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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Rickie Slaughter,

Petitioner,

v.

Renee Baker, et al.,

Respondents.

Case No. 3:16-cv-00721-RCJ-WGC

Third amended petition

INTRODUCTION

The jury wrongfully convicted Rickie Slaughter because the State and his attorneys unconstitutionally prevented him from making two key points at trial.

The first point involved photographic lineups. The State accused Mr. Slaughter of entering Ivan Young's house, tying up Mr. Young and his friends and family, robbing or attempting to rob some of the victims, and shooting Mr. Young. Four victims purported to identify Mr. Slaughter from a photo lineup as one of the two perpetrators. The only reason those victims identified Mr. Slaughter is because the lineup was unduly suggestive and encouraged the victims to pick Mr. Slaughter. In fact, when the police showed the victims a *second* photo lineup with a *different*, non-suggestive photo of Mr. Slaughter, none of the victims identified Mr. Slaughter. That fact devastates the reliability of the victims' purported identifications. But the State failed to disclose this information to the defense—to the contrary, the prosecutor repeatedly misrepresented the results of the second photo lineup in open court, and the prosecutor misrepresented the results *again* at a federal deposition. Mr. Slaughter therefore wasn't able to establish a key point at trial that would've undermined the jury's confidence in the victims' identifications.

The second point involved Mr. Slaughter's alibi. Mr. Slaughter couldn't have been involved with the home invasion because he was halfway across town during the incident picking up his girlfriend, Tiffany Johnson, from work. Based on the 911 call logs, the perpetrators left the crime scene at about 7:08 p.m. Based on witness testimony, Mr. Slaughter picked up Ms. Johnson at about 7:15 p.m. Ms. Johnson's workplace was at least a 20-minute drive from Mr. Young's house. If Mr. Slaughter had been at the crime scene, at best he might've been able to get to Ms. Johnson's workplace by 7:28 p.m. (not including the time it would've taken him to drop off his co-conspirator, clean up himself and the car, and hide any evidence of the crime). But the State failed to disclose evidence memorializing the precise time of the 911 call

and once again made relevant misrepresentations about the timing in open court. In addition, defense counsel failed to introduce foundational information about the alibi timeline. Making matters worse, the attorneys insisted on calling a second alibi witness, notwithstanding Mr. Slaughter's objections that her testimony would be counterproductive. Thus, while Mr. Slaughter should've been able to present an airtight alibi to the jury, the State's incomplete disclosures and his attorney's mistakes made the alibi much less reliable than it would've otherwise been.

Mr. Slaughter's case is littered with additional errors. Defense counsel intended to introduce exculpatory evidence through multiple witnesses, including police officers, who never ended up testifying. Defense counsel assumed the State would present these witnesses, and the lawyers planned to elicit favorable testimony on cross-examination. But the State didn't call these witnesses, and the attorneys failed to subpoena them, so the defense was out of luck. That fundamental oversight deprived the jury of key information. For example, the State argued Mr. Slaughter drove a Ford Taurus to and from the incident, but one of the witnesses recalled the getaway car was a Pontiac Grand Am. For obvious reasons, the State didn't call that witness, and Mr. Slaughter's lawyers dropped the ball when they failed to subpoena her. In addition to failing to call certain witnesses, defense counsel was lackluster in their cross-examinations of the witnesses that the State did present. At the same time, defense counsel failed to object to numerous instances of prosecutorial misconduct. Finally, appellate counsel omitted two winning issues from Mr. Slaughter's appeal, wasting space on weaker issues instead.

For these reasons and others, the Court should issue Mr. Slaughter a writ of habeas corpus.

PROCEDURAL HISTORY

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

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

- Ivan Young. Mr. Young operated an under-the-table car detailing operation from his garage. He was working in the garage when the culprits first approached him. After bringing Mr. Young into his house and tying him up, the robbers demanded Mr. Young tell them where he kept his money and drugs. Mr. Young repeatedly refused to cooperate, and one of the culprits shot a gun toward the ground near him. The bullet fragments hit Mr. Young in the face, but Mr. Young survived.
- Jennifer Dennis. Ms. Dennis is Mr. Young's wife. She was in the house, and the robbers tied her up during the incident.
- A.D. A.D. is Ms. Dennis's son. He was also in the house, and the robbers tied him up as well.
- J.P. J.P. is Mr. Young and Ms. Dennis's nephew. He was also in the house, and the robbers tied him up as well.
- Ryan John. Mr. John was standing outside his girlfriend's house (near Mr. Young's house) at the time of the incident. While he was outside, someone called him over to Mr. Young's house. He walked over to the house, where the perpetrators apprehended him and tied him up. One of the culprits stole his ATM card and demanded his pin number. Mr. John later heard someone had used his ATM card at a 7-Eleven.
- Jermaun Means. Mr. Means wanted Mr. Young to paint his car's rims, and he went over to Mr. Young's house to give him money. When he approached

the door, the robbers dragged him inside, tied him up, and took his money. His girlfriend, Destiny Waddy, was waiting in the car; she was unaware the alleged crimes were taking place.

At first, the police had few leads. But two days after the incident, a confidential informant contacted a detective. The informant had "been providing assistance to the [police] in return for favorable consideration for outstanding warrants." ECF No. 15-8 (PEx. 8) at 6.[1] This informant claimed to have "overheard a subject named Ricky Slaughter bragging about having committed a robbery which was being reported on TV. This robbery was the one which had occurred on Glory View on June 26." *Id.*

The police prepared a suggestive photo lineup with Mr. Slaughter's picture. *See* Ground One, *infra*. After showing it to the six victims and Ms. Waddy, four of the victims identified Mr. Slaughter as one of the perpetrators.

B. Mr. Slaughter mistakenly pleads guilty.

The police arrested Mr. Slaughter on June 28, 2004. ECF No. 15-10 (PEx. 10). The State issued a criminal complaint against Mr. Slaughter on July 1, 2004. ECF No. 15-11 (PEx. 11). The State repeatedly amended the complaints and informations. ECF Nos. 15-17, 15-18, 15-21, 15-22, 15-32, 16-8 (PExs. 17, 18, 21, 22, 32, 50).

Mr. Slaughter's attorney filed a motion to reveal the identity of the confidential informant in justice court on August 17, 2004. ECF No. 15-1 (PEx. 1) at 2. The State opposed the motion, and the court denied it on September 13, 2004. *Id.* at 3.

The justice court held a preliminary hearing on September 21, 2004, based on the second amended criminal complaint. ECF No. 15-19 (PEx. 19). Jeff Rue from the

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[1] Pin citations to previously filed exhibits refer to the page numbers generated in the header by CM/ECF upon filing. Pin citations to newly filed exhibits refer to the documents' internal numbering schemes. Mr. Slaughter expects the State will ultimately file new exhibits from the new state court proceedings Mr. Slaughter recently instituted. *See* L.S.R. 3-3(a).

Clark County public defender's office represented Mr. Slaughter. The court dismissed one of the charges but bound Mr. Slaughter over for trial on the other counts.

The state district court arraigned Mr. Slaughter on October 5, 2004. ECF No. 15-1 (PEx. 1) at 5. Mr. Slaughter pled not guilty and invoked his state-law right to a speedy trial. *Id.*

Mr. Rue filed a motion to withdraw due to a conflict of interest on October 12, 2004. ECF No. 15-25 (PEx. 25). The court appointed Paul Wommer to replace Mr. Rue on October 19, 2004. ECF No. 15-27 (PEx. 27).

Mr. Slaughter submitted a proper person motion to dismiss counsel on or about December 7, 2004. ECF No. 15-33 (PEx. 33). He explained Mr. Wommer had failed to file any motions on his behalf or investigate his case, and he described his poor relationship with Mr. Wommer. He also explained he had submitted a bar complaint against Mr. Wommer.

The court held a hearing regarding Mr. Slaughter's motion on December 13, 2004. ECF No. 15-34 (PEx. 34). (The transcript for this proceeding is incomplete, apparently due to a court order. *See* ECF No. 15-35 (PEx. 35).) The court conducted a *Faretta* canvass and allowed Mr. Slaughter to represent himself, with Mr. Wommer as stand-by counsel.

