no new evidence, other than that which directly contradicts Petitioner's claims.

Further, when claiming a fundamental miscarriage of justice based on actual innocence, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Berry v. State, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (quoting Schlup, 513 U.S. at 327, 115 S.Ct. 851). "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House, 547 U.S. at 536–37, 126 S. Ct. at 2076–77 (quoting Schlup, 513 U.S. at 327, 115 S.Ct. 851). Importantly, "the actual innocence standard is demanding and permits review *only in the extraordinary case*." Berry, 131 Nev. at 969, 363 P.3d at 1156 (internal quotations omitted) (quoting House, 547 U.S. at 538, 126 S.Ct. 2077).

Petitioner mistakenly relies on his legal claims that insufficient evidence of his guilt was presented at trial, and presents self-serving interpretations of the admitted surveillance

video and witness credibility. Such determinations are within the exclusive province of the jury, and they cannot form the basis of an actual innocence claim. See, e.g., Brown v. McDaniel, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014); Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. Petitioner has failed to demonstrate that had such evidence been introduced at trial, there is a reasonable probability of a different result. Petitioner has not made a colorable showing of actual innocence, and therefore, he has not demonstrated a fundamental miscarriage of justice sufficient to excuse the procedural bars.

D. First and Second Photo Lineups

In Ground 1, Petitioner 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. Fourth Petition, at 19-25.[5] Petitioner claimed on direct appeal that the first photographic lineup was suggestive, and the Nevada Supreme Court rejected this claim. 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 petitioner 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 Marc Digiacamo's deposition testimony —the supposed "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. This claim is barred because it "fail[s] to allege new or different grounds for

---

[5]This claim was also raised in the Third Petition. Third Petition at 31–37.

relief [where] the prior determination was on the merits." NRS 34.810 (2). Though during his deposition Marc Digiacamo was briefly questioned regarding the first photographic lineup, neither his testimony or what Petitioner terms "ensuing investigation" unearthed any new evidence or information regarding this photographic lineup. Thus, any claim regarding the suggestiveness of this photographic lineup is barred from this Court's consideration.

Further, the issue of the second photographic lineup was already raised in Petitioner's Third Petition. Third Petition at 35-37. There is no good cause for re-raising it because the testimony from Marc Digiacamo's deposition did not provide any new evidence that supports this claim. Petitioner regurgitates his unsupported claim that none of the victims in this case recognized him from this second photographic lineup. Fourth Petition at 35-36. Marc Digiacamo's testimony – the supposed "new evidence" – does not support this claim. In fact, his testimony directly contradicts it. Marc Digiacamo testified that in 2005, while interviewing witnesses Ivan Young and Jennifer Dennis in preparation for trial, one of the witnesses informed him that they had been shown a second photographic lineup containing Petitioner's photograph. Fourth Petition, Exhibit 23, at 69. Marc Digiacamo testified "I learned from the witnesses themselves that Ricky [Petitioner] was in the second lineup." Id. at 70. Thus, at least some of the witnesses did in fact recognize Petitioner's photograph in this second photographic lineup.

Marc Digiacamo was also questioned regarding Detective Prieto's testimony as it pertained to this second photographic lineup. Id. at 67-68. Detective Prieto's deposition testimony is not new evidence, as it was presented in Petitioner's Third Petition. Further, when read in its entirety, it does not support Petitioner's claim that none of the witnesses recognized Petitioner from the second photographic lineup. Detective Prieto testified that he did not recall showing the second photographic lineup to anyone. Fourth Petition, Exhibit 24, at 68-69. Petitioner continues to confuse the terms "identification" and "recognition." It remains unclear what occurred in the eyewitnesses' minds when shown the second photographic lineup. They may have identified Petitioner from his photograph in that lineup, and pointed that out to Detective Prieto, but Detective Prieto no longer recalls. They may have recognized Petitioner's

photograph, but not pointed this out to Detective Prieto, because they were asked to identify another suspect from that lineup – Jacquan Richards.

Regarding the affidavits from defense counsel Osvaldo Fumo and Petitioner's investigator, neither presents any new relevant evidence. Mr. Fumo's affidavit merely states that he does not recall knowing in advance of trial whether or not any of the eyewitnesses identified Petitioner from that photographic lineup. Fourth Petition, Exhibit 25. Mr. Fumo also does not recall having any conversations with Marc Digiacamo or any other attorneys from the District Attorney's Office regarding this photographic lineup. Id. Mr. Fumo's lack of specific recollections is unsurprising, given that Petitioner's trial occurred nearly nine years ago. Similarly, Maribel Yanez's affidavit establishes no new evidence. The affidavit itself is hearsay, but regardless at most it establishes only that the individuals involved in Petitioner's case either could not be relocated or have little recollection of the matters about which they were questioned. Fourth Petition, Exhibit 26. Lacking good cause to re-raise this claim, it must be dismissed.

E. Ineffective Assistance of Counsel Regarding Establishing Alibi

In Ground 2, Petitioner complains trial counsel was ineffective for failing to present 911 records—which Petitioner alleges the State suppressed—and to present other evidence that would have established a timeline for Petitioner's alibi. Fourth Petition at 26-33.[6] This issue was previously raised in Petitioner's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. 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. Petitioner points to nothing in Marc Digiacamo's deposition testimony or the "ensuing investigation" that is new evidence regarding this claim, which is really a mere repetition of the claim raised in his Third Petition. Thus, all of Ground 2's subsections should be dismissed as lacking good cause.

---

[6]Petitioner also raised this claim in his Third Petition. Third Petition at 37–45.

Though this Court need not examine anything beyond the lack of good cause, Petitioner would never be able to show prejudice because the underlying claim is meritless. Petitioner presents a mere *ipse dixit* that he had a "strong alibi" despite the evidence to the contrary. 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 Petitioner was attempting to fabricate the alibi altogether. See, e.g., Third Petition, Exhibit 9 at 3 (detailing how Petitioner 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 must be dismissed.

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

In Ground 3, Petitioner complains that trial counsel was ineffective for failing to cross-examine and impeach the State's witnesses. Fourth Petition at 33-38.[7] This issue was previously raised in Petitioner's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. 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 Marc Digiacamo's deposition testimony presented no new information regarding this claim. Further, nothing in Marc Digiacamo's deposition changes the Nevada Supreme Court's decision that even assuming counsel was ineffective, 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. Petitioner does not even attempt to assert good cause for Ground 3(B) through (D). See Fourth Petition at 16, 35-38. All of Ground 3's subsections must be dismissed as lacking good cause to re-assert them.

[7]Petitioner also raised this claim in his Third Petition. Third Petition at 45–50.

G. Ineffective Assistance of Counsel for Failure to Call Witness Regarding the Second Photo Lineup

In Ground 4, Petitioner 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 Petitioner's alibi. Fourth Petition at 39-46.[8] This issue was previously raised in Petitioner's First Petition and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. 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 Marc Digiacamo's deposition provides no new evidence regarding this claim.

Further, nothing in Marc Digiacamo'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. Petitioner does not even attempt to explain how Marc Digiacamo's deposition testimony constitutes good cause for raising this claim. Thus, all of Ground 4's subsections must be dismissed as lacking good cause to re-assert them.

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

In Ground 5, Petitioner 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. Fourth Petition at 46.[9] This issue was previously raised in Petitioner's First and Second Petitions and denied on the merits by this Court, this decision being affirmed by the Nevada Supreme Court. 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 Marc Digiacamo's deposition is not new, nor is it factually related to this claim. Further, nothing in Marc

[8]Petitioner raised this same claim in his Third Petition. Third Petition at 50–57.
[9]Petitioner raised this same claim in his Third Petition. Third Petition at 57–58.

Digiacamo'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 must be dismissed as lacking good cause.

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

In Ground 6, Petitioner claims that counsel was ineffective for failing to object to various instances of alleged prosecutorial misconduct. Fourth Petition at 47-50.[10] Some of the individual instances of alleged misconduct have been raised 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. None of the several sub-sections of this claim rely upon the "new" evidence discussed *supra*. Thus, Petitioner has asserted no good cause for re-raising these claims. The only sub-claim that was remotely addressed during Marc Digiacamo's testimony was Ground 6(G), and his testimony in no way supported raising this dilatory claim, as it is based upon statements made by Marc Digiacamo during closing arguments. Obviously any claim based upon the prosecution's closing arguments has been available to Petitioner from the conclusion of trial, and no testimony from the prosecutor is necessary to raise such a claim. Thus, all subsections of this claim must be dismissed as lacking good cause.

J. Prosecutorial Misconduct

In Ground 7, Petitioner discusses the same alleged prosecutorial misconduct as alleged under an ineffective assistance of counsel claim in Ground 6. Fourth Petition at 50-51.[11] 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

[10]Petitioner raised this same claim in his Third Petition. Third Petition at 58–61.

[11]Petitioner raised this same claim in his Third Petition. Third Petition at 58–61.

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. Moreover, these claims clearly do not rely upon the "new" evidence discussed *supra*.

Additionally, a claim of prosecutorial misconduct may be raised via direct appeal. This claim therefore must be dismissed pursuant to NRS 34.810(1)(b)(2). The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).

In fact, Petitioner raised some of these same prosecutorial misconduct claims on direct appeal, which were rejected by the Nevada Supreme Court. Slaughter Jr. v. State, Docket No. 61991, Order of Affirmance, filed March 12, 2014, at 4-6. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. Therefore, these claims cannot be considered by this Court. Accordingly, this claim must be dismissed.

K. State's Alleged Introduction of Hearsay

In Ground 8, Petitioner complains that the State connected surveillance footage from the night of the crime to him via hearsay. Fourth Petition at 51-52.[12] Similarly to Ground 7, this is a claim that was available on direct appeal, and therefore this claim must be dismissed pursuant to NRS 34.810(1)(b)(2).

Furthermore, Petitioner 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

---

[12]Petitioner raised this same claim in his Third Petition. Third Petition at 63.

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). This Court's consideration of this claim is also barred under the doctrine of the law of the case. Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

Petitioner presents absolutely no good cause for re-raising these arguments. Further, this claim clearl does not rely upon the "new" evidence discussed *supra*. 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 must be summarily dismissed.

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

In Ground 9, Petitioner claims that appellate 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. Fourth Petition at 52-54.[13] 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. Further, this claim does not rely upon the "new" evidence discussed *supra*. Thus, Petitioner has asserted no good cause for re-raising or for not raising these particular IAC claims in an earlier petition. This claim must be summarily dismissed as lacking good cause to overcome the procedural bars.

M. Alleged Batson Violation

In Ground 10, Petitioner complains of an alleged Batson violation. Fourth Petition at 54.[14] This claim, as Petitioner acknowledges, could have been raised on direct appeal. Id. at 52-53. This claim therefore must be dismissed pursuant to NRS 34.810(1)(b)(2). See Franklin, 110 Nev. at 752, 877 P.2d at 1059 (1994).

