IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE SLAUGHTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82602

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

JEREMY C. BARON
Nevada Bar #014143
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is not presumptively retained by the Nevada Court of Appeals because it relates to a post-conviction Petition for multiple Category A felonies. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Appellant cannot demonstrate good cause to overcome the mandatory procedural bars and the law of the case doctrine in order to raise his Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) claims.
2. Whether this Court has already determined that Appellant cannot demonstrate that he is actually innocent.
3. Whether there is no reason for this Court to reconsider its decision in Brown v. McDaniel.

STATEMENT OF THE CASE

On September 28, 2004, the State filed an Information charging Rickie Lamont Slaughter ("Appellant") 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). I AA 074-082.

On April 4, 2005, Appellant entered into a Guilty Plea Agreement ("GPA"), 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). I AA 162-170.

On August 8, 2005, Appellant was adjudicated guilty and sentenced to the Nevada Department of Corrections ("NDC") as follows: Count 1 – a minimum of ninety (90) months and maximum of two hundred forty (240) months, plus an equal consecutive minimum of ninety (90) months and maximum of two hundred forty (240) months for the use of a deadly weapon; Count 2 – a minimum of seventy-two (72) months and a maximum of one hundred eighty (180) months, plus an equal and consecutive minimum of seventy-two (72) months and a maximum of one hundred eighty (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 fifteen (15) years, concurrent to Counts 1 and 2; Count 4 – Life With the Possibility of Parole after a minimum of five (5) years, plus an equal consecutive Life With the Possibility of Parole after a minimum of five (5) years for the use of a deadly weapon, concurrent to Counts 1, 2, and 3. I AA 211-228. Appellant received no credit for time served. I AA 227-228. The Judgment of Conviction was filed on August 31, 2005. I AA 234-235.

On August 7, 2006, Appellant filed a Petition for Writ of Habeas Corpus. II AA 236-253. Among other claims, Appellant 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 fifteen (15) years. II AA 242-245. The State filed its Opposition on September 11, 2006. II AA 254-261. This Court denied

the Petition on December 18, 2006. II AA 300-318. The Findings of Fact, Conclusions of Law and Order was filed on January 30, 2007. II AA 321-327. On January 11, 2007, Appellant filed a Notice of Appeal. II AA 319-320. 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 Appellant'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. II AA 328-336.

On June 19, 2008, the district court held an evidentiary hearing. III AA 407-564. Afterward, the district court denied Appellant's claim that his guilty plea was involuntarily entered, but ordered the NDC to parole Appellant from sentences for the deadly weapon enhancements for Counts 1, 2, and 4 at the same time as the sentences for the primary counts. III AA 531-535. Appellant appealed and on March 27, 2009, the Nevada Supreme Court reversed the judgment of the district court and ordered Appellant to be permitted an opportunity to withdraw his guilty plea. III AA 569-577.

Appellant withdrew his guilty plea, and his jury trial commenced on May 12, 2011. IV AA 709. On May 20, 2011, the jury returned a verdict finding Appellant guilty on all counts. VI AA 1175-1178.

On October 16, 2012, Appellant was adjudicated guilty and sentenced to the NDC as follows: Count 1 – a minimum of twenty (24) months and maximum of sixty (60) months; Count 2 – a minimum of twenty (24) months and maximum of sixty (60) months, consecutive to Count 1; Count 3 – a minimum of sixty (60) months and maximum of one hundred eighty (180) months, plus a consecutive minimum of sixty (60) months and maximum of one hundred eighty (180) months for the deadly weapons enhancement, consecutive to Count 2; Count 5 – a minimum of forty-eight (48) months and maximum of one hundred twenty (120) months, plus a consecutive minimum of forty-eight (48) months and maximum of one hundred twenty (120) months for the deadly weapon enhancement, concurrent to Count 3; Count 6 – a minimum of forty-eight (48) months and maximum of one hundred twenty (120) months, plus a consecutive minimum of forty-eight (48) months and maximum of one hundred twenty (120) months for the deadly weapon enhancement, consecutive to Count 3; Count 7 – a minimum of forty-eight (48) months and maximum of one hundred twenty (120) months, concurrent to Count 6; Count 8 – a minimum of twenty (24) months and maximum of sixty (60) months, concurrent to Count 7; Count 9 – Life With the Possibility of Parole after a minimum of fifteen (15) years, plus a consecutive Life With the Possibility of Parole after a minimum of fifteen (15) years for the deadly weapon enhancement; Counts 10-14 – Life With the Possibility of Parole after five (5) years, plus a consecutive Life With the

Possibility of Parole after five (5) years, all concurrent to Count 9. VI AA 1199-1263. Appellant received two thousand, six hundred twenty-six (2,626) days credit for time served. VI AA 1241. Appellant was not adjudicated on Count 4. VI AA 1239.

