No. 86694

IN THE NEVADA SUPREME COURT

John Seka,

Appellant,

v.

State of Nevada, et al.,

Respondents.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County (CR A-22-860668-W)
Honorable Kathleen E. Delaney, District Court Judge

Petitioner-Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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2. Shelly Richter
3. Paola M. Armeni
4. Jennifer Springer
5. Kirk T. Kennedy
6. Peter S. Christiansen

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JURISDICTIONAL STATEMENT

This is an appeal from the final order denying John Seka's petition for writ of habeas corpus filed May 5, 2023. 15-AA-3036. The court filed the Notice of Entry of Findings of Fact, Conclusions of Law and Order on May 10, 2023. 15-AA-3035. John Seka timely filed a notice of appeal on May 25, 2023. 15-AA-3069.

This Court has jurisdiction under NEV. REV. STAT. § 34.575.

ROUTING STATEMENT

This case is presumptively retained by the Nevada Supreme Court because it is a post-conviction appeal that involves a challenge to a judgment of conviction or sentence for category A felony offenses. *See* NRAP 17(b)(3); NRS 200.030 (explaining murder is a category A offense). It also raises as a principal issue a question of first impression involving the United States and Nevada Constitutions, and it raises as a principal issue a question of statewide public importance. *See* NRAP 17(a)(11)-(12).

STATEMENT OF THE ISSUES

John "Jack" Seka was convicted of the shootings of Eric Hamilton and Seka's friend Peter Limanni on the most tenuous of evidence. A central tenet of the prosecution's case was its theory of access: the killer had access to the business at 1933 Western Avenue. And there can be no doubt Seka had access to this location. But a suppressed police report that Seka recently obtained shows that another person did too, and that person was committing gun crimes in Las Vegas at the same time as Limanni and Hamilton were killed. The police's own firearms identification evidence even suggests a stronger connection between the unknown criminal and Hamilton's murder than the prosecution argued to convict Seka more than twenty years ago. This new evidence enhances the already exonerating DNA evidence Seka previously obtained, which shows Hamilton had another person's skin cells under his fingernails, and Seka was excluded. Accordingly, the issues on appeal are:

1. Whether the State violated Seka's right to due process when it suppressed an exonerating and material latent fingerprint report.

2. Whether Seka's 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.

3. Whether the district court erred by not granting an evidentiary hearing on these claims.

STATEMENT OF THE FACTS

Jack Seka was wrongfully convicted more than two decades ago, in 2001. The trial evidence only tenuously supported his convictions for the murder and robbery of Eric Hamilton and his friend Peter Limanni. As this Court has acknowledged, the case against Seka was circumstantial. The evidence showed that someone who had access to the business at 1933 Western Avenue killed Hamilton in the neighboring business with one gun, killed Limanni with another gun somewhere else, and left their bodies in different desert locations in two different states. Because Seka had access to the office at 1933 Western, the State's theory went, he must be the killer of both.

This theory of liability does not withstand even the most casual scrutiny. More importantly, new evidence undermines its already rickety foundation. For years, the State withheld a police report showing that, during the relevant time frame, an unknown person—not Seka—shot out the window of a car in Las Vegas to steal a purse and hid that purse in the ceiling of 1933 Western. The prosecution's expert determined that the markings on the bullet found in that car are consistent with the bullets found where Hamilton was killed. This

supports that someone other than Seka had access to 1933 Western, concealed their crimes there, and likely shot Hamilton.

Further, touch DNA testing reveals that an unknown person's DNA—not Seka's DNA—was under Hamilton's fingernails. Because Hamilton's killer likely dragged his body by his wrists and took off his jacket, there is reason to believe the killer's skin cells would be found under Hamilton's fingernails. This supports that someone other than Seka shot Hamilton. Although this Court denied relief to Seka in 2021 based on the DNA evidence only, it did so because of a flawed, incomplete understanding of the facts. Given all these indicia of innocence, Seka's case merits a close second look.

I. After Peter Limanni and Eric Hamilton are shot and killed, the police zero in on Jack Seka because he knew them

A. Jack Seka begins working for Peter Limanni; Limanni develops financial issues with his investors

In 1998, Seka moved from Philadelphia to Las Vegas to work for his friend Peter Limanni. 7-AA-1317-18. Limanni owned and operated a refrigeration and HVAC business called Cinergi at 1933 Western Avenue ("1933 Western"). 3-AA-489-90. Limanni and Seka lived in a back room at 1933 Western. 3-AA-576-77.

Limanni's girlfriend at the time, Jennifer Harrison, described Limanni as a con man. 3-AA-613-14, 619. During Seka's employment, Limanni was transitioning Cinergi into a cigar shop. 4-AA-867. Limanni and Seka had bought lumber to build a humidor, 10-AA-1983-85, 1992; the lumber was stacked inside and outside of 1933 Western. 10-AA-1983-85, 1992.

Takeo Kato and Kazutoshi Toe were two Japanese investors who financially backed Cinergi and lived at the business for a short time in the summer or fall 1998. 4-AA-855-56, 862-63; 10-AA-2015-2030, 2032-49. Kato and Toe not only provided Limanni with a significant amount of money in capital, but also four white vans to help operate the business.[1] 4-AA-855-56, 862-63; 10-AA-2015-2030, 2032-49. They also put the lease of 1933 Western in Kato's name. 4-AA-855-56, 862-63; 10-AA-2015-2030, 2032-49. Limanni tried to obtain more financial backing from Kato and Toe but was unsuccessful. 4-AA-867. However, Limanni did receive capital for the cigar shop from Amir Mohammed, an investor

[1]Toe said it was one million dollars, 10-AA-2021, while Kato said it was three hundred thousand. 10-AA-2034. Either way, "we lost so much money on this." 10-AA-2021.

who resided in Las Vegas. 10-AA-2065-66, 2073-75. A former business associate characterized Mohammed as a dangerous person; the FBI was investigating Mohammed around the time of the murders. 10-AA-2163.

All three investors—Kato, Toe, and Mohammed—had access to 1933 Western and to the Cinergi vans and Toyota truck. 4-AA-865-66; 10-AA-2065-66. In addition, Harrison and numerous others who were invited to the frequent parties Limanni hosted had access to the business and the vehicles at 1933 Western. 4-AA-865-66; 5-AA-1019-20; 11-AA-2083-84. The keys for the vehicles were kept in 1933 Western and were easily accessible. 6-AA-1086, 1210.

As early as September 1998, Limanni began taking large sums of money from his bank accounts and was even overdrawn. 6-AA-1235-36. On September 22, 1998, he signed a lease for an office space in Lake Tahoe and eventually paid a deposit of three months of the lease. 3-AA-609-10; 10-AA-2069. Limanni left one of Cinergi's work vans in Lake Tahoe. 3-AA-609-10.

Kato and Toe visited Cinergi in late summer or fall 1998. 4-AA-865. They believed Limanni was diverting business funds for personal use. 4-AA-863-64. As a result, Kato tried to cancel the lease on 1933

Western. 3-AA-519. In addition, Kato told Limanni that he wanted his investment money back. 4-AA-864-65. Kato and Toe confronted Limanni, seeking to recover the business vehicles and to recoup some of their investment, but Limanni refused to give them the keys. 10-AA-2026. On October 26, 1998, before Limanni disappeared, Kato repossessed one of the vans that he provided for the business. 3-AA-486; 10-AA-2152. Kato was forced to start bankruptcy proceedings that same month. 4-AA-871.