[13]Petitioner raised this same claim in his Third Petition. Third Petition at 63–65.
[14]Petitioner raised this same claim in his Third Petition. Third Petition at 65.

Petitioner does not even attempt to address the procedural bars. This claim is in no way based upon what he contends is "new evidence." Instead, he simply puts forth a three-sentence conclusory assertion that the State's explanation for striking the African-American juror was pretextual. Fourth Petition, at 54. Petitioner provides no detailed argument or citation to the record to support this claim. Accordingly, Petitioner has failed to demonstrate that he is entitled to post-conviction relief on this claim. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that bare or naked allegations are insufficient to entitle a defendant to post-conviction relief). He has put forth no substantive argument regarding this claim. See generally Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). This claim must be summarily dismissed.

N. Alleged Brady Violation

In Ground 11, Petitioner complains of an alleged Brady violation. Fourth Petition at 54-67.[15] This claim is not based upon truly "new" evidence. Though Petitioner refers to Marc Digiacamo's testimony in an attempt to support this claim, he states that "Mr. Digiacamo's version of events is doubtful." Id. at 59. It is Marc Digiacamo's deposition testimony that Petitioner contends is new evidence. Yet his claim is not truly based upon this new evidence, but upon Petitioner's unsupported contention that Marc Digiacamo's testimony on this subject should not be believed. Accordingly, no good cause has been shown for re-raising this procedurally barred claim, and it should be dismissed.

Regardless, the Brady claim is meritless. Petitioner alleges the State withheld a document showing that the time of the 911 call was 7:11pm, attached to the Fourth Petition as part 5 of Exhibit 24, or Exhibit 35 during the deposition of Marc Digiacamo.[16] However, trial counsel already knew the time of the 911 call. He had several other documents supporting a time of 7:11pm, including the police report. Fourth Petition, part 5 of Exhibit 24, Exhibit 34

[15]Petitioner raised this same claim in his Third Petition. Third Petition at 66–70.
[16]This document was also attached to the Third Petition as Exhibit 6.

from the deposition of Marc Digiacamo; Third Petition, Exhibit 7. Counsel attempted to put that information in his PowerPoint in his closing argument; but since this information had not been admitted into evidence, the trial court prohibited him from doing so. Fourth Petition, part 4 of Exhibit 24; Exhibit 25 of Marc Digiacamo's deposition testimony; Jury Trial Transcript, May 20, 2011, at 77-82. The record shows that the timing of the 911 call was known to the parties. This does not constitute suppression by the State. Furthermore, Marc Digiacamo's deposition testimony indicates that defense counsel may have had this specific document in its possession during trial. Fourth Petition, Exhibit 23, at 147. Mr. Fumo's affidavit only establishes that he does not believe this item was provided through the discovery process by the State, but is silent as to whether he obtained this document directly from the North Las Vegas Police Department. Fourth Petition, Exhibit 25.

Second, Petitioner alleges that the State withheld information that none of the victims identified Petitioner in the second photo lineup. As discussed, Petitioner knew at the time of trial that this second photo lineup was shown to the eyewitnesses by Detective Prieto. Third Petition, Exhibit 12 at 10. 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, Petitioner alleges the State withheld Arbuckle's trespass complaint. However, even if Petitioner did not have the particular police report until the federal habeas discovery process, the document itself is not impeachment or exculpatory evidence. Petitioner fails to cite a single legal authority supporting that such a complaint constitutes impeachment evidence under Brady or its progeny. Fourth Petition at 66-67. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence *affecting credibility* falls within this general rule [of requiring disclosure]." Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959)). "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the

defense but not likely to have changed the verdict . . ..'" Id. (quoting United States v. Keogh, 391 F.2d 138, 148 (2nd Cir. 1968)". Further, the evidence must be material. Id.

The record of the trespass complaint establishes at most that previously Jeffrey Arbuckle had reported Petitioner for trespassing. It is not exculpatory and does nothing to undermine Jeffrey Arbuckle's credibility, and therefore it is not in fact Brady or Giglio evidence. Further, Petitioner ignores the fact that cross-examination of Jeffrey Arbuckle regarding the trespass incident could have yielded information that would present Petitioner in a negative light. Jeffrey Arbuckle would have been able to describe the incident, including Petitioner's behavior that lead to him contacting the police. Arguably, trespassing would be a bad act by Petitioner, and one that could bias the jury against him. Further, other than Tiffany Johnson (Petitioner's girlfriend), Jeffrey Arbuckle was the only individual who testified that Petitioner did in fact arrive at the Eldorado Dry Cleaner's at 715 N. Nellis Blvd. on June 26, 2004. Though Petitioner disputes some of the details regarding the precise time of arrival, to an extent Jeffrey Arbuckle's testimony supported his alibi that he picked up his girlfriend on the night in question. It may not have worked to Petitioner's advantage to undermine Jeffrey Arbuckle's credibility.

Regardless, Petitioner cannot establish that the State withheld this information. 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 ("NLVPD"). 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 NLVPD 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. Moreover, obviously Petitioner himself was aware of the trespassing incident. The State has no obligation to inform the defense of a situation of which it is entirely unaware when the defendant himself is aware of it and can easily inform his counsel. "Brady does not require the State to disclose evidence *which is available to the defendant from other sources*, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) (emphasis added) (citing Stockton v. Murray, 41 F.3d 920, 927 (4th Cir.1994)). "When a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government." United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

There was no impediment external to the defense that prevented its discovery, and the failure to discover it was entirely Petitioner's fault; it cannot constitute good cause. Hathaway, 119 Nev. at 252, 71 P.3d at 506. Thus, this claim must be dismissed as lacking good cause.

IV. PETITIONER CANNOT OVERCOME THE PRESUMPTION OF PREJUDICE TO THE STATE

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" As the Nevada Supreme Court has observed, "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." Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). To invoke the presumption, the statute requires the State plead laches in its motion to dismiss the petition. NRS 34.800(2). The State affirmatively pleads laches in the instant case, and moves for the Fourth Petition to be dismissed.

Here, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction on March 12, 2014. Remittitur issued from Petitioner's direct appeal on April 30, 2014- nearly

six years ago. As more than five years have elapsed since the decision on Petitioner's direct appeal, there is a presumption of prejudice to the State should his post-conviction habeas claims be considered. Petitioner's trial occurred in May of 2011- nearly nine years ago. The offenses for which he was convicted occurred on June 26, 2004- nearly 16 years ago. Obviously, after so many years memories of the crime diminish and witnesses become more difficult to locate. Petitioner's affidavit from his investigator (Fourth Petition, Exhibit 26) documents some of these difficulties, as some witnesses could not be located, and those that could be had limited recollection of the events in question. Clearly, Petitioner's delay in raising these claims would prejudice the State in conducting a retrial of the Petitioner. The length of the delay means such prejudice is presumed. Petitioner cannot overcome this presumption, and therefore this Petition must be dismissed.

V. THE PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

NRS 34.770 determines when a Petitioner is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

(emphasis added). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary

hearing.").

Further, an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, the Petitioner has not demonstrated the need for an evidentiary hearing. His Petition is procedurally barred, and he has failed to demonstrate good cause or prejudice, or a fundamental miscarriage of justice, to overcome the procedural bars. He has already had an evidentiary hearing before this Court, on his claims of ineffective assistance of his trial counsel, at which his trial counsel testified. Accordingly, the request for an evidentiary hearing should be denied.

CONCLUSION

For the foregoing reasons, the State requests that the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) be denied.

DATED this 29th day of April, 2020.

Respectfully submitted,

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

BY /s/KAREN MISHLER
KAREN MISHLER
Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 29th day of April, 2020, by electronic transmission to:

Jeremy C. Baron, Asst. Federal Public Defender
Email: jeremy_baron@fd.org

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

04FN0980X/KM-Appeals/dd-MVU/

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER,

Petitioner,

v.

CHARLES DANIELS, Director, Nevada Department of Corrections; MARTIN L. FRINK, Warden, Saguaro Correctional Center; RENEE BAKER, ex-Warden, Ely State Prison; and AARON FORD, Attorney General of the State of Nevada,

Respondents.

Case No. A-20-812949-W
Dept. No. III

(Not a Death Penalty Case)

SUPPLEMENTAL INDEX OF MANUALLY FILED EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

No.	DATE	DOCUMENT	COURT	CASE #
28.	02/22/2018	Three (3) DVD's Containing Video of Jesus Prieto's Deposition **MANUALLY FILED**	N/A	N/A
29.	07/26/2019	Three (3) DVD's Containing Video of Marc DiGiacomo's Deposition **MANUALLY FILED**	N/A	N/A

DATED March 27, 2020.

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 March 27, 2020, I mailed the foregoing DVDs to the Clerk of the Eighth Judicial District through first-class mail, postage pre-paid, or through a third-party commercial service for delivery within three calendar days.

I further certify that I will mail a copy of the foregoing DVDs to:

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

Alexander Chen
Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155-2212

Rickie Slaughter
No. 85902
Saguaro Correctional Center
1252 E. Arica Road
Eloy, AZ 85131

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

OMD
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. CHARLES DANIELS, et al., Respondents.	Case No. A-20-812949-W (04C204957) Dept. No. III Date of Hearing: May 14, 2020 Time of Hearing: 9:00 a.m.

OPPOSITION TO THE STATE'S MOTION TO DISMISS

ARGUMENT

After the Court orally announced its intent to dismiss Mr. Slaughter's third post-conviction petition, Mr. Slaughter received permission from the federal court to depose the lead prosecutor on his case, Marc DiGiacomo. Mr. DiGiacomo's deposition (and Mr. Slaughter's ensuing follow-up investigation) produced new evidence supporting some of the claims for relief in his prior petition, and supporting his innocence argument. Mr. Slaughter therefore filed a fourth petition to incorporate Mr. DiGiacomo's testimony, among other new facts. The Court should conclude the new evidence amounts to good cause and/or establishes Mr. Slaughter's innocence, and it should set this case for an evidentiary hearing so Mr. Slaughter can continue developing the relevant facts.

I. The Court has jurisdiction to decide this petition.

As Mr. Slaughter's new petition explains (3/27/20 Petition at 11-13), Mr. Slaughter previously filed his third post-conviction petition (his first counseled post-conviction petition) in November 2018. After the Court orally announced its intent to dismiss the petition (Tr. 3/7/19), Mr. Slaughter received permission from the federal court to depose Mr. DiGiacomo (Exhibit 22). Mr. Slaughter therefore filed a motion proposing the Court refrain from entering a formal written order dismissing the petition until after Mr. DiGiacomo's deposition, and until after Mr. Slaughter had a chance to supplement his third petition to incorporate the deposition testimony. 4/4/19 Motion. The State opposed the proposal and argued the correct procedure would be for the Court to enter its order then, and for Mr. Slaughter to file a fourth petition after the deposition. 4/8/19 Opposition. The Court didn't officially rule on Mr. Slaughter's motion but entered a formal written order dismissing the petition. 4/15/19 Notice of Entry. Mr. Slaughter appealed, and the appeal remains pending.