The Judgment of Conviction was filed on October 22, 2012. VI AA 1264-1268. Appellant filed a direct appeal, and on March 12, 2014, the Nevada Supreme Court affirmed the Judgment of Conviction on March 12, 2014. VI AA 1269-1274. Remittitur issued on April 30, 2014. VI AA 1269-1274.

On March 25, 2015, Appellant filed a post-conviction Petition for Writ of Habeas Corpus ("First Petition"). VII AA 1275-1443. The State filed its Response on June 2, 2015. VII AA 1444-1459. The district court denied Appellant's Petition on June 18, 2015. VII AA 1460-1474. The Findings of Fact, Conclusions of Law and Order was filed on July 15, 2015. VII AA 1505-1515. Appellant appealed the district court's decision, and on July 13, 2016, the Nevada Supreme Court affirmed the denial of the First Petition. VIII AA 1612-1614. Remittitur issued on August 8, 2016. VIII AA 1612-1614.

On February 12, 2016, while the appeal from this First Petition was pending, Appellant filed a second post-conviction Petition for Writ of Habeas Corpus ("Second Petition"). VIII AA 1516-1598. The State filed its Response on April 6, 2016. VIII AA 1601. The district court held a hearing on the Second Petition on

April 28, 2016, and denied the Second Petition. VIII AA 1597-1611. The Findings of Fact, Conclusions of Law and Order was filed on June 10, 2016. VIII AA 1597-1611. Appellant filed a Notice of Appeal, and on April 19, 2017, the Nevada Supreme Court affirmed the denial of the Second Petition. Remittitur issued April 19, 2017. VIII AA 1615-1619.

Appellant filed a third Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Petition") on November 20, 2018, under Case No. A-18-784824-W. XII AA 2443-2522. The State filed its Response on December 19, 2018. XII AA 2523-2669. On March 7, 2019, the district court denied the Third Petition. XIII AA 2713-2728. The Findings of Fact, Conclusions of Law and Order was filed on April 11, 2019. XIII AA 2754-2779. On May 6, 2019, Appellant filed a Notice of Appeal. XIII AA 2785-2787. On October 15, 2020, the Nevada Supreme Court affirmed the judgment of the district court and Remittitur issued on November 9, 2020. XXII AA 4505-4515.

On March 27, 2020, Appellant filed a fourth Petition for Writ of Habeas Corpus (Post-Conviction) ("Fourth Petition"). XXII AA 4369-4441. On April 29, 2020, the State filed its Response and Motion to Dismiss the Petition. XXII AA 4442-4471. On May 7, 2020, Appellant filed an Opposition to the State's Motion to Dismiss. XXII AA 4475-4503. On November 16, 2020, the district court denied the

Fourth Petition. XXII AA 4516-4519. The Findings of Fact, Conclusions of Law and Order was filed on February 8, 2021. XXII AA 4520-4529.

Appellant filed a Notice of Appeal on March 5, 2021. XXII AA 4530-4532. Appellant filed the instant Opening Brief on July 21, 2021.

STATEMENT OF THE FACTS

In June of 2004 Ivan Young (hereinafter "Ivan") resided at 2612 Gloryview, North Las Vegas, Clark County, Nevada. V AA 879. Also residing in the home were his wife Jennifer Dennis (hereinafter "Jennifer") and their ten-year-old son Aaron Dennis (hereinafter "Aaron"). V AA 879-80. On June 26, 2004, Ivan was in his garage working on a Monte Carlo with the garage door open. V AA 880. Ivan's wife, son, and nephew Jose Posada (hereinafter "Joey") had just returned home and entered through the front door. Id.