On November 2, 1998, Limanni closed his bank accounts. 6-AA-1235-36.

B. Peter Limanni disappears

The State presented inconsistent evidence about the exact date Limanni disappeared. Harrison testified that Limanni disappeared on November 5, 1998. 3-AA-584-87. However, the property manager for 1933 Western, Michael Cerda, reported talking with Limanni around 10:30 a.m. outside 1933 Western on November 6, 1998. 3-AA-491-92; 10-AA-2062. Limanni asked Cerda if he could delay making the monthly lease payment because, although he had between $2,000 and $3,000 in cash, he needed the money for a weekend cigar show at

Cashman Field. 3-AA-493-94. Cerda reminded him that since it was after the fifth of the month he was already late on the payment, so there would be a late fee. 3-AA-493. Limanni agreed and left; he was not seen again. 6-AA-1262-64.

Unsure of the whereabouts of his friend, Seka called several mutual friends on the East Coast and told them he was worried because he could not find Limanni. 7-AA-1332-33. With the business closed, Limanni missing, and expenses coming due, Seka pawned various items from the business to raise money to keep it afloat but was unsuccessful. 7-AA-1441.

C. Eric Hamilton is found dead; he had previously worked at 1933 Western

Around 6 a.m. on November 16, 1998, a construction worker found Eric Hamilton's body in a remote area near Las Vegas with seven wood boards scattered on top of the corpse. 3-AA-641-642. Hamilton had a ring on his finger and a note in his pants pocket with the name "Jack" and a telephone number connected to 1933 Western. 3-AA-645-46. Crime scene analysts also collected two empty Beck's beer bottles, two

cigarette butts, and a Skoal chewing tobacco container near the body. 4-AA-756; 5-AA-947-48; 6-AA-1179-80.

Hamilton died from three gunshot wounds to his leg, chest, and abdomen. 3-AA-547-48, 551. The coroner also noted a minor laceration just above the right wrist that he said was possibly consistent with someone removing a bracelet. 3-AA-548. The coroner estimated Hamilton's time of death to be within twenty-four hours of when the body was found. 3-AA-553.

Hamilton was a drifter. He had moved to Las Vegas from California before his death and had been working sporadically at Cinergi doing construction projects. 4-AA-835, 838-41. Seka later told officers he knew Hamilton by the name "Seymour." 3-AA-470-71, 484; 10-AA-2059. According to Seka, Hamilton would come to Cinergi looking for work. 10-AA-1995-97. He last saw Hamilton about a month before his death, and at that time he told Hamilton to call Cinergi in about a month to see if there was work available. 10-AA-2146.

Hamilton's sister Michelle testified that Hamilton had approximately $3,000 dollars with him when he moved to Las Vegas. 4-AA-836. So the prosecutor accused Seka of murdering Hamilton for

money. *See* 7-AA-1400. But the record does not support that theory. Hamilton had been held in the county jail on a trespassing charge from November 6, 1998 (the last day Limanni was seen alive), until November 12, 1998; Hamilton was likely killed only three days later, on November 15, and his body was found a day after. 6-AA-1218-21. When booked into jail, Hamilton had no money. 6-AA-1218-21.

D. The police conclude Hamilton was murdered at a business neighboring 1933 Western

On November 17, 1998, the day after Hamilton's body was found, someone called the police about an alleged break-in at an abandoned business at 1929 Western Avenue ("1929 Western"), which is next door to 1933 Western. 3-AA-561-62. Upon arriving at 1929 Western, the police noticed broken glass and apparent blood. 5-AA-950-51. Immediately in front of the abandoned business, the police found a piece of molding from the broken window with what appeared to be a bullet hole. 3-AA-670. A lead projectile (assumed to be from a bullet) was found on the sidewalk outside, next to droplets of blood. 3-AA-670; 4-AA-717.

All indications were that Hamilton was murdered in 1929 Western. 3-AA-647, 670-71, 674. In addition to the broken window, the police found copious amounts of blood on the entryway carpet and on the broken glass; the blood was later matched to Hamilton. 3-AA-670-71; 5-AA-951. There were two sets of bloody drag marks across the carpet, one of which led to the broken window. 3-AA-670-71; *see also* 11-AA-2248. Seka was excluded from the blood found at 1929 Western. 4-AA-745-57.

A black baseball cap that Hamilton always wore, his gold bracelet, and a rolled-up jacket with blood and bullet holes were also found in 1929 Western. 3-AA-469, 484, 653; 5-AA-951; *see also* 4-AA-745-57; 11-AA-2248, 2254. The bullet holes in the jacket were consistent with Hamilton's wounds. 3-AA-647-48; 11-AA-2248. The police also found three bullets and three bullet fragments. 3-AA-647.

Latent fingerprints were lifted from the "exterior north vertical metal frame edge" of the point-of-entry window, the glass pane on the interior of the front door, and a glass fragment inside the point-of-entry on the office floor. 11-AA-2253-55. These prints were submitted for comparison with Seka's, Limanni's, and Hamilton's prints. 12-AA-2453.

The result of each of these latent print comparisons was "NI," 12-AA-2455, or "Not Identified."[2] *See, e.g.*, 12-AA-2455-58. These prints fell under the examiner's conclusion, "Latents remain unidentified." 12-AA-2453. Overall, no evidence found in 1929 Western was directly connected to Seka.

While the police were investigating 1929 Western, Seka arrived in Cinergi's Toyota pickup truck. 5-AA-954. The police approached Seka and let him know of the disturbance in 1929 Western. 5-AA-954. Seka consented to a search of 1933 Western. 5-AA-956-57; 11-AA-2261. Seka and Cerda—the property manager, who had also been alerted to the disturbance—went with the police to 1933 Western. 11-AA-2270-72. After noticing a bullet and some knives in 1933 Western, the police handcuffed Seka as they continued to search 1933 Western. 5-AA-957-

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[2]*See* Fingerprint Examination—Terminology, Definitions, and Acronyms, *Forensic Science Regulator*, at 37, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/267523/FingerprintTerminology.pdf (last visited Sept. 27, 2023); NI, *Abbreviations.com*, available at https://www.abbreviations.com/term/266285 (last visited Sept. 27, 2023).

58. Cerda stayed with Seka while the officers searched the business. 11-AA-2270-72. Cerda told officers that he was the only person with a key to 1929 Western and that the business had been vacant for around a month and a half. 11-AA-2269.

Seka went to the detective bureau and provided a voluntary taped statement. 6-AA-1201. During the interview, Seka denied hurting Hamilton. 10-AA-2007.

The police took Seka back to 1933 Western after informing him that he was not under arrest. 6-AA-1208. Upon arriving at 1933 Western, the police told Seka he could not enter because it was still being processed. 6-AA-1209. They also told him that they were impounding the Toyota truck he arrived in. 6-AA-1209. Seka said he had a dinner appointment and needed a vehicle. 6-AA-1209. The police went into 1933 Western and grabbed the keys to the two remaining vans. 6-AA-1210. Before Seka was allowed to leave, the police asked him if they could search the vans; he agreed. 6-AA-1210-11. After discovering what appeared to be blood in one of the vans, the police impounded the vehicle. 6-AA-1211-12. The police searched the other van and did not find anything of apparent evidentiary value. They gave

Seka the keys to that van, and he was free to leave. 6-AA-1212; 10-AA-2061-62.