Since that time, Mr. Slaughter has conducted Mr. DiGiacomo's deposition (and has completed additional follow-up investigation). He therefore filed the instant

fourth petition, which incorporates that new information, as the State suggested he should. However, the State now argues—in tension with its prior position—that the Court shouldn't resolve the fourth petition because Mr. Slaughter's appeal from the third petition remains pending. 4/29/20 Motion at 5-6. The Court should reject that argument.

As the State correctly notes, once an appeal is pending, the district court generally loses jurisdiction over the case. 4/29/20 Motion at 5-6. Thus, the Court currently doesn't have jurisdiction over Mr. Slaughter's third petition, because an appeal is pending involving that petition. But the instant petition is a new petition filed in a new civil case number, so the Court has jurisdiction over it, notwithstanding the pending appeal involving the prior petition. *See Navarrette v. State*, 417 P.3d 1120 (Nev. 2018) (unpublished disposition) ("Although the notice of appeal from the order resolving his earlier postconviction habeas petition divested the district court of jurisdiction to alter or reconsider that order, it did not divest the district court of jurisdiction to consider a new postconviction habeas petition."). Indeed, the State doesn't cite any case law suggesting an appeal involving one petition forecloses jurisdiction over a new, related petition. The Court should therefore conclude it has jurisdiction over this new petition.

While the claims in this petition overlap with the claims in the third petition, that doesn't affect the jurisdictional analysis, and it would be appropriate to resolve the instant petition now. Indeed, Mr. Slaughter filed the instant petition because he developed new evidence through Mr. DiGiacomo's deposition and other sources that may be material to his claims and his innocence argument. Thus, if the Court were to conclude that an evidentiary hearing is now appropriate given the substance of Mr. DiGiacomo's deposition, that conclusion would potentially render moot (or at least premature) the existing appeal involving the third petition. On the other hand, if the Court concludes Mr. DiGiacomo's deposition doesn't materially alter the analysis,

then it should enter an adverse order now, and Mr. Slaughter could appeal (and attempt to consolidate the two appeals). Thus, it would be appropriate (and judicially efficient) for the Court to exercise jurisdiction and resolve the petition now.

II. Mr. Slaughter can overcome the procedural bars with respect to his *Brady* claims.

The State argues this petition is procedurally barred (4/29/20 Motion at 6-8), but Mr. Slaughter can show good cause and prejudice with respect to many of the claims in his petition.

Mr. Slaughter's good cause arguments regarding this petition are similar to the arguments he presented in connection with his third petition. In his third petition, Mr. Slaughter argued he'd developed new evidence supporting new claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264, 266 (1959). Because the merits of a *Brady* claim track the good cause and prejudice analysis, Mr. Slaughter argued he had good cause and could show prejudice because his *Brady* claims are winning claims on the merits. The same is true here: Mr. Slaughter has developed additional evidence supporting his meritorious *Brady* claims, so he has good cause to present the new version of these claims now.

Mr. Slaughter recognizes the Court previously rejected the *Brady* cause-and-prejudice argument regarding the third petition. However, Mr. DiGiacomo's deposition has strengthened the evidentiary basis for Mr. Slaughter's *Brady* claims. He is therefore presenting the new versions of these claims to this Court, and he maintains the Court can consider those claims on the merits. To the extent the Court believes its prior decision is controlling here, Mr. Slaughter respectfully intends to preserve the issue for further review.

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)), 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. 356, 359-60, 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.'" 131 Nev. at 360, 351 P.3d at 728 (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 violated *Brady*, and Mr. Slaughter can show good cause regarding those claims.

The State failed to disclose three specific pieces of new evidence, and those *Brady* violations amount to good cause.

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. That difference in time was material to the defense: if the suspects left the crime scene at 7:08 p.m., then Mr. Slaughter couldn't have been a suspect, because he wouldn't have been able to get to his girlfriend's workplace when he did. But if the suspects left at or before 7:00 p.m., the prosecution had more wiggle room to argue Mr. Slaughter could've been at both places that evening. The State violated *Brady* when it failed to disclose the 911 call time, which supports good cause.

Mr. Slaughter previously raised these arguments in his third post-conviction petition, and the Court rejected those arguments. However, Mr. DiGiacomo's deposition has strengthened the evidentiary basis for this claim. *See* Exhibit 23 at 138 (stating he didn't "have an independent recollection of seeing [the relevant document] before," which tends to show he didn't turn over the document); *id.* at 139-40 (agreeing the time of 7:11 p.m. listed on the document would likely correspond to the time when Las Vegas Metro picked up the 911 call, or when North Las Vegas received the

call transfer from Metro). Thus, if there were any doubt at the time of Mr. Slaughter's third petition whether Mr. DiGiacomo failed to turn over this document to the defense, or whether the document establishes a call time of 7:11 p.m., the deposition further proves that fact. Because the deposition testimony provides new factual support for this claim, Mr. Slaughter maintains he has good cause. *See Clem*, 119 Nev. at 621, 81 P.3d at 525.

The State attempts to show there was no *Brady* violation at all. In the State's view, it doesn't matter whether Mr. DiGiacomo failed to turn over this specific document, because the defense had access to other record materials showing the victim placed the 911 call at 7:11 p.m. 4/29/20 Motion at 24-25. That argument misunderstands those other record materials. As Mr. Slaughter explained in his opposition to the motion to dismiss in the prior proceedings (1/3/19 Opposition at 3-4), the defense had copies of police reports listing a time of "7:11 p.m." associated with the crime (for example, as a dispatch time), but none of those records confirmed when the 911 call took place. Mr. Slaughter therefore maintains the State committed a *Brady* violation when it failed to disclose records establishing the victim called 911 at 7:11 p.m.

The State also reads Mr. DiGiacomo's deposition and defense counsel's declaration as creating a factual dispute about whether defense counsel (Ozzie Fumo and Dustin Marcello) had a copy of this document during trial. 4/29/20 Motion at 12, 25. Mr. Slaughter disagrees with the State's view of Mr. Fumo's declaration, which (among other things) says the defense would've used the document as part of the alibi defense if they'd had a copy before trial. Exhibit 25 ¶ 9. But if the Court has any doubt about whether the defense received a copy of this document from a source besides the State before trial, it should hold a hearing to resolve this factual dispute.

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 the 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, which would've materially aided the defense timeline. The State violated its *Brady* obligations by failing to disclose this material impeachment evidence, which supports good cause.

Mr. Slaughter previously raised these arguments in his third post-conviction petition, and the Court rejected those arguments. However, Mr. DiGiacomo's deposition has strengthened the evidentiary basis for this claim. *See* Exhibit 23 at 175 (answering "No" when asked if he'd ever seen the relevant document before). at the time of Mr. Slaughter's third petition whether Mr. DiGiacomo failed to turn over this

document to the defense, the deposition further proves that fact. Because the deposition testimony provides new factual support for this claim, Mr. Slaughter maintains he has good cause. *See Clem*, 119 Nev. at 621, 81 P.3d at 525.

The State argues this evidence isn't "impeachment" information within the meaning of *Brady*. 4/29/20 Motion at 12, 25-26. But the trespassing complaint established Mr. Arbuckle had a motive to lie about when Mr. Slaughter arrived (because the duo apparently had a pre-existing grudge), and evidence of bias is straightforward impeachment evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 676 (1985). The State also argues the trespassing complaint was a double-edged sword because Mr. Slaughter might've prompted Mr. Arbuckle's complaint by doing something unflattering. 4/29/20 Motion at 25. But the circumstances leading up to the trespassing complaint aren't in the record. If the State believes those circumstances might've hurt the defense and therefore undercut materiality, the Court should hold a hearing to allow the State to present that evidence. In any event, no matter what the complaint was about, it was critical impeachment material supporting a solid alibi, so it would've benefitted the defense on balance.

The State also argues 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. 4/29/20 Motion at 12, 26-27. As Mr. Slaughter explained in his opposition to the motion to dismiss in the prior proceedings (1/3/19 Opposition at 5-6), both of those agencies are state agencies, so the prosecution's *Brady* obligations extended to both agencies. *See Wade v. State*, 114 Nev. 914, 919, 966 P.2d 160, 163 (1998) (stating *Brady* extends to information held by a "local police department" that constitutes "an agent of the State"), *opinion modified on denial of reh'g*, 115 Nev. 290, 986 P.2d 438 (1999); *see also Browning v. Baker*, 875 F.3d 444,

460 (9th Cir. 2017) (stating *Brady* applies to evidence "in the possession of state agents").

Finally, the State argues Mr. Slaughter "was aware of the trespassing incident," so the prosecution couldn't have violated *Brady* by failing to turn over information about an incident he knew occurred. 4/29/20 Motion at 27. But even though Mr. Slaughter would've been aware of the incident, he wouldn't have known Mr. Arbuckle called the police to report him. That fact is therefore *Brady* material.

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

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 (Detective Prieto) testified during a 2018 federal deposition, *none* of the victims or witnesses identified Mr. Slaughter from that lineup. That outcome was material because it suggested the initial eyewitness identifications were unreliable—after all, the witnesses weren't able to pick Mr. Slaughter out of a second, non-suggestive lineup—and the identifications were by far the most significant evidence of guilt. The State violated its *Brady* obligations by failing to disclose the outcome of the second photo lineup, which supports good cause.

Mr. Slaughter previously raised these arguments in his third post-conviction petition, and the Court rejected those arguments. However, Mr. DiGiacomo's deposition has strengthened the evidentiary basis for this claim. At his deposition, he testified extensively about the second photo lineup. *See* 3/27/20 Petition at 58-59 (summarizing the relevant testimony). As Mr. Slaughter's petition explains, the version

of events he described at the deposition (i.e., that at least one of the witnesses claimed to have noticed Mr. Slaughter in the second photo lineup but failed to tell Detective Prieto about it) is doubtful, but even if his version of events is accurate, it still confirms a *Brady* violation took place. *Id.* at 59-66. Because the deposition testimony provides new factual support for this claim, Mr. Slaughter maintains he has good cause. *See Clem*, 119 Nev. at 621, 81 P.3d at 525. Meanwhile, Mr. DiGiacomo's deposition creates substantial issues of fact about which witnesses (if any) recognized Mr. Slaughter in the second photo lineup, so an evidentiary hearing would be particularly warranted with respect to this issue. *See, e.g.*, *Marshall v. State*, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994) (discussing the standards for an evidentiary hearing).

