NOAS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
Jonathan M. Kirshbaum
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Assistant Federal Public Defender
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411 E. Bonneville, Ste. 250
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(702) 388-5819 (fax)
Shelly_Richter@fd.org

Attorney for Petitioner John Seka



EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

| | |
|---|---|
| John Seka,<br><br>Petitioner,<br><br>v.<br><br>Calvin Johnson, Warden,<br><br>Respondent. | Case No. A-22-860668-W<br>(C99C159915)<br><br>Dept. No. XXV |

## NOTICE OF APPEAL

Notice is hereby given that Petitioner John Seka appeals to the Nevada Supreme Court from the Findings of Fact, Conclusions of Law and Order entered in this action on May 10, 2023.

Dated this 25th day of May 2023.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

*/s/ Shelly Richter*
SHELLY RICHTER
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

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

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

| | |
|---|---|
| John Joseph Seka, #69025<br>High Desert State Prison<br>P.O. Box 650<br>Indian Springs, NV 89070 | Attorney General<br>555 E. Washington Ave.<br>Ste. 3900<br>Las Vegas, NV 89101 |
| Taleen Pandukht<br>Clark County District Attorney<br>200 Lewis Ave.<br>Las Vegas, NV 89101 | |

*/s/ Rosana Aporta*
An Employee of the
Federal Public Defender

ASTA
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

| | |
|---|---|
| John Seka,<br>Petitioner,<br>v.<br>Calvin Johnson, Warden,<br>Respondent. | Case No. A-22-860668-W<br>(C99C159915)<br><br>Dept. No. XXV |

## CASE APPEAL STATEMENT

1. **Name of petitioner filing this case appeal statement:** John Seka.

2. **Identify the judge issuing the order appealed from:** Honorable Judge Kathleen E. Delaney, District Court Judge, Dept. No. 25, Eighth Judicial District Court, Clark County, Nevada.

3. **Identify each appellant and the name and address of counsel for each appellant:** Mr. Seka is represented by Jonathan M. Kirshbaum and Shelly Richter,

Assistant Federal Public Defenders, Federal Public Defender's Office, District of Nevada, 411 E. Bonneville Ave. Suite 250, Las Vegas, NV 89101.

4. **Identify each respondent and the name and address of appellate counsel, if known, for each respondent:** Calvin Johnson, Warden; Steven Wolfson, and Alexander Chen, Clark County District Attorney's Office, 200 Lewis Avenue, Las Vegas, NV 89101.

5. **Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42.** The attorneys mentioned above are licensed to practice law in Nevada.

6. **Whether petitioner/appellant was represented by appointed or retained counsel in the district court:** Mr. Seka was represented in the district court by counsel previously appointed to represent him in a related federal matter.

7. **Whether petitioner/appellant is represented by appointed or retained counsel on appeal:** Mr. Seka is represented on appeal by counsel previously appointed to represent him in a related federal matter.

8. **Whether petitioner/appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:** No. An inmate need not pay a fee to file (or appeal from the denial of) a post-conviction petition. NRS 2.250(1)(d); NRS 34.724(1).

9. **Date proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed):** Mr. Seka filed his Petition for Writ of Habeas Corpus (Post-Conviction) on November 1, 2022.

10. **Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief**

**granted by the district court:** This is an appeal of an order dismissing Petitioner's November 1, 2022, Petition for Writ of Habeas Corpus (Post-Conviction).

11. **Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court or Court of Appeals and, if so, the caption and docket number of the prior proceeding:**

State v. Seka, 80925 (other)

Seka v. State, 45096 (post-conviction/proper person)

Seka v. State, 44690 (post-conviction/proper person)

Seka v. State, 37937 (post-conviction/proper person)

Seka v. State, 37907 (direct appeal)

12. **Indicate whether this appeal involves child custody or visitation:** This appeal does not involve child custody or visitation.

13. **If this is a civil case, indicate whether this appeal involves the possibility of settlement:** N/A.

Dated this 25th day of May 2023.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

*/s/ Shelly Richter*
SHELLY RICHTER
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

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

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| John Joseph Seka, #69025<br>High Desert State Prison<br>P.O. Box 650<br>Indian Springs, NV 89070 | Attorney General<br>555 E. Washington Ave.<br>Ste. 3900<br>Las Vegas, NV 89101 |
| Taleen Pandukht<br>Clark County District Attorney<br>200 Lewis Ave.<br>Las Vegas, NV 89101 | |

*/s/ Rosana Aporta*
An Employee of the
Federal Public Defender

EIGHTH JUDICIAL DISTRICT COURT

# CASE SUMMARY

## CASE NO. A-22-860668-W

| | | | |
|---|---|---|---|
| **John Seka, Plaintiff(s)** | § | Location: | **Department 25** |
| **vs.** | § | Judicial Officer: | **Delaney, Kathleen E.** |
| **Calvin Johnson, Defendant(s)** | § | Filed on: | **11/01/2022** |
| | § | Case Number History: | |
| | § | Cross-Reference Case Number: | **A860668** |
| | § | Defendant's Scope ID #: | **1424324** |

### CASE INFORMATION

**Related Cases**
99C159915 (Writ Related Case)

**Statistical Closures**
05/05/2023 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Flags: **Appealed to Supreme Court**
**NRS 34.730 Case**

### DATE — CASE ASSIGNMENT

**Current Case Assignment**

| | |
|---|---|
| Case Number | A-22-860668-W |
| Court | Department 25 |
| Date Assigned | 11/03/2022 |
| Judicial Officer | Delaney, Kathleen E. |

### PARTY INFORMATION

| | | *Lead Attorneys* |
|---|---|---|
| **Plaintiff** | **Seka, John** | **Valladares, Rene L.**<br>*Retained*<br>702-388-6577(W) |
| **Defendant** | **Johnson, Calvin** | **Pandukht, Taleen R**<br>*Retained*<br>702-671-2794(W) |
| | **Nevada State of** | **Pandukht, Taleen R**<br>*Retained*<br>702-671-2794(W) |

### DATE — EVENTS & ORDERS OF THE COURT — INDEX

| DATE | EVENTS & ORDERS OF THE COURT |
|---|---|
| 11/01/2022 | Notice of Appearance<br>Party: Plaintiff Seka, John<br>*[1] Notice of Appearance* |
| 11/01/2022 | Notice of Appearance<br>Party: Plaintiff Seka, John<br>*[2] Notice of Appearance* |
| 11/01/2022 | Petition for Writ of Habeas Corpus<br>Filed by: Plaintiff Seka, John<br>*[3] Petition for Writ of Habeas Corpus (Post-Conviction)* |
| 11/01/2022 | Exhibits<br>Filed By: Plaintiff Seka, John<br>*[4] Exhibits in Support of Petition for Writ of Habeas Corpus (Post-Conviction)* |
| 11/01/2022 | Motion |

| | |
|---|---|
| | Filed By: Plaintiff Seka, John<br>*[5] Motion for Court to Take Judicial Notice of the Filings in Mr. Sekas Criminal Case Number* |
| 11/03/2022 | Notice of Department Reassignment<br>*[6] Notice of Department Reassignment* |
| 02/13/2023 | Order<br>*[7] Order for Petition for Writ of Habeas Corpus* |
| 03/28/2023 | Response<br>Filed by: Defendant Johnson, Calvin<br>*[8] State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss Pursuant to the Doctrine of Laches* |
| 04/05/2023 | Opposition<br>Filed By: Plaintiff Seka, John<br>*[9] Opposition to State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)* |
| 04/12/2023 | **Petition for Writ of Habeas Corpus** (9:30 AM) (Judicial Officer: Delaney, Kathleen E.) |
| 04/21/2023 | Recorders Transcript of Hearing<br>*[10] Record's Transcript of Hearing: Petition for Writ of Habeas Corpus, Wednesday, April 12, 2023* |
| 05/05/2023 | Findings of Fact, Conclusions of Law and Order<br>*[11] Findings of Fact, Conclusions of Law and Order* |
| 05/10/2023 | Notice of Entry of Findings of Fact, Conclusions of Law<br>*[12] Notice of Entry of Findings of Fact, Conclusions of Law and Order* |
| 05/25/2023 | Case Appeal Statement<br>Filed By: Plaintiff Seka, John<br>*[13] Case Appeal Statement* |
| 05/25/2023 | Notice of Appeal<br>Filed By: Plaintiff Seka, John<br>*[14] Notice of Appeal* |

| DATE | FINANCIAL INFORMATION | |
|---|---|---|
| | **Plaintiff** Seka, John | |
| | Total Charges | 24.00 |
| | Total Payments and Credits | 24.00 |
| | **Balance Due as of 5/26/2023** | **0.00** |

# DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada

Case No. _____ *(Assigned by Clerk's Office)*

CASE NO: A-22-860668-W
Department 9

## I. Party Information *(provide both home and mailing addresses if different)*

| Plaintiff(s) (name/address/phone): | Defendant(s) (name/address/phone): |
|---|---|
| Jack Joseph Seka, NDOC No. 69025 | Calvin Johnson |
| High Desert State Prison | Warden, High Desert State Prison |
| P.O. Box 650 | |
| Indian Springs, NV 89070 | |
| **Attorney (name/address/phone):** | **Attorney (name/address/phone):** |
| Jonathan M. Kirshbaum | Steve Wolfson, Clark County District Attorney |
| Assistant Federal Public Defender | 200 Lewis Ave., Las Vegas, NV 89101, (702) 671-2500 |
| 411 E.Bonneville Ave. Suite 250, Las Vegas, NV 89101 | cc: Attorney General's Office |
| (702) 388-6577 | 100 North Carson Street, Carson City, NV 89701 |

## II. Nature of Controversy *(please select the one most applicable filing type below)*

### Civil Case Filing Types

**Real Property**

**Landlord/Tenant**
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

**Title to Property**
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

**Other Real Property**
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

**Torts**

**Negligence**
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

**Malpractice**
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

**Other Torts**
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

**Probate**

**Probate** *(select case type and estate value)*
- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside
- ☐ Trust/Conservatorship
- ☐ Other Probate

**Estate Value**
- ☐ Over $200,000
- ☐ Between $100,000 and $200,000
- ☐ Under $100,000 or Unknown
- ☐ Under $2,500

**Construction Defect & Contract**

**Construction Defect**
- ☐ Chapter 40
- ☐ Other Construction Defect

**Contract Case**
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

**Judicial Review/Appeal**

**Judicial Review**
- ☐ Foreclosure Mediation Case
- ☐ Petition to Seal Records
- ☐ Mental Competency

**Nevada State Agency Appeal**
- ☐ Department of Motor Vehicle
- ☐ Worker's Compensation
- ☐ Other Nevada State Agency

**Appeal Other**
- ☐ Appeal from Lower Court
- ☐ Other Judicial Review/Appeal

**Civil Writ**

**Civil Writ**
- ■ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

**Other Civil Filing**

**Other Civil Filing**
- ☐ Compromise of Minor's Claim
- ☐ Foreign Judgment
- ☐ Other Civil Matters

***Business Court filings should be filed using the Business Court civil coversheet.***

11/01/2022
Date

*/s/ Jonathan M. Kirshbaum*
Signature of initiating party or representative

***See other side for family-related case filings.***

**FFCO**
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN JOSEPH SEKA,
#1525324

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-22-860668-W**
(C99C159915)
DEPT NO: XXV

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

DATE OF HEARING: April 12, 2023
TIME OF HEARING: 9:30 a.m.

THIS CAUSE having come on for hearing before the Honorable KATHLEEN E. DELANEY, District Judge, on the 12th day of April, 2023, Petitioner not being present, being represented by JONATHAN M. KIRSHBAUM, ESQ. and SHELLY RICHTER, ESQ., Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through AGNES BOTELHO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law.

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///

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

**PROCEDURAL HISTORY**

On June 30, 1999, John Joseph Seka (hereinafter "Petitioner") was charged by way of Information with: Counts 1 & 2 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); and Counts 3 & 4 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). On July 26, 1999, the State filed its Notice of Intent to Seek the Death Penalty.

Jury trial commenced on February 12, 2001. On March 1, 2001, the jury returned a verdict of guilty of First Degree Murder With Use of a Deadly Weapon as to Count 1, guilty of Second Degree Murder With Use of a Deadly Weapon as to Count 2, and guilty of Robbery as to Counts 3 and 4. The penalty hearing commenced on March 2, 2001. However, the jury could not return a special verdict. On March 13, 2001, the parties filed a Stipulation and Agreement to Waive Sentencing by Three-Judge Panel and stipulated to a sentence of life without the possibility of parole as to Count 1.

On April 26, 2001, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – Life without the possibility of parole with an equal and consecutive term of Life without the possibility of parole for use of a deadly weapon; as to Count 2 – Life with the possibility of parole after ten (10) years with an equal and consecutive term of Life with the possibility of parole after ten (10) years for use of a deadly weapon consecutive to Count 1; as to Count 3 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 2; and as to Count 4 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 3. The Judgment of Conviction was filed on May 9, 2001.

On May 15, 2001, Petitioner filed a Notice of Appeal. On April 8, 2003, the Nevada Supreme Court issued an Order affirming Petitioner's Judgment of Conviction and Remittitur issued on May 9, 2003.

On February 13, 2004, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"). The State filed its Response on April 6, 2004. On

///

November 5, 2004, the District Court denied the First Petition. On January 31, 2005, the Findings of Fact, Conclusions of Law and Order was filed.

On February 9, 2005, Petitioner filed a Notice of Appeal. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the district court's decision and Remittitur issued on July 15, 2005.

On June 19, 2017, Petitioner filed a post-conviction Petition Requesting a Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. The State filed its Response on August 15, 2017. Petitioner filed his Reply on September 5, 2017. On September 13, 2017, the District Court granted Petitioner's Petition. The District Court filed its Order granting Petitioner's Petition on September 19, 2017.

On December 14, 2018, the District Court held an evidentiary hearing regarding additional testing on the DNA evidence. On December 19, 2018, the District Court granted Petitioner's Petition in part and denied the Petition in part. On July 24, 2019, the District Court set a briefing schedule based on the DNA testing.

On November 19, 2019, Petitioner filed a Motion for New Trial. The State filed its Response on January 30, 2020. Petitioner filed his Reply on March 4, 2020. On March 11, 2020, the District Court granted Petitioner's Motion. The District Court entered its Order on March 24, 2020.

On March 27, 2020, the State filed a Notice of Appeal.

On June 15, 2020, Petitioner filed a Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484. The State filed its Response on June 18, 2020. On June 29, 2020, the District Court denied Petitioner's Motion and noted that "proof is evident or the presumption is great" that Petitioner committed the crimes charged. The District Court further noted that the State demonstrated, by clear and convincing evidence, that the detention order was appropriate.

On July 8, 2021, the Nevada Supreme Court reversed the District Court's decision granting Petitioner's Motion for New Trial. Remittitur issued on November 2, 2021.

///

On November 1, 2022, Petitioner filed the instant Second Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") and Request for Evidentiary Hearing. The State's Response was filed on March 28, 2023. Petitioner filed an Opposition/Reply on April 5, 2023. On April 12, 2023, the Court denied the Second Petition and Request for Evidentiary Hearing on the merits.

## FACTUAL SYNOPSIS

The Nevada Supreme Court has stated:

> Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived together at Cinergi.1Limanni typically drove the business's brown Toyota truck, while Seka drove one of the company vans. The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.
>
> Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.
>
> The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.
>
> On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the 1-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton

had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

Notably, a cigarette butt was found a few feet from the body. A Skoal tobacco container, a second cigarette butt, a beer bottle, and a second beer bottle were found at varying distances of approximately 15 to 120 feet away from the body. All of the items were located in the desert area within several yards of Las Vegas Boulevard South.

The following day, a break-in was reported at 1929 Western Avenue, a vacant business next door to Cinergi. The front window was broken, and the glass and carpet were bloodied. There were also blood drag marks, and three bullets and bullet fragments. A bloodied dark blue jacket contained bullet holes that matched Hamilton's injuries. A baseball hat and a "gold nugget" bracelet were also found at the scene. An officer checked the perimeter that morning and looked into the communal dumpster, which contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

While the police were investigating 1929 Western, Seka drove up in Cinergi's Toyota truck—Limanni's work vehicle. The truck had been recently washed. Officers talked to Seka, who seemed nervous. Seka told them he worked at Cinergi with Limanni, who was in the Reno area with his girlfriend. Officers asked Seka if they could check inside Cinergi to see if anyone was injured, and Seka agreed. Officers became concerned after spotting a bullet on the office desk and some knives, and they handcuffed Seka and searched the business. In the room being remodeled as a humidor, they found lumber that matched the lumber covering Hamilton's body. They also found a bullet hole in the couch, a .32 cartridge bullet in the toilet, and both .357 and .32 bullets in the ceiling. Officers looked above the ceiling tiles and found a wallet containing Limanni's driver's license, social security card, and birth certificate as well as credit cards and a stolen purse. In a garbage can inside, they found Limanni's photographs alongside some papers and personal belongings. The officers eventually left to go to lunch, unhandcuffing Seka and leaving him at Cinergi. They were gone for a little over an hour.