In addition to the blood found in the van, the police found drops of blood in the bed of the Toyota pickup truck Seka had driven to 1933 Western. 3-AA-528; 4-AA-750; 4-AA-802-04; 6-AA-1211-12. The blood in the pickup truck bed matched Hamilton. 4-AA-754. The blood on the floor of the van and on some magnetic cards found in the door of the van matched Limanni.[3] 4-AA-744, 747.

E. Seka leaves Las Vegas

The police did not indicate to Seka that he was ordered to return to 1933 Western after his dinner appointment on November 16, so he went to a friend's home where he had been staying after Limanni disappeared, and the business ceased to operate. 6-AA-1212, 1252-54, 1257; *see* 11-AA-2258. He had no money and no work after Limanni disappeared with the business assets, so he returned to his home on the East Coast in December 1998. 7-AA-1323-24; 10-AA-1991; 12-AA-2335-

[3]Mohammed disappeared shortly after Hamilton's body was discovered and the police began investigating the crime scene at 1929 Western. 10-AA-2053, 2065-66.

36. The police had several addresses and phone numbers where they could reach Seka on the East Coast, 6-AA-1257; 7-AA-1307; 10-AA-1990, but they did not pursue Seka.

F. Peter Limanni is found dead

On December 23, 1998, Limanni's body was found off a service road in the California desert near the Nevada border. 3-AA-632-33. He was found near some tire tracks lying face down and buried from the legs down. 4-AA-882, 885. The body was decomposed and mummified consistent with a body that had been outdoors partially buried for several weeks. 4-AA-885, 887-88. The coroner found eight gunshot wounds in the head and neck area, one on the top of the left shoulder, and one in the back, fatally injuring his heart. 4-AA-825, 827.

Limanni's girlfriend Harrison testified at trial that Limanni had been mistreating Seka.[4] 3-AA-578-82. The prosecutor argued this

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[4]Harrison also testified about a lengthy call she made to Seka on his cell phone on the morning of November 5, 1998, in which he stated he was depressed. 3-AA-584-87. The prosecutor used this evidence to establish Seka's state of mind at that time. However, Seka's phone records show this call never happened. *See* 14-AA-2844-52. Moreover, Cerda saw Limanni alive on the morning of November 6, 1998, making his state of mind on November 5 mostly irrelevant.

mistreatment gave Seka a motive to kill Limanni. But evidence discovered in the post-conviction investigation contradicted her testimony. Justin Nguyen, who worked with Limanni and Seka at Cinergi for several months, said Limanni treated Seka "like his own brother," they got along very well, and Nguyen never observed Limanni call Seka names or mistreat him. 10-AA-2011-12. Kato and Toe also described Seka and Limanni as "having a good friendship," "buddies," and like brothers. 4-AA-855-56, 862-63; 10-AA-2015-2030, 2032-49.

G. The police search 1933 Western and find a stolen purse in the ceiling

Police thoroughly searched 1933 Western. 11-AA-2248-50. They found Limanni's wallet in the ceiling above his desk. 3-AA-650-51. The police also found a purse in the ceiling in another room that was later identified as belonging to Lydia Gorzoch, who, as discussed in more detail below, reported it missing on November 6, 1998. 10-AA-2063.

The police also found beer bottles in the dumpster behind Cinergi and two Miller beer bottles in a trash can in the business. 5-AA-1068. Fingerprints identified on the beer bottles from the trash can matched Hamilton and Seka. 5-AA-1068; 6-AA-1158-59. The presence of both

sets of fingerprints was because Hamilton helped on construction projects at 1933 Western three or four times, 4-AA-835, 838-41; 10-AA-1995-97, a place Harrison described as a pig sty, "just trashed." 3-AA-601; 7-AA-1442; 12-AA-2349.

The police found several stains in the 1933 Western office and living space that tested positive for presumptive blood. 4-AA-780; 11-AA-2080. Seka's blood was identified on the front right pocket area of a pair of his jeans, and a drop of his blood was identified on a wall being remodeled and on the sink counter. 4-AA-747-48, 755-56; 11-AA-2156. Neither Hamilton's nor Limanni's blood was found in 1933 Western. 4-AA-745-57.

The wood boards scattered on Hamilton's body seemed to have markings similar to wood boards found at 1933 Western. *See* 7-AA-1387.

Cartridges and shell casings of different calibers, including calibers consistent with the ones used in the murders, were found in 1933 Western. 3-AA-650; 5-AA-1043; 6-AA-1129-30; 11-AA-2248-50, 2292. A bullet fragment, which had no blood on it, was found lodged in the wall that had been shot through the couch. 6-AA-1111.

Officers also searched the dumpster behind 1933 Western, but what they found varies with the report. 5-AA-1043-44; *see also* 10-AA-2058-59; 12-AA-2373. Detective Thowsen reported that, when the officers looked in the dumpster at first, it was empty, but when they searched it later it contained several items of clothing and checks purportedly belonging to Limanni. 5-AA-977, 981; *see also* 10-AA-2058-59. Officer Nogues reported there were miscellaneous papers and trash at the bottom of the dumpster when he arrived on the scene. 12-AA-2373. Later Officer Nogues noted several pieces of clothing, including a tennis shoe, along with six inches of paper and other "debris" in the dumpster, none of which was there before. 12-AA-2374. Richard Ferguson, who ran a neighboring trophy shop, testified he saw trash at the bottom of the dumpster earlier in the day. 7-AA-1339.

The prosecutor suggested Seka must have disposed of evidence while the police were searching 1929 and 1933 Western. However, Seka was either with Cerda or at the police station during the searches. 11-AA-2272. Furthermore, the police were at the scene "constantly, continually" throughout the day. 3-AA-663; 6-AA-1198. By the police officers' own descriptions of the scene, it would have been nearly

impossible for anyone to have put evidence in the dumpster undetected during the searches. The better explanation is that the police did not conduct a thorough search of the dumpster when they first arrived.

H. The police perform fingerprint and firearm identification analysis before trial

Fingerprint analysis was conducted on several items of evidence. 12-AA-2452. Latent prints were identified on six of the seven wood boards presumably used to cover Hamilton's body, and on the Beck's beer bottle recovered from where Hamilton's body was found in the desert. 12-AA-2452-53.

Seka's palm print was on one board, his fingerprint was found on a second board, and Limanni's fingerprints were identified on one board; however, **additional unknown fingerprints, not belonging to Seka, Limanni, or Hamilton, were also identified on three boards**. 12-AA-2452-53. The fingerprints on the Beck's beer bottle did not belong to Seka, Limanni, or Hamilton. 12-AA-2452-53. Seka's fingerprints were also identified on the Miller beer bottles collected from inside 1933 Western and the dumpster just outside his home and business in 1933 Western. 12-AA-2452-53.

The police conducted firearm identification analysis on the various types of ammunition found in 1929 and 1933 Western.[5] This analysis established that at least three of the bullets found inside 1929 Western, the presumed location of Hamilton's murder, were .357 caliber. 6-AA-1128; 11-AA-2292-93. The police found four spent .357 cartridge cases in 1933 Western. 5-AA-1042-43; 6-AA-1130-31; 12-AA-2292-93. All the spent .357 cartridge cases in 1933 Western had the same characteristic markings, suggesting they were shot from the same firearm. 6-AA-1130-31; 12-AA-2292-93.