According to the State, this claim lacks merit because in its view, Detective Prieto didn't testify that none of the eyewitnesses identified Mr. Slaughter from the second photo lineup. 4/29/20 Motion at 11. The State misunderstands Detective Prieto's testimony. Mr. Slaughter asked, "Did any of the victims identify anyone from [the second photo] lineups?" Exhibit 14 at 87. Detective Prieto answered, "If my report reflects that they didn't, then they didn't." *Id.* Mr. Slaughter continued, "So to the best of your knowledge, none of the victims or witnesses identified Rickie Slaughter from [the] second photo lineup . . . ?" *Id.* Detective Prieto responded, "No. I showed you, or you have the ones that they identified him from" (i.e., the first photo lineup). *Id.* Just to be sure, Mr. Slaughter asked whether any of the eyewitnesses wrote anything on the lineup forms. *Id.* at 87-88. Detective Prieto responded, "No. If they say they didn't, they are not able to pick any[one], I just notate it in my report." *Id.* To summarize, Detective Prieto testified none of the witnesses identified Mr. Slaughter from the second photo lineup, and if they had, he would've asked them to make a note on the lineup form and would've mentioned it in his report.

In truth, the State isn't trying to dispute what Detective Prieto said—rather, it suggests his *memory* wasn't crystal clear, so he wasn't credible. 4/29/20 Motion at 11. But his testimony makes perfect sense. His report doesn't mention anyone identifying Mr. Slaughter from the second photo lineup, and the lineup forms don't contain any notes. Detective Prieto testified based on these facts (as well as his memory) that none of the witnesses identified Mr. Slaughter from the second photo lineup. The State had a full opportunity at the deposition to question Detective Prieto on that point if it thought his testimony was inaccurate, but it wasn't able to undercut this testimony. Thus, the State's attacks on Detective Prieto's memory fall flat. But if the State insists on challenging Detective Prieto's credibility, or if it wants to dispute his testimony, then the Court should set an evidentiary hearing.

In any event, as Mr. Slaughter's petition explains, Mr. DiGiacomo's testimony suggests one of the witnesses may have recognized Mr. Slaughter in the second photo lineup (although that witness apparently didn't mention that fact to Detective Prieto). But even if one of the six victims purported to notice Mr. Slaughter in the second photo lineup, that means the other five didn't. In turn, those five non-identifications amounted to material exculpatory evidence. The State insists Mr. DiGiacomo's testimony can't support good cause for this claim because Mr. Slaughter has argued Detective Prieto's testimony—i.e., that *none* of the witnesses identified Mr. Slaughter from the second photo lineup—is the more likely account. 4/29/20 Motion at 10-12, 24. But even under Mr. DiGiacomo's version of events, the prosecution *still* committed a *Brady* violation. *See* 3/27/20 Petition at 64-66. Moreover, Mr. DiGiacomo's testimony creates a new factual question about the circumstances and outcome of the second photo lineup, and his testimony illustrates why an evidentiary hearing is needed to sort out what happened. *See id.* at 59-64. For both those reasons—because (1) Mr. DiGiacomo's testimony on its face proves a *Brady* violation; and (2) Mr. Slaughter believes his testimony doesn't accurately reflect the true scope

of the *Brady* violation, so a hearing would be necessary to develop this *Brady* claim—the Court should find good cause.

The State also argues the prosecution disclosed the fact Detective Prieto showed the second photo lineup to the witnesses, and thus the defense could've investigated the issue and asked the witnesses about it at trial. 4/29/20 Motion at 10, 25. But while the State disclosed the *existence* of the lineup, it didn't disclose the *outcome* of the lineup, and it's the *outcome* of the lineup (not just its *existence*) that's exculpatory. The State therefore committed a *Brady* violation by failing to tell the defense the *outcome* of the lineup, even though it disclosed the *existence* of the lineup.

Even if defense counsel should've investigated the issue on their own, that wouldn't cure the *Brady* violation. Courts have routinely disclaimed a due diligence exception to *Brady*. For example, in *Banks v. Dretke*, 540 U.S. 668 (2004), the prosecution said it had provided complete discovery, but it failed to disclose certain impeachment evidence. Mr. Banks pursued a *Brady* claim, and the State faulted him for a "lack of appropriate diligence in pursuing" the claim. *Id.* at 695. The U.S. Supreme Court disagreed. As it explained, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable." *Id.* at 696. To the contrary, "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation," regardless of whether the defense attorneys could've cured their misconduct by finding the hidden evidence sooner. *Id.* The Court therefore rejected a due diligence exception to *Brady*.

Likewise, in *Strickler v. Greene,* 527 U.S. 263 (1999), the State represented it had an open file policy but failed to disclose certain impeachment evidence about a witness, specifically one of the witness's prior police interviews. Mr. Strickler pursued a *Brady* claim; the federal court of appeals rejected it because he failed to litigate it in state court, even though the claim "was available to reasonably competent [post-conviction] counsel." *Id.* at 279. The U.S. Supreme Court disagreed. While the trial

and post-conviction attorneys "must have known" the witness "had had multiple interviews with the police," and while the attorneys could've investigated whether those interviews contained impeachment material, they were nonetheless entitled to assume the prosecutor would've turned them over if they did. *Id.* at 285. Because "a defendant cannot conduct [a] 'reasonable and diligent investigation' . . . when the evidence is in the hands of the State," the U.S. Supreme Court held the State suppressed the evidence, regardless of whether the defense attorneys should've looked harder. *Id.* at 287-88.

The Ninth Circuit reached a similar result in *Amado v. Gonzalez*, 758 F.3d 1119 (9th Cir. 2014). There, the prosecution failed to disclose impeachment information about its key witness. The court ordered the prosecution to make its witnesses available for interviews with defense counsel at the courthouse, but the defense attorney failed to interview this witness. Mr. Amado eventually raised a *Brady* claim, and the state court concluded he failed to exercise due diligence. The Ninth Circuit disagreed. As it explained, "The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence." *Id.* at 1135. In its view, a prosecutor can't "excuse" a non-disclosure "by arguing that defense counsel could have found the information himself." *Id.* at 1136.

Many other cases have reached the same conclusion. *See, e.g.*, *Dennis v. Sec'y*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc) ("[T]he United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*."); *Lewis v. Conn.*, 790 F.3d 109, 121-22 (2d Cir. 2015) ("[T]he state habeas court's imposition of such a due diligence requirement plainly violated clearly established federal law under *Brady* and its progeny."); *Barton v. Warden*, 786 F.3d 450, 468 (6th Cir. 2015) (stating *Brady* "does not require the State simply to turn over *some* evidence, on the assumption that defense counsel will find the cookie from a

trail of crumbs"); *Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) (rejecting an argument there was no *Brady* violation "because the defense could and should have discovered [the evidence] itself").

The Court should therefore reject the State's insistence that a lack of diligence on the part of defense counsel would excuse the *Brady* violation in this case. Rather, the State declined to disclose exculpatory information about the outcome of the second photo lineup, and the Court should set an evidentiary hearing on this claim.

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

In addition to proving a *Brady* violation, a petitioner seeking to rely on *Brady* as a good cause argument must file a corresponding petition "within a reasonable time after the [relevant] evidence was disclosed to or discovered by the defense." *Lisle*, 131 Nev. at 360, 351 P.3d at 728. Filing within a year of discovery should be considered reasonable. *Cf. Rippo v. State*, 134 Nev. 411, 421-22, 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. As with his third petition, which he within a year after the federal court authorized Detective Prieto's deposition, Mr. Slaughter filed the instant petition within a year after the federal court authorized Mr. DiGiacomo's deposition. Both these timeframes are reasonable, so Mr. Slaughter has satisfied this timeliness requirement.

III. Mr. Slaughter can show good cause and prejudice regarding other claims related to the withheld evidence.

As the previous section explains, the State failed to disclose three key pieces of material exculpatory or impeachment 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's petition raised other types of claims (besides *Brady* claims) that involve the withheld evidence. For example, Ground One alleges the first photo lineup was impermissibly suggestive, so the ensuing eyewitness identifications were unreliable; this claim relies on the outcome of the second photo lineup to help prove the first lineup was suggestive. Grounds Two(A) through Two(D) raise trial-counsel-ineffectiveness claims regarding Mr. Slaughter's alibi. Ground Three(A) alleges trial counsel was ineffective for failing to cross-examine the eyewitnesses about the second photo lineup. And Ground Four(A) alleges trial counsel was ineffective for failing to call Detective Prieto (for example, to testify about the second photo lineup). For the same reasons Mr. Slaughter has good cause to raise his *Brady* claims—i.e., the new evidence Mr. Slaughter recently received from Mr. DiGiacomo's deposition and other sources improves the factual basis for these claims—Mr. Slaughter also has good cause to raise these related claims.

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's 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 73, 993 P.2d at 41) (stating a "post-trial refusal [to disclose] also constitutes a *Brady* violation in its own right). 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 his trial-counsel-ineffectiveness 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, he was unable to uncover the evidence the prosecution previously withheld and his lawyers ineffectively failed to obtain. Thus, the factual basis for these related 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 these claims are winning claims for relief. Mr. Slaughter's petition explains why these claims have merit, and Mr. Slaughter respectfully incorporates those discussions by reference here.

Mr. Slaughter previously raised these arguments in his third post-conviction petition, and the Court rejected those arguments. However, Mr. DiGiacomo's deposition has strengthened the evidentiary basis for these claims: for example, his deposition testimony provided new information about the second photo lineup and confirmed various details about Mr. Slaughter's alibi. Because the deposition testimony provides new factual support for these claims, Mr. Slaughter maintains he has good cause. *See Clem*, 119 Nev. at 621, 81 P.3d at 525. To the extent the Court believes its prior decision is controlling here, Mr. Slaughter respectfully intends to preserve the issue for further review.

The State disputes these arguments. It tries to demonstrate Mr. DiGiacomo's deposition isn't relevant to these claims, and it argues the claims lack merit in any event. Its position is unconvincing.

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

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 photo 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. Mr. DiGiacomo's testimony provide new factual support regarding the outcome of the second photo lineup and indeed warrants an evidentiary hearing regarding the outcome of the lineup. The Court should therefore set a hearing on this issue; the evidence developed at a hearing would likely show the first lineup was unreliable, which supports this claim.

The State argues the Nevada Supreme Court's ruling on this issue is law of the case, so this Court is therefore bound by that ruling. 4/29/20 Motion at 16. But law of the case doesn't apply when a petitioner presents "substantially new or different evidence" in support of a claim. *Rippo*, 134 Nev. at 427, 423 P.3d at 1101. Here, Mr. DiGiacomo's deposition provides new information about the outcome of the second photo lineup, so an exception to law of the case applies.