Mr. Slaughter filed a variety of proper person pre-trial motions, including a motion to inspect the original photo lineups. ECF No. 16-1 (PEx. 43). He asked the court to issue an order requiring the State to preserve "any and all original photo lineups containing an image of" Mr. Slaughter. *Id.* at 5. He also asked the court to allow him to view the original lineups that the witnesses used to identify Mr. Slaughter. *Id.* at 6. The State filed a response, asserting that it had already preserved the lineups. ECF No. 16-2 (PEx. 44).

Mr. Slaughter also filed a motion for the release of the identity of the confidential informant. ECF No. 16 (PEx. 42). The State opposed that motion. ECF No. 16-

4 (PEx. 46). In his reply in support of that motion (filed March 18, 2005), Mr. Slaughter explained the State had shown the witnesses different photo lineups on different occasions. Some of the witnesses identified Mr. Slaughter's picture in one of the lineups (the suggestive lineup). But none of the witnesses identified Mr. Slaughter's picture in a second, non-suggestive photo lineup. ECF No. 16-7 (PEx. 49) at 5. Relatedly, Mr. Slaughter filed a motion for a continuance of the trial date. ECF No. 16-12 (PEx. 54). He explained he was planning to seek a court order requiring the police to disclose his mug shots. *Id.* at 5. His needed his mug shots to prove the police had used one of his photos in that second, non-suggestive lineup. *Id.*

Before trial, Mr. Slaughter and the State negotiated a guilty plea. ECF No. 16-13 (PEx. 55). As part of the deal, Mr. Slaughter would plead guilty to four counts in a fourth amended information. The State agreed to seek a sentence of life with the possibility of parole after fifteen (15) years on the most serious count and stipulated that life without parole was not an available sentence for that count. *Id.* at 2. The State would not oppose concurrent time between counts. *Id.*

The court conducted a plea colloquy on April 4, 2005. ECF No. 16-14 (PEx. 56). The prosecutor summarized the outcome of the deal as "either a 15 to life or a 15 to 40, depending on the Court's decision at sentencing." *Id.* at 26. Mr. Slaughter agreed his understanding of outcome was "the decision's between 15 to 40 and 15 to life." *Id.* The State accepted Mr. Slaughter's guilty plea. *Id.* at 36.

Mr. Slaughter filed a request for an amended plea agreement on or about June 27, 2005, and a motion to withdraw his plea on or about August 8, 2005. ECF Nos. 16-15, 16-17 (PExs. 57, 59). At sentencing, the prosecutor suggested Mr. Slaughter was concerned the State would not follow the negotiations at sentencing and would argue for a stiffer sentence. The prosecutor said Mr. Slaughter was also concerned the court might not follow the negotiations and might impose a harsher sentence,

regardless of what the State argued. The prosecutor said to the court, "It is our understanding you have every intention . . . to follow those negotiations so that he's not looking at doing more than the 15 to either 40, if he gets that, or life if we get what we want." ECF No. 16-18 (PEx. 60) at 6.

Mr. Slaughter expressed confusion about the manner in which counts run concurrently if certain counts have consecutive weapons enhancements. ECF No. 16-18 (PEx. 60) at 7. He asked whether, if the court ran all the counts concurrently, he would receive a total sentence of 15 to 40 years or 15 years to life. *Id.* The court agreed he would and said it was inclined to follow the negotiations. *Id.* at 7-8.

As promised, the prosecutor argued for a total sentence of 15 to life. As for the attempted murder charge, she represented Mr. Slaughter did not shoot directly at Mr. Young—instead, he "shot into the floor [and] that was the ricochet that went up into [Mr. Young's] face." ECF No. 16-18 (PEx. 60) at 10.

The court followed the negotiations and imposed the following sentence:

> Count 1: A term of imprisonment of 90 months to 240 months, plus an equal and consecutive term of imprisonment of 90 months to 240 months.
>
> Count 2: A term of imprisonment of 72 months to 180 months, plus an equal and consecutive term of imprisonment of 72 months to 180 months, concurrent with Count 1;
>
> Count 3: A term of imprisonment of life with the possibility of parole after 15 years, concurrent with Counts 1 and 2;
>
> Count 4: A term of imprisonment of life with the possibility of parole after five years, plus an equal and consecutive term of imprisonment of life with the possibility of parole after five years, concurrent with Counts 1, 2 and 3.

ECF No. 16-18 (PEx. 60) at 15-16; *see also* ECF No. 16-19 (PEx. 61). As the court explained, "Effectively Mr. Slaughter, you have a life sentence with a minimum of 15 years, which is what I believe you bargained for." ECF No. 16-18 (PEx. 60) at 16-17.

C. Mr. Slaughter vacates his guilty plea.

Mr. Slaughter filed a pro se post-conviction petition for a writ of habeas corpus on or about August 7, 2006. ECF No. 16-22 (PEx. 64). As his petition explained, he was initially under the impression he would be eligible for parole to the streets within 15 years. *Id.* at 8-10. After conducting additional research, he had become concerned the State's deal would not actually allow for that. He had filed his pre-sentencing motion to withdraw his guilty plea because of that concern. Prior to sentencing, the State reassured Mr. Slaughter the deal would indeed allow him the possibility of release after 15 years. But just as he had feared, the Nevada Department of Corrections had structured his sentences in such a way that his minimum total sentence exceeded 15 years—contrary to the State's repeated assurances.

The State filed an opposition to the petition on November 7, 2006. ECF No. 16-31 (PEx. 73). Once again, it claimed Mr. Slaughter would have the opportunity to be released after 15 years. *Id.* at 6. Mr. Slaughter filed a reply, where he explained again that he would not. ECF No. 16-32 (PEx. 74) at 7.

The court held a hearing on the petition on December 18, 2006. ECF No. 16-34 (PEx. 76). Mr. Slaughter raised his concerns again, but the court disagreed with his understanding of his sentencing structure. As the court put it, "whatever the prison may have told you about the sentence, I know what the sentence is." *Id.* at 13. The court denied the petition. *Id.* at 17; *see* ECF No. 16-36 (PEx. 78).

Mr. Slaughter appealed. Ex. 77. The Nevada Supreme Court issued an order affirming in part, vacating in part, and remanding on July 24, 2007. ECF No. 16-40 (PEx. 82). The opinion explained the problem with Mr. Slaughter's sentence structure. Under Nevada law (NRS 212.1312), inmates serving multiple concurrent sentences cannot parole off any of their concurrent sentences until they are eligible for parole on the longest concurrent sentence. Mr. Slaughter was serving four concurrent sentences, but three of those sentences involved consecutive weapons enhancements:

Count 1: 90 to 240 months, plus an equal and consecutive 90 to 240 months for the weapons enhancement.

Count 2: 72 to 180 months, plus an equal and consecutive 90 to 240 months for the weapons enhancement.

Count 3: 15 years to life.

Count 4: 5 years to life, plus an equal and consecutive 5 years to life for the weapons enhancement.

Even though all four counts ran concurrently with each other, the consecutive weapons enhancements created a wrinkle. Mr. Slaughter was not eligible to parole off the underlying sentences in counts 1, 2, and 4, and onto the consecutive weapons enhancements in those counts, until he was eligible for parole on his longest concurrent sentence: the 15-to-life sentence on Count 3. Only after those 15 years passed would Mr. Slaughter have the chance to begin serving his sentences on the consecutive weapons enhancements, the longest of which required a minimum of 90 months (7.5 years) before parole eligibility. That meant Mr. Slaughter's minimum total sentence was 22.5 years—not the 15 years he was promised.

The Nevada Supreme Court remanded the case for the trial court to answer two questions: (1) whether the State had, in fact, promised Mr. Slaughter a minimum 15-year total sentence, and (2) whether it was legally possible for the prison system to structure his sentences such that he would receive a minimum 15-year total sentence. ECF No. 16-40 (PEx. 82) at 8.

The Nevada Attorney General's office filed a response to the Nevada Supreme Court's order on November 9, 2007. ECF No. 17-4 (PEx. 87). The response explained it wasn't legally possible to structure Mr. Slaughter's sentences in a way that would give him a minimum total 15-year sentence.