The bullets found in Limanni's body were .32 caliber. 6-AA-1137-38. The police found two full .32 caliber cartridges in 1933 Western and a single .32 bullet fragment lodged in the wall of 1933 Western that had been shot through the couch. 6-AA-1111; 11-AA-2292-93. The bullet fragment had no blood on it. 6-AA-1111. The bullet fragment

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[5]A cartridge is a full round of ammunition. Its main components (at least for purposes of a ballistics/firearm identification analysis) are a cartridge case and a bullet. Here, references to a "bullet" are to the projectile that was shot out of the firearm.

purportedly was fired from a gun with a misaligned cylinder, similar to a bullet found in Limanni's body. 6-AA-1137-39.

The prosecutor argued that the caliber of bullets and cartridge cases found in 1933 Western connected Seka to the two murders. 7-AA-1402, 1411; 7-AA-1481. He argued, "Is it a coincidence that Pete Limanni is killed with a .32, that Eric Hamilton is killed with a .357, and that both of these kinds of ammunition, some of them with very peculiar markings [the .32 caliber bullet], are found inside of 1933 Western?" 7-AA-1481. The State continued to advance as evidence of guilt this bullet-caliber connection in the recent appeal from the order granting Seka a new trial. 13-AA-2548-49.

The State also performed DNA analysis, which is discussed below.

I. Thomas Cramer claims Seka made an incriminating comment about Limanni

When Seka returned to Philadelphia, he reconnected with his old friend Thomas Cramer. Cramer first learned of Limanni's murder in December 1998 from Lee Polsky, a mutual friend of Seka and Limanni. 7-AA-1333-35;12-AA-2427. Cramer was addicted to drugs and often became physically and emotionally abusive. 7-AA-1304. During these

abusive episodes, his girlfriend, Margaret Daly, would ask Seka for help calming Cramer. 7-AA-1305-06, 1310.

On January 23, 1999, Daly frantically contacted Seka from the residence she shared with Cramer to ask for help controlling Cramer. 7-AA-1305-06, 1310. Seka came over and Cramer became incensed. At one point, he pushed Seka down the stairs. 7-AA-1310-11. The police arrived and involuntarily committed Cramer to a mental institution for ten days. *See* 1-AA-66; 7-AA-1302-03, 1310-12; 8-AA-1623-26; 12-AA-2430-33.

After being released from the mental institution, Cramer claimed he pushed Seka down the stairs because Seka said, "Do you want me to do to you what I did to Pete Limanni?" 5-AA-906-07. However, in 2017, Daly (who changed her last name to McConnell) explained in a declaration that she was there during the altercation and Seka never said that to Cramer. 12-AA-2430-33. She believed Cramer fabricated the confession because he was angry at Seka for getting him committed and for allegedly trying to steal her away. 12-AA-2430-33. Of note, when Cramer spoke to the police about Seka's statement, he indicated

Seka told him he knew nothing about the Hamilton murder. 12-AA-2428.

J. The State prosecutes Seka for the Hamilton and Limanni murders

After law enforcement became aware of Cramer's statement, an arrest warrant was issued for Seka for the Hamilton and Limanni murders on February 26, 1999. 6-AA-1257. In March 1999, Seka was arrested at his home in Pennsylvania. The State filed an Intent to Seek Death on July 26, 1999. 1-AA-130-31.

The jury trial occurred in February 2001. After deliberations lasting almost five full days, the jury convicted Seka of first-degree murder with a deadly weapon with respect to Hamilton, second-degree murder with a deadly weapon with respect to Limanni, and two counts of robbery. 7-AA-1490-91. After the jury deadlocked at the penalty phase hearing, Seka waived sentencing by a jury in favor of being sentenced by a three-judge panel. On April 26, 2001, Seka was sentenced to life without parole on the first-degree murder conviction, with an equal and consecutive sentence of life without parole on the weapon enhancement; 10 years to life on the second-degree murder

conviction, with an equal and consecutive sentence of 10 years to life on the weapon enhancement; and a sentence of 35 to 156 months on each robbery count, all to be served consecutively. 7-AA-1492-93. The judgment of conviction was entered May 9, 2001. 7-AA-1492-93.

The Nevada Supreme Court affirmed on April 8, 2003. 7-AA-1494.

On February 13, 2004, Seka filed a state post-conviction petition, which was denied on January 31, 2005. 8-AA-1507, 1568. The Nevada Supreme Court affirmed on June 8, 2005. 8-AA-1574.

On July 22, 2005, Seka filed a pro se federal habeas petition pursuant to 28 U.S.C. § 2254. The Federal Public Defender was appointed, filing an amended petition on May 18, 2007. On August 26, 2008, the district court denied the petition and denied a certificate of appealability. The Ninth Circuit granted a certificate of appealability but then affirmed the denial of the petition. *Seka v. McDaniel*, No. 08-17120 (9th Cir. Mar. 14, 2011) (Memorandum and Order). The U.S. Supreme Court denied certiorari on March 5, 2012.

K. In 2017, RMIC discovers a previously undisclosed favorable fingerprint report for the stolen purse found at 1933 Western

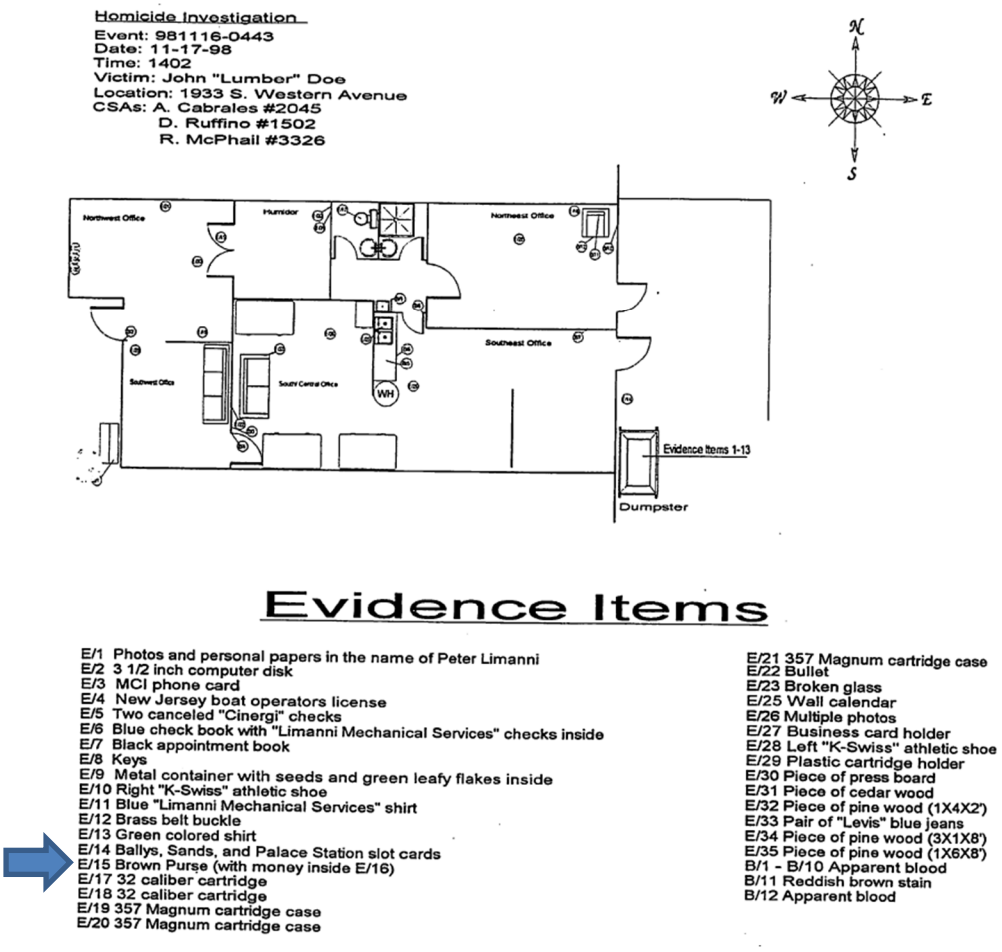
After the initial post-conviction proceedings, new attorneys uncovered an exculpatory, previously suppressed fingerprint report.