The State disputes the idea that Mr. DiGiacomo's testimony supports this claim. 4/29/20 Motion at 16-17. But even on its face, Mr. DiGiacomo's deposition suggests five out of six witnesses failed to identify Mr. Slaughter from the second photo lineup (as opposed to the four out of seven who purported to identify him from the first photo lineup). This discrepancy supports Mr. Slaughter's argument that the first photo lineup was suggestive, which is why the testimony provides good cause. Similarly, and contrary to the State's argument (*id.* at 18), the witnesses who spoke to Mr. Slaughter's investigator didn't recall identifying Mr. Slaughter from a second photo lineup or even speaking to Mr. DiGiacomo about a second photo lineup. Those statements tend to support Mr. Slaughter's argument and contradict Mr. DiGiacomo's testimony. At bottom, these disputes highlight why an evidentiary hearing is necessary to determine what really happened when the witnesses saw the second photo lineup, which would in turn help resolve the question whether the first photo lineup was impermissibly suggestive.

B. The Court should consider Grounds Two(A) through Two(D) on the merits.

Grounds Two(A), (B), (C), and (D) are trial-counsel-ineffectiveness claims regarding Mr. Slaughter's alibi. Mr. DiGiacomo's testimony and Mr. Slaughter's follow-up investigation provide additional factual support for Mr. Slaughter's alibi. The Court should therefore conclude Mr. Slaughter has good cause to present these claims.

The State argues Mr. DiGiacomo's deposition didn't produce new evidence regarding Mr. Slaughter's alibi. 4/29/20 Motion at 18. But Mr. DiGiacomo agreed the victim probably called 911 (or the call got immediately transferred to North Las Vegas) at 7:11 p.m. *See supra* at page 5-6. That testimony helps support the factual predicate of Ground Two(A), which alleges trial counsel should've proven the victim called 911 at 7:11 p.m. The deposition therefore provides added factual support for Ground Two(A), which supports good cause. And because the other alibi subclaims in Ground Two are all interrelated, the Court should consider all those claims on the merits in light of the new evidence.

The State also insists Mr. Slaughter is unable to show prejudice because the evidence doesn't establish his alibi. 4/29/20 Motion at 19. But the State doesn't attempt to rebut the key facts of Mr. Slaughter's alibi: the suspects left the scene at about 7:08 p.m.; Mr. Slaughter picked up his girlfriend from work at 7:20 p.m. at the latest; and there's no way someone could've driven from the crime scene to the workplace in only 12 minutes. Those facts provide indisputable proof of Mr. Slaughter's alibi, and therefore his innocence.

Rather than address the timeline, the State simply argues the Nevada Supreme Court previously found the State's evidence to be overwhelming, which in the State's view means there's no reasonable probability the alibi evidence would've change the trial's outcome. 4/29/20 Motion at 19. When the Nevada Supreme Court

previously called the evidence "overwhelming," it was almost certainly relying on the three in-court eyewitness identifications. But Mr. Slaughter's evidence has discredited those purported identifications, since it appears none of those witnesses (and at the very most one, which is debatable) recognized Mr. Slaughter from a non-suggestive second photo lineup. The Nevada Supreme Court's view of the evidence was incomplete, because it was unaware of this critical fact. In any event, even if the Court were right that the evidence was overwhelming, an airtight alibi can still produce reasonable doubt even in the face of overwhelming evidence. If the jury knew the suspects left the crime scene at 7:08 p.m. and Mr. Slaughter was halfway across town only 12 minutes later, there's a reasonable probability the jury would've doubted whether he could've been at the crime scene, and there's a reasonable probability the jury would've acquitted—no matter how strong the State's other evidence was.

In addition, the State tries to undercut the alibi because it relies in part on his girlfriend (Tiffany Johnson)'s testimony that Mr. Slaughter picked her up no later than 7:20 p.m. According to the State, Mr. Slaughter attempted to fabricate the alibi with his girlfriend on a recorded jailhouse phone call. 4/29/20 Motion at 19. 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 9 at 3. 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 a legitimate alibi and was trying to make one up out of whole cloth. 4/29/20 Motion at 19. That's 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'd gotten off work a few minutes early, that would've been a few minutes before 7:00 p.m., not as

late as 7:30 p.m. Her comments over the phone (that she got off work a few minutes early, so Mr. Slaughter was there at 7:30 p.m.) didn't make sense: if she got off work early, and if Mr. Slaughter had been there when she got off work, that would've been right before 7:00 p.m., not 7:30 p.m. Thus, Mr. Slaughter was simply reacting over the phone to Ms. Johnson's misstatement. Of course, it would be a different story if, apropos of nothing, Mr. Slaughter called Ms. Johnson and told her to reach out to Detective Prieto to provide a previously unmentioned alibi. But that's not what happened, even though the State is trying to give that misleading impression. In any event, even if this call is taken in the light most favorable to the State, it doesn't undermine her testimony that Mr. Slaughter arrived to pick her up no later than 7:20 p.m., especially since her boss (Mr. Arbuckle) originally told the police Mr. Slaughter arrived at 7:15 p.m. The Court should therefore conclude Mr. Slaughter can show prejudice based on these claims.

C. The Court should consider Ground Three(A) on the merits.

Ground Three(A) is a trial-counsel-ineffectiveness claim regarding the defense's failure to cross-examine the eyewitnesses about the outcome of the second photo lineup. Mr. DiGiacomo's testimony provide new factual support regarding the outcome of the second photo lineup and indeed warrants an evidentiary hearing regarding the outcome. As his testimony demonstrates, most (if not all) of the eyewitnesses would've testified they didn't recognize Mr. Slaughter from the second photo lineup; although one of the witnesses might've claimed to have noticed him, that witness didn't say anything about it to Detective Prieto, which raises questions about that witness's identifications, too. Mr. Slaughter has good cause to litigate this claim because Mr. DiGiacomo's testimony provides new information about how the witnesses would've testified on cross-examination. The State argues Mr. DiGiacomo's deposition doesn't provide any new information regarding this claim (4/29/20 Motion

at 19), but his testimony has obvious relevance to this issue, and the Court should reject the State's counterargument.

The State again argues the evidence was overwhelming, so Mr. Slaughter can't show prejudice. 4/29/20 Motion at 19. But if the evidence was overwhelming, that's only because three eyewitnesses identified him in court. If the defense had been able to cross-examine the witnesses about the second photo lineup, this "overwhelming" evidence would've become dubious at best. Mr. Slaughter can therefore demonstrate prejudice regarding this claim.

D. The Court should consider Ground Four(A) on the merits.

Ground Four(A) is a trial-counsel-ineffectiveness claim regarding the defense's failure to call Detective Prieto as a witness. Mr. DiGiacomo's testimony provide new factual support regarding this claim—for example, Mr. DiGiacomo testified he didn't call Detective Prieto because he thought his testimony would undercut the credibility of the police investigation. The Court should therefore conclude Mr. Slaughter has good cause to present this claim.

The State makes similar arguments regarding this claim: Mr. DiGiacomo's testimony doesn't affect it, and the evidence was overwhelming. 4/29/20 Motion at 20. But Mr. DiGiacomo's testimony casts substantial doubt on the quality of Detective Prieto's investigation. *See* Exhibit 23 at 184 (stating Mr. Slaughter's inclusion in the second photo lineup "makes Jessie Prieto look like a bad detective"); *id.* (stating he "made mistakes"); *id.* (suggesting the defense could've "attack[ed] the investigation" if they introduced evidence about the second photo lineup); *id.* at 33 (Mr. DiGiacomo is unwilling to say Detective Prieto is a good or thorough detective); *id.* at 34-35 ("[T]here are times when I certainly questioned his ability to articulate certain facts."). That testimony supports Mr. Slaughter's argument in Ground Four(A) that the defense counsel should've called Detective Prieto to attack the investigation. Meanwhile, the Nevada Supreme Court was unaware of the flaws in the investigation

(for example, it was unaware of the outcome of the second photo lineup) when it previously called the evidence overwhelming, so the Court shouldn't give that outdated statement much credence.

IV. Mr. Slaughter is innocent.

When it comes to all the claims in the petition—the claims that rely on Mr. DiGiacomo's deposition, and even the claims that don't—the Court should review the petition on the merits because Mr. Slaughter is innocent.

A. If a petitioner is innocent, the Court may consider a procedurally barred petition on the merits.

If an otherwise procedurally barred petitioner can establish he or she is actually innocent of the crimes of conviction, the Court may reach the merits of the claims in the petition. *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. 957, 966, 363 P.3d 1148, 1154 (2015). "[O]r, to remove the double negative," the petitioner must establish it's "more likely than not [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" 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 doesn't demand evidence that was "newly discovered" after trial; any evidence outside the trial record will suffice. *Id.* The new evidence need not "affirmatively prov[e]" 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 (cleaned up) (quoting *House*, 547 U.S. at 538). "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).

Even if a petitioner has raised and litigated a claim before, and even if law of the case would otherwise apply, the law of the case doctrine (like other procedural bars) can be overcome through a showing of innocence. *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)). Thus, if a petitioner re-raises a previously rejected claim in a new petition and establishes innocence, the Court may consider the claim on the merits.

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. Mr. Slaughter provided a detailed discussion of his innocence during the prior post-conviction proceedings. *See* 11/18/18 Petition at 26-29; 1/3/19 Opposition at 26-28. In brief, the State's most compelling evidence at trial involved three in-court identifications of Mr. Slaughter as the culprit (and a fourth out-of-court identification). But new evidence regarding the outcome of the second photo lineup demonstrates all those witnesses (or at least three out of four) failed to identify Mr. Slaughter from a second, non-suggestive photo lineup. That new evidence substantially undercuts the State's most significant argument for guilt. All the other evidence the State presented was circumstantial and weakly probative at best. Meanwhile, new evidence supports Mr. Slaughter's alibi: the suspects left the scene at about 7:08 p.m., but Mr. Slaughter arrived at his girlfriend's workplace no later than 7:20 p.m., and he couldn't have made that drive in only 12 minutes. Given all the new evidence, and on this complete record, Mr. Slaughter has demonstrated his innocence.

Mr. Slaughter previously raised these arguments in his third post-conviction petition, and the Court rejected those arguments. However, the new evidence strengthens the evidentiary basis for his innocence. Mr. Slaughter therefore maintains the Court has good cause to consider this claim on the merits. To the extent the Court believes its prior decision is controlling here, Mr. Slaughter respectfully intends to preserve the issue for further review.

The State insists Mr. DiGiacomo's testimony doesn't constitute new evidence supporting Mr. Slaughter's innocence. 4/29/20 Motion at 15. But at his deposition, he suggested that while one witness recognized Mr. Slaughter in the second photo lineup (and declined to share that information with Detective Prieto), the other six witnesses apparently didn't notice him in the lineup. That exculpatory information

undercuts the reliability of three of the four eyewitness identifications, which tends to show Mr. Slaughter's innocence. Meanwhile, Mr. Slaughter disputes Mr. DiGiacomo's deposition testimony and maintains he could prove at a hearing that, in fact, none of the witnesses noticed Mr. Slaughter in the second photo lineup. As far as Mr. Slaughter's alibi, Mr. DiGiacomo agreed the victims likely called 911 at about 7:11 p.m., which tends to support Mr. Slaughter's timeline of events. In addition, any evidence outside the trial record qualifies as new evidence, including Detective Prieto's deposition and the other evidence Mr. Slaughter referenced in his third petition. Taking all the evidence as a whole—the trial evidence, the evidence described in the third petition, and the evidence described in the fourth petition—Mr. Slaughter has satisfied the standard for proving innocence.