There was still daylight and Jennifer went back out to check the mail about two houses down. V AA 900. There, she observed a teal or blue, Mercury or Ford car, also parked two houses down, from which two men were walking toward their home. Id. She came to the garage briefly and told Ivan that she thought his friends were here. Id. Ivan looked out from the garage and observed the two men walking up from a green Ford Taurus, but they were not his friends, nor the person he was expecting that evening. V AA 881. At first, they asked if they could come in the garage and discussed painting cars and other related topics. V AA 882. However,

when Appellant asked Ivan for a phone number and Ivan turned to get a business card, Appellant put a gun to Ivan's head and ordered him inside the home. Id.

Once inside the home, Appellant and his co-conspirator tied Ivan up in the living room (later moving him into the kitchen area), tied Jennifer up in the kitchen, and restrained Aaron and Joey in the den area facing the wall using cords that they cut from appliances in Ivan's home. Id. Neither Aaron nor Joey had their heads covered. V AA 1017. Throughout the encounter, Appellant and his co-conspirator demanded to know where the money, drugs, and guns were at. V AA 882.

Appellant and his co-conspirator sprayed Lysol on Jennifer and told her it was to cover up their fingerprints. V AA 901. Jennifer also noted that Appellant and his co-conspirator were wearing dark gloves. Id. Joey had a better look at the gloves and described them as sport gloves, possibly baseball gloves. V AA 1016. Crime scene personnel testified that no fingerprints were found at the scene, but a cloth pattern in the shape of fingers, consistent with gloves, was found on numerous items. V AA 891-92.

When Ivan did not respond to their demanding questions, they would kick, hit, and strike him with their guns. V AA 882. At some point during this ordeal, Ivan's head was covered. Id. Then they drug him into the kitchen and told him "to look up and this is the gun that's going to kill you." V AA 883. Appellant pointed

the gun at Ivan and fired it into his face. Id. Ivan heard the gunshot and then blacked out for some period. Id. Joey described Ivan's shooting as follows:

> A: Me and my – my cousin and I were sitting in the den and they kept asking my uncle for money and then I hear a gunshot and then I looked over and nothing was wrong and then I faced the wall again and then a couple seconds later I look over and there's a pool of blood by my uncle's head.
> Q: Okay. What did you do?
> A: I told my cousin not to look and then I was trying to comfort him.
> Q: And what were you thinking when you saw the blood by your uncle?
> A: I thought he was dead.
> …
> Q: After you looked over, did you see anyone with weapons at that point?
> A: Yes, the two black men still had the guns.

V AA 1017.

Jennifer later discovered that the bullet had struck their floor after going through Ivan's face. V AA 903. She discovered this when "[she] had to clean up [her] husband's blood and teeth." Id. At some point, Ivan regained consciousness and heard his friend Jermaun Means (hereinafter "Jermaun") come in the home. V AA 883. Ivan had painted some rims and was expecting Jermaun to pick them up. Id. When Jermaun entered the room, Ivan was laying on the floor bleeding. V AA 877. Appellant and his co-conspirator tied Jermaun up and demanded his money. Id. Jermaun had brought $1,500.00 with him; they took at least $1,000.00 and his cell phone. V AA 876, 877. After Appellant and his co-conspirator left, Jermaun was able to go across the street to his girlfriend's car and called 9-1-1; at some point

Jennifer also got on the phone, telling police that the car was likely blue but a voice can also be heard in the background saying the car was green. V AA 877.

At some point, one of Ivan's neighbors, Ryan John (hereinafter "Ryan"), also came in the house. V AA 883-84, 951. Ryan heard Appellant tie Ivan up, demand money, kick him, beat him, and jump on his head resulting in a scream. V AA 884. Ryan had been visiting his girlfriend but was summoned across to the house by the Appellant who claimed Ivan needed to talk to him. V AA 951. Appellant first summoned him to the garage and then forced him in the house at gun point. Id. He was tied up in the kitchen. Id. Appellant took Ryan's wallet and Wells Fargo bank card. V AA 952, 953. Ryan heard Ivan beg not to die in front of his son, then a gun shot. V AA 953. After Appellant and his co-conspirator left the house Ryan went out a window, through the backyard, and to other homes where he found someone with a phone which he used to call 9-1-1. Id.