1. At trial, the State tells the defense the stolen purse is "not important"

As noted above, the police found a purse hidden above the ceiling tiles inside 1933 Western. There was $36.06 still in the purse.

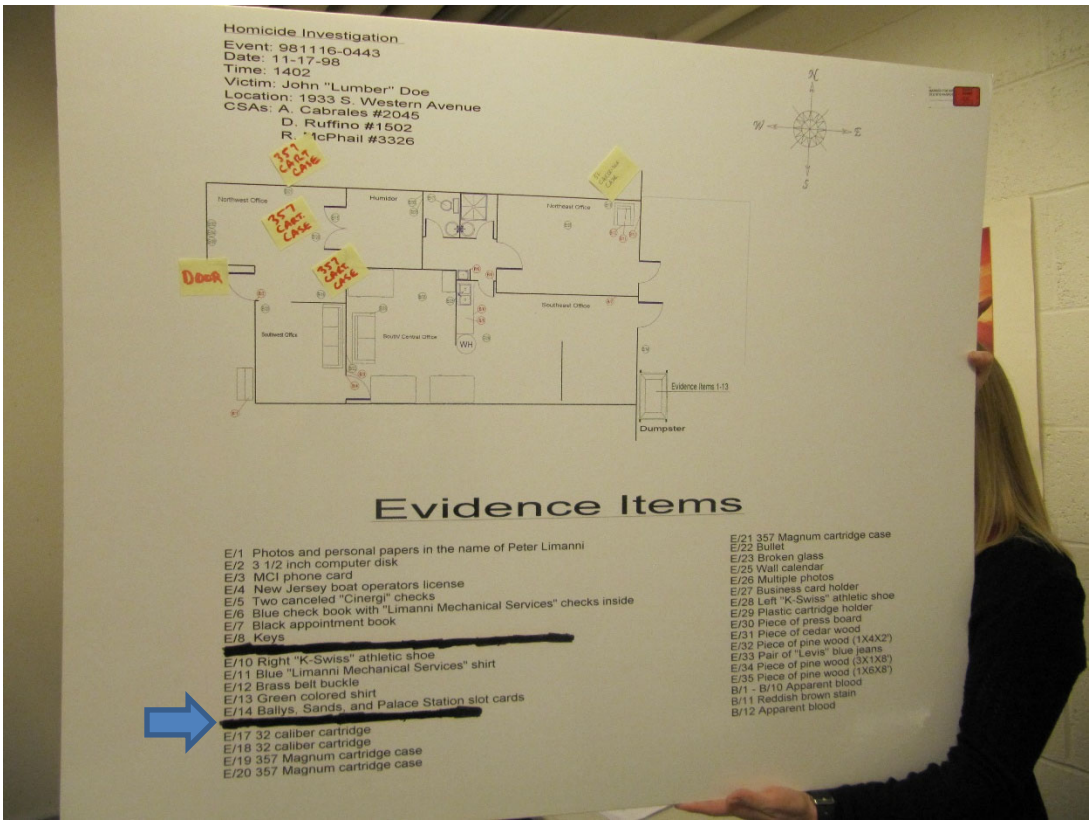
The declaration in support of Seka's arrest warrant mentioned the purse. It stated, "a purse was discovered in the false ceiling having ID in the name Lydia Gorz[o]ch. Investigation revealed that the purse had been taken out of her vehicle as it was parked near the Crazy Horse II on Industrial after someone fired a bullet through the window to gain entry on 11/6/98." 11-AA-2149. A damaged lead bullet was found in the car. 11-AA-2290. The declaration accused Seka of committing a series of crimes "which included the theft of the purse." 11-AA-2156. But Seka was never charged with stealing the purse. The purse and the cash were returned to Gorzoch on November 28, 1998. 11-AA-2295.

The crime scene report for 1933 Western, turned over during discovery, included a diagram of what was found inside 1933 Western. *See* 14-AA-2842. The purse was listed as item 15. 14-AA-2842.



There is no indication in the crime scene report or the latent fingerprint report related to the murder investigation that the purse had been fingerprinted or that any latent prints in the murder case were compared to any latent prints connected to the purse. 11-AA-2275-80; 12-AA-2452-54.

At trial, the prosecution presented the same crime scene diagram to the jury. However, as shown below, the prosecution **crossed out the purse and the money**. 5-AA-1075.



In his trial testimony, Detective James Buczek discussed the items recovered at 1933 Western. After the detective mentioned they had found Limanni's wallet in the ceiling, the prosecutor asked him, "And what else of significance did you observe in 1933 Western Avenue?" The detective answered, "There was also a purse, okay." The

prosecutor responded, "**Not important**." 3-AA-651 (emphasis added). The prosecutor then immediately moved on to other matters.

2. In November 2017, RMIC obtains a previously undisclosed fingerprint report

On January 3, 2010, while his first federal petition was pending in the Ninth Circuit, Seka sent a letter to the Rocky Mountain Innocence Center ("RMIC") asking if they would help him. 14-AA-2884. In September 2012, RMIC began investigating Seka's case. 14-AA-2884. RMIC is a small non-profit organization with limited staff and resources that relies on a succession of law students to perform a great deal of the work on innocence cases. 14-AA-2884. RMIC continuously expended resources on the case from the moment it began its investigation until RMIC's representation ended. 14-AA-2876, 2884-85.

Kurt London worked as a legal intern and then an attorney at RMIC from 2014 until 2018, working on Seka's case the entire time. 14-AA-2876. Among other things, he participated in the investigation and submitted public records requests. 14-AA-2876-77.

RMIC began its investigation pursuing non-DNA avenues. 14-AA-2885. As advancements in "touch DNA" progressed, RMIC started to

consider post-conviction DNA testing of physical evidence left at the crime scenes. 14-AA-2885. RMIC reviewed evidence at the court in 2014 and decided they needed further documents from Las Vegas Metropolitan Police Department ("LVMPD") to determine whether to seek DNA testing. 14-AA-2885. However, RMIC had a difficult time obtaining documents from LVMPD. Its experience was that LVMPD required a subpoena before turning over documents. 14-AA-2885.

On February 17, 2016, RMIC sent a Nevada Public Records Act request to LVMPD for all documents related to the homicide investigations under event number 98 1116-0043. 14-AA-2876. This was to further research the potential for exculpatory DNA testing.

On May 5, 2016, RMIC received some police reports related to the homicide investigation. 14-AA-2876. However, they believed that many documents related to the investigation had not been provided. RMIC submitted an updated request listing numerous documents they believed had not been turned over. 14-AA-2876.