The State suggests Mr. Slaughter is arguing the State presented insufficient evidence at trial, which it views as an improper innocence argument. 4/29/20 Motion at 15-16. But Mr. Slaughter hasn't raised a sufficiency claim. Rather, he's arguing that the State's only direct evidence of guilt—the eyewitness identifications—are unreliable in light of new evidence; a reasonable juror would've viewed the State's other evidence as unpersuasive; and his current alibi is much stronger in light of new evidence than the version of the alibi his attorneys presented at trial. When looking at all the evidence in the record, new and old, it's more likely than not no reasonable juror would've voted to convict. Mr. Slaughter's innocence argument therefore follows the governing law, and the Court should consider all his claims on the merits.

V. Mr. Slaughter preserves his argument regarding ineffective assistance of post-conviction counsel.

As Mr. Slaughter noted in his petition (3/27/20 Petition at 18-19), and as the State reiterates (4/29/20 Motion at 12-14), Mr. Slaughter is currently litigating whether the Nevada Supreme Court should overruled *Brown v. McDaniel*, 130 Nev.

565, 331 P.3d 867 (2014). Out of an abundance of caution, he is preserving the same issue here.

VI. Laches shouldn't apply.

The State invokes the laches bar. 4/29/20 Motion at 27-28. But laches is a discretionary doctrine (*see* NRS 34.800) ("A petition *may* be dismissed . . . .") (emphasis added), and it would be inequitable to apply it here.

First, as this opposition has explained, Mr. Slaughter is innocent. Laches doesn't preclude a court from considering a petition when a petitioner demonstrates innocence. *See Mitchell*, 122 Nev. at 1274, 149 P.3d at 36. Thus, laches isn't a concern here.

Second, laches shouldn't apply because Mr. Slaughter hasn't inappropriately delayed the case. *Cf. State v. Powell*, 122 Nev. 751, 758-59, 138 P.3d 453, 458 (2006). Specifically, he filed his third petition within the five-year laches period, but the federal court didn't grant leave to depose Mr. DiGiacomo until March 29, 2019 (just one month shy of the five-year laches period), and Mr. Slaughter didn't depose Mr. DiGiacomo until July 26, 2019 (outside of the five-year laches period). He then filed the instant petition promptly, within a year of the federal court's order granting leave to depose Mr. DiGiacomo. Because Mr. Slaughter has been litigating promptly, the Court shouldn't hold any delays against him.

Third, Mr. Slaughter can overcome the presumption of prejudice because many of the key witnesses (for example, Detective Prieto and most of the victims) remain in the Clark County jurisdiction. Indeed, Mr. Slaughter's investigator was able to speak to many of the witnesses recently, although some declined to speak to the defense. *See* Exhibit 26. Because these witnesses remain available, the State wouldn't be unduly prejudice if it were to conduct a retrial, and the Court shouldn't presume otherwise.

VII. The Court should hold an evidentiary hearing.

Mr. Slaughter previously requested an evidentiary hearing in connection with his third post-conviction proceedings, and the Court concluded an evidentiary hearing wasn't warranted. However, the new evidence helps demonstrate why an evidentiary hearing is necessary. In particular, a hearing is needed to resolve discrepancies between Detective Prieto's testimony and Mr. DiGiacomo's testimony about what, exactly, happened when the witnesses saw the second photo lineup. Mr. Slaughter therefore maintains an evidentiary hearing is appropriate, and to the extent the Court believes its prior decision is controlling, Mr. Slaughter respectfully intends to preserve the issue.

The State insists a hearing is unnecessary (4/29/20 Motion at 28-29), but it largely incorporates its prior arguments, which Mr. Slaughter already addressed. The State also suggests Mr. Slaughter's trial attorneys already testified at a hearing (*id.* at 29), but there has been no such hearing, and one would be appropriate now.

CONCLUSION

The Court should deny the State's motion to dismiss and set this case for an evidentiary hearing.

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

Dated May 7, 2020.

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 7, 2020, 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 certain interested individuals are not registered electronic filing system users. I will mail a copy of this document to the following people:

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
Eloy, AZ 85131

/s/ Richard Chavez
An Employee of the Federal Public Defender, District of Nevada

A-20-812949-W Rickie Slaughter, Plaintiff(s)
vs.
Charles Daniels, Defendant(s)

June 11, 2020 03:30 PM All Pending Motions

HEARD BY: Herndon, Douglas W. COURTROOM: RJC Courtroom 16C

COURT CLERK: Schlitz, Kory

RECORDER: Ray, Stacey

REPORTER:

PARTIES PRESENT:

Jeremy C. Baron **Attorney for Plaintiff**

Marc P. Di Giacomo **Attorney for Defendant**

JOURNAL ENTRIES

PETITION FOR WRIT OF HABEAS CORPUS... MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE FILINGS IN MR. SLAUGHTER'S PRIOR CASES... STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND STATE'S MOTION TO DISMISS PETITION PURSUANT TO NRS 34.800...

Defendant not present and in custody in the Nevada Department of Corrections. Upon Court's inquiry, Mr. Baron stated they filed the Petition for Writ in November of 2018, and there was argument in March of 2019, adding at the time of argument, the Court stated it's intent to dismiss the Petition based on the procedural bars. Mr. Baron stated they got an order from the Federal Court Judge, who is handling the Federal Post Conviction proceedings, allowing the Defense to dispose Mr. Di Giacomo. Mr. Baron stated if the Court intends to apply the procedural bars in this case, the Defense would appeal and try and consolidate the cases into one, since their goal is to try to get the information from both cases before the Court, and the Defense is requesting the Court exercise it's jurisdiction today. Mr. Di Giacomo stated he does not understand the Defense's position as it relates to jurisdiction, since the Court denied the issue, and this is the fourth petition in which the same grounds are being raised. Mr. Di Giacomo indicated the State feels that this Court does not have jurisdiction, and if this matter is really about judicial economy, the Court should hold the petition in abeyance pending the decision of the Nevada Supreme Court, since ultimately they have stated they will not review it as it relates to this particular issue. Upon Court's inquiry, Mr. Baron stated the case before the Supreme Court has been fully briefed and is pending a decision. Mr. Baron stated this Court has jurisdiction, and it is appropriate for this Court to decide this matter. COURT STATED they have issues deciding matters which were previously denied, and then appealed to the Supreme Court, and then submitted in a new Petition; and this COURT FINDS it is appropriate for the Supreme Court to issue their decision on the appeals before moving forward on the fourth Petition and this matter will be held in abeyance. COURT ORDERED, status check SET.

NDC

8/13/2020 9:00 A.M. STATUS CHECK: PETITION

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78760

FILED

OCT 15 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.[1]

Appellant filed his petition on November 20, 2018, more than four years after the remittitur issued on appeal from the judgment of conviction. *See Slaughter v. State*, Docket No. 61991 (Order of Affirmance, March 12, 2014). The petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, appellant previously sought postconviction relief. *See Slaughter v. State*, Docket No. 70676-COA (Order of Affirmance, April, 19, 2017); *Slaughter v. State*, Docket No. 68532 (Order of Affirmance, July 13, 2016). The petition was therefore successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims that could have been raised earlier. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3), or a showing that the procedural bars should be excused to

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1094, 1097 n.12 (2018).

Appellant argues he demonstrated good cause and prejudice sufficient to excuse the procedural bars because the State withheld three pieces of material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). There are three components to a successful *Brady* claim: "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." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Evidence is material only when there is a reasonable probability or possibility—depending on whether there was a specific request for the evidence—that the result of the trial would have been different. *Id.* at 74, 993 P.2d at 41; *see also Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("[S]trictly speaking, there is never a real '*Brady* violation' unless the [Government's] nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (internal quotation marks omitted)).

When a *Brady* claim is raised in the context of a procedurally-barred postconviction petition, the petitioner has the burden of demonstrating good cause for his failure to present the claim earlier and actual prejudice. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). As a general rule, "[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld

evidence was material establishes prejudice." *Id.* Additionally "a *Brady* claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012). Our review is de novo. *See Bennett*, 119 Nev. at 599, 81 P.3d at 7-8 (reviewing de novo a *Brady* claim in a procedurally-barred petition).

First, appellant asserts the State withheld the outcome of a second photographic lineup—that none of the victims identified him in the second lineup. A photographic lineup was created for appellant, and four of the victims recognized appellant.[2] A second photographic lineup, which inadvertently included a different picture of appellant than the picture in the first lineup, was created for an alleged accomplice. While he always suspected none of the victims identified him in the second photographic lineup, appellant claims that he did not have proof of this fact until he deposed the detective in 2018. During the deposition, the detective said that he would never intentionally include two suspects in the same lineup, that the victims did not identify anyone in the second lineup, and that, consequently, the victims did not fill out anything or write anything down regarding the second lineup.

Appellant fails to show that the State withheld material evidence related to the second photographic lineup. Before trial, appellant was provided with copies of the second photographic lineup and knew that he was in the lineup. Before and during trial, appellant argued to the

---

[2]We reject appellant's argument that the suggestiveness of the first lineup—a claim previously considered and denied by this court in *Slaughter v. State*, Docket No. 61991, Order of Affirmance, at 2-3 (March 12, 2014)—should be reconsidered because the allegedly withheld results from the second lineup make his suggestiveness argument stronger.

district court that there was no notation or indication of his being identified. The outcome of the second lineup was therefore not withheld as appellant acknowledged during the pretrial hearings that there was no record of his being identified. But even assuming the outcome of the second lineup was withheld, appellant fails to show the materiality of the victims' inability to identify him in a second photographic lineup created for the alleged accomplice considering the other evidence against appellant, including in-court identifications by three of the victims, surveillance video showing appellant using a victim's ATM card shortly after the incident, *see Slaughter v. State*, Docket No. 61991, Order of Affirmance, at 3 (March 12, 2014) (giving deference to the district court's factual finding that appellant was depicted in the surveillance footage), and the fact that appellant's girlfriend owned a vehicle, to which appellant had access, resembling the witnesses' descriptions and containing "two firearms consistent with those used in the crimes and ammunition consistent with ballistic evidence recovered from the scene," *id.* at 2-3. Based on this evidence, appellant has not demonstrated a reasonable possibility that the result of trial would have been different had the outcome of the second lineup been disclosed. Therefore, the district court did not err in denying this claim as procedurally barred.