When the officers returned, they noticed that the bullet that had been on the desk was missing. Seka opined that the building owner had removed it, but the building owner denied having been inside or having touched the bullet. Officers also checked the dumpster again and this time saw the bottom of the dumpster was now filled with clothing, papers, cards, and photographs, some of it in Limanni's name. Some of the items were burnt. Detectives also investigated and impounded the Toyota truck Seka
drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

Officers Mirandized Seka, who agreed to be interviewed at the detective bureau. Seka told the detective that Limanni had vanished weeks ago and that Seka was trying to keep up the business, alone. He described a man named "Seymore who had done odd jobs for Cinergi and claimed he last spoke to Seymore in late October, when Seymore called Seka's cell phone to ask about doing odd jobs. Detectives determined "Seymore" was Hamilton. The detective interviewing Seka told Seka he was a murder suspect, at which point Seka "smiled" and stated, "You're really starting to scare me now. I think you'd better arrest me or take me home. Do you have enough to arrest me right now?" The detective explained that officers would wait until the forensic evidence returned before making an arrest, and then he drove Seka back to Cinergi.

> Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.
>
> Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border. Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.
>
> Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

State v. Seka, 13 Nev 305, 306-08, 490 P.3d 1272, 1273-75 (2021).

## ANALYSIS

### I. THE COURT FINDS THE SECOND PETITION IS NOT PROCEDURALLY BARRED

#### A. Application Of The Procedural Bars Is Mandatory

The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. Instead, the Nevada Supreme Court has emphatically and repeatedly stated that the procedural bars *must* be applied.

The district courts have *a duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). Riker held that the procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. Accord, State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95, footnote 2 (2012), cert. denied, 571 U.S. ___, 133 S.Ct. 988 (2013) ("under the current statutory scheme the time bar in NRS 34.726 is *mandatory, not discretionary*" (emphasis added)).

///

Even "a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules." State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003); accord, Sullivan v. State, 120 Nev. 537, 540, footnote 6, 96 P.3d 761, 763-64, footnote 6 (2004) (concluding that a petition was improperly treated as timely and that a stipulation to the petition's timeliness was invalid). The Sullivan Court "expressly conclude[d] that the district court should have denied [a] petition" because it was procedurally barred. Sullivan, 120 Nev. at 542, 96 P.3d at 765.

The district courts have zero discretion in applying the procedural bars because to allow otherwise would undermine the finality of convictions. In holding that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," the Riker Court noted:

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

Riker, 121 Nev. at 231, 112 P.3d at 1074.

Moreover, strict adherence to the procedural bars promotes the best interests of the parties:

> At some point, we must give finality to criminal cases. Should we allow [petitioner's] post-conviction relief proceeding to go forward, we would encourage defendants to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interests of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citations omitted).

**B. The Court Finds The Second Petition Is Not Time-Barred**

The Second Petition is not time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this

> subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. __, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Petitioner had one year from the filing of his original Judgment of Conviction to file a timely petition.

Petitioner failed to file this Second Petition prior to the one-year deadline. Remittitur issued from Petitioner's direct appeal on May 9, 2003; therefore, Petitioner had until May 9, 2004, to file a timely habeas petition. Petitioner filed this Second Petition on November 1, 2022. This is over nineteen (19) years and five (5) months after Petitioner's one-year deadline. The Court finds good cause but does not find prejudice to excuse this delay. Therefore, Petitioner's Second Petition is denied.

**C. The Court Finds The Second Petition Is Not Barred As Successive**

NRS 34.810(2) reads:

> A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner has filed a prior petition for habeas relief. On February 13, 2004, Petitioner filed his First Petition. The State filed its Response on April 6, 2004. On November 5, 2004, the District Court denied the First Petition. On January 31, 2005, the Findings of Fact,

Conclusions of Law and Order was filed. On February 9, 2005, Petitioner filed a Notice of Appeal. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the District Court's decision and Remittitur issued on July 15, 2005. While the Court appreciates the State's argument that the Second Petition is successive and constitutes an abuse of the writ, the Court finds good cause but does not find prejudice to excuse this procedural bar. Therefore, Petitioner's Second Petition is denied.

**D. The State Affirmatively Pled Laches**

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, the State affirmatively pled laches. This Second Petition was filed on November 1, 2022, twenty-one (21) years after the Judgment of Conviction was filed on May 9, 2001; and nineteen (19) years after the Nevada Supreme Court filed its order affirming the Judgment

of Conviction on April 8, 2003. Because these time periods exceed five (5) years, the State argued it was entitled to a rebuttable presumption of prejudice under NRS 34.800(2). As the Court finds good cause but does not find prejudice to excuse the procedural bars, the Court further declines to dismiss the Second Petition pursuant to the doctrine of laches.

**E. The Court Finds Good Cause To Overcome The Procedural Bars**

To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

"To establish good cause, Petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "Petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish prejudice, the Petitioner must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a *reasonable* time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34

P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A reasonable period is presumably one-year from when the claim became available. See Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 734 (2016) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur."); Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001) ("The State concedes, and we agree, that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions"). A claim is reasonably available if the facts giving rise to the claim were discoverable using reasonable diligence. McClesky v. Zant, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470 (1991). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S.Ct. 1587, 1592 (2000).

In the instant Second Petition, Petitioner claims a violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) provides him good cause to overcome the procedural bars. Second Petition, at 9-12, 41-48. Petitioner claims a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match his, was not disclosed to defense Second Petition, at 41-48. Petitioner further claims he has good cause to overcome the procedural bars because he is actually innocent as shown by a previously unavailable report excluding Petitioner as a contributor of DNA found under Hamilton's fingernails. Second Petition, at 12, 48-51.

To qualify as good cause, Petitioner must demonstrate that the State withheld information favorable from the defense. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8

(2003). The defense bears the burden of proving that the State withheld information and it must prove specific facts that show as much. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003).

The Court finds that while the State raised several issues related to the aforementioned procedural bars of timeliness, successiveness and the affirmative pleading of laches, the Court is not denying the Second Petition based on the procedural bars. The Court finds that the procedural bars to not apply in light of Petitioner's claim that he did not receive the fingerprint report at issue earlier. The State did not concede that the fingerprint print report was withheld from Petitioner until 2017. However, whether it was inadvertent or intentional, it was not provided. Therefore, the Court is going to give Petitioner the benefit of the doubt that this is newly obtained evidence and information, and based on those circumstances, the procedural bars of timeliness, successiveness and laches should not apply.

## II. PETITIONER FAILS TO DEMONSTRATE PREJUDICE AS HIS CLAIMS ARE WITHOUT MERIT

To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

In this case, Petitioner claims a violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) based on a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match his, was not disclosed to defense Second Petition, at 9-12. 41-48. Petitioner further claims he is actually innocent as shown by a previously unavailable report excluding Petitioner as a contributor of DNA found under Hamilton's fingernails. Second Petition, at 12, 48-51.

Petitioner's claims fail to establish prejudice because these claims are without merit and barred by the law of the case doctrine. See Section IV, *infra.* Petitioner's claims based on new fingerprint and DNA evidence is negated by the Nevada Supreme Court's holding that "none

of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial." Seka, 13 Nev. at 316, 490 P.3d at 1280. Therefore, the Second Petition fails to establish prejudice and is denied.

**A. Petitioner Cannot Establish Prejudice Due To Overwhelming Evidence Supporting Both Murder Convictions**

Petitioner claims that the DNA evidence and the Brady material establish his innocence of the Hamilton murder and robbery because the evidence at trial was weak and entirely circumstantial. Second Petition, at 13. Petitioner's claim fails due to the overwhelming evidence presented against him at trial. As the Nevada Supreme Court found:

> Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.
>
> Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his

> girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.
>
> Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling, and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer. All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281.

Based on the prior findings and ruling of the Nevada Supreme Court, this Court now finds that Petitioner fails to establish prejudice and therefore, this Second Petition is denied.

**B. Ground One Is Denied Because Petitioner Fails To Establish A Brady Violation**

Petitioner claims a Brady violation and alleges that the State failed to provide a latent fingerprint report. Second Petition, at 42. Petitioner claims a Brady violation because a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match Seka's, was not disclosed to Petitioner. Second Petition, at 41-48. Petitioner's Brady claim is denied because Petitioner failed to establish that the report was favorable to him and Petitioner failed to establish that the report was material.

It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-

19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan, 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome. Id. (original emphasis) (citing Jimenez, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

**1. Petitioner Fails To Show That The Fingerprint Report Was Favorable And Material**

Petitioner claims that the fingerprint report was favorable and material:

> The fingerprint report was favorable. The police had originally alleged that Seka had stolen the purse. But the latent fingerprint report showed that Seka was not the contributor to the fingerprints found on the purse. It is clear evidence showing that he did not steal the purse. That is obviously favorable.
>
> The fingerprint report is also material. The fingerprint report exonerates Seka of stealing the purse. The report shows that Seka, as well as Hamilton and Limanni, were excluded as the source of the fingerprints connected to the purse.
>
> Just as important, a comparison of the deformed lead bullet found in Gorzoch's car and two bullets found in the Hamilton case established a likely connection between the two crimes. The class characteristics found on the bullets were consistent, potentially linking them to the same gun. If Seka did not steal the purse, then he very likely did not commit the Hamilton murder due to this ballistics connection. This evidence standing alone would raise a reasonable doubt in any reasonable juror's mind as to whether Seka committed the Hamilton murder.