On June 6, 2016, London spoke to Gorzoch as part of RMIC's ongoing investigation. 14-AA-2876. Gorzoch indicated that she was notified when her purse was found at the scene of a murder. 14-AA-

2876. The police returned the purse with cash still inside of it, and she believed fingerprint testing had been done on it. 14-AA-2876.

On June 19, 2017, RMIC filed a petition in the Eighth Judicial District Court seeking DNA testing of items in Seka's case. 8-AA-1588. This petition is discussed in more detail below.

At some point during his review of the documents related to the homicide investigation, London noticed a different case number, 98 1106-0539, than the one related to the homicides. 14-AA-2876. This case number was for the stolen purse. 14-AA-2876.

On August 21, 2017, RMIC submitted a public records request to LVMPD for all documents and photos related to the stolen purse case, 98 1106-0539. 14-AA-2866-70, 2877. The request was broad, seeking, among other things, fingerprint or lab reports. 14-AA-2866-70, 2877.

On September 15, 2017, LVMPD officially responded that they were only authorized to provide the "Incident Report," which they later did provide. 14-AA-2877. They indicated that they had requested detective approval to release any laboratory reports. 14-AA-2877.

On September 19, 2017, the state district court granted the petition seeking DNA testing and authorized the parties to conduct

DNA testing. 8-AA-1662. The court's order required LVMPD to preserve and inventory any relevant evidence. 8-AA-1663.

On October 23, 2017, London followed up on the purse documents that required detective approval. 14-AA-2877. He was told the request was on the "subpoena desk" because LVMPD had received a subpoena from RMIC. 14-AA-2877. London believes LVMPD misunderstood the order granting DNA testing and requiring preservation of evidence; LMVPD may have believed the order was in fact a subpoena. 14-AA-2877.

On November 7, 2017, RMIC received from LMVPD a latent fingerprint report related to the purse case. 14-AA-2878. This report indicated that Seka's prints did not match the latent prints found on the purse. 11-AA-2288. The fingerprint examination had been ordered by the same detective, Thowsen, who was investigating the murders. *Compare* 11-AA-2288, *with* 10-AA-2051.

This fingerprint report was never turned over to the defense. In his work on the case, London had reviewed the files from Seka's prior attorneys, which included the discovery turned over by the prosecution.

14-AA-2878. This document was not in any of these files. 14-AA-2878. London had never seen this document before. 14-AA-2878.

A firearm identification report dated April 28, 1999, which listed the case numbers for both the murders and the stolen purse, indicated that a criminalist had examined the damaged lead bullet found in Gorzoch's car. He found that it was a "nominal 38/357 caliber bullet." Furthermore, the class characteristics "found on" this bullet were consistent with the class characteristics "found on" two of the bullets at 1929 Western. 11-AA-2290.

II. Seeking to overturn his fundamentally flawed convictions, Jack Seka tests DNA evidence, yielding favorable results, and presents a suppressed police report

A. The parties conduct new DNA testing and receive exonerating results

As mentioned above, on June 19, 2017, Seka, through RMIC, filed a petition in district court seeking DNA testing of physical evidence. 8-AA-1588. He argued the DNA testing done before trial was limited to old PCR testing, so only a small fraction of the physical evidence was tested. 8-AA-1595-96. Due to scientific advances since the time of trial, the physical evidence, which included potential "touch DNA," could

undergo more advanced DNA testing, namely sensitive STR testing. 8-AA-1644-45, 1656.

On September 19, 2017, the district court granted the petition. It authorized DNA testing and ordered the State to inventory any possible items for testing. 8-AA-1662. In two later orders, the district court ordered DNA testing on several items. 8-AA-1665; 9-AA-1820.

While testing was ordered on evidence in both the Limanni and Hamilton cases, the viable results came from evidence in the Hamilton case. The most consequential result came from the DNA testing of Hamilton's fingernails. That testing showed, for the first time, that foreign DNA was present and Seka was excluded as the contributor.

Specifically, fingernail clippings from Hamilton's left and right hands were collected at the autopsy. There was blood on the fingernails. Before trial, PCR-RFLP testing was performed on only the left-hand clippings. Seka was excluded as the contributor of the blood and Hamilton was included. 4-AA-753-54; 12-AA-2443. However, any touch DNA on the fingernails was not tested. 12-AA-2443-47.

In 2018 STR DNA testing was done on the right- and left-hand fingernail clippings. This testing was able to analyze epithelial cells,

that is, skin cells. 9-AA-1730. For the first time, the testing revealed a mix of two DNA profiles. The examiner assumed Hamilton was one of the contributors, which meant **a foreign DNA profile was found on Hamilton's fingernail clippings on both his left and right hands**. 12-AA-2449. The foreign profile was consistent for both hands. 9-AA-1697-98. **Seka was excluded as a contributor of this foreign profile**. 12-AA-2449.

In addition, a Marlboro cigarette butt was collected near Hamilton's body. 11-AA-2246. PCR-RFLP DNA testing was performed in 1998, but it was unsuccessful. 4-AA-794; 12-AA-2443-44. The 2018 STR DNA testing produced a full DNA profile and excluded both Hamilton and Seka as contributors. 12-AA-2449.

B. The state district court grants a new trial, but the Nevada Supreme Court reverses

At the conclusion of the DNA testing, Seka moved for a new trial on November 11, 2019, arguing the new DNA results "absolve [him] of responsibility for these murders." 10-AA-1828. He brought the motion pursuant to statutes that provide that, even though a motion for new trial based on newly discovered evidence must typically be brought

within two years of conviction, a petitioner may bring a new trial motion based on DNA evidence even after that period. *See* NRS 176.09187(1); NRS 176.515(3).

The district court granted the motion and ordered a new trial on both murders. 12-AA-2521. However, in a published opinion, a three-justice panel of the Nevada Supreme Court reversed. 13-AA-2666. The Court denied en banc reconsideration over a three-justice dissent. 13-AA-2763. Remittitur issued on November 2, 2021. 13-AA-2765.

C. Seka files a petition for writ of habeas corpus (post-conviction), which the district court denies

On November 1, 2022, Seka filed a petition for writ of habeas corpus (post-conviction). 14-AA-2768. He raised the two grounds for relief asserted in this brief.

At the hearing on the petition, the district court denied the petition and the request for an evidentiary hearing. 15-AA-3030. The court found that the procedural bars do not apply given that the prosecutor had withheld the purse report. 15-AA-3031. The court found that the report is "newly obtained evidence and information," so issues related to "timeliness, successiveness, or laches really should not

apply." 15-AA-3031. But relying in large part on the Nevada Supreme Court's opinion, the court found that the new evidence was not sufficiently favorable or material. 15-AA-3031-33. The court issued a written order drafted by the State, 15-AA-3036-61, and Seka timely appealed. 15-AA-3069.[6]

SUMMARY OF THE ARGUMENT

The Court should grant post-conviction relief because the State violated Seka's right to due process when it suppressed an exonerating and material latent fingerprint report. Further, Seka's 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. Given that, the district court erred by not granting an evidentiary hearing on these claims.

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[6]Seka also sought authorization to file a second or successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(B) in the Ninth Circuit on November 1, 2022 (Case No. 22-1795). On February 17, 2023, the Ninth Circuit granted authorization. Seka's petition was then transferred to the federal district court (Case No. 2:22-cv-02184-RFB-BNW), and no further action has been taken.