Second, appellant asserts the State withheld material evidence confirming the time of the 9-1-1 call. While acknowledging the State disclosed police reports referencing 7:11 p.m. in connection with the incident and the dispatch of officers, appellant claims that he had no explanation for what the time meant and that nothing explicitly stated the call time was 7:11 p.m. until he received a document in 2018. He claims this evidence would have shown the perpetrators left the scene at approximately 7:08 p.m., a fact he alleges was crucial to his alibi defense.

Appellant fails to show that the State withheld material evidence related to the time of the 9-1-1 call. Appellant was aware from police reports that at or about 7:11 p.m. officers were dispatched in reference to the incident. "Evidence is not suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *United State v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (internal citations and quotation marks omitted); *see also United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000); *United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998); *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983); *People v. Superior Court (Johnson)*, 377 P.3d 847, 858-59 (Cal. 2015); *State v. Bisner*, 37 P.3d 1073, 1082-83 (Utah 2001); *State v. Mullen*, 259 P.3d 158, 166 (Wash. 2011). And this court has recognized, "a *Brady* violation does not result if the defendant, exercising reasonable diligence, could have obtained the information." *Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) (listing federal cases holding the same); *see also United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) ("When, as here, a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government."); *Mass v. Quarterman*, 446 F.Supp.2d 671, 693 (W.D. Tex. 2006) (noting that "*Brady* imposes a duty of disclosure with regard to [exculpatory] *information*, regardless of what form that information might assume" and finding no *Brady* violation where specific reports were not disclosed but the substantive information from the reports was known by the defense).

Even assuming that confirmation of the 9-1-1 call time was withheld, appellant fails to show the materiality. While appellant relies on testimony from his girlfriend that he was picking her up ten miles away

from the scene of the crime between 7:00 p.m. to 7:15 p.m. but no later than 7:20 p.m. in order to demonstrate materiality, the jury also heard about a prior statement by the girlfriend and testimony of another witness that appellant picked his girlfriend up at 7:30 p.m. Moreover, the jury heard evidence that appellant attempted to fabricate his alibi on a phone call with his girlfriend. *See Slaughter v. State*, Docket No. 68532, Order of Affirmance, at 3 (July 13, 2016) (referencing the district court's finding that appellant made statements which indicated he was attempting to fabricate an alibi). Lastly, as noted above, appellant was identified in court by three of the victims and video surveillance showed him using one of the victim's ATM cards shortly after the incident. Considering all of the above, appellant failed to demonstrate a reasonable probability that the result of the trial would have been different had a document confirming the 7:11 p.m. call time been disclosed.

Third, appellant asserts the State withheld material impeachment evidence. He claims the evidence demonstrates that Jeffrey Arbuckle, a witness for the State, was biased against appellant based on the fact that Arbuckle called the police on appellant for trespassing approximately three weeks before the incident. Appellant fails to show that he raised this claim within a reasonable time after the allegedly withheld evidence was disclosed to or discovered by the defense. In his first postconviction petition, filed in 2015, appellant wrote: "In response to the verbal argument between [appellant] and Arbuckle, Arbuckle appears to have filed a police report /or complaint with the police on 06/03/2004, requesting that [appellant] be 'trespassed' from [the premise]. I personally discovered this information after trial, after receiving [defense counsel's] case file regarding my case and reviewing a 'print-out' of my S.C.O.P.E.-record which was contained in [defense counsel's] personal trial file."

Because information about the trespass was included in trial counsel's folder, it does not appear that it was withheld by the State. Further, because appellant was aware of the underlying facts of this claim in 2015, he has not shown good cause for litigating the claim again in his 2018 petition. Therefore, the district court did not err in concluding that appellant has not demonstrated good cause or actual prejudice to excuse the procedural bars based on the alleged *Brady* violations.[3]

Next, appellant argues the procedural bars should be excused to prevent a fundamental miscarriage of justice because he is actually innocent of the crimes. Appellant claims new evidence, mainly the alleged *Brady* material set forth above, establishes a more solid alibi than was introduced at trial and demonstrates the victims' identifications were unreliable such "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted). While a colorable showing of actual innocence—factual innocence of the crime as opposed to legal insufficiency—may demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural bars, *see Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006),

---

[3]To the extent appellant argues good cause for his ineffective-assistance-of-counsel claims related to the *Brady* material, this argument fails. Either the good cause for the delay is that the evidence was withheld from counsel—as appellant alleged for his *Brady* claims—or that counsel was ineffective for not discovering or using the evidence—a claim that is itself procedurally barred and cannot constitute good cause. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Additionally, appellant contends that his *Brady* claims establish good cause to (re)raise substantive claims regarding the suggestiveness of the first lineup and prosecutorial misconduct during closing argument. Because we have concluded that his *Brady* claims do not constitute good cause and actual prejudice to overcome the procedural bars, this argument also fails.

we conclude appellant has not made this showing. The alleged new evidence of appellant's alibi—that the perpetrators left the scene closer to 7:08 p.m. and not 7:00 p.m. and that Arbuckle called the police on appellant—does not demonstrate factual innocence when considering all the evidence produced at trial. And even incorporating new evidence that none of the victims identified appellant in a second lineup—a lineup prepared for an alleged accomplice—does not change that conclusion. In addition to three of the victims identifying appellant in court, appellant's girlfriend's car, to which appellant had access, resembled the car described by witnesses, and law enforcement found two firearms and ammunition in the car consistent with evidence recovered at the crime scene. Surveillance footage shows appellant using a victim's ATM card and appellant made statements that indicated he was attempting to fabricate his alibi. In light of this evidence, the outcome of the second lineup and small variances in the time the 9-1-1 call was placed and the time appellant picked up his girlfriend would not have made it more likely than not that no reasonable juror would have convicted him. Therefore, the district court did not err in denying this claim.

Lastly, appellant asks this court to reconsider and overrule its decision in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), and hold that the failure to appoint postconviction counsel may constitute good cause in non-capital cases to excuse the procedural bars. Appellant claims that *Brown* was wrongly decided and that this court should instead follow the reasoning outlined in *Martinez v. Ryan*, 566 U.S. 1 (2012). "'[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing.'" *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (alterations in original) (quoting *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnoted omitted)). "Mere

disagreement" with a prior decision is not a compelling reason to overturn precedent. *Miller*, 124 Nev. at 597, 188 P.3d at 1124. Instead, this court considers whether the prior decision has been proven "badly reasoned" or "unworkable." *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013); *see also Kapp v. Kapp*, 31 Nev. 70, 73, 99 P. 1077, 1078 (1909) (concluding that, when an issue has been squarely presented and decided, "the point should not be unsettled, except for very weighty and conclusive reasons"). We conclude appellant has not demonstrated compelling reasons to overturn *Brown* and deny his request.

Having considered appellant's claims and concluded no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 78760
District Court Case No. A784824

FILED

DEC 11 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.
Original Manually Filed Exhibit(s) 20.

DATE: November 09, 2020

Elizabeth A. Brown, Clerk of Court

By: Kaitlin Meetze
Administrative Assistant

cc (without enclosures):
Hon. Douglas W. Herndon, District Judge
Federal Public Defender/Las Vegas
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on NOV 16 2020.

Deputy District Court Clerk

RECEIVED
APPEALS
NOV 16 2020
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 78760
District Court Case No. A784824

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 15 day of October, 2020.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this November 09, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Kaitlin Meetze
Administrative Assistant

Electronically Filed
12/2/2020 3:20 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

RICKIE SLAUGHTER, Plaintiff, vs. CHARLES DANIELS, Defendant.	CASE NO. A-20-812949-W DEPT. X

BEFORE THE HONORABLE TIERRA JONES, DISTRICT COURT JUDGE

MONDAY, NOVEMBER 16, 2020
RECORDER'S TRANSCRIPT RE:
HEARING

APPEARANCES:

For the State: MARC DIGIACOMO, Esq.
Chief Deputy District Attorney

For the Defendant: JEREMY C. BARON, Esq.
Assistant Federal Public Defender

RECORDED BY: VICTORIA BOYD, COURT RECORDER

Case Number: A-20-812949-W

Las Vegas, Nevada, Monday, November 16, 2020 at 9:01 a.m.

THE COURT: Marc Digiacomo is here on behalf of the State. Mr. Digiacomo, can we have your bar number?

MR. DIGIACOMO: 6955.

THE COURT: And we have Mr. Baron - - are you here?

MR. BARON: I am. Bar number 14143C.

THE COURT: You said C was the last one.

MR. BARON: Yeah, C as in conditional.

THE COURT: Okay. So this is on for a status check petition writ of habeas corpus. The Supreme Court has affirmed Judge Herndon's denial of the writ so where are we?

MR. BARON: Your Honor, if I could just kind of explain the procedural background and then make a record on our innocence argument. So we had filed this third petition for Rickie Slaughter. It was his first counsel petition after we were appointed in Federal Court to represent him in his Federal petition and after we developed some new evidence through Federal discovery. So we filed a third petition. That's in front of Judge Herndon in the prior department. While that petition is pending we get authorization from the Federal Court to depose Mr. Digiacomo which is why we're in this sort of strange procedural setting.

So we made some efforts - -

THE COURT: Counsel, I did read everything that has occurred up to this point. I've read all of the minutes that have occurred up to this point and the full order that was issued by the Nevada Supreme Court.

MR. BARON: Understood. If I could just then make a quick record on innocence. I expect Mr. Digiacomo is going to tell you that because the Nevada Supreme Court has ruled you need to follow what the Nevada Supreme Court has done. I understand the argument. I just would like the Court to be aware this is an innocence case. We have pretty substantial evidence of innocence that we've put forward in our opposition to the State's motion to dismiss if you look at the evidence about the line ups, about his alibi, the weak nature of the State's case. This is an innocence case and we understand law of the case, we understand the procedural bars but innocence is an exception to all that so we're asking Your Honor to take a close look at our innocence argument and issue the writ.

THE COURT: Mr. Digiacomo.

MR. DIGIACOMO: Thank you, Judge. This was held in abeyance in order for the Nevada Supreme Court to make a determination, if you read that order from the Nevada Supreme Court every issue that is raised in this particular petition was already raised and rejected by the Nevada Supreme Court in their petition and the argument that somehow that I have added to the evidence of innocence is well in my mind laughable. And so I think the Court is in a position where it's got to procedurally deny the petition and they can take this to the Supreme Court if they want.

THE COURT: Mr. Baron, do you have any response to Mr. Digiacomo's arguments?

MR. BARON: I understand his argument but again because we've established innocence we think Your Honor can take a fresh look at this case and that's what we're asking you to do.

THE COURT: Well, the Nevada Supreme Court in the order that they issued

in Case Number 78760 they absolutely addressed the innocence issue and the Nevada Supreme Court decided on that innocence issue and they denied the writ based on the innocence issue so this Court is going to follow suit and deny this writ as well.

THE COURT: Marc, I need you to prepare the order.