Second Petition, at 44.

Petitioner argues that the report undermines the State's theory that he was guilty of murdering Hamilton because Petitioner had control over 1933 Western. Second Petition, 45 (citing JTT 2/23/2001 Vol 1, at 51). Petitioner concludes that the existence of the purse inside 1933 Western provides concrete physical evidence that someone else had access to 1933 Western. Second Petition, at 46.

Petitioner's argument that the report, showing that a purse was found in 1933 Western Avenue with an unknown person's fingerprints, was favorable and material fails for several reasons. First, Petitioner's claim that the existence of a purse would have shown the jury that

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"someone else had access to 1933 Western" fails because evidence presented at trial showed that several people had access to 1933 Western.

For instance, Michael Cerda testified that when he last saw Limanni, there was a "shapely, blonde-headed nice-looking gal" exiting 1933 Western. JTT 2/13/2001, Vol 2, at 61. Jennifer Harrison also testified that she dated Limanni and would visit him at 1933 Western; that there was an employee, "a Mexican guy," aside from Limanni and Petitioner. JTT 2/14/2001, Vol 1, at 49, 72. Harrison further testified that when she was looking for Limani on the first day that he was missing, she went to Cinergi and found Petitioner passed out on the floor while an unknown woman was sleeping on the couch. JTT 2/14/2001, Vol 1, at 65. Christine Caterino further testified that when she visited Petitioner in September 1998 and stayed at Cinergi, "there were people coming and going from the store." JTT 2/22/2001, Vol 2, at 40. Thus, Petitioner's argument that the report would have shown that "someone else had access to 1933 Western" fails.

Second, Petitioner argues that the State's case relied almost entirely on the purported connections between evidence related to the Hamilton murder and evidence found in or connected to 1933 Western. Second Petition, at 45. Petitioner's claim for materiality of the report fails because the State did not charge Petitioner with any crime related to the stolen purse and did not use any evidence related to the purse to connect Petitioner to Hamilton's or Limanni's murder.

Third, the report does not negate the overwhelming evidence that Petitioner killed Hamilton and Limanni. The State is not required to show that Petitioner's fingerprints were on every piece of evidence recovered by the police. The jury's verdict reflects as much. At trial, the LVMPD latent print examiner Fred Boyd testified that a beer bottle and wooden boards found near Hamilton's body had fingerprints that did not belong to Petitioner or the victims, yet they found Petitioner guilty of both murders. JTT, 2/21/2001, Vol 2, at 15, 17-23.

Finally, Petitioner's Brady claim fails because he cannot establish that the outcome of his case would have been different if the report was presented to the jury due to the overwhelming evidence supporting the guilty verdicts for both murders. See Section II (C),

*supra*. Therefore, Petitioner fails to establish all three (3) elements of his Brady claim, and Ground One is denied.

**C. Ground Two Is Denied Because Petitioner's Claim Of Actual Innocence Does Not Entitle Him To Relief**

Petitioner claims his "conviction and sentence are invalid because new evidence including exonerating DNA evidence, establishes he is actually innocent of first-degree murder, second degree murder and robbery." Second Petition, at 48. Petitioner argues he is actually innocent because the new DNA result excludes him as a contributor to the "DNA profile found on Hamilton's right and left fingernails." Second Petition, at 50.

Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

"Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has

made a showing of actual innocence, he may then use the claim as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Id.

**1. Freestanding Actual Innocence Claims Are Not Cognizable Even In Post-Conviction Proceedings**

Nevada law does not recognize freestanding claims of actual innocence in a Petition for Writ of Habeas Corpus, but rather only provides for claims of actual innocence where a defendant is attempting to overcome a procedural bar caused by an untimely or successive petition. See Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); See also Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). This is consistent with the Nevada Supreme Court's adoption of the standard established in Schlup v. Delo. See 513 U.S. 238, 315, 115 S. Ct. 851, 861 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993)) ("Schlup's claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

In contrast, a freestanding claim of actual innocence is a claim wherein a petitioner alleges actual innocence alone, rather than actual innocence supported by a claim of constitutional deficiency, warrants relief. See Herrera, 506 U.S. 390, 113 S. Ct. 853 (1993). The Herrera Court acknowledged that claims of actual innocence based on newly discovered evidence have never been held as a ground for habeas relief absent an independent constitutional violation in the underlying criminal proceeding. Id. The Court noted such claims were traditionally addressed in the context of requests for executive clemency, which power exists in every state and at the federal level. Id. at 414-15, 113 S. Ct. at 867-68. However, the Court assumed, arguendo, that a federal freestanding claim of actual innocence may exist where a petitioner was sentenced to death and state law precluded any relief. Herrera, 506 U.S. at 417, 113 S. Ct. at 869; Schlup, 513 U.S. at 317, 115 S. Ct. at 862. The United States Supreme Court has never found a freestanding claim of actual innocence to be available in a non-capital case. See, e.g., Herrera, 506 U.S. at 404-405, 416-417; House v. Bell, 547 U.S.

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518, 554, 126 S. Ct. 2064, 2086 (2006); see also Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000).

Petitioner fails to cite any Nevada authority which would allow him to raise a freestanding claim of actual innocence and improperly suggests such a claim before this Court. However, Petitioner fails to recognize that this assertion, itself, is not an independent, cognizable ground for habeas relief. See Schlup, 513 U.S. at 327, 115 S.Ct. at 867. Instead, such an assertion may only constitute good cause to overcome other procedural bars to Petitioner's claim. Id. However, as shown below, Petitioner's claim for actual innocence lacks merit. Therefore, Petitioner cannot meet the "stringent standard" for demonstrating actual innocence sufficient to establish prejudice.

**2. Ground Two Is Without Merit And Barred By The Law Of The Case Doctrine**

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011).

Petitioner presents the same DNA result that was among those considered by the Nevada Supreme Court in 2021:

> In 2017, Seka requested a DNA test of evidence collected at Hamilton's remote desert crime scene and the surrounding area. Seka argued that had items collected by detectives yielded exculpatory evidence at trial, he would not have been convicted, particularly in light of the evidence implicating Cinergi investors and undermining Cramer's testimony of Seka's confession. The district court granted Seka's request, and the following items were tested for DNA in late 2018 and early 2019:

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.

*(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA that it could have been transferred from something as benign as a handshake or DNA may not have actually existed.*

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.

(4) The Skoal tobacco container found near Hamilton's body. The 2019 testing showed two contributors, but Hamilton and Seka were excluded. The forensic scientist explained that an old technique used to find latent fingerprints, "huffing," may have been used on this item and may have contaminated the DNA profile. Moreover, because at the time of the original trial the State did not have the capability to test for "touch DNA," the scientists may not have worn gloves while examining the evidence, or crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

(5) A beer bottle found off the road in the desert in the vicinity of Hamilton's body. The 2019 DNA testing excluded Hamilton and Seka but included a female contributor. As with the Skoal tobacco container, the forensic scientist testified that huffing and other outdated procedures may have contributed unknown DNA onto the item.

(6) The baseball hat found at 1929 Western. The 2019 DNA testing showed three contributors, including Hamilton, but the results were inconclusive as to Seka. The forensic scientist explained the cap was kept in an unsealed bag along with a toothbrush also found at 1929 Western. Critically, he further testified that it was impossible to know how many times the bag had been opened or closed during the jury trial or whether the hat had been contaminated, such as by jurors holding it or talking over it.

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion. Arguing the new DNA evidence does not warrant a new trial, the State appeals.

Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281 (emphasis added).

The Nevada Supreme Court discussion of the DNA results negates Petitioner's contention that they show actual innocence:

*First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows*

*Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails. Moreover, the fingernail clippings provided so little DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.*

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time. Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

Finally, the DNA on the hat has no probative value here. Although that testing produced other profiles, it was inconclusive as to Seka, and, moreover, the hat was not properly sealed and may have been contaminated before and during trial, including by the jury, making the presence of additional DNA profiles of no relevance under these circumstances.

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not materially support Seka's defense, as it is cumulative of the evidence already adduced at trial excluding Seka as a contributor to DNA profiles or fingerprint evidence. The State did not rely upon any of these items at trial to argue Seka's guilt, further reducing the evidentiary value of the new DNA evidence, and, moreover, nothing supports that the killer actually touched any of the evidence tested in 2018 and 2019. Nor did any of the new DNA evidence implicate another killer or exonerate Seka under the totality of all of the evidence adduced in this case.