Eventually police and medical personnel arrived and were shown to a bedroom where Ivan was lying down. Id.; V AA 906. Ivan was taken to UMC and suffered severe injuries because of his attack. V AA 884. Ivan lost his right eye and four or five of his teeth. Id. Ivan continues to suffer from severe migraines and sharp pains in the right side of his face. Id.

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Witness Identifications

Ivan positively identified Appellant as his attacker at trial. V AA 881. Ivan also selected Appellant from a photo line-up presented to him at the hospital on June 28, 2004, approximately two days after the crime, by initialing next to the photo. V AA 884. Ivan clarified that detectives did not tell him Appellant's name, nor did he know it at the time of the crime or lineup, but rather was told by a friend later. V AA 887.

Jermaun identified Appellant in a photo line-up approximately two days after the crime, on June 28, 2004; Jermaun said Appellant's face stood out to him, the face not the photograph used. V AA 878-79. Jermaun acknowledged at trial that after seven years he probably could not identify Appellant in person; as such, the State never asked him to try to identify anyone in the courtroom. Id. Jermaun testified at trial that he had also told the police that one of the attackers had been wearing a beige suit jacket and had dreadlocks or a dreadlock wig. V AA 878.

Ryan also participated in a photo line-up on June 29, 2004, approximately three days after the shooting and identified Appellant. V AA 954. Ryan was able to identify Appellant at trial. V AA 954-55.

Joey also participated in a photo line-up; he identified Appellant by writing "I saw him next to my uncle. This man had a gun." V AA 1018. He was also able to identify Appellant at trial. V AA 1019. At trial, Joey described Appellant and his co-

conspirator on the day of the crime as having braids and dreadlocks and at least one of them having a "suit jacket" or "tuxedo dress up suit." V AA 1020.

Jennifer testified at trial that one of the attackers had "little short dreads," and fake Jamaican accents. V AA 900, 904. She had provided descriptions that one of them was wearing a blue shirt and jeans and the other a red shirt and jeans. V AA 900, 904. Jennifer confirmed that she had not been able to pick Appellant out of the photo line-up but also noted that she followed Appellant's instructions not to look up during the attack. V AA 901, 905. Jennifer observed that there were suit jackets missing from their home after the robbery; these were different than the leather jackets used to cover their heads with during the crime. V AA 902, 905.

Firearms Evidence

Ivan testified that during the ordeal he observed a total of three firearms in the perpetrators' possession. V AA 883. One was a black revolver, possibly a .380 caliber. Id.; V AA 885. The second was a silver gun. V AA 885. The third was a bigger, possibly .9 millimeter caliber, black gun. V AA 885-86. Appellant told Ivan he was going to shoot him with a .380. V AA 887. Jennifer heard Appellant tell Ivan that they were playing a game of murder and that they had a Magnum gun that was going to leave a big hole in Ivan. V AA 901. She remembered the "game of murder" statement because she heard her son and nephew scream when it was said. V AA 901-02. Jennifer saw a total of three guns, one black and the others black and grey.

V AA 901. Jermaun saw the one gun they grabbed him with. V AA 877. Ryan saw multiple guns as well; specifically, a black gun was put against his throat and he saw a revolver while he was on the ground when they told him to look at the gun and if he touched it they would use it to blow his brains out. V AA 952. Joey saw the guns Appellant and his co-conspirator used to torment them; he saw one silver, one black, and a third gun. V AA 1016, 1020.

Crime scene personnel recovered fragments of a partial bullet core and bullet jacket from Ivan's face. V AA 895, 1011. A Winchester .357 Magnum cartridge casing and larger partial bullet core were recovered from Appellant's girlfriend's car, a green Ford Taurus. V AA 909. Appellant was seen picking up his girlfriend in this same car approximately 30-45 minutes after the crime. V AA 946. Two guns were also found in the car, one a black .22 caliber revolver and the other a .25 caliber Raven Semi-Automatic Pistol. V AA 912, 913-14. A crime scene expert testified that the Winchester .357 Magnum cartridge case found in the car could not have been fired out of either gun recovered, and that it was fired from a revolver which leaves the casing in the gun rather than ejecting it. V AA 970. Further, the expert testified that the bullet core fragment found in the car had consistent cannulars, or marks made as the bullet is fired which are found on the bullet jacket and also imprinted on the softer bullet core, with the bullet jacket fragments recovered from Ivan's face. V AA 969, 970. The expert further testified that the material

composition of the bullet core found in the car, and presumably removed from the house, the jacket fragments from Ivan's face, and the cartridge casing found in the car were consistent with one Winchester .357 silver tip hollow point Magnum cartridge. V AA 971.