MR. DIGICAOMO: Thank you. We will.

(Proceedings concluded at 9:05 a.m.)

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Victoria W. Boyd

12-2-20

Victoria W. Boyd
Court Recorder/Transcriber

Date

Electronically Filed
2/12/2021 3:44 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

RICKIE SLAUGHTER,

Petitioner,

vs.

CHARLES DANIELS,

Respondent,

Case No: A-20-812949-W

Dept No: X

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

PLEASE TAKE NOTICE that on February 8, 2021, 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 February 12, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 12 day of February 2021, 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
P.O. Box 650
Indian Springs, NV 89070

Rene L. Valladares
Federal Public Defender
411 E. Bonneville Ave., Ste 250
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

Case Number: A-20-812949-W

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
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-20-812949-W
(C204957)
DEPT NO: X

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: NOVEMBER 16, 2020
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable TIERRA JONES, District Judge, on the 16th day of November, 2020, the Petitioner not being present, represented by JEREMY C. BARON, Assistant Federal Public Defender , the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACAMO, 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

PROCEDURAL HISTORY

On September 28, 2004, the State filed an Information charging Rickie Lamont Slaughter ("Petitioner") with the following: 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); Counts 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, Petitioner entered into a Guilty Plea Agreement, wherein he agreed to plead guilty to the following: 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, Petitioner 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 and 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. Petitioner received no credit for time served. The Judgment of Conviction was filed on August 31, 2005. Petitioner did not file a direct appeal.

On August 7, 2006, Petitioner filed a Petition for Writ of Habeas Corpus. Among other claims, Petitioner 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. The Court denied the Petition on December 18, 2006. The Findings of Fact, Conclusions of Law and Order were filed on January 29, 2007. On January 11, 2007, Petitioner filed a Notice of Appeal. On July 24, 2007, the Nevada Supreme Court affirmed the denial of several of the claims raised in the Petition, but reversed the denial of Petitioner'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 claim. Slaughter v. State, Docket No. 48742 (Order Affirming in Part, Vacating in Part and Remanding, July 24, 2007).

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

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

On October 16, 2012, Petitioner 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 10-14 – 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. Petitioner received 2,626 days for credit time served.[1]

The Judgment of Conviction was filed on October 22, 2012. Petitioner 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, Petitioner filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed its Response on June 2, 2015. The Court denied Petitioner'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, Petitioner filed a Notice of Appeal. On July 13, 2016, the Nevada Supreme Court affirmed the denial of the First Petition. Slaughter v. State, Docket No. 68532 (Order of Affirmance, July 13, 2016). Remittitur issued on August 8, 2016.

///

[1]Petitioner was not adjudicated guilty as to Count 4, due to his right against double jeopardy.

On February 12, 2016, while the appeal from this First Petition was pending, Petitioner filed a second post-conviction Petition for Writ of Habeas Corpus ("Second Petition"). The State filed its Response on April 6, 2016. The Court held a hearing on the Second Petition on April 28, 2016. This Court denied the Second Petition. Petitioner filed a Notice of Appeal. The Nevada Supreme Court affirmed the denial of the Second Petition. Slaughter v. State, Docket No. 70676-COA (Order of Affirmance, Apr. 19, 2017). Remittitur issued April 19, 2017.

On August 8, 2017, Petitioner 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 Petitioner raises in the instant matter. Petitioner has filed a total of three separate Petitions in the federal case, and this matter appears to be ongoing.

Petitioner filed a third Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") on November 20, 2018, in case A-18-784824-W. The State filed its Response on December 19, 2018. On March 7, 2019, the Court denied the Petition. The Findings of Fact, Conclusions of Law, were filed on April 11, 2019. On May 6, 2019, Petitioner filed a Notice of Appeal. On October 20, 2020, the Nevada Supreme Court affirmed the denial of the Third Petition. Slaughter v. State, Docket No. 78760 (Order of Affirmance, Oct. 15, 2020). Remittitur issued on November 9, 2020.

On March 27, 2020, while the appeal of his Third Petition was still pending, Petitioner filed a fourth Petition for Writ of Habeas Corpus (Post-Conviction) ("Fourth Petition"). This Court herein denies the Fourth Petition and sets forth its reasoning for doing so as follows.

ANALYSIS

PETITIONER'S CLAIMS ARE BARRED FROM CONSIDERATION UNDER THE LAW OF THE CASE DOCTRINE

In the instant Fourth Petition, Petitioner raises the same eleven claims presented in his Third Petition. In an attempt to overcome the procedural bars to his substantive claims, he also repeats the same good cause and prejudice and actual innocence arguments from his Third Petition. In affirming denial of his Third Petition, the Nevada Supreme Court considered these claims and rejected them. Slaughter v. State, Docket No. 78760 (Order of Affirmance, Oct.

15, 2020). The Nevada Supreme Court's decision in this matter is now law of the case, and cannot be altered through litigation in this Court. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)), *abrogated on other grounds by* Rippo v. State, 134 Nev. 411, 423 n.12, 423 P.3d 1094, 1097 n.12 (2018). "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). This Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6.

In his Fourth Petition, Petitioner repeats his good cause and actual innocence claims in an attempt to overcome the procedural bars to his substantive claims. As was his Third Petition, his Fourth Petition is untimely and successive. NRS 34.726(1); NRS 34.810(1)(b)(2); NRS 34.810(2). Thus, Petitioner's substantive claims are barred from consideration unless Petitioner makes a showing of either good cause and prejudice or a fundamental miscarriage of justice. NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3); Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006).

In his Fourth Petition, Petitioner again argues he has demonstrated good cause and prejudice by alleging the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Fourth Petition, at 11-13. On appellate review of Petitioner's Third Petition, the Nevada Supreme Court explicitly rejected this claim, concluding that "the district court did not err in concluding that appellant has not demonstrated good cause or actual prejudice to excuse the procedural bars based on the alleged *Brady* violations." Slaughter v. State, Docket No. 78760 (Order of Affirmance, Oct. 15, 2020), at 7. Petitioner also repeats his argument that the ineffective assistance of his post-conviction counsel should constitute good cause, though Petitioner acknowledges that the Nevada Supreme Court has previously ruled that such a claim does not constitute good cause in non-capital cases. Fourth Petition, at 18-19. Petitioner maintains that this precedent – Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014) – should be overruled. Id. at 19. In affirming the denial of his Third Petition, the Nevada Supreme Court declined to overrule this precedent, stating that "appellant has not

demonstrated compelling reasons to overturn *Brown* and deny his request." Slaughter v. State, Docket No. 78760 (Order of Affirmance, Oct. 15, 2020), at 9.

Petitioner also repeats his argument that he has demonstrated a fundamental miscarriage of justice in the form of actual innocence. Fourth Petition, at 17-18. On appellate review of the denial of his Third Petition, the Nevada Supreme Court rejected this claim, stating that Petitioner failed to make a colorable showing of actual innocence. Slaughter v. State, Docket No. 78760 (Order of Affirmance, Oct. 15, 2020), at 7-8.

Petitioner contends that in his Fourth Petition he has provided new evidence in support of his good cause argument, in the form of the deposition of Chief Deputy District Attorney Marc DiGiacomo's, who was the lead prosecutor during Petitioner's trial. While this deposition testimony was not presented in Petitioner's Third Petition, Petitioner fails to explain how any of Marc DiGiacomo's testimony supports his good cause argument. Petitioner actually disputes the truth of Marc DiGiacomo's deposition testimony, and urges this Court not to credit it. Fourth Petition, at 59-64. Accordingly, the inclusion of this deposition testimony does not support his good cause arguments. It also does not alter the substance of Petitioner's arguments related to good cause and a fundamental miscarriage of justice, which are repetitions of arguments raised in his Third Petition. The deposition testimony presented nothing substantially new or different regarding any of Petitioner's claims, and therefore his claims remain barred from consideration due to the law of the case. See Rippo v. State, 134 Nev. 411, 427, 423 P.3d 1084, 1100-01 (2018). Accordingly, the law of the case doctrine bars consideration of Petitioner's claims.

Petitioner has not overcome the procedural bars to his untimely and successive Fourth Petition. In an attempt to overcome these bars, he has re-raised the same arguments presented in his Fourth Petition. These claims have been rejected by the Nevada Supreme Court, and are now barred under the law of the case doctrine. Therefore, consideration of Petitioner's claims is barred, and the Fourth Petition must be denied.

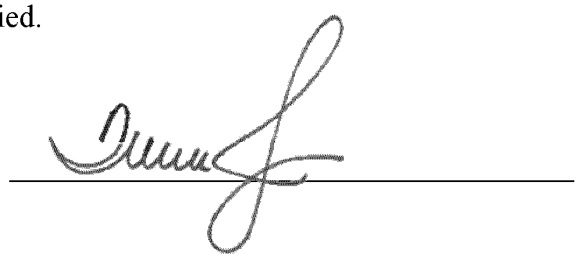
///

///

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 8th day of February, 2021



248 B40 3CCD 72C0
Tierra Jones
District Court Judge

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

BY /s/ KAREN MISHLER
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 4th day of February, 2021, by electronic transmission to:

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

BY: /s/ J. HAYES
Secretary for the District Attorney's Office

KM/jh/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Rickie Slaughter, Plaintiff(s)	CASE NO: A-20-812949-W
vs.	DEPT. NO. Department 10
Charles Daniels, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/8/2021

Dept 3 Law Clerk	dept03lc@clarkcountycourts.us
Richard Chavez	richard_chavez@fd.org
Jeremy Baron	jeremy_baron@fd.org
Alexander Chen	Motions@clarkcountyda.com
ECF Notifications NCH Unit	ecf_nvnch@fd.org

NOASC
RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JEREMY C. BARON
Assistant Federal Public Defender
Nevada State Bar No. 14143C
411 E. Bonneville Ave. Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (fax)
jeremy_baron@fd.org

Attorneys for Petitioner Rickie Slaughter

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

RICKIE SLAUGHTER, Petitioner, v. CHARLES DANIELS, et al., Respondents.	Case No. A-20-812949-W (04C204957) Dept. No. X

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 March 27, 2020, post-conviction petition for a writ of habeas corpus. This Court entered its order denying the petition on February 8, 2021, and filed a notice of entry of the order on February 12, 2021.

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

Dated March 5, 2021.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, 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 certain interested individuals are not registered electronic filing system users. I will mail a copy of this document to the following people:

Erica Berrett
Office of the Attorney General
555 E. Washington Ave. Suite 3900
Las Vegas, NV 89101

Rickie Slaughter
No. 85902
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

/s/ Richard Chavez
An Employee of the Federal Public Defender, District of Nevada

EXHIBIT 128

MANUALLY FILED

EXHIBIT 128

EXHIBIT 129

MANUALLY FILED

EXHIBIT 129

EXHIBIT 130

MANUALLY FILED

EXHIBIT 130