Importantly, none of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial. It is clear from the circumstantial evidence that Hamilton was killed next door to Seka's business and residence on Western Avenue, and his body was transported and dumped in a remote desert area. The .357 bullet casings found at Cinergi were consistent with the caliber of gun that was used to shoot Hamilton next door, and Hamilton's blood was found at 1929 Western and in the truck Seka was driving the morning after Hamilton's body was discovered. Moreover, the truck's tire impressions were similar to the tire tracks found near Hamilton's body—tracks that drove off and back on the road consistent with the body being quickly dumped. Although crime scene analysts routinely gather items found around a body in hopes of implicating a killer, under these particular circumstances—where the body was driven to a remote area and dumped off the side of the road—the random trash items in the desert with unknown DNA contributors do not undermine the other evidence against Seka.

Seka, 13 Nev. at 315-316, 490 P.3d at 1280-1281 (emphasis added).

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Petitioner fails to establish actual innocence because he supports his claim with DNA evidence that the Supreme Court found to be of little value. Additionally, Petitioner cannot establish actual innocence due to the overwhelming evidence supporting his murder convictions. See Section II (C), *supra.*

In conclusion, the Court notes that there was DNA evidence, fingerprint evidence, and items that perhaps did not belong to Petitioner. The Court further notes that the Nevada Supreme Court found that this other DNA evidence was very similar to DNA evidence that did not match Petitioner. What the Nevada Supreme Court recognized in reversing this Court's determination to grant a new trial was that in convicting Petitioner at trial, the jury did not rely on DNA evidence because there was no DNA evidence to rely on. The jury was informed that there were fingerprints that did not belong to Petitioner on items that were near where Mr. Hamilton was found, yet the jury still convicted Petitioner. New evidence related to this same type of evidence does not seem to be persuasive in any way to the Nevada Supreme Court, nor is it persuasive to the District Court at this time in light of what the Nevada Supreme Court has found. Ultimately, Petitioner was found guilty based on the circumstantial evidence presented at trial and this additional physical evidence would not have changed that outcome.

Even though the Brady claim differs from the actual innocence claim, it is ultimately on the same basis that they are both being denied, which is the finding of the Nevada Supreme Court that is the law of the case under the laws of the State of Nevada. The Nevada Supreme Court determined in this case that the additional evidence and the way in which the jury conducted its determination would not have been changed by additional DNA or fingerprint evidence not matching Petitioner. And for those reasons, based on what the Nevada Supreme Court previously found, this Court is going to follow in their determination that the additional evidence at issue would not have been favorable or otherwise material, and that Petitioner's claims do not establish prejudice in this case. Therefore, Ground Two is denied.

## III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is

> required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.** Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Petitioner requested an evidentiary hearing. The Court finds that there is no need for an evidentiary hearing because Petitioner is not entitled to any relief. The reason the Court is denying the request for an evidentiary hearing is because the Court is not persuaded from a substantive standpoint that there is anything here that would change the outcome of what previously occurred in this case and what the Nevada Supreme Court previously found. No need exists to expand the record as all claims can be disposed of based on the existing record. Therefore, Petitioner's request for an evidentiary hearing is denied.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that Petitioner's Second Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Evidentiary Hearing shall be, and they are, hereby denied.

**Dated this 5th day of May, 2023**

**D91 CA3 29D0 B849**
**Kathleen E. Delaney**
**District Court Judge**

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

BY /s/ *TALEEN PANDUKHT*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 3rd day of May 2023, by Electronic Filing to:

JONATHAN_Kirshbaum, Assistant Federal Public Defender

E-mail: Jonathan_Kirshbaum@fd.org

/s/ Janet Hayes
Secretary for the District Attorney's Office

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 3rd day of May 2023, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOHN JOSEPH SEKA, BAC #69025
HIGH DESERT STATE PRISON
P. O. BOX 650
INDIAN SPRINGS, NEVADA 89070

BY /s/ *Janet Hayes*
Secretary for the District Attorney's Office

99F03542X/TRP/jh/MVU

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| John Seka, Plaintiff(s) | CASE NO: A-22-860668-W |
| vs. | DEPT. NO. Department 25 |
| Calvin Johnson, Defendant(s) | |

**AUTOMATED CERTIFICATE OF SERVICE**

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

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# DISTRICT COURT
# CLARK COUNTY, NEVADA

JOHN SEKA,

Petitioner,

vs.

CALVIN JOHNSON,

Respondent,

Case No: A-22-860668-W

Dept No: XXV

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

**PLEASE TAKE NOTICE** that on May 5, 2023, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on May 10, 2023.

STEVEN D. GRIERSON, CLERK OF THE COURT

*/s/ Amanda Hampton*
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 10 day of May 2023, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:

John Seka # 69025
P.O. Box 650
Indian Springs, NV 89070

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

*/s/ Amanda Hampton*
Amanda Hampton, Deputy Clerk

**FFCO**
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Clark County District Attorney
Nevada Bar #001565
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN JOSEPH SEKA,
#1525324

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-22-860668-W**
(C99C159915)
DEPT NO: XXV

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

DATE OF HEARING: April 12, 2023
TIME OF HEARING: 9:30 a.m.

THIS CAUSE having come on for hearing before the Honorable KATHLEEN E. DELANEY, District Judge, on the 12th day of April, 2023, Petitioner not being present, being represented by JONATHAN M. KIRSHBAUM, ESQ. and SHELLY RICHTER, ESQ., Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through AGNES BOTELHO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law.

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**FINDINGS OF FACT, CONCLUSIONS OF LAW**

**PROCEDURAL HISTORY**

On June 30, 1999, John Joseph Seka (hereinafter "Petitioner") was charged by way of Information with: Counts 1 & 2 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); and Counts 3 & 4 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). On July 26, 1999, the State filed its Notice of Intent to Seek the Death Penalty.

Jury trial commenced on February 12, 2001. On March 1, 2001, the jury returned a verdict of guilty of First Degree Murder With Use of a Deadly Weapon as to Count 1, guilty of Second Degree Murder With Use of a Deadly Weapon as to Count 2, and guilty of Robbery as to Counts 3 and 4. The penalty hearing commenced on March 2, 2001. However, the jury could not return a special verdict. On March 13, 2001, the parties filed a Stipulation and Agreement to Waive Sentencing by Three-Judge Panel and stipulated to a sentence of life without the possibility of parole as to Count 1.

On April 26, 2001, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – Life without the possibility of parole with an equal and consecutive term of Life without the possibility of parole for use of a deadly weapon; as to Count 2 – Life with the possibility of parole after ten (10) years with an equal and consecutive term of Life with the possibility of parole after ten (10) years for use of a deadly weapon consecutive to Count 1; as to Count 3 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 2; and as to Count 4 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 3. The Judgment of Conviction was filed on May 9, 2001.

On May 15, 2001, Petitioner filed a Notice of Appeal. On April 8, 2003, the Nevada Supreme Court issued an Order affirming Petitioner's Judgment of Conviction and Remittitur issued on May 9, 2003.

On February 13, 2004, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"). The State filed its Response on April 6, 2004. On

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November 5, 2004, the District Court denied the First Petition. On January 31, 2005, the Findings of Fact, Conclusions of Law and Order was filed.

On February 9, 2005, Petitioner filed a Notice of Appeal. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the district court's decision and Remittitur issued on July 15, 2005.

On June 19, 2017, Petitioner filed a post-conviction Petition Requesting a Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. The State filed its Response on August 15, 2017. Petitioner filed his Reply on September 5, 2017. On September 13, 2017, the District Court granted Petitioner's Petition. The District Court filed its Order granting Petitioner's Petition on September 19, 2017.

On December 14, 2018, the District Court held an evidentiary hearing regarding additional testing on the DNA evidence. On December 19, 2018, the District Court granted Petitioner's Petition in part and denied the Petition in part. On July 24, 2019, the District Court set a briefing schedule based on the DNA testing.

On November 19, 2019, Petitioner filed a Motion for New Trial. The State filed its Response on January 30, 2020. Petitioner filed his Reply on March 4, 2020. On March 11, 2020, the District Court granted Petitioner's Motion. The District Court entered its Order on March 24, 2020.

On March 27, 2020, the State filed a Notice of Appeal.

On June 15, 2020, Petitioner filed a Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484. The State filed its Response on June 18, 2020. On June 29, 2020, the District Court denied Petitioner's Motion and noted that "proof is evident or the presumption is great" that Petitioner committed the crimes charged. The District Court further noted that the State demonstrated, by clear and convincing evidence, that the detention order was appropriate.

On July 8, 2021, the Nevada Supreme Court reversed the District Court's decision granting Petitioner's Motion for New Trial. Remittitur issued on November 2, 2021.

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On November 1, 2022, Petitioner filed the instant Second Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") and Request for Evidentiary Hearing. The State's Response was filed on March 28, 2023. Petitioner filed an Opposition/Reply on April 5, 2023. On April 12, 2023, the Court denied the Second Petition and Request for Evidentiary Hearing on the merits.