ARGUMENT

I. The State suppressed an exonerating and material latent fingerprint report, violating Seka's right to due process under the Fifth and Fourteenth Amendments

Seka presents a meritorious *Brady* claim because the State suppressed the latent fingerprint report in the purse case, and the fingerprint report was both favorable and material. The report shows someone other than Seka shot out the window of a car, stole a purse, and hid it in 1933 Western, and the person who committed this crime also likely killed Hamilton. Seka's showing of good cause and prejudice based on the *Brady* claim overcomes the procedural bars. Moreover, the district court did not abuse its discretion by finding Seka overcame the application of laches. Alternatively, even if the Court disagrees, Seka can overcome all procedural issues because he is actually innocent.

A. Seka presents a meritorious *Brady* claim

The district court found that the State withheld a relevant report regarding the purse theft, but found the report was not favorable or material. *See* 15-AA-3047-48, 3050. This Court owes that erroneous materiality conclusion no deference. *See Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) ("Determining whether the state

adequately disclosed information under [*Brady v. Maryland*] requires consideration of both factual circumstances and legal issues; thus, this court reviews de novo the district court's decision.").

The prosecution's suppression of evidence favorable to an accused violates federal due process where the evidence is material to guilt or punishment, regardless of the prosecutor's good or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* violation, a party must demonstrate that (1) the evidence at issue is favorable to the accused; (2) the evidence was suppressed by the State; and (3) the suppression of that evidence was prejudicial, i.e., the evidence is material. *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012); *see also Comstock v. Humphries*, 786 F.3d 701, 708 (9th Cir. 2015).

Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[ ] confidence in the outcome of the trial." *Smith v. Cain*,

565 U.S. 73, 75-76 (2012) (quoting *Kyles*, 514 U.S. at 434). The court must reverse upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

1. As the district court properly found, the prosecution suppressed the latent fingerprint report in the purse case

The prosecution's duty to disclose evidence extends beyond evidence within the prosecutor's actual possession. It includes evidence within the prosecution's constructive possession, which includes evidence known to law enforcement agencies working with the prosecution. *Kyles v. Whitley*, 514 U.S. at 437; *State v. Bennett*, 119 Nev. 589, 603, 81 P.3d 1, 10 (2003).

Here, the latent fingerprint report was patently in the State's possession. The stolen purse was part of the investigation into the murders. The investigating detective, Thowsen, discussed the purse in his December 10, 1998 report, indicating that he investigated the purse after it had been recovered at 1933 Western. 10-AA-2063. The detective then mentioned the same information about the purse in his declaration in support of an arrest warrant. Moreover, the declaration

accused Seka of committing a series of crimes "which included the theft of the purse." 11-AA-2149. Clearly, the stolen purse case was part of this case from the beginning, providing the State actual knowledge of any documents connected to that case.

Furthermore, the latent fingerprint report was well within the knowledge of law enforcement personnel working on this case. The investigating detective on the murders ordered the latent fingerprint report in the purse case. 11-AA-2288. In fact, the prints on the purse were compared against the relevant people in the murder cases: Seka, Limanni, and Hamilton. 11-AA-2288. So, the report was done to try to establish a link between the purse and the murders. And the same latent print examiner, Fred Boyd, conducted the fingerprint analysis with respect to the murders and the purse case. 11-AA-2288; 12-AA-2452-54. The prosecution, at the very least, had constructive possession of this document.

This fingerprint report was also not turned over to the defense. The defense did not see this report until November 2017, after the district court granted Seka's DNA petition and ordered the State to inventory any relevant evidence. 14-AA-2876-87. Prior to its disclosure

in 2017, the defense had never seen it. 14-AA-2876-87. It was not a part of the discovery material contained in Seka's trial counsel's files.

No argument can be made that the defense could have, or should have, discovered this report on its own. The defense was never put on notice that this fingerprint report existed. There is nothing in the discovery material indicating that latent prints were obtained from the purse or that fingerprint comparisons were made. Neither the crime scene report nor the latent fingerprint report in the murder case indicates that latent prints were obtained from the purse or that they were compared to Seka's fingerprints. 11-AA-2078-91; 12-AA-2452-54.

Moreover, the defense had no onus to investigate the purse because the prosecution misled the defense to believe the purse was not relevant. The prosecutor actively relayed this message. For example, the prosecutor crossed the purse off the crime scene diagram shown to the jury, 5-AA-1075, and, while addressing the item during the lead detective's testimony, noted that the purse was "not important." 3-AA-651; *cf. Mazzan*, 116 Nev. at 71, 993 P.2d at 39 (finding a *Brady* violation where defense counsel accepted the prosecutor's assessment that withheld reports were "unimportant"). It is reasonable for the

defense to rely on representations from the prosecution that no *Brady* evidence exists and, as a result, not conduct any further investigation of that evidence. *See Banks v. Dretke*, 540 U.S. 668, 692-93, 695-96 (2004); *Strickler v. Greene*, 527 U.S. 263, 283-84 (1999). That is what happened here. The prosecution indicated the purse was not important to the murder cases; it was reasonable for Seka to rely on the prosecutor's statement and not spend resources investigating.

Seka only fortuitously obtained the fingerprint report in 2017 when the district court granted his DNA petition. 14-AA-2877-78. This report was turned over because LVMPD apparently misinterpreted the order granting DNA testing as a subpoena. Accordingly, the district court correctly found that the State suppressed the fingerprint report.

2. The fingerprint report was both favorable and material

The fingerprint report was favorable. The police had originally alleged that Seka stole the purse, but the latent fingerprint report shows that Seka was not the source of the fingerprints on the purse. It follows that Seka did not steal the purse, which is favorable.

The fingerprint report is also material. The fingerprint report exonerates Seka of stealing the purse, showing that Seka, as well as Hamilton and Limanni, were excluded as the source of the fingerprints connected to the purse. 11-AA-2288. This is significant when placed in the broader context of Seka's trial and other evidence. A comparison of the damaged lead bullet found in Gorzoch's car and two bullets found where Hamilton was killed established a likely connection between the two crimes. 11-AA-2290, 2292-93. The class characteristics found on the bullets were consistent, potentially linking them to the same gun. 11-AA-2290, 2292-93. So, if Seka did not steal the purse, then he very likely did not kill Hamilton due to this firearm identification connection. This evidence standing alone would raise a reasonable doubt in any juror's mind as to whether Seka committed the Hamilton murder.

And this evidence becomes even more impactful in light of the weak evidence of guilt presented at trial. The State's case on the Hamilton murder was circumstantial, causing the jury to deliberate for five days. *See Jimenez v. State*, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996) (finding that withheld evidence was material "because the

evidence against Jimenez was circumstantial"). There was no evidence found at 1929 Western directly tying Seka to the crime. Unidentified fingerprints were discovered on the wood at the location where Hamilton's body was found.[7] 6-AA-1153-54. The State presented no real motive.[8] *Cf. Mazzan*, 116 Nev. at 74, 993 P.2d at 41 (observing "there was never a satisfying explanation of Mazzan's motive, and he had no violent background"). There was no evidence Hamilton was robbed, given that his property was left at 1929 Western and the jail records showed he had no money. *Cf. id.* at 74, 993 P.2d at 41-42

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[7]The wood also had Seka's and Limanni's fingerprints. 6-AA-1151. It is unremarkable that their fingerprints were on this lumber considering it was taken from the lumber being used to build the humidor. Indeed, Limanni couldn't have been involved in the murder, as he had already gone missing. Limanni's fingerprints must have come from his handling of the wood to build the humidor; Seka's fingerprints would have been there for the same reason.