Mr. Slaughter filed a brief in support of his request to withdraw his guilty plea on or about March 28, 2008. ECF No. 17-6 (PEx. 89). He described the prosecutors'

misrepresentation regarding his parole eligibility, which he argued rendered his plea unknowing and involuntary. The State filed an opposition on April 18, 2008. ECF No. 17-8 (PEx. 91). According to the opposition, the prosecutors didn't promise Mr. Slaughter he would have a minimum total 15-year sentence. Nonetheless, the State said it was amenable to the court vacating the convictions for the weapons enhancements, which would give Mr. Slaughter a minimum total 15-year sentence. *Id.* at 10. Mr. Slaughter filed a proper person reply in support of his motion, again arguing the proper remedy was to allow him to withdraw his plea. ECF No. 17-9 (PEx. 92).

The court held an evidentiary hearing on June 19, 2008. ECF No. 17-11 (PEx. 94). It ultimately found Mr. Slaughter's plea was knowing and voluntary. It also held the prison system was incorrectly interpreting Nevada law. According to the court, the prison had the authority to parole Mr. Slaughter from his underlying offenses to his enhancements on Counts 1, 2, and 4, before he was eligible for parole on Count 3. The court denied Mr. Slaughter's motion. ECF No. 17-13 (PEx. 96).

Mr. Slaughter appealed the decision. ECF No. 17-16 (PEx. 99). The Nevada Supreme Court issued an order of reversal and remand on March 27, 2009. ECF No. 17-18 (PEx. 101). It held the prison system had properly structured Mr. Slaughter's sentences—under Nevada law, he couldn't parole off his underlying sentences and onto the weapon enhancements on Counts 1, 2, and 4, until he was eligible for parole after 15 years on Count 3. *Id.* at 6-7. The Nevada Supreme Court also concluded Mr. Slaughter didn't knowingly and voluntarily enter his plea because of the parties' misapprehension regarding the minimum total time Mr. Slaughter would have to serve before he became eligible for parole to the streets. *Id.* at 7-9. As a result, the court allowed Mr. Slaughter to withdraw his guilty plea. *Id.* at 9.

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

On remand, Mr. Slaughter was initially represented by Susan Bush and Patrick McDonald. The lawyers filed various pre-trial motions on behalf of Mr. Slaughter. Most significantly, counsel filed a motion to dismiss the case because the police failed to preserve exculpatory evidence. ECF No. 18 (PEx. 113). This motion described how Detective Jesus Prieto had created a (suggestive) photo lineup including Mr. Slaughter's image on June 28, 2004. Detective Prieto showed versions of this lineup to the witnesses, and some of them identified Mr. Slaughter from the lineup. But someone from the police had created a *second* photo lineup. This second lineup apparently included a picture of the man the police suspected as Mr. Slaughter's co-defendant, but it *also* included a picture of Mr. Slaughter (a different picture than the one used in the first lineup). The police showed this lineup to all the victims, and the outcome wasn't clear, but the defense thought none of the witnesses identified Mr. Slaughter from this new lineup.

As the motion explained, the police had failed to preserve basic information regarding this lineup, including which officers administered the lineup to which victims, and when the viewings took place. ECF No. 18 (PEx. 113) at 6-7. Based on their failure to preserve evidence, the motion asked the court to either dismiss the case or exclude evidence relating to the first photo lineup and any ensuing identifications. ECF No. 18 (PEx. 113) at 8-14.

The State filed an opposition to that motion. ECF No. 18-2 (PEx. 115). It conceded the police had shown a second photo lineup to the victims, and that the second lineup included a picture of Mr. Slaughter. The State refused to admit none of the victims had identified Mr. Slaughter from that second photo lineup, although the State suggested Mr. Slaughter would be "free to cross-examine the witnesses on that fact." *Id.* at 3 n.1. Mr. Slaughter filed a reply in support of the motion. ECF No. 18-10 (PEx. 123).

The court held a hearing on pre-trial motions on December 1, 2009. ECF No. 18-13 (PEx. 126). With regard to the motion to dismiss, defense counsel explained the second photo lineup was "apparently shown to some or all of the alleged victims by whom, I'm not sure, when, I'm not sure, and what were the results, I'm not sure." *Id.* at 8. The prosecutor (Marc DiGiacomo) agreed the second lineup had been shown to the victims. *Id.* But Mr. DiGiacomo said it was a "giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups" (*id.* at 10), even though there was no indication any of the witnesses identified *anyone* from the second lineup. The prosecutor suggested the defense should simply cross-examine the detectives or the victims regarding that second lineup. *Id.* The court agreed, stating the defense "argument is sloppy bookkeeping by the police department, which as defense attorneys that is often times a line of questioning you pursue at trial." *Id.* at 12.

After a series of proper person attempts to dismiss his counsel, the court granted Mr. Slaughter's request for a new attorney on July 8, 2010. ECF No. 15-1 (PEx. 1) at 142. Osvaldo Fumo took over as counsel on July 15, 2010. *Id.* at 145.

Mr. Fumo filed a variety of pre-trial motions on Mr. Slaughter's behalf, including a motion to preclude the victims' identifications of Mr. Slaughter. ECF No. 18-22 (PEx. 135). The motion described the suggestive nature of the first photo lineup the police showed to the victims. The photograph the police used of Mr. Slaughter "stood out considerably compared to the other photographs due to a highlighted background, which was not present in the other photographs." *Id.* at 8. For that reason and others, the lineup was impermissibly suggestive, and it would violate due process if the court were to allow the victims to identify Mr. Slaughter at trial. The State filed oppositions to Mr. Fumo's motions, including the motion to suppress the identifications. It argued the lineup wasn't suggestive. ECF No. 18-25 (PEx. 138) at 5. Mr. Fumo filed a reply in support of that motion. ECF No. 18-29 (PEx. 142). The court held a hearing on the new set of motions on March 3, 2011. ECF No. 19-1 (PEx. 144).

Mr. Fumo requested the court conduct an evidentiary hearing on the motion to suppress the identifications. *Id.* at 9. The court rejected that proposal and denied all the motions, including the motion to suppress. *Id.* at 13.

Trial began on May 12, 2011, with two days of jury selection. ECF Nos. 20, 20-1, 20-2 (PExs. 155, 157, 158). Opening arguments took place on May 16, 2011, and the trial continued for another five days. ECF Nos. 21, 21-3, 22-1, 22-8, 23, 23-4 (PExs. 162, 165, 167, 174, 175, 179). The jury found Mr. Slaughter guilty on all the charges on May 20, 2011. ECF No. 23-5 (PEx. 180).

Mr. Slaughter filed a proper person motion to dismiss counsel and for a new trial on or about June 15, 2011. ECF No. 23-9 (PEx. 184). The court allowed Mr. Slaughter to once again proceed in proper person. ECF No. 15-1 (PEx. 1) at 173. He filed another proper person motion for a new trial on or about November 18, 2011. ECF No. 24 (PEx. 187). The State opposed the second motion (ECF No. 24-1 (PEx. 188)), and Mr. Slaughter filed a reply in support of the motion (ECF No, 25 (PEx. 189)). The court held a hearing on May 17, 2012, and denied the motion. ECF No. 25-1 (PEx. 190).

The sentencing hearing took place on October 16, 2012. ECF No. 25-9 (PEx. 198). The court imposed the following terms of imprisonment:

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

ECF No. 25-10 (PEx. 199).

E. Mr. Slaughter pursues a direct appeal.

Mr. Slaughter filed a notice of appeal on or about October 24, 2012. ECF No. 25-11 (PEx. 200). William Gamage represented Mr. Slaughter on appeal. After repeated delays and motions for extensions of time, Mr. Gamage filed an opening brief on September 4, 2013. It included the following issues:

1. The identifications must be excluded because the photo lineup was unnecessarily suggestive, and the identifications lack reliability.

   A. The use of the unnecessarily suggestive photo lineup was unconstitutional.

   B. The identifications were not sufficiently reliable to warrant admission.

   C. The inclusion of the identifications is harmful error.

2. The authentication of the surveillance video was insufficient and, therefore, inadmissible.

3. The probative value of the video is outweighed by the prejudice to appellant, confusion of the issues, and misleading the jury.

4. Numerous instances of prosecutorial misconduct rise to a constitutional level and warrant reversal.

A. Prosecutorial misconduct related to the 7-Eleven video.

B. Misconduct during cross-examination of Ms. Westbrook.

C. Misconduct related to 'that alone would make him guilty' argument.

D. Misconduct related to 'I got to tell appellant this, too…' argument.

E. Misconduct related to 'doing the job' argument.

ECF No. 25-22 (PEx. 212).

The State filed an answering brief on October 10, 2013 (ECF No. 26 (PEx. 213)), and Mr. Gamage filed a reply on December 2, 2013 (ECF No. 26-5 (PEx. 218)). The Nevada Supreme Court issued an order of affirmance on March 12, 2014. ECF No. 26-7 (PEx. 220). Remittitur issued on April 3, 2014. ECF No. 26-10 (PEx. 223). Mr. Gamage filed a petition for a writ of certiorari with the United States Supreme Court, which the Court denied on October 15, 2014. ECF Nos. 26-11, 26-12 (PExs. 224, 225).

F. Mr. Slaughter pursues a pro se state post-conviction petition.

Mr. Slaughter filed a proper person post-conviction petition for a writ of habeas corpus on or about March 25, 2015. He raised the following claims:

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.

ECF No. 26-13 (PEx. 226); *see also* ECF No. 26-14 (PEx. 227) (supporting exhibits).

The State filed a response to the petition on June 2, 2015. ECF No. 26-16 (PEx. 229). The court held a brief hearing on June 18, 2015, where it discussed its reasons for denying the petition. ECF No. 26-17 (PEx. 230). Mr. Slaughter mailed a reply in support of his petition after the hearing, unaware that the court had already denied the petition. ECF No. 27 (PEx. 231); *see also* ECF No. 27-3 (PEx. 234) at 11-12. The court issued a notice of entry of a written order denying the petition on July 24, 2015. ECF No. 27-1 (PEx. 232).

Mr. Slaughter filed a notice of appeal on or about July 30, 2015. ECF No. 27-2 (PEx. 233). He submitted a proper person opening brief on or about February 8, 2016. ECF No. 27-3 (PEx. 234). The Nevada Supreme Court issued an order of affirmance on July 13, 2016. ECF No. 27-13 (PEx. 244). Remittitur issued on August 8, 2016. ECF No. 27-14 (PEx. 245).

G. Mr. Slaughter pursues a second pro se state post-conviction petition.

Mr. Slaughter filed a second post-trial post-conviction petition for a writ of habeas corpus in state court on or about February 12, 2016. This petition included the following claims:

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.

ECF No. 27-4 (PEx. 235); *see also* ECF No. 27-5 (PEx. 236) (supporting exhibits).

The State filed a response on April 6, 2016. ECF No. 27-8 (PEx. 239). The court issued a notice of entry of a written order denying the petition on June 13, 2016. ECF No. 27-11 (PEx. 242).

Mr. Slaughter filed a notice of appeal on or about June 22, 2016. ECF No. 27-12 (PEx. 243). The Nevada Supreme Court transferred the case to the Nevada Court of Appeals on February 16, 2017. ECF No. 27-15 (PEx. 246). The Nevada Court of Appeals issued an order of affirmance on April 19, 2017. ECF No. 27-16 (PEx. 247). Remittitur issued on May 17, 2017. ECF No. 27-17 (PEx. 248).

H. Mr. Slaughter pursues a federal post-conviction petition.

Mr. Slaughter mailed his proper person petition for a writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 on or about August 16, 2016. ECF No. 1-1. The Court granted Mr. Slaughter's motion for counsel and appointed the Federal Public Defender, District of Nevada, to represent him on December 20, 2016. ECF No. 5.

Mr. Slaughter filed an amended petition on August 2, 2017. ECF No. 14. He also filed a motion for discovery (ECF No. 28), which the Court granted (ECF No. 31). In light of the information received in discovery, Mr. Slaughter ultimately filed a second amended petition. ECF No. 54. Mr. Slaughter also filed a second motion for discovery (ECF No. 40), which the Court granted (ECF No. 52). In light of the information received in the second round of discovery, Mr. Slaughter is now filing this third amended petition.

Mr. Slaughter anticipates additional factual development may be useful before the Court resolves some of the claims in this petition on the merits. However, Mr. Slaughter has determined it would be more efficient not to request additional discovery at this point. In particular, Mr. Slaughter is aware of the Court's desire to "move forward with as much alacrity as possible." ECF No. 52 at 9 n.5; *see also* ECF No. 58 at 1. Thus, Mr. Slaughter is declining to file a third discovery motion at this point. Rather, Mr. Slaughter anticipates filing a motion for an evidentiary hearing at a later stage of this case. However, if the Court prefers the parties engage in additional

factual development now, rather than later, Mr. Slaughter would be willing to file a third motion for discovery and/or a motion for an evidentiary hearing now.

I. Mr. Slaughter pursues a third state post-conviction petition.

Within a year of this Court's order granting Mr. Slaughter's first motion for discovery, Mr. Slaughter filed a new, counseled state post-conviction petition. 11/20/18 Petition. The State filed a motion to dismiss (12/19/18 Response), and Mr. Slaughter filed an opposition (1/3/19 Opposition). The court held argument on the motion to dismiss on March 7, 2019. Mr. DiGiacomo appeared on behalf of the state. The parties discussed the issues involving the second photo lineup. Mr. DiGiacomo stated, "I would dispute with the defense that Jessie Prieto saying no one picked out Rickie Slaughter from the second lineup means that none of the victims recognized that Rickie Slaughter was in the photo lineup." Tr. 3/7/19 at 10. Mr. DiGiacomo continued, "the reason this came up and the defense even knew about it was because the victims themselves told the State, hey, there's a second photo lineup and Rickie was in it, but . . . we couldn't identify the second suspect." *Id.* In response, undersigned counsel stated he was unaware of any evidence like that in the record, and "if the State wants to come bring in additional evidence about that, then we need a hearing to resolve the factual dispute." *Id.* at 13. The court stated it intended to deny the petition. *Id.* at 15.

Soon after, this Court granted Mr. Slaughter's second motion for discovery and allowed him to depose Mr. DiGiacomo. ECF No. 52. Mr. Slaughter filed a corresponding motion in state court asking the court to wait before resolving the petition. 4/4/19 Motion. Mr. Slaughter proposed the court stay the case until after the deposition and then allow Mr. Slaughter to supplement his petition. The court didn't resolve that motion and instead issued a formal written order denying the petition. 4/15/19 Notice of Entry. Mr. Slaughter appealed. 5/6/19 Notice of Appeal. The appeal remains pending.

STATEMENT REGARDING 28 U.S.C. § 2254(d)

With respect to each ground for relief in this petition, Mr. Slaughter alleges any rulings from the Nevada Supreme Court denying him relief on the merits are (or would be) (1) contrary to, and/or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; and/or (2) are (or would be) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Mr. Slaughter also asserts for the purposes of further review that the standard of review in 28 U.S.C. § 2254(d) violates the U.S. Constitution, specifically the Suspension Clause (Article One, Section Nine, clause two); fundamental principles of separation of powers (Articles One, Two, Three); and the ban on cruel and unusual punishments (Amendment Eight). *But see Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007) (rejecting Suspension Clause and separation of powers arguments).

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.

Statement regarding exhaustion:

Mr. Slaughter exhausted this claim (or a similar claim) on direct appeal. ECF Nos. 25-23, 26-5, 26-7 (PExs. 212, 218, 220). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

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 the victims would mistakenly pick Mr. Slaughter's photograph from the lineup. Meanwhile, the victims' identifications weren't otherwise reliable. Therefore, 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* ECF No. 15-9 (PEx. 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, and 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.*, ECF No. 41-5 (PEx. 253) at 36-39, 194-97, 207-11. 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* ECF No. 18-29 (PEx. 142) at 38; *see also* ECF No. 41-5 (PEx. 253) at 43-49; ECF No. 50-5 (PEx. 258). 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 color differences. *See, e.g.*, ECF No. 41-5 (PEx. 253) at 86-88. 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 weren't otherwise reliable.

The suggestive lineup rendered the victims' identifications untrustworthy, and the circumstances don't suggest 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 he "couldn't really see good" at the time the police showed him the lineup. ECF No. 21 (PEx. 162) at 17 (Tr. at 60). That's not surprising, since he received facial wounds and 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 15 (Tr. 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. ECF No. 15-4 (PEx. 4) at 3. Then, at the preliminary hearing, he stated 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. ECF No. 15-19 (PEx. 19) at 6-9 (Tr. 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 9-10 (Tr. at 28-29). Then, at trial, he testified both suspects were wearing hats and wigs, and they both had Jamaican accents. ECF No. 21 (PEx. 162) at 15 (Tr. at 49). His ever-changing description of the suspects suggests he couldn't remember what they looked like.