## FACTUAL SYNOPSIS

The Nevada Supreme Court has stated:

> Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived together at Cinergi.1Limanni typically drove the business's brown Toyota truck, while Seka drove one of the company vans. The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.
>
> Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.
>
> The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.
>
> On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the 1-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton

had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

Notably, a cigarette butt was found a few feet from the body. A Skoal tobacco container, a second cigarette butt, a beer bottle, and a second beer bottle were found at varying distances of approximately 15 to 120 feet away from the body. All of the items were located in the desert area within several yards of Las Vegas Boulevard South.

The following day, a break-in was reported at 1929 Western Avenue, a vacant business next door to Cinergi. The front window was broken, and the glass and carpet were bloodied. There were also blood drag marks, and three bullets and bullet fragments. A bloodied dark blue jacket contained bullet holes that matched Hamilton's injuries. A baseball hat and a "gold nugget" bracelet were also found at the scene. An officer checked the perimeter that morning and looked into the communal dumpster, which contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

While the police were investigating 1929 Western, Seka drove up in Cinergi's Toyota truck—Limanni's work vehicle. The truck had been recently washed. Officers talked to Seka, who seemed nervous. Seka told them he worked at Cinergi with Limanni, who was in the Reno area with his girlfriend. Officers asked Seka if they could check inside Cinergi to see if anyone was injured, and Seka agreed. Officers became concerned after spotting a bullet on the office desk and some knives, and they handcuffed Seka and searched the business. In the room being remodeled as a humidor, they found lumber that matched the lumber covering Hamilton's body. They also found a bullet hole in the couch, a .32 cartridge bullet in the toilet, and both .357 and .32 bullets in the ceiling. Officers looked above the ceiling tiles and found a wallet containing Limanni's driver's license, social security card, and birth certificate as well as credit cards and a stolen purse. In a garbage can inside, they found Limanni's photographs alongside some papers and personal belongings. The officers eventually left to go to lunch, unhandcuffing Seka and leaving him at Cinergi. They were gone for a little over an hour.

When the officers returned, they noticed that the bullet that had been on the desk was missing. Seka opined that the building owner had removed it, but the building owner denied having been inside or having touched the bullet. Officers also checked the dumpster again and this time saw the bottom of the dumpster was now filled with clothing, papers, cards, and photographs, some of it in Limanni's name. Some of the items were burnt. Detectives also investigated and impounded the Toyota truck Seka
drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

Officers Mirandized Seka, who agreed to be interviewed at the detective bureau. Seka told the detective that Limanni had vanished weeks ago and that Seka was trying to keep up the business, alone. He described a man named "Seymore who had done odd jobs for Cinergi and claimed he last spoke to Seymore in late October, when Seymore called Seka's cell phone to ask about doing odd jobs. Detectives determined "Seymore" was Hamilton. The detective interviewing Seka told Seka he was a murder suspect, at which point Seka "smiled" and stated, "You're really starting to scare me now. I think you'd better arrest me or take me home. Do you have enough to arrest me right now?" The detective explained that officers would wait until the forensic evidence returned before making an arrest, and then he drove Seka back to Cinergi.

> Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.
>
> Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border. Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.
>
> Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

State v. Seka, 13 Nev 305, 306-08, 490 P.3d 1272, 1273-75 (2021).

## ANALYSIS

### I. THE COURT FINDS THE SECOND PETITION IS NOT PROCEDURALLY BARRED

#### A. Application Of The Procedural Bars Is Mandatory

The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. Instead, the Nevada Supreme Court has emphatically and repeatedly stated that the procedural bars *must* be applied.

The district courts have *a duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). Riker held that the procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. Accord, State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95, footnote 2 (2012), cert. denied, 571 U.S. ___, 133 S.Ct. 988 (2013) ("under the current statutory scheme the time bar in NRS 34.726 is *mandatory, not discretionary*" (emphasis added)).

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Even "a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules." State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003); accord, Sullivan v. State, 120 Nev. 537, 540, footnote 6, 96 P.3d 761, 763-64, footnote 6 (2004) (concluding that a petition was improperly treated as timely and that a stipulation to the petition's timeliness was invalid). The Sullivan Court "expressly conclude[d] that the district court should have denied [a] petition" because it was procedurally barred. Sullivan, 120 Nev. at 542, 96 P.3d at 765.

The district courts have zero discretion in applying the procedural bars because to allow otherwise would undermine the finality of convictions. In holding that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," the Riker Court noted:

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

Riker, 121 Nev. at 231, 112 P.3d at 1074.

Moreover, strict adherence to the procedural bars promotes the best interests of the parties:

> At some point, we must give finality to criminal cases. Should we allow [petitioner's] post-conviction relief proceeding to go forward, we would encourage defendants to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interests of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citations omitted).

**B. The Court Finds The Second Petition Is Not Time-Barred**

The Second Petition is not time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this

> subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

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

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. __, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Petitioner had one year from the filing of his original Judgment of Conviction to file a timely petition.

Petitioner failed to file this Second Petition prior to the one-year deadline. Remittitur issued from Petitioner's direct appeal on May 9, 2003; therefore, Petitioner had until May 9, 2004, to file a timely habeas petition. Petitioner filed this Second Petition on November 1, 2022. This is over nineteen (19) years and five (5) months after Petitioner's one-year deadline. The Court finds good cause but does not find prejudice to excuse this delay. Therefore, Petitioner's Second Petition is denied.

**C. The Court Finds The Second Petition Is Not Barred As Successive**

NRS 34.810(2) reads:

> A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner has filed a prior petition for habeas relief. On February 13, 2004, Petitioner filed his First Petition. The State filed its Response on April 6, 2004. On November 5, 2004, the District Court denied the First Petition. On January 31, 2005, the Findings of Fact,

Conclusions of Law and Order was filed. On February 9, 2005, Petitioner filed a Notice of Appeal. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the District Court's decision and Remittitur issued on July 15, 2005. While the Court appreciates the State's argument that the Second Petition is successive and constitutes an abuse of the writ, the Court finds good cause but does not find prejudice to excuse this procedural bar. Therefore, Petitioner's Second Petition is denied.

**D. The State Affirmatively Pled Laches**

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, the State affirmatively pled laches. This Second Petition was filed on November 1, 2022, twenty-one (21) years after the Judgment of Conviction was filed on May 9, 2001; and nineteen (19) years after the Nevada Supreme Court filed its order affirming the Judgment

of Conviction on April 8, 2003. Because these time periods exceed five (5) years, the State argued it was entitled to a rebuttable presumption of prejudice under NRS 34.800(2). As the Court finds good cause but does not find prejudice to excuse the procedural bars, the Court further declines to dismiss the Second Petition pursuant to the doctrine of laches.

**E. The Court Finds Good Cause To Overcome The Procedural Bars**

To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

"To establish good cause, Petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "Petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish prejudice, the Petitioner must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a *reasonable* time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34

P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

A reasonable period is presumably one-year from when the claim became available. See Rippo v. State, 132 Nev. 95, 101, 368 P.3d 729, 734 (2016) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur."); Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001) ("The State concedes, and we agree, that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions"). A claim is reasonably available if the facts giving rise to the claim were discoverable using reasonable diligence. McClesky v. Zant, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470 (1991). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S.Ct. 1587, 1592 (2000).

In the instant Second Petition, Petitioner claims a violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) provides him good cause to overcome the procedural bars. Second Petition, at 9-12, 41-48. Petitioner claims a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match his, was not disclosed to defense Second Petition, at 41-48. Petitioner further claims he has good cause to overcome the procedural bars because he is actually innocent as shown by a previously unavailable report excluding Petitioner as a contributor of DNA found under Hamilton's fingernails. Second Petition, at 12, 48-51.

To qualify as good cause, Petitioner must demonstrate that the State withheld information favorable from the defense. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8

(2003). The defense bears the burden of proving that the State withheld information and it must prove specific facts that show as much. State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003).

The Court finds that while the State raised several issues related to the aforementioned procedural bars of timeliness, successiveness and the affirmative pleading of laches, the Court is not denying the Second Petition based on the procedural bars. The Court finds that the procedural bars to not apply in light of Petitioner's claim that he did not receive the fingerprint report at issue earlier. The State did not concede that the fingerprint print report was withheld from Petitioner until 2017. However, whether it was inadvertent or intentional, it was not provided. Therefore, the Court is going to give Petitioner the benefit of the doubt that this is newly obtained evidence and information, and based on those circumstances, the procedural bars of timeliness, successiveness and laches should not apply.

## II. PETITIONER FAILS TO DEMONSTRATE PREJUDICE AS HIS CLAIMS ARE WITHOUT MERIT

To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

In this case, Petitioner claims a violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) based on a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match his, was not disclosed to defense Second Petition, at 9-12. 41-48. Petitioner further claims he is actually innocent as shown by a previously unavailable report excluding Petitioner as a contributor of DNA found under Hamilton's fingernails. Second Petition, at 12, 48-51.