Additional Evidence

The guns, bullet fragments, and casing were recovered from the same car Appellant was seen picking his girlfriend up in approximately 30-45 minutes after the crime by her boss. V AA 909-12, 946. Appellant's girlfriend testified that no one else drove her car and that Ivan did not clean it out after using it but before it was searched by police. V AA 458-60, 465. Appellant's girlfriend attempted to help create an alibi for Appellant, saying that he picked her up at 7:00 pm or 7:15 pm, depending on which version of the story she was giving. V AA 1048. However, she also testified that her boss left before she did on the day of the crime. V AA 1059. Her manager, Jeffrey Arbuckle, testified that they closed at 7:00 p.m., he waited with Appellant's girlfriend for at least 30 minutes, and he saw Appellant pulling in as he was leaving the parking lot. V AA 946. The jail calls played at trial demonstrated an obvious consciousness of guilt and also that Appellant threatened and/or at least yelled at his girlfriend that she had to say he picked her up at 7:00 on the night of the crime. V AA 1013, 1053; I AA 43-44.

A blue shirt was recovered from Appellant's apartment which matched Ivan and Jennifer's description of Appellant (which is not inconsistent with Joey and Jermaun's description of suit jackets as Jennifer noted the same was taken during the crime). V AA 878, 886, 900-01, 902, 911, 1020. Gloves were recovered from Appellant's apartment and from the Ford Taurus. V AA 910-11, 913.

Ryan testified that Appellant took his Wells Fargo bank card, and that he gave the correct pin number because Appellant threatened to come back and kill him if it was incorrect. V AA 952-953, 956, 958. He also testified that the same card was used at a 7-Eleven at approximately 8:00pm on the same night of the crime, and that $300 was removed from his account. V AA 954. The surveillance video presented at trial showed Appellant entering the 7-Eleven at approximately 8:00pm on the night of the offense, in heavy winter clothing in the middle of summer, trying to partially conceal his face when he approached the ATM and attempted to use it. V AA 942-44, 945.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Appellant's Fourth Petition for Writ of Habeas Corpus (Post-Conviction). First, the district court correctly determined that Appellant's Brady claims are procedurally barred and barred by the law of the case doctrine. The district court correctly found that Appellant's Fourth Petition is time-barred, successive, and barred by the law of the

case doctrine with no good cause to overcome the mandatory procedural bars. Second, this Court already determined that Appellant cannot demonstrate that he is actually innocent and thus, this claim is also barred by the law of the case doctrine. Lastly, Appellant does not put forth a cogent argument for why this Court should reconsider its decision in Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014). Accordingly, the district court properly denied Appellant's Fourth Petition for Writ of Habeas Corpus (Post-Conviction).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT CANNOT DEMONSTRATE GOOD CAUSE TO OVERCOME THE MANDATORY PROCEDURAL BARS AND THE LAW OF THE CASE DOCTRINE IN ORDER TO RAISE HIS BRADY CLAIMS

Appellant complains that the district court incorrectly determined he cannot establish good cause to raise his Brady claims. AOB, at 18-57. However, Appellant puts forth no new evidence to demonstrate good cause to overcome the mandatory procedural bars. Further, Appellant's Brady claims have been rejected by this Court, and are now barred under law of the case doctrine. XXII AA 4505-4515.

A. The district court correctly found that Appellant's claims were procedurally barred.

As was Appellant's Third Petition, the district court correctly found that the Fourth Petition is also procedurally barred as time-barred and successive.

/ / /

a. Appellant's fourth 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.

This Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), this Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

Further, this 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. This Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

Here, Appellant filed a direct appeal, and this Court affirmed his convictions. Remittitur issued on April 30, 2014. Thus, pursuant to NRS 34.726, Appellant had until April 30, 2015 to file his Petition. Appellant 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 (6) years after remittitur issued. Thus, absent a showing of good cause for this delay and undue prejudice, the district court correctly found the Fourth Petition is time-barred because of its tardy filing.

b. Appellant's fourth 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). This 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 his Fourth Petition, *all* of Appellant's claims were raised in his Third Petition. Though Appellant added some argument to his claims based upon the deposition testimony of Mr. Digiacomo, his claims are substantively the same, and

plead in a substantially similar manner as the claims were plead in the Third Petition. Clearly, the Fourth Petition is successive as it only raises previously-raised claims. Therefore, the district court correctly determined it must be dismissed pursuant to NRS 34.810(2).