In addition, Mr. Young claimed at the preliminary hearing that he had met Mr. Slaughter before the incident (*see* ECF No. 15-19 (PEx. 19) at 7 (Tr. at 19)), but he didn't report that fact to the police (*see, e.g.*, ECF No. 15-4 (PEx. 4) at 3; ECF No. 26-14 (PEx. 227) at 7-8). The fact that he didn't initially claim to have known one of the assailants suggests his memory was altered by the suggestive lineup.

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

2. J.P.

J.P. was a 12-year-old child who was put through a traumatic experience during the incident. He didn't 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." ECF No. 15-2 (PEx. 2) at 12. His view of the suspects was obstructed during the ordeal, and he took only brief glances toward them. ECF No. 15-19 (PEx. 19) at 24-25 (Tr. at 88-89). He didn't see who the shooter was. ECF No. 22-1 (PEx. 167) at 13, 16 (Tr. at 43, 56). Moreover, when the police asked J.P. to come to the station for the lineup, they told him they already had a suspect in custody, and they said a picture of the suspect was in the lineup. *Id.* at 16 (Tr. at 53). Telling J.P. that information made it much more likely he would make

an identification—even a mistaken one—as opposed to telling the police he couldn't identify anyone. For these reasons and others, J.P.'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. ECF No. 15-2 (PEx. 2) at 10. 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 10-11. 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." ECF No. 18 (PEx. 113) at 46 (emphasis added). For these reasons and others, Mr. John's identification is untrustworthy as well.

4. Jermain Means.

When confronted with the police's suggestive lineup, Mr. Means selected Mr. Slaughter's picture, writing, "The face just stand out to me." ECF No. 18 (PEx. 113) at 45. That is an apt description, because Mr. Slaughter's photograph literally stands out from the rest. At trial, however, Mr. Means was unable to identify Mr. Slaughter as a participant in the robbery. ECF No. 21 (PEx. 162) at 12 (Tr. at 37). Nonetheless, the State introduced his prior "identification" of Mr. Slaughter into evidence. *Id.* at 11 (Tr. 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. ECF No. 15-2 (PEx. 2) at 10. His initial identification of Mr. Slaughter shouldn't be trusted.

5. Jennifer Dennis and A.D.

Ms. Dennis 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. ECF No. 15-3 (PEx. 3) at 5. A.D. told the police that one of the suspects was wearing a black jacket. ECF No. 15-2 (PEx.

2) at 12. Neither Ms. Dennis nor her son A.D. identified Mr. Slaughter in a lineup or at trial.

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. ECF No. 15-2 (PEx. 2) at 11. Ms. Waddy wasn't able to identify anyone from the photo lineup, and she didn't testify at trial.

7. The second photographic lineup.

Finally, as Grounds Three(A), Four(A), and Eleven(B) explain, the police showed the victims a second photo 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 less suggestive second photo lineup. All told, these circumstances show the suggestive nature of the lineup influenced the identifications.

C. The error wasn't harmless.

The introduction of the witnesses' tainted identifications wasn't harmless—to the contrary, those identifications were the core of the State's case. The other evidence of Mr. Slaughter's guilt was weak, and without the witnesses' identifications, the State couldn't have met its burden of proof.

In brief, the State's other evidence chiefly involved two guns, a bullet core, and a bullet casing that the police found in a car owned by Mr. Slaughter's girlfriend. 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've been consistent with the shell casing and the lead core the police found in the car, those fragments could've been consistent with many other calibers of bullets as well, so that observation didn't mean much. *See generally* 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 someone used his stolen debit card at a 7-Eleven soon after the incident. (Mr. John didn't specify a particular 7-Eleven, and there are over a hundred 7-Eleven stores in Las Vegas.) Based on Mr. John's testimony, the State argued the tape showed Mr. Slaughter using Mr. John's ATM card. But the tape itself hardly shows anything, and the State was grasping at straws when they introduced it. *See generally* Ground Nine, *infra*.

In sum, the State had no physical evidence linking Mr. Slaughter to the crime. Mr. Slaughter didn't 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 the tainted identifications therefore 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted subclaims A, C, D, and E (or similar subclaims) in his initial state post-trial post-conviction proceedings. ECF Nos. 26-13, 27-13 (PExs. 226, 244). Mr. Slaughter exhausted subclaim B (or a similar subclaim) in his second state post-trial post-conviction proceedings. ECF Nos. 27-4, 27-16 (PExs. 235, 247). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

The State claimed 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've subpoenaed the 911 records to pin down when the victims first called the police. Second, they should've 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 establish as precisely as possible when the culprits left the crime scene. Third, the attorneys should've 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 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 testimony. Finally, defense counsel should've 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 legitimate 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 his 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." ECF No. 21 (PEx. 162) at 7 (Tr. 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's 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, when the crime took place. One of the victims, Jermain 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've been complete.

Mr. Slaughter's attorneys didn't 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* ECF No. 41-2 (PEx. 250); ECF No. 41-5 (PEx. 253) at 102; PEx. 262 at 139-52. Similarly, the police reports associated with the robbery at Mr. Young's house suggested the incident occurred at or shortly before 7:11 p.m. ECF No. 15-2 (PEx. 2) at 2 ("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* ECF No. 15-3 (PEx. 3) at 2, 5 (similar); ECF No. 15-4 (PEx. 4) at 2-3 (similar); ECF No. 15-5 (PEx. 5) at 2, 6 (stating an 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 about the timing of the 911 call. ECF No. 23-4 (PEx. 179) at 22 (Tr. 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 23 (Tr. at 82). That objection shifted the timeframe in the State's favor

by about eight to 11 minutes and introduced a level of ambiguity that shouldn't 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 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 didn't 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." ECF No. 41-7 (PEx. 255) at 1:38-1:40. As a matter of arithmetic, Mr. Means's statement indicates the suspects left the house 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 (ECF No. 21 (PEx. 162) at 10 (Tr. at 30)), but he didn't 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 taken these steps, the jury would've learned the robbers left about three minutes before Mr. Means placed his call—that is, the robbers left at about 7:08 p.m. 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 at 7:00 p.m. at the latest. *See* ECF No. 23-4 (PEx. 179) at 22-23 (Tr. 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?

To answer that question, the defense 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. ECF No. 22-8 (PEx. 174) at 9 (Tr. 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 amended petition will refer to her as Ms. Johnson.) If the robbery ended at 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* ECF No. 26-14 (PEx. 227) at 33-43; ECF No. 41-5 (PEx. 253) at 125-26; PEx. 262 at 157-58. But the jury never learned the answer to that crucial question. That's 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. ECF No. 26-13 (PEx. 226) at 46-47. 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 he showed up between 7:00 and 7:15 p.m., but in no event was it later than 7:20 p.m. ECF No. 22-8 (PEx. 174) at 9 (Tr. at 21-22). However, Jeffrey Arbuckle (Ms. Johnson's coworker) testified Mr. Slaughter didn't show up until 7:30 p.m. ECF No. 21-3 (PEx. 165) at 13 (Tr. at 42). That testimony created a potential problem for Mr. Slaughter's alibi. Defense counsel should've impeached Mr. Arbuckle's recollection in order to shore up the timeline.

First, Mr. Arbuckle previously told the police he had left work at 7:15 p.m., and Ms. Johnson was still waiting for Mr. Slaughter at that point. ECF No. 15-14 (PEx. 14) at 4-5; ECF No. 41-5 (PEx. 253) at 141. That prior statement to the police is inconsistent with Mr. Arbuckle's trial testimony, i.e., that Mr. Slaughter didn't arrive 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., but 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* ECF No. 22-8 (PEx. 174) at 18 (Tr. at 60) ("When [Mr. Arbuckle] was leaving the parking lot, Rickie was coming in the parking lot"); ECF No. 21-3 (PEx. 165) at 13 (Tr. 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 hadn't testified about Mr. Arbuckle's prior inconsistent statement, and the court sustained the objection. ECF No. 21-3 (PEx. 165) at

15 (Tr. at 46).[2] Defense counsel should've called Detective Prieto to verify that statement. *See* Ground Four, Section A, *infra*.