Petitioner's claims fail to establish prejudice because these claims are without merit and barred by the law of the case doctrine. See Section IV, *infra.* Petitioner's claims based on new fingerprint and DNA evidence is negated by the Nevada Supreme Court's holding that "none

of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial." Seka, 13 Nev. at 316, 490 P.3d at 1280. Therefore, the Second Petition fails to establish prejudice and is denied.

**A. Petitioner Cannot Establish Prejudice Due To Overwhelming Evidence Supporting Both Murder Convictions**

Petitioner claims that the DNA evidence and the Brady material establish his innocence of the Hamilton murder and robbery because the evidence at trial was weak and entirely circumstantial. Second Petition, at 13. Petitioner's claim fails due to the overwhelming evidence presented against him at trial. As the Nevada Supreme Court found:

> Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.
>
> Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his

> girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.
>
> Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling, and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer. All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281.

Based on the prior findings and ruling of the Nevada Supreme Court, this Court now finds that Petitioner fails to establish prejudice and therefore, this Second Petition is denied.

**B. Ground One Is Denied Because Petitioner Fails To Establish A Brady Violation**

Petitioner claims a Brady violation and alleges that the State failed to provide a latent fingerprint report. Second Petition, at 42. Petitioner claims a Brady violation because a latent fingerprint report, showing that a stolen purse recovered from 1933 Western Avenue had fingerprints that did not match Seka's, was not disclosed to Petitioner. Second Petition, at 41-48. Petitioner's Brady claim is denied because Petitioner failed to establish that the report was favorable to him and Petitioner failed to establish that the report was material.

It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-

19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan, 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome. Id. (original emphasis) (citing Jimenez, 112 Nev. at 618-19, 918 P.2d at 692; Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

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

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

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

**1. Petitioner Fails To Show That The Fingerprint Report Was Favorable And Material**

Petitioner claims that the fingerprint report was favorable and material:

> The fingerprint report was favorable. The police had originally alleged that Seka had stolen the purse. But the latent fingerprint report showed that Seka was not the contributor to the fingerprints found on the purse. It is clear evidence showing that he did not steal the purse. That is obviously favorable.
>
> The fingerprint report is also material. The fingerprint report exonerates Seka of stealing the purse. The report shows that Seka, as well as Hamilton and Limanni, were excluded as the source of the fingerprints connected to the purse.
>
> Just as important, a comparison of the deformed lead bullet found in Gorzoch's car and two bullets found in the Hamilton case established a likely connection between the two crimes. The class characteristics found on the bullets were consistent, potentially linking them to the same gun. If Seka did not steal the purse, then he very likely did not commit the Hamilton murder due to this ballistics connection. This evidence standing alone would raise a reasonable doubt in any reasonable juror's mind as to whether Seka committed the Hamilton murder.

Second Petition, at 44.

Petitioner argues that the report undermines the State's theory that he was guilty of murdering Hamilton because Petitioner had control over 1933 Western. Second Petition, 45 (citing JTT 2/23/2001 Vol 1, at 51). Petitioner concludes that the existence of the purse inside 1933 Western provides concrete physical evidence that someone else had access to 1933 Western. Second Petition, at 46.

Petitioner's argument that the report, showing that a purse was found in 1933 Western Avenue with an unknown person's fingerprints, was favorable and material fails for several reasons. First, Petitioner's claim that the existence of a purse would have shown the jury that

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"someone else had access to 1933 Western" fails because evidence presented at trial showed that several people had access to 1933 Western.

For instance, Michael Cerda testified that when he last saw Limanni, there was a "shapely, blonde-headed nice-looking gal" exiting 1933 Western. JTT 2/13/2001, Vol 2, at 61. Jennifer Harrison also testified that she dated Limanni and would visit him at 1933 Western; that there was an employee, "a Mexican guy," aside from Limanni and Petitioner. JTT 2/14/2001, Vol 1, at 49, 72. Harrison further testified that when she was looking for Limani on the first day that he was missing, she went to Cinergi and found Petitioner passed out on the floor while an unknown woman was sleeping on the couch. JTT 2/14/2001, Vol 1, at 65. Christine Caterino further testified that when she visited Petitioner in September 1998 and stayed at Cinergi, "there were people coming and going from the store." JTT 2/22/2001, Vol 2, at 40. Thus, Petitioner's argument that the report would have shown that "someone else had access to 1933 Western" fails.

Second, Petitioner argues that the State's case relied almost entirely on the purported connections between evidence related to the Hamilton murder and evidence found in or connected to 1933 Western. Second Petition, at 45. Petitioner's claim for materiality of the report fails because the State did not charge Petitioner with any crime related to the stolen purse and did not use any evidence related to the purse to connect Petitioner to Hamilton's or Limanni's murder.

Third, the report does not negate the overwhelming evidence that Petitioner killed Hamilton and Limanni. The State is not required to show that Petitioner's fingerprints were on every piece of evidence recovered by the police. The jury's verdict reflects as much. At trial, the LVMPD latent print examiner Fred Boyd testified that a beer bottle and wooden boards found near Hamilton's body had fingerprints that did not belong to Petitioner or the victims, yet they found Petitioner guilty of both murders. JTT, 2/21/2001, Vol 2, at 15, 17-23.

Finally, Petitioner's Brady claim fails because he cannot establish that the outcome of his case would have been different if the report was presented to the jury due to the overwhelming evidence supporting the guilty verdicts for both murders. See Section II (C),

*supra*. Therefore, Petitioner fails to establish all three (3) elements of his Brady claim, and Ground One is denied.

**C. Ground Two Is Denied Because Petitioner's Claim Of Actual Innocence Does Not Entitle Him To Relief**

Petitioner claims his "conviction and sentence are invalid because new evidence including exonerating DNA evidence, establishes he is actually innocent of first-degree murder, second degree murder and robbery." Second Petition, at 48. Petitioner argues he is actually innocent because the new DNA result excludes him as a contributor to the "DNA profile found on Hamilton's right and left fingernails." Second Petition, at 50.

Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

"Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has

made a showing of actual innocence, he may then use the claim as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Id.

**1. Freestanding Actual Innocence Claims Are Not Cognizable Even In Post-Conviction Proceedings**

Nevada law does not recognize freestanding claims of actual innocence in a Petition for Writ of Habeas Corpus, but rather only provides for claims of actual innocence where a defendant is attempting to overcome a procedural bar caused by an untimely or successive petition. See Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); See also Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). This is consistent with the Nevada Supreme Court's adoption of the standard established in Schlup v. Delo. See 513 U.S. 238, 315, 115 S. Ct. 851, 861 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862 (1993)) ("Schlup's claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

In contrast, a freestanding claim of actual innocence is a claim wherein a petitioner alleges actual innocence alone, rather than actual innocence supported by a claim of constitutional deficiency, warrants relief. See Herrera, 506 U.S. 390, 113 S. Ct. 853 (1993). The Herrera Court acknowledged that claims of actual innocence based on newly discovered evidence have never been held as a ground for habeas relief absent an independent constitutional violation in the underlying criminal proceeding. Id. The Court noted such claims were traditionally addressed in the context of requests for executive clemency, which power exists in every state and at the federal level. Id. at 414-15, 113 S. Ct. at 867-68. However, the Court assumed, arguendo, that a federal freestanding claim of actual innocence may exist where a petitioner was sentenced to death and state law precluded any relief. Herrera, 506 U.S. at 417, 113 S. Ct. at 869; Schlup, 513 U.S. at 317, 115 S. Ct. at 862. The United States Supreme Court has never found a freestanding claim of actual innocence to be available in a non-capital case. See, e.g., Herrera, 506 U.S. at 404-405, 416-417; House v. Bell, 547 U.S.

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518, 554, 126 S. Ct. 2064, 2086 (2006); see also Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000).

Petitioner fails to cite any Nevada authority which would allow him to raise a freestanding claim of actual innocence and improperly suggests such a claim before this Court. However, Petitioner fails to recognize that this assertion, itself, is not an independent, cognizable ground for habeas relief. See Schlup, 513 U.S. at 327, 115 S.Ct. at 867. Instead, such an assertion may only constitute good cause to overcome other procedural bars to Petitioner's claim. Id. However, as shown below, Petitioner's claim for actual innocence lacks merit. Therefore, Petitioner cannot meet the "stringent standard" for demonstrating actual innocence sufficient to establish prejudice.

**2. Ground Two Is Without Merit And Barred By The Law Of The Case Doctrine**

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011).

Petitioner presents the same DNA result that was among those considered by the Nevada Supreme Court in 2021:

> In 2017, Seka requested a DNA test of evidence collected at Hamilton's remote desert crime scene and the surrounding area. Seka argued that had items collected by detectives yielded exculpatory evidence at trial, he would not have been convicted, particularly in light of the evidence implicating Cinergi investors and undermining Cramer's testimony of Seka's confession. The district court granted Seka's request, and the following items were tested for DNA in late 2018 and early 2019:

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.