B. The district court correctly found that Appellant's claims were barred from consideration under the law of the case doctrine.

Appellant also claims that this Court should reach these issues and that law of the case does not apply because of Mr. Digiacomo's deposition. AOB, at 35-57. However, Appellant's exact Brady claims have already been rejected by this Court and are now barred under law of the case doctrine.

In his Fourth Petition, Appellant raised the same eleven (11) claims presented in his Third Petition. In an attempt to overcome the procedural bars to his substantive claims, he also repeated the same good cause and prejudice and actual innocence arguments from his Third Petition. In affirming denial of his Third Petition, this Court considered these claims and rejected them. XXII AA 4505-4515. This 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)). The district court does not have the authority to overrule this Court. Nev. Const. Art. VI § 6.

Appellant again argues he has demonstrated good cause and prejudice by alleging the State withheld evidence in violation of Brady. AOB, at 35-57. On appellate review of Appellant's Third Petition, this 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." XXII AA 4511. Furthermore, the deposition testimony presented nothing substantially new or different regarding any of Appellant's claims, and therefore his claims remain barred from consideration due to the law of the case. See Rippo, 134 Nev. at 427, 423 P.3d at 1100-01. As discussed infra, Section I.C., Appellant cannot use his Brady claims to establish good cause because they have been barred by the law of the case doctrine. Accordingly, the district court correctly determined that the law of the case doctrine bars consideration of Appellant's claims.

In sum, Appellant 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 this Court, and are now barred under the law of the case doctrine.

Therefore, the district court correctly determined that consideration of Appellant's claims are procedurally barred and barred by the law of the case doctrine.

C. The district court correctly found that Appellant's failed to demonstrate good cause to overcome the mandatory procedural bars.

Appellant 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 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, 77 3 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)).

Here, Appellant claims that he can demonstrate good cause to assert his Brady claims because the State withheld material evidence. AOB, at 18-35. Appellant's claim stems around the deposition testimony of Mr. Digiacomo. Specifically, Appellant claims that the State withheld relevant evidence regarding the second photo lineup and Appellant's alibi. Id. However, as discussed supra, Section I.B., Appellant cannot use his Brady claims to establish good cause because they have been barred by the law of the case doctrine.

It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. See 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). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan, 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility*

that the omitted evidence would have affected the outcome. Id. (original emphasis) (*citing* Jimenez, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108 96 S. Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles, 514 U.S. at 433-34, 115 S. Ct. at 1565 (*citing* United States v. Bagley, 473 U.S. 667, 682 105 S. Ct. 3375, 3383 (1985)). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles, 514 U.S. at 434, 115 S. Ct .1565. Appellant is unable to demonstrate prejudice and thus his claim fails.

Further, in Evans v. State, 117 Nev. 609, 625-27, 28 P.3d 498, 510-11 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the defendant, on appeal, argued that the State had the obligation to continue investigating alternate suspects of the crime, and speculated the State had evidence one of the victims had been an informant previously, which would have demonstrated others had motive to kill her. Id. at 626, 28 P.3d at 510-11. The Court found that the defendant had not demonstrated that such an investigation would have

led to exculpatory information. Id. at 626, 28 P.3d at 510. To undermine confidence in a trial's outcome, a defendant would have to allege the nondisclosure of specific information that not only linked alternate suspects to the crime, but also indicate the defendant was not involved. Id. at 626, 28 P.3d at 510. Further, the Court found that the victim's mere acting as an informant, without at least some evidence that she had received actual threats against her, would not implicate the State's affirmative duty to disclose potentially exculpatory information to the defense because such information must be material. Id. at 627, 28 P.3d at 511.

a. Second photo lineup

Appellant claims the State withheld relevant evidence regarding the second photo lineup. AOB, at 20-26. Appellant contends that he can establish good cause based on the deposition testimony of Mr. Digiacomo. AOB, at 21-26. While this deposition testimony was not presented in Appellant's Third Petition, Appellant fails to explain how any of Marc Digiacamo's testimony supports his good cause argument. The inclusion of this deposition testimony does not support his good cause arguments. It also does not alter the substance of Appellant's arguments related to good cause and a fundamental miscarriage of justice, which are repetitions of arguments raised in his Third Petition.