Second, Mr. Arbuckle held bias against Mr. Slaughter. The two had a verbal altercation at the El Dorado Cleaners (where Mr. Arbuckle and Ms. Johnson worked) in late May 2004 or early June 2004. ECF No. 26-13 (PEx. 226) at 53. Soon after, 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. ECF No. 26-14 (PEx. 227) at 78; ECF No. 41-1 (PEx. 249). 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've asked Mr. Arbuckle about this fight 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've asked Mr. Arbuckle whether he had received any funds from the State for pre-trial preparation. That would've given the jury another reason to question his motives for testifying.

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

As the previous subsections explain, 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 that testimony was unhelpful and undermined the defense's credibility. Mr. Slaughter's attorneys shouldn't have called Ms. Westbrook.

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[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, which have been manually added to the filed copy of the transcript.

Mr. Slaughter's defense investigator spoke with Ms. Westbrook before trial. Mr. Slaughter claimed he was with Ms. Westbrook before picking up Ms. Johnson, and while Ms. Westbrook recalled spending time with Mr. Slaughter in the past, she didn't remember the specific days and times they were together. ECF No. 26-14 (PEx. 227) at 83-84. 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.* at 85-87. Mr. Slaughter told his lawyers he didn't want Ms. Westbrook to testify if she didn't 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. ECF No. 26-13 (PEx. 226) at 74-77. Their arguments were substantial enough that Mr. Slaughter insisted on making 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. ECF No. 23-4 (PEx. 179) at 19-22 (Tr. at 68-77).

Just as Mr. Slaughter predicted, Ms. Westbrook's testimony didn't go well. While she recalled being with Mr. Slaughter at some point in time, she couldn't specify the date, and she provided testimony that suggested she remembered spending time with Mr. Slaughter in 2005—a year after the incident, well after Mr. Slaughter had been taken into custody. ECF No. 22-1 (PEx. 167) at 23-25 (Tr. 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 the State thought showed him attempting to fabricate an alibi. It certainly didn't help matters that counsel had previewed Ms. Westbrook as a star alibi witness during opening statements. ECF No. 21 (PEx. 162) at 7 (Tr. at 17).

Ms. Westbrook provided little upside as a defense witness and substantial downside. Reasonable attorneys wouldn't have called her. Had Ms. Westbrook not

testified, there's a reasonable probability 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted subclaims A, B, and C (or similar subclaims) in his initial state post-trial post-conviction petition. ECF Nos. 26-13, 27-13 (PExs. 226, 244). Mr. Slaughter exhausted subclaim D (or a similar subclaim) in his second state post-trial post-conviction petition. ECF Nos. 27-4, 27-16 (PExs. 235, 247). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

Three of the State's witnesses purported to identify Mr. Slaughter as one of the assailants. But their accounts shifted over time in significant ways, suggesting their recollections were faulty. A reasonable defense lawyer would have seized on these inconsistencies during cross-examination. But Mr. Slaughter's attorneys didn't follow these lines of questioning. Similarly, the attorneys didn't 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 legitimate 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's a reasonable probability the jury 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 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, *infra*. But the police showed the witnesses a second photo lineup that included a different picture of Mr. Slaughter, taken only days after his arrest. This time, the victims didn't identify him as a suspect. ECF No. 41-5 (PEx. 253) at 89-90; *see also* Ground Eleven(B), *infra*. This second photo lineup was the subject of a pre-trial motion (ECF No. 18 (PEx. 113)), and both the State and the court suggested it would be a suitable subject for cross-examination (ECF No. 18-2 (PEx. 115) at 3; ECF No. 18-13 (PEx. 126) at 11-12). But defense counsel didn't 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 photo lineup with the court outside the presence of the jury. The attorney explained 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. ECF No. 22-1 (PEx. 167) at 17 (Tr. at 60). He asked for "jury instructions that these lineups were in fact [shown] and nobody selected Mr. Slaughter on them." *Id.* at 18 (Tr. 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 didn't get the message, and they didn't present evidence about the 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. The

fact that the witnesses failed to identify Mr. Slaughter in a second, non-suggestive lineup substantially undercut the reliability of the witnesses purported identifications. But defense counsel did nothing to elicit that fact, depriving the jury of a substantial reason to doubt the witnesses' testimony.

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 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." ECF No. 15-4 (PEx. 4) at 3. He said he "kn[ew] for a fact" 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. ECF No. 15-19 (PEx. 19) at 7-9 (Tr. 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. ECF No. 21 (PEx. 162) at 15 (Tr. at 49). And while he had previously said only one assailant had a Jamaican accent (ECF No. 15-19 (PEx. 19) at 9-10 (Tr. at 28-29)), at trial he said both suspects had Jamaican accents (ECF No. 21 (PEx. 162) at 15 (Tr. 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've 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" (ECF No. 15-19 (PEx. 19) at 8 (Tr. at 21)), even though Mr. Slaughter is 5'9" (ECF No. 23-1 (PEx. 176)). In addition,

during his initial police interview Mr. Young didn't mention seeing the perpetrators' car (ECF No. 26-14 (PEx. 227) at 7-8), but at trial he claimed to have seen a green Ford Taurus (ECF No. 21 (PEx. 162) at 14 (Tr. 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.*, ECF No. 15-19 (PEx. 19) at 5-6 (Tr. at 12-13); *with, e.g.*, ECF No. 21 (PEx. 162) at 15 (Tr. 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. ECF No. 15-19 (PEx. 19) at 9 (Tr. 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 question 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 he was able to see the perpetrators throughout most of the incident, including during the shooting. ECF No. 21-3 (PEx. 165) at 20 (Tr. at 58-59). However, at the preliminary hearing, Mr. John testified the suspects had placed a jacket over his head immediately after he entered Mr. Young's house. ECF No. 15-19 (PEx. 19) at 16 (Tr. at 54-55). That account is consistent with what Mr. John initially told the police. ECF No. 15-2 (PEx. 2) at 9.

Just as with Mr. Young, a reasonable defense attorney would've drawn out this inconsistency and others during Mr. John's cross-examination. But defense counsel didn't cover these topics with Mr. John. Had the attorneys made these points, the

jury would've 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 (and its jacket) 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 used to make a Winchester .357 Magnum silver tip hollow point bullet. ECF No. 21-3 (PEx. 165) at 38 (Tr. 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." ECF No. 27-5 (PEx. 236) at 8.

Despite that suggestion, defense counsel didn't adequately cross-examine Ms. Moses on this subject. Rather, the attorney focused on the expert's views regarding whether a generic lead bullet core the police also found in the car could be linked to a .357 round. That line of questioning missed the mark. It didn't 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 the *jacket fragments* were from a .357 round, and thus establish a connection between the crime scene and the car. Defense counsel's cross examination didn't address that issue and left the jury with the mistaken impression the jacket fragments from the crime scene 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." ECF No. 23-4 (PEx. 179) at 36 (Tr. at 136). Defense counsel should've 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted this claim (or a similar claim) in his initial state post-trial post-conviction proceedings. ECF Nos. 26-13, 27-13 (PExs. 226, 244). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

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 didn't 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 didn't 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 legitimate strategic reason for failing to introduce this exculpatory evidence. On information and belief, defense counsel also didn't bother trying to speak to any of these potential witnesses informally before trial. Had Mr. Slaughter's lawyers taken any or all of these steps, there's a reasonable probability the jury 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 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 didn't testify at trial. That was a problem, because his investigation suffered from critical flaws, and the jury should've 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 didn't bother to subpoena him, so they didn't 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've 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 regarding the timeframe. But he didn't collect available surveillance footage that could've shown exactly when Mr. Slaughter arrived. ECF No. 41-5 (PEx. 253) at 145; *see also* ECF No. 21-3 (PEx. 165) at 14-15 (Tr. at 45-46) (Jeffrey Arbuckle testifies footage was available). Defense counsel should've asked Detective Prieto why he failed to take this obvious step.

