

IN THE NEVADA SUPREME COURT

Electronically Filed
Sep 30 2021 12:05 p.m.
Elizabeth A. Brown
Clerk of 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 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

Argument	1
I. Law of the case shouldn't apply because Mr. Slaughter is relying on substantial new evidence.	1
II. Law of the case shouldn't apply because the Court's prior decision was clearly erroneous and manifestly unjust.....	6
III. Law of the case shouldn't apply because Mr. Slaughter is innocent.....	7
IV. The Court should reconsider its decision in <i>Brown v. McDaniel</i>	9
Conclusion.....	9

TABLE OF AUTHORITIES

Federal Cases

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	1
<i>United States v. Bundy</i> , 968 F.3d 1019 (9th Cir. 2020)	4

State Cases

<i>Brown v. McDaniel</i> , 130 Nev. 565, 331 P.3d 867 (2014)	9
<i>Hsu v. County of Clark</i> , 123 Nev. 625, 173 P.3d 724 (2007)	6
<i>Maresca v. State</i> , 103 Nev. 669, 748 P.2d 3 (1987)	7
<i>Rippo v. State</i> , 134 Nev. 411, 423 P.3d 1084 (2018)	1

ARGUMENT

Mr. Slaughter has presented meritorious claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and has demonstrated his innocence: the prosecution withheld substantial evidence undercutting the crucial eyewitness identifications and establishing Mr. Slaughter's alibi. Although the Court previously rejected these arguments in Mr. Slaughter's 2018 appeal, it should take a fresh look at these issues, especially following Mr. Slaughter's deposition of the lead prosecutor, Marc DiGiacomo.

The State's answering brief invokes the law of the case doctrine. As Mr. Slaughter's opening brief argues at length, there are exceptions to that doctrine that apply in this appeal. The State fails to substantially engage with those arguments, instead preferring to simply block-quote the Court's prior opinion. The Court should reverse.

I. Law of the case shouldn't apply because Mr. Slaughter is relying on substantial new evidence.

The law of the case doctrine generally requires courts to abide by their previous rulings. But the Court may revisit an earlier decision if a litigant relies on "substantially new or different evidence" in a new appeal. *Rippo v. State*, 134 Nev. 411, 428, 423 P.3d 1084, 1101 (2018). Here,

Mr. Slaughter maintains he has good cause to raise his *Brady* claims involving the second photo lineup and his alibi in an otherwise untimely and successive petition. To that end, he's currently relying on substantial new evidence—Mr. DiGiacomo's deposition testimony—that wasn't part of the record in the 2018 appeal. The Court should review Mr. DiGiacomo's deposition and reconsider its prior decision with respect to the second photo lineup and the alibi. *See* Opening Brief at 38-45.

The State disagrees on both points. In its view, the law of the case doctrine precludes reconsideration of these issues. The Court should reject that position.

Starting with the second photo lineup, the State argues Mr. DiGiacomo's "deposition testimony does not change this Court's prior decision" regarding the lineup. Answering Brief at 30. According to the State, the Court "already held that the outcome of the second photo lineup was not withheld from" Mr. Slaughter, and it also determined the outcome wasn't "material." *Id.* Thus, the State concludes, law of the case still applies.

This cursory reasoning fails to persuade. The Court's prior decision mistakenly understood the prosecution's *Brady* obligations and mistakenly underplayed the lineup's significance; it therefore reached a

manifestly unjust result. *See* Opening Brief at 45-52. Although the State disclosed the fact the second photo lineup *existed*, it failed to disclose *its results*. Indeed, whenever the defense said it suspected the eyewitnesses had failed to identify Mr. Slaughter from the second photo lineup, Mr. DiGiacomo made a point to *dispute* that inference. *See, e.g.*, IV.App.675. In his deposition, Mr. DiGiacomo admitted he didn't tell the defense about the lineup's outcome. *See, e.g.*, XIV.App.2886; *contra* Answering Brief at 30 (incorrectly stating otherwise). Meanwhile, Mr. DiGiacomo acknowledged he was concerned the information would hurt his case, which tends to bolster its materiality. XIV.App.2909-11, 2973. The State's brief declines to address these points. Because the Court reached an incorrect decision in the 2018 appeal, and because Mr. Slaughter now has substantial new evidence supporting his *Brady* claim, the Court should revisit its prior ruling.

Meanwhile, the Court should apply a law of the case exception when a litigant develops substantial new evidence proving a prosecutor made a conscious decision not to provide the defense with exculpatory information. *See* Opening Brief at 39. As part of its supervisory powers, the Court has a duty to ensure the State is fully complying with its *Brady*

obligations. *Cf. United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020). If the Court erroneously rejects a *Brady* claim, but if a petitioner then develops additional proof the prosecution made a bad faith decision to withhold favorable evidence, then the Court should retain the authority to depart from law of the case. That situation applies here, and the State doesn't address this argument.

In addition, Mr. DiGiacomo's deposition testimony raises substantial factual issues about what exactly happened when the witnesses saw the second photo lineup, and what exactly Mr. DiGiacomo did after he learned about this lineup. *See* Opening Brief at 39-43. In short, the deposition produced serious factual disputes, and a hearing would be appropriate to resolve those disputes. The State doesn't address this argument, either. The Court should therefore decline to apply law of the case and should revisit the second photo lineup.

Separately, Mr. Slaughter raised a *Brady* claim regarding his alibi, and he maintains Mr. DiGiacomo's deposition provides further evidentiary support for that claim. The State disagrees. In its view, the Court already concluded Mr. Slaughter's "arguments regarding his alibi are not good cause to overcome the mandatory procedural bars," and Mr.

DiGiacomo's deposition "does nothing to change this." Answering Brief at 34. Thus, the State insists, law of the case still applies.

Once again, this cursory reasoning fails to persuade. The Court's prior decision mistakenly concluded the defense had access to the relevant information, and it mistakenly downplayed the probative force of the alibi; it therefore reached a manifestly unjust result. *See* Opening Brief at 52-57. At the time of trial, the defense knew the police were dispatched on or about 7:11 p.m., but the defense didn't know the exact 911 call time. Mr. DiGiacomo used their ignorance to his advantage, convincing the trial court the defense could tell the jury only that the call took place at about 7:00 p.m. Mr. Slaughter can now prove the suspects left the crime scene at 7:08 p.m., based on new documents Mr. DiGiacomo admitted he never turned over to the defense before trial. XIV.App.2927. That shift in the timeline materially improves Mr. Slaughter's alibi.

Meanwhile, Mr. Slaughter previously developed reason to believe Mr. Arbuckle (an adverse trial witness regarding the alibi) might've previously called the police on him, which would demonstrate a motive for bias in the State's favor. But Mr. Slaughter was previously unable to prove this point. He can now verify this fact, based on new documents

Mr. DiGiacomo admitted he never turned over to the defense before trial. XIV.App.2964. Establishing this motive for bias materially improves Mr. Slaughter's alibi.

Yet again, the State's brief declines to address these arguments. Because the Court reached an incorrect decision in the 2018 appeal, and because Mr. Slaughter now has substantial new evidence proving the non-disclosures regarding his alibi, the Court should revisit its prior ruling regarding the alibi.

II. Law of the case shouldn't apply because the Court's prior decision was clearly erroneous and manifestly unjust.

A court should depart from law of the case when it previously reached "clearly erroneous" conclusions, and when those incorrect conclusions produced "manifest injustice." *Hsu v. County of Clark*, 123 Nev. 625, 631, 173 P.3d 724, 729 (2007) (cleaned up). With respect, the Court's prior opinion in the 2018 appeal was clearly erroneous and manifestly unjust. *See* Opening Brief at 45-57. It would therefore be inappropriate to apply law of the case here.

The State fails to address this position. Although it repeatedly block-quotes from the Court's prior opinion, it doesn't make any attempt

to undercut Mr. Slaughter's arguments about why the Court's earlier reasoning was incorrect. The Court should treat that failure as a waiver or a forfeiture. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); *see also* Answering Brief at 39 (citing *Maresca*).

III. Law of the case shouldn't apply because Mr. Slaughter is innocent.

The Court may decline to follow law of the case when a petitioner is innocent. Here, Mr. Slaughter maintains his innocence. The Court previously rejected his innocence argument, but because Mr. Slaughter is objectively correct about his innocence, the Court should give this issue a second look. *See* Opening Brief at 57-66.

The State insists the Court's previous decision was correct, but its reasoning is terse and unconvincing. In its view, Mr. Slaughter isn't trying to demonstrate factual innocence but is instead claiming "insufficient evidence of his guilt was presented at trial." Answering Brief at 37. That's not Mr. Slaughter's argument. He isn't claiming he's innocent because the State presented insufficient evidence to convict at trial; rather, Mr. Slaughter maintains he's innocent because he has new evidence that destroys the reliability of the purported eyewitness identifications, and

because he has new evidence that proves his alibi. *See* Opening Brief at 60-64. That's not a sufficiency argument, and it's unclear why the State says otherwise.

The State also suggests Mr. Slaughter is presenting "self-serving interpretations of the admitted surveillance video and witness credibility." Answering Brief at 37. But Mr. Slaughter included the surveillance stills along with his contemporaneous photos in the appendix, and it's obvious from a simple side-by-side comparison no reasonable juror could view the surveillance video as inculpatory evidence. *See* Opening Brief at 50. The State doesn't present a contrary argument. Meanwhile, it's unclear what the State is referencing when it mentions "witness credibility." Answering Brief at 37. Mr. Slaughter's innocence argument isn't merely an attack on the credibility of a witness the jury found believable: rather, his argument presents new evidence that undercuts the eyewitness identifications and proves his alibi.

In sum, the Court erroneously rejected Mr. Slaughter's innocence argument, and the State makes only a cursory effort to justify the Court's prior reasoning. The Court should apply a law of the case exception and reconsider Mr. Slaughter's innocence.

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

Mr. Slaughter maintains his position *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014), was incorrectly decided. The State faults Mr. Slaughter for not presenting a more detailed argument on that front. Answering Brief at 38-40. But Mr. Slaughter previously presented this purely legal argument in the 2018 appeal, and the Court rejected that argument. Nevertheless, Mr. Slaughter preserves his position that *Brown* was incorrectly decided.

CONCLUSION

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

Dated September 30, 2021.

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 1,656 words.

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

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

Dated September 30, 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 September 30, 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 Taleen Pandukht.

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