As discussed supra, Section I.B., this Court already determined that Appellant's second lineup Brady argument is without merit and cannot establish

good cause to overcome the mandatory procedural bars. When denying this claim from Appellant's Third Petition, this Court specifically stated:

> 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. 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 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 incourt 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.

XXII AA 4507-4508.

This Court also specifically noted that, in light of all the evidence, the second lineup would not have changed the outcome of 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 m 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.

XXII AA 4512.

As this Court has already held, Appellant fails to show that the State withheld material evidence related to the second photographic lineup. This Court has already found that Appellant's Brady arguments regarding the second photo lineup are not good cause to overcome the mandatory procedural bars. Therefore, the district court correctly found this Brady claim is barred by the law of the case and cannot establish good cause.

Appellant only relies on the new deposition testimony of Mr. Digiacomo to establish good cause. However, the deposition testimony does not change this Court's prior decision. During the deposition, Mr. Digiacomo testified that he was not present when Detective Prieto showed the second photo lineup to the eyewitnesses. XIV AA 2852-2853. He also testified that he learned of the second photo lineup in 2005, when during a pretrial interview some witnesses informed him they had been shown a second lineup that contained a photograph of Appellant. XIV AA 2858-2859. Mr. Digiacomo testified that the witnesses had not been asked to identify Appellant but rather another suspect, Richard Jacquan, in that lineup. XIV AA 2854-2869. Mr. Digiacomo's testimony also established that the defense was well-aware of the outcome of the second photo lineup and thus, it was not withheld. XIV AA 2896-2899.

Mr. Digiacomo's deposition testimony does not change the fact that this Court already determined that Appellant cannot show the State withheld material evidence with the second photo lineup. XXII AA 4507. This Court already held that the outcome of the second photo lineup was not withheld from Appellant—and Mr. Digiacomo's deposition testimony does nothing to change this fact. XXII AA 4507-4508. Therefore, the deposition testimony is not good cause to overcome the mandatory procedural bars.

/ / /

b. Alibi

Appellant also claims the State withheld information regarding his alleged alibi. AOB, at 26-31. Specifically, Appellant claims the State withheld: (1) the 911 call time, and (2) the impeachment material about Jeffrey Arbuckle. AOB, at 27-31. However, just like Appellant's Brady claims regarding the second photo lineup, this Court already determined Appellant's alibi claims are without merit. Therefore, as discussed supra, Section I.B., the instant claim is also barred by the law of the case doctrine.

First, when affirming the denial of Appellant's Third Petition, this Court specifically stated that Appellant failed to demonstrate the State withheld material evidence related to the 911 call:

> 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 7:08p.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).

XXII AA 4508-4509.

This Court also explained that Appellant cannot prove the 911 call was material evidence to support a Brady allegation:

> 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.

XXII AA 4509-4510.

Second, this Court also stated that the State did not withhold material impeachment evidence regarding Jeffrey Arbuckle:

> 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.

XXII AA 4510-4511.

As this Court has already held, Appellant fails to show that the State withheld material evidence related to Appellant's alleged alibi. XXII AA 4508-4511. Mr.

Digiacomo's deposition testimony does nothing to change this. In fact, Mr. Digiacomo testified that he encourages the police to investigate a potential alibi, and that he would not prosecute a suspect who had a valid alibi. XIV AA 2923. He also testified that there was nothing reliable about Appellant's alleged alibi. XIV AA 2980. This Court has already found that Appellant's arguments regarding his alibi are not good cause to overcome the mandatory procedural bars, and Mr. Digiacomo's deposition testimony does nothing to change this. Therefore, the district court correctly found Appellant's alibi claim is barred by the law of the case, and Appellant cannot establish good cause to overcome the mandatory procedural bars.

II. THIS COURT HAS ALREADY DETERMINED THAT APPELLANT CANNOT DEMONSTRATE THAT HE IS ACTUALLY INNOCENT

Appellant claims that this Court should hear his claims on the merits because he is actually innocent. AOB, at 57-64. Specifically, Appellant claims he is actually innocent based upon his "solid alibi," the fact the victims' identifications are not reliable, and the State's other evidence of guilt "was weak." AOB, at 60-64.