Second, 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 Mr. Slaughter arrived at 7:00 p.m. ECF No. 22-8 (PEx. 174) at 7 (Tr. at 14). Detective Prieto responded that Ms. Johnson must be lying, because Mr. Slaughter was somewhere else committing a crime at 7:00 p.m. *Id.* at 7 (Tr. at 16). After that

interview, Detective Prieto called her and threatened to arrest her if she didn't tell him Mr. Slaughter "picked [her] up at a later time." *Id.* at 8 (Tr. at 18). Detective Prieto made good on that threat and arrested her at work, for allegedly "obstructing justice." *Id.* at 8, 14 (Tr. at 18, 42). As he interviewed her again, he implied that if Ms. Johnson didn't cooperate with the police, her arrest would make it hard for her to get a job in the future. *Id.* at 15 (Tr. at 47-48). Ms. Johnson felt she was being coerced to change her story. *Id.* at 15-16 (Tr. at 48-49); *see also* ECF No. 19 (PEx. 143) at 11-12, 17-25. In light of the pressure, she said Mr. Slaughter picked her up at 7:30 p.m. ECF No. 22-8 (PEx. 174) at 8 (Tr. at 19). But at trial, she confirmed Mr. Slaughter arrived "between 7:00 to 7:15; no later than 7:20." *Id.* at 9 (Tr. at 21). Defense counsel should've called Detective Prieto and asked him about his attempts to manipulate Ms. Johnson's testimony. *See* ECF No. 23 (PEx. 175) at 38 (the prosecutor acknowledges defense counsel could argue Detective Prieto "was inappropriate with" Ms. Johnson); ECF No. 41-5 (PEx. 253) at 106-139.

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. ECF No. 41-5 (PEx. 253) at 141.

Fourth, Detective Prieto put together the suggestive photo lineup that led to the witnesses' faulty identifications. ECF No. 15-19 (PEx. 19) at 28 (Tr. at 103-04). He 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. ECF No. 41-5 (PEx. 253) at 89-90; *see also* Ground Eleven(B), *infra*. Defense counsel should've called Detective Prieto and asked about the second photo lineup; his testimony would've established none of the victims identified Mr. Slaughter from that lineup.

Fifth, Destiny Waddy told the police the getaway car was "possibly a Pontiac Grand Am." ECF No. 15-2 (PEx. 2 at 11); *see also* ECF No. 21 (PEx. 162) at 40 (Tr. at 149) (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 the witnesses described the getaway car as a Pontiac *or* a Ford, the latter of which conveniently happened to be the make of Ms. Johnson's car. ECF No. 17-29 (PEx. 112) at 30; *see* ECF No. 41-5 (PEx. 253) at 163-66. Defense counsel should've 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* ECF No. 41-5 (PEx. 253) at 36-39, 86-88, 194-97, 207-11.

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." ECF No. 50-4 (PEx. 257) at 4. 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." ECF No. 50-3 (PEx. 256) at 4. 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* ECF No. 41-5 (PEx. 253) at 166-172.

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.*, ECF No. 41-5 (PEx. 253) at 103-05, 126-27 (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. PEx. 262 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've had reasonable doubt about whether the State had charged the right man.

In addition, Detective Prieto could've laid the foundation for prior inconsistent statements by various witnesses. For example, he could've testified about various inconsistencies in Mr. Young's accounts. *See* Ground Three Section A, *supra*; *see also*, *e.g.*, ECF No. 26-14 (PEx. 227) at 7-8. As mentioned above, he could've 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* ECF No. 15-14 (PEx. 14) at 4-5. Counsel should've 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 Detective Prieto was a crucial witness. In fact, they anticipated cross-examining him, and they mentioned Detective Prieto repeatedly in their opening statement. ECF No. 21 (PEx. 162) at 7-8 (Tr. at 20-22). But they weren't able to deliver because the State didn't call him, and they had forgotten to subpoena him. ECF No. 26-13 (PEx. 226) at 8. 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 the court should bar that argument, and the court agreed. ECF No. 23 (PEx. 175) at 12-14 (Tr. 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've called Detective Prieto to lay the foundation for some of Mr. Young's prior inconsistent statements, defense counsel should've 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. ECF No. 15-4 (PEx. 4) at 3. According to Mr. Young, he was sure the assailant with dreadlocks had shot him. *Id.* At the preliminary hearing, Mr. Young specified Mr. Slaughter wasn't the one with the dreadlocks. ECF No. 15-19 (PEx. 19) at 9 (Tr. at 28). But he changed his mind and said Mr. Slaughter *was* the shooter (*id.* at 12 (Tr. at 39))—even though he previously said the robber *with* the dreadlocks was the shooter (ECF No. 15-4 (PEx. 4) at 3). Defense counsel should've 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. ECF No. 21 (PEx. 162) at 14 (Tr. at 46). Had counsel called Officer Bailey, counsel could've confirmed he hadn't mentioned that at the time.

Defense counsel didn't 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 didn't bother to subpoena him. ECF No. 26-13 (PEx. 226) at 21. In fact, Mr. Slaughter told the court he had asked his lawyers to call Officer Bailey, and they had neglected to do so. ECF No. 23-4 (PEx.

179) at 19 (Tr. 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 the assailants left in a car she described as possibly a Pontiac Grand Am. ECF No. 15-2 (PEx. 2) at 11. That conflicted with the State's version of events, namely that the assailants were driving Ms. Johnson's Ford Taurus. Defense counsel should've called Ms. Waddy to testify about the getaway car. Her testimony would've gone a long way toward undercutting the State's theory, in part because Ms. Dennis recalled the perpetrators mentioning a Pontiac. ECF No. 21 (PEx. 162) at 40 (Tr. at 149). That detail would've 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. ECF No. 21 (PEx. 162) at 7-8 (Tr. at 20-21). But the attorneys yet again made the same mistake they made with Detective Prieto and Officer Bailey—they assumed the State would call Ms. Waddy, so they didn't bother to subpoena her. ECF No. 26-13 (PEx. 226) at 34. Again, Mr. Slaughter told the court he had asked his lawyers to call Ms. Waddy, and they had neglected to do so. ECF No. 23-4 (PEx. 179) at 19 (Tr. 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've called Ms. Waddy to testify about the getaway car, counsel should've called Officer Hoyt, who could've confirmed Ms. Waddy described the car as a Pontiac. ECF No. 15-2 (PEx. 2) at 11. 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've 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. ECF No. 15-2 (PEx. 2) at 10; *see also* Ground Three Section C, *supra*. The only reason the attorneys didn't call Officer Hoyt is because they made the same mistake they made with Detective Prieto, Officer Bailey, and Ms. Waddy—they assumed the State would call Officer Hoyt, so they didn't bother to subpoena him. ECF No. 26-13 (PEx. 226) at 57. Yet again, Mr. Slaughter told the court he had asked his lawyers to call Officer Hoyt, and they had neglected to do so. ECF No. 23-4 (PEx. 179) at 19 (Tr. at 66). Once again, this was 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted this claim in his initial state post-trial post-conviction proceedings and in his second state post-trial post-conviction proceedings. ECF Nos. 26-13, 27-13, 27-4, 27-16 (PExs. 226, 235, 244, 247). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

As described in certain of Mr. Slaughter's grounds for relief above, Mr. Slaughter's defense counsel made a number of unfulfilled promises during opening statements. For one, counsel promised the jury would learn about Mr. Slaughter's alibi—based on the timeline of events, he would've 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 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 broke other promises as well. Counsel suggested the jury would hear from Detective Prieto, but he never appeared at trial. *See* Ground Four Section A, *supra*. Counsel also suggested the jury would hear from Destiny Waddy, but she didn't 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 legitimate 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've 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted subclaims A, B, C, and D in his second state post-trial post-conviction proceedings. ECF Nos. 27-4, 27-16 (PExs. 235, 247). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

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 legitimate strategic justification. Had defense counsel objected to any or all of these comments, and had the jury

been appropriately admonished, there's a reasonable probability it would have voted to acquit. As a result, Mr. Slaughter received ineffective assistance from 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've 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've 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 the suspects had Jamaican accents. ECF No. 21 (PEx. 162) at 15 (Tr. at 49) (Mr. Young); *id.* at 37 (Tr. at 140) (Ms. Dennis); ECF No. 21-3 (PEx. 165) at 18 (Tr. at 52) (Mr. John). None of them testified at trial that the accents sounded fake (although Ms. Dennis said she couldn't tell whether the accent was authentic). That fact was exculpatory, since Mr. Slaughter doesn't have a Jamaican accent; indeed, the jury heard jailhouse phone calls that Mr. Slaughter allegedly placed, and those calls confirm Mr. Slaughter doesn't have a Jamaican accent. *E.g.*, ECF No. 22-1 (PEx. 167) at 24 (Tr. at 86) (the prosecution plays phone calls).

During the State's initial closing argument, the prosecutor told the jury the suspects "used fake accents." ECF No. 23-4 (PEx. 179) at 6 (Tr. 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 "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 didn't 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 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've objected.

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

The 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." ECF No. 23-4 (PEx. 179) at 35 (Tr. at 130). Of course, that was one of the key questions for the jury to resolve. Defense counsel should've 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 didn't 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." ECF No. 23-4 (PEx. 179) at 35 (Tr. 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've 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 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." ECF No. 23-4 (PEx. 179) at 38 (Tr. at 141); *see also id.* (Tr. at 142). The prosecutor's tacit answer was 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. ECF No. 15-8 (PEx. 8) at 6; ECF No. 41-5 (PEx. 253) at 146. Defense counsel should've 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 wouldn't need witnesses to lie for him, and "[t]hat alone would make him guilty." ECF No. 23-4 (PEx. 179) at 38 (Tr. at 142). Once again, the comment inappropriately suggested Mr. Slaughter had manufactured an alibi and was guilty as a result. Defense counsel should've 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 on jailhouse 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." ECF No. 23-4 (PEx. 179) at 38 (Tr. at 143). Defense counsel should've 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." ECF No. 23-4 (PEx. 179) at 40 (Tr. 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've 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted subclaims E, F, and G during his direct appeal. ECF Nos. 25-23, 26-5, 26-7 (PExs. 212, 218, 220). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

As described in Ground Six above, 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" 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 presented 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.

Statement regarding exhaustion:

Mr. Slaughter exhausted this claim in his direct appeal. ECF Nos. 25-23, 26-5, 26-7 (PExs. 212, 218, 220). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

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." ECF No. 21-3 (PEx. 165) at 21 (Tr. 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 the video showed Mr. Slaughter with the proceeds of the robbery. Indeed, the prosecutors repeatedly stressed this point during closing arguments. ECF No. 23-3 (PEx. 179) at 9, 12, 16 (Tr. at 25, 39-40, 53). Mr. Slaughter is therefore entitled to a new trial.

Ground Nine: Counsel failed to raise meritorious issues during the direct appeal, in violation of Mr. Slaughter's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Statement regarding exhaustion:

Mr. Slaughter exhausted subclaims (A) and (B) in his initial state post-trial post-conviction petition for a writ of habeas corpus. ECF Nos. 26-13, 27-13 (PExs. 226, 244). Mr. Slaughter is also litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

Mr. Slaughter's appellate attorney omitted crucial issues from his appeal: a solid *Batson* claim, and the police's failure to document the use of a second photo lineup. 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. This failure 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* ECF No. 20-3 (PEx. 158) at 3-7 (Tr. at 1-20).

Despite this viable *Batson* claim, direct appeal counsel didn't raise this issue. Counsel told Mr. Slaughter he chose not raise this claim because the juror was "not [a] member[] of your race." ECF No. 26-14 (PEx. 227) at 80. That explanation defies both law and fact. As for the law, *Batson* doesn't 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've 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's a reasonable probability the Nevada Supreme Court would've 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*), 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 didn't 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. ECF No. 18 (PEx. 113).

The court denied that motion. Direct appeal counsel should've 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's a reasonable probability the Nevada Supreme Court would've 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 didn't 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 complemented the prosecutorial misconduct claims counsel did raise. Had the attorney litigated each of the improper remarks, there's 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.

Statement regarding exhaustion:

Mr. Slaughter is litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

As described above in Ground Nine Section A, 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 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.

Statement regarding exhaustion:

Mr. Slaughter is litigating this claim (or a similar claim) in his pending state post-conviction proceedings. *See* 11/20/18 Petition.

Statement in support of claim:

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* ECF No. 50-12 (PEx. 260); ECF No. 50-13 (PEx. 261); PEx. 262 at 138; PEx. 263 ¶ 7; PEx. 264 ¶ 16. That issue—when the 911 call was placed, which helps pin down when the culprits left the crime scene—was a key component of Mr. Slaughter's defense. 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). ECF No. 41-5 (PEx. 253) at 106-139. 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 (Mr. 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. ECF No. 23-4 (PEx. 179) at 22 (Tr. 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.* (Tr. at 79). Although 7:11 p.m. was "the time the call was transferred from Metro to North Las Vegas," Mr. Means would've actually placed the 911 call earlier. *Id.*; *but see* PEx. 262 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. *Id.* 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 23 (Tr. at 82); *see id.* (Tr. 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. ECF No. 23-4 (PEx. 179) at 22 (Tr. at 79); *see* ECF No. 41-2 (PEx. 250) (North Las Vegas ticket for 911 call listing "time received" of 7:11 p.m.); ECF No. 41-5 (PEx. 253) at 102 (Detective Prieto says North Las Vegas picked up the call at 7:11 p.m.); ECF No. 41-7 (PEx. 255) at 0:00-0:12 (audio recording of 911 call) (Metro dispatcher explains to North Las Vegas dispatcher that she is transferring the call); PEx. 262 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."

Id. 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. This evidence 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 gotten 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) explain, 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 didn't 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 straightforward 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, and the State didn't disclose that.

As Detective Prieto testified, none of the eyewitnesses identified Mr. Slaughter from the second photo lineup. ECF No. 41-5 (PEx. 253) at 89-90. But the State never disclosed that to the defense. *See, e.g.*, PEx. 263 ¶¶ 4-5; PEx. 264 ¶ 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." ECF No. 18-13 (PEx. 126) at 10. 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 state court. Mr. DiGiacomo made similar statements in a pre-trial pleading and at trial (ECF No. 18-2 (PEx. 115); ECF No. 22-1 (PEx. 167) at 18 (Tr. 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 before 2005. Mr. DiGiacomo couldn't recall precisely who was present, but he guessed it was Mr. Young, Ms. Dennis, and maybe A.D. PEx. 262 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. PEx. 262 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. PEx. 262 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 witness 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. ECF No. 41-5 (PEx. 253) at 89-90. 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." ECF No. 18 (PEx. 113) at 51. 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). 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.*, ECF No. 41-5 (PEx. 253) at 85-86. 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." PEx. 262 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. PEx. 262 at 75, 95. But Ms. Krisko doesn't remember anything about the photo lineups in this case. PEx. 264 ¶ 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. PEx. 264 ¶¶ 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 (PEx. 262 at 95, 117-19), but the trial lawyers disagree (PEx. 263 ¶¶ 4-5; PEx. 264 ¶ 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. PEx. 262 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 authorized an opposition. ECF No. 18-2 (PEx. 115). 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. ECF No. 18-13 (PEx. 126). 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." ECF No. 18-13 (PEx. 126). 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. ECF No. 22-1 (PEx. 167) at 18 (Tr. at 61-62). This conclusion even applies to

an email exchange between undersigned counsel and the DA's office. ECF No. 41-6 (PEx. 254). Indeed, the first time Mr. DiGiacomo hinted at this story on the record was at a March 7, 2019, hearing, after Mr. Slaughter filed a new state post-conviction petition raising 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 (PEx. 262 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. The State withheld that material exculpatory fact, so Mr. Slaughter is 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 (PEx. 262 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, J.P., 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. PEx. 262 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* PEx. 264 ¶¶ 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. *Id.* 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 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. PEx. 262 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. *See* ECF No. 41-1 (PEx. 249). The State didn't turn that information over to the defense before trial. *See* ECF No. 50-12 (PEx. 260); ECF No. 50-13 (PEx. 261);

PEx. 262 at 175; PEx. 263 ¶¶ 6-9; PEx. 264 ¶ 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 a fight, which caused Mr. Arbuckle to file a trespassing complaint against him. That's one explanation for why, as both Mr. Arbuckle and Ms. Johnson testified, Mr. Slaughter arrived just as Mr. Arbuckle was leaving; perhaps Mr. Slaughter had gotten to the cleaners 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. ECF No. 21-3 (PEx. 165) at 13 (Tr. 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 15 (Tr. 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.*; *see also* PEx. 262 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.

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 amended petition and any defenses that may be raised by respondents; and

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

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

Dated October 24, 2019.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Michael J. Bongard.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing 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 non-CM/ECF participants:

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