[8]The prosecutor's original theory appeared to be that Seka's motive for murdering Hamilton was financial. 7-AA-1400. But the trial evidence didn't support this theory as Hamilton had no money when he was released from custody right before his murder and his belongings were found at 1929 Western. Thus, the State turned to the bizarre and argued, without any supporting evidence, that Hamilton must have been present when Limanni was murdered and Seka killed Hamilton to tie up a loose end. 7-AA-1487. To note, Hamilton was in jail on November 6, 6-AA-1218-21, the same day Cerda saw Limanni still alive.

(finding robbery-motive theory suspect given a lack of evidence about how much money the decedent had). In such a weak, circumstantial case, evidence showing Seka was not connected to the crime is material.

Furthermore, this evidence undermines one of the prosecutor's main arguments. The prosecution's case relied almost entirely on the purported connections between evidence related to the Hamilton murder and evidence connected to 1933 Western.[9] Specifically, the prosecutor argued that cartridge cases found in 1933 Western were the same caliber as bullets found at the murder scene in 1929 Western. 7-AA-1391, 1402, 1405, 1411. Hamilton's blood was found in a Cinergi truck. 7-AA-1389. The keys for the Cinergi vehicles were kept in 1933 Western. The prosecutor argued that, due to these connections between the murder and 1933 Western, Seka was guilty because he had "control over" 1933 Western. 7-AA-1398.

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[9]Beyond the evidence found in 1933 Western and the truck, the only remaining circumstantial evidence was the paper in Hamilton's pocket with Seka's name and the Cinergi phone number on it. Because Hamilton had worked at 1933 Western and Seka had asked him to reach out again if he needed more work, it is unsurprising that he had Seka's name and the Cinergi number with him.

The existence of the purse inside 1933 Western provides concrete physical evidence that someone else had access to 1933 Western. And this other person not only had access to 1933 Western but was hiding gun crimes inside 1933 Western. This means the purse thief had ready access to the evidence found in 1933 Western—including to the truck in which the police found Hamilton's blood and the lumber on his body. So, this evidence undermines a central tenet of the prosecution's case. *See* 7-AA-1398.

Just as important, the prosecution took steps to exclude the purse from the jury's consideration, knowing the purse pointed the finger away from Seka. In fact, the fingerprint report plus the class consistency between the bullets provide **stronger** evidence of Seka's innocence than the circumstantial evidence the State presented of his guilt. At trial, the prosecutor argued Seka was guilty because the same caliber of ammunition was found in 1933 Western and 1929 Western. 7-AA-1391, 1402, 1405, 1411. Specifically, four .357 caliber cartridge cases were found in 1933 Western, while three .357 caliber bullets were found in 1929 Western. 11-AA-2292-93.

However, the examiner's class consistency finding between the bullet found in the car from which the purse was stolen and two of the bullets found in 1929 Western goes beyond just caliber, which is the diameter of the ammunition. The examiner made the connection between the purse bullet and the bullets from 1929 Western based on markings found on the bullets themselves. 11-AA-2290, 2292-93. The criminalist testified that markings on bullets can be used to connect the bullets to a make or model or type of firearm. 6-AA-1126. The criminalist's reference to "class characteristics" "found on" these bullets was clearly to these markings because the examiner listed in his reports what specific firearms possessed the class characteristics found on these bullets. 11-AA-2290, 2292-93. Thus, this class consistency from the markings **potentially connects them to the same gun.** *See* 11-AA-2290, 2292-93 (in reference to the bullets found at 1929 Western, explaining "[t]hese bullets/bullet fragments have consistent class characteristics and could have been fired from a single firearm"). That is a stronger connection than simply the caliber similarity the State argued at trial.

By removing the purse from the jury's consideration, it bolstered the prosecution's circumstantial case. The prosecutor even suggested the jury infer Seka's guilt from the strange circumstance of Limanni's IDs being in the ceiling tile. 7-AA-1411. "Who had control over the business?" the prosecutor insisted. 7-AA-1398. In sum, the exonerating *Brady* evidence undermines the foundation of the State's circumstantial case, and the failure to disclose the fingerprint report undermines confidence in the verdict as to the Hamilton murder and robbery.

The report is also material to the Limanni murder and robbery. If the *Brady* evidence undermines confidence in the verdict at to the Hamilton murder, it necessarily undermines confidence in the verdict as to the Limanni murder. The prosecution's theory, from the day of Seka's arrest through trial, was that the two crimes were connected. 7-AA-1487. The Nevada Supreme Court even adopted the State's joinder argument, viewing them "as part of a common scheme or plan." 7-AA-1503. Thus, the report is material as to the Limanni counts because if one person schemed to commit both crimes, and doubt arises that the person committed one of the two crimes, then doubt arises as to both.

As with the Hamilton murder, the new evidence also undermines the circumstantial connection to 1933 Western for the Limanni murder. It is clear someone besides Seka had access to 1933 Western and the Cinergi vehicles. Just as with Hamilton, this other person could be the one responsible for the ballistics evidence found in 1933 Western that was consistent with the Limanni murder. This other person would have had access to the van in which Limanni's blood was found.

The State's case against Seka on the Limanni murder was also a weak, circumstantial case. The State could never definitively establish where Limanni was even murdered. *See* 4-AA-745-57 (reflecting that Limanni's blood was not found in 1933 Western). Evidence discovered during post-conviction review contradicts the prosecutor's arguments as to motive for the Limanni murder, including that Limanni had been mistreating Seka. 10-AA-2011-12, 2023, 2047. There are many reasons to disbelieve the purported confession to Cramer, who was mentally ill and had an obvious motive to harm Seka. For one, Cramer's girlfriend was there and did not hear Seka make any confession. 12-AA-2430-33. And there were more likely suspects for the murder of Limanni, a "con man," 3-AA-613-14, 619, including a violent and dangerous individual

who had invested in Limanni's cigar shop and disappeared shortly after Hamilton's body was found. *See* 10-AA-2065-66, 2163, 2073-75.

As a result, the suppressed, favorable fingerprint report was material to both the Hamilton and Limanni murders and robberies, which amply justifies the Court in granting Seka's writ petition.

B. Seka's showing of good cause and prejudice overcomes the statutory procedural bars

This Court defers "to the district court's factual findings regarding good cause, but . . . will review the court's application of the law to those facts de novo." *Huebler*, 128 Nev. at 197, 275 P.3d at 95. So, this Court should defer to the district court's conclusion that the prosecution withheld a relevant report regarding the purse theft, but independently evaluate the materiality of the report.

Seka can show good cause for Ground One because he meets the elements of *Brady*. The prosecution suppressed the fingerprint report in the stolen purse case. This report was both favorable and material. Such allegations can represent "good cause" and prejudice to overcome the procedural bars contained in Chapter 34. *See Huebler*, 128 Nev. at 198, 275 P.3d at 95-96; *Bennett*, 119 Nev. at 599, 81 P.3d at 8; *Mazzan*,

116 Nev. at 66, 993 P.2d at 36. As this Court explained in *Huebler*, "establishing that the State withheld the evidence demonstrates that the delay was caused by an impediment external to the defense, and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely." 128 Nev. at 198, 275 P.3d at 95-96.

Seka can also establish that he filed the petition within a reasonable time after the *Brady* claim became available. *See Huebler*, 128 Nev. at