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 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, 513 U.S. at 324, 115 S. Ct. at 865). "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.

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).

Here, Appellant has provided no new evidence in support of his claim of actual innocence. Appellant cannot establish he is actually innocent because he is not alleging newly discovered facts. Appellant even concedes that this Court has already rejected Appellant's innocence arguments based on his alibi. Appellant

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. Appellant has failed to demonstrate that had such evidence been introduced at trial, there is a reasonable probability of a different result. As this Court has already found, Appellant 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.

As discussed supra, Section I.B., Appellant simply re-raises the same arguments presented in his Third Petition and these arguments are barred by the law of the case doctrine. Appellant repeats his argument that he has demonstrated a fundamental miscarriage of justice because he is actually innocent. AOB, at 57-60. On appellate review of the denial of his Third Petition, this Court rejected this exact same claim, stating that Appellant failed to make a colorable showing of actual innocence. XXII AA 4511-4512. Regarding Appellant's actual innocence claim based on his alibi, this Court specifically stated:

> 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 m 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.

XXII AA 4512.

Therefore, as this Court has already held, Appellant cannot demonstrate he is actually innocent. This Court has already determined that Appellant's alleged "alibi" does not demonstrate factual innocence and that there was overwhelming evidence of Appellant's guilt. XXII AA 4511-4512. As such, this Court has already determined that Appellant's actual innocence claim is without merit and is therefore barred by the law of the case doctrine.

III. THERE IS NO REASON FOR THIS COURT TO RECONSIDER ITS DECISION IN BROWN V. McDANIEL

Appellant's final contention is that this Court should reconsider its decision in Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014). AOB, at 66-67. Appellant has failed to even put forth one reason why this Court should reconsider

its decision, and simply says it was "incorrectly decided." AOB, at 67. It is improper for Appellant to merely refer this Court to its previous arguments instead of properly briefing the issues on appeal. Maresca v. State, 103 Nev. 669, 673, 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"); Mack v. State, 410 P.3d 981, 4 (2018), 2018 WL 366896, No. 69225, Jan. 10, 2018 (unpublished disposition).

The Brown Court's decision was hardly groundbreaking. In fact, the Nevada Supreme Court's stance toward a petitioner's right—or lack thereof—to assistance of post-conviction counsel for non-capital prisoners has been consistent. See McKague v. Warden, 112 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996) (concluding, "there is no right to effective assistance of counsel, or to counsel at all, in post-conviction proceedings."). The Brown Court rejected the petitioner's assertion "that the ineffective assistance of his prior post-conviction counsel provide[d] cause and prejudice to excuse his failure to comply with Nevada's procedural rules governing post-conviction habeas petitions." 130 Nev. at 569, 331 P.3d at 870. In so doing, the Court reiterated that a claim of ineffective assistance of post-conviction counsel does not constitute good cause for overcoming post-conviction procedural bars, reasoning, "there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and where

there is no right to counsel there can be no deprivation of effective assistance of counsel." Id. (internal quotations and citations omitted).

In the instant appeal, Appellant simply states that he "maintains *Brown* was incorrectly decided and intends to preserve the issue in a diligent manner." AOB, at 67. Appellant does not even address the merits of Brown or discuss why this Court's ruling in Brown was wrong. Appellant even concedes that this Court rejected Appellant's Brown argument in his prior appeal. AOB, at 67; XXII AA 4512-4513. In affirming the denial of his Third Petition, this Court declined to overrule this precedent, stating that "appellant has not demonstrated compelling reasons to overturn *Brown* and deny his request." XXII AA 4513. Therefore, this claim is barred by the law of the case doctrine, and Appellant cannot establish a reason why this Court should reconsider its decision in Brown.

CONCLUSION

Wherefore, the State respectfully requests that the district court's denial of Appellant's Fourth Petition for Writ of Habeas Corpus (Post-Conviction) be AFFIRMED.

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Dated this 17th day of August, 2021.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,213 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 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 that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of August, 2021.

Respectfully submitted

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 17, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JEREMY C. BARON
Assistant Federal Public Defender

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

TP/Brianna Stutz/ed