*(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA that it could have been transferred from something as benign as a handshake or DNA may not have actually existed.*

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.

(4) The Skoal tobacco container found near Hamilton's body. The 2019 testing showed two contributors, but Hamilton and Seka were excluded. The forensic scientist explained that an old technique used to find latent fingerprints, "huffing," may have been used on this item and may have contaminated the DNA profile. Moreover, because at the time of the original trial the State did not have the capability to test for "touch DNA," the scientists may not have worn gloves while examining the evidence, or crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

(5) A beer bottle found off the road in the desert in the vicinity of Hamilton's body. The 2019 DNA testing excluded Hamilton and Seka but included a female contributor. As with the Skoal tobacco container, the forensic scientist testified that huffing and other outdated procedures may have contributed unknown DNA onto the item.

(6) The baseball hat found at 1929 Western. The 2019 DNA testing showed three contributors, including Hamilton, but the results were inconclusive as to Seka. The forensic scientist explained the cap was kept in an unsealed bag along with a toothbrush also found at 1929 Western. Critically, he further testified that it was impossible to know how many times the bag had been opened or closed during the jury trial or whether the hat had been contaminated, such as by jurors holding it or talking over it.

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion. Arguing the new DNA evidence does not warrant a new trial, the State appeals.

Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281 (emphasis added).

The Nevada Supreme Court discussion of the DNA results negates Petitioner's contention that they show actual innocence:

*First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows*

*Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails. Moreover, the fingernail clippings provided so little DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.*

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time. Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

Finally, the DNA on the hat has no probative value here. Although that testing produced other profiles, it was inconclusive as to Seka, and, moreover, the hat was not properly sealed and may have been contaminated before and during trial, including by the jury, making the presence of additional DNA profiles of no relevance under these circumstances.

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not materially support Seka's defense, as it is cumulative of the evidence already adduced at trial excluding Seka as a contributor to DNA profiles or fingerprint evidence. The State did not rely upon any of these items at trial to argue Seka's guilt, further reducing the evidentiary value of the new DNA evidence, and, moreover, nothing supports that the killer actually touched any of the evidence tested in 2018 and 2019. Nor did any of the new DNA evidence implicate another killer or exonerate Seka under the totality of all of the evidence adduced in this case.

Importantly, none of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial. It is clear from the circumstantial evidence that Hamilton was killed next door to Seka's business and residence on Western Avenue, and his body was transported and dumped in a remote desert area. The .357 bullet casings found at Cinergi were consistent with the caliber of gun that was used to shoot Hamilton next door, and Hamilton's blood was found at 1929 Western and in the truck Seka was driving the morning after Hamilton's body was discovered. Moreover, the truck's tire impressions were similar to the tire tracks found near Hamilton's body—tracks that drove off and back on the road consistent with the body being quickly dumped. Although crime scene analysts routinely gather items found around a body in hopes of implicating a killer, under these particular circumstances—where the body was driven to a remote area and dumped off the side of the road—the random trash items in the desert with unknown DNA contributors do not undermine the other evidence against Seka.

Seka, 13 Nev. at 315-316, 490 P.3d at 1280-1281 (emphasis added).

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Petitioner fails to establish actual innocence because he supports his claim with DNA evidence that the Supreme Court found to be of little value. Additionally, Petitioner cannot establish actual innocence due to the overwhelming evidence supporting his murder convictions. See Section II (C), *supra.*

In conclusion, the Court notes that there was DNA evidence, fingerprint evidence, and items that perhaps did not belong to Petitioner. The Court further notes that the Nevada Supreme Court found that this other DNA evidence was very similar to DNA evidence that did not match Petitioner. What the Nevada Supreme Court recognized in reversing this Court's determination to grant a new trial was that in convicting Petitioner at trial, the jury did not rely on DNA evidence because there was no DNA evidence to rely on. The jury was informed that there were fingerprints that did not belong to Petitioner on items that were near where Mr. Hamilton was found, yet the jury still convicted Petitioner. New evidence related to this same type of evidence does not seem to be persuasive in any way to the Nevada Supreme Court, nor is it persuasive to the District Court at this time in light of what the Nevada Supreme Court has found. Ultimately, Petitioner was found guilty based on the circumstantial evidence presented at trial and this additional physical evidence would not have changed that outcome.

Even though the Brady claim differs from the actual innocence claim, it is ultimately on the same basis that they are both being denied, which is the finding of the Nevada Supreme Court that is the law of the case under the laws of the State of Nevada. The Nevada Supreme Court determined in this case that the additional evidence and the way in which the jury conducted its determination would not have been changed by additional DNA or fingerprint evidence not matching Petitioner. And for those reasons, based on what the Nevada Supreme Court previously found, this Court is going to follow in their determination that the additional evidence at issue would not have been favorable or otherwise material, and that Petitioner's claims do not establish prejudice in this case. Therefore, Ground Two is denied.

## III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is

> required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.** Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Petitioner requested an evidentiary hearing. The Court finds that there is no need for an evidentiary hearing because Petitioner is not entitled to any relief. The reason the Court is denying the request for an evidentiary hearing is because the Court is not persuaded from a substantive standpoint that there is anything here that would change the outcome of what previously occurred in this case and what the Nevada Supreme Court previously found. No need exists to expand the record as all claims can be disposed of based on the existing record. Therefore, Petitioner's request for an evidentiary hearing is denied.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that Petitioner's Second Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Evidentiary Hearing shall be, and they are, hereby denied.

**Dated this 5th day of May, 2023**

**D91 CA3 29D0 B849**
**Kathleen E. Delaney**
**District Court Judge**

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

BY /s/ *TALEEN PANDUKHT*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the foregoing, was made this 3rd day of May 2023, by Electronic Filing to:

JONATHAN_Kirshbaum, Assistant Federal Public Defender

E-mail: Jonathan_Kirshbaum@fd.org

/s/ Janet Hayes
Secretary for the District Attorney's Office

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 3rd day of May 2023, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOHN JOSEPH SEKA, BAC #69025
HIGH DESERT STATE PRISON
P. O. BOX 650
INDIAN SPRINGS, NEVADA 89070

BY /s/ *Janet Hayes*
Secretary for the District Attorney's Office

99F03542X/TRP/jh/MVU

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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|---|---|
| John Seka, Plaintiff(s) | CASE NO: A-22-860668-W |
| vs. | DEPT. NO. Department 25 |
| Calvin Johnson, Defendant(s) | |

**AUTOMATED CERTIFICATE OF SERVICE**

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

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| Jonathan Kirshbaum | jonathan_kirshbaum@fd.org |
| Rosana Aporta | rosana_aporta@fd.org |
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| Shelly Richter | Shelly_Richter@fd.org |

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| **Writ of Habeas Corpus** | **COURT MINUTES** | **April 12, 2023** |
|---|---|---|

A-22-860668-W John Seka, Plaintiff(s)
vs.
Calvin Johnson, Defendant(s)

**April 12, 2023** **9:30 AM** **Petition for Writ of Habeas Corpus**

**HEARD BY:** Delaney, Kathleen E. **COURTROOM:** RJC Courtroom 15B

**COURT CLERK:** April Watkins

**RECORDER:** Aimee Curameng

**REPORTER:**

**PARTIES PRESENT:**

| | |
|---|---|
| Botelho, Agnes M | Attorney |
| Kirshbaum, Jonathan M. | Attorney |
| Richter, Shelly | Attorney |

**JOURNAL ENTRIES**

- Mr. Kirshbaum stated there is a pending motion for judicial notice. Further, counsel filed motion to make sure the criminal case is part of this case. Motion for the Court to Take Judicial Notice of the filings in Pltf's Criminal Case GRANTED.

Mr. Kirshbaum advised counsel filed a notice in Federal Court requesting to file a successive petition. The 9th Circuit granted that request, Federal Petition (2:22-CV-02184-RFB-BMW) is now pending and there is no impact in this Court's case. Further, Mr. Kirshbaum stated as to the prior Nevada Supreme Court decision, does not have impact on the Brady claim and argued in support of petition. Opposition by Ms. Botelho. Court stated findings and ORDERED, petition DENIED. State to prepare order denying petition and request for evidentiary hearing, provide to the Federal Public Defender for review and then file with the Court.

# Certification of Copy

**State of Nevada**
**County of Clark** } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISTRICT COURT MINUTES

JOHN SEKA,

Petitioner(s),

vs.

CALVIN JOHNSON, WARDEN,

Respondent(s),

Case No: A-22-860668-W

Dept No: XXV

now on file and of record in this office.

**IN WITNESS THEREOF,** I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 26 day of May 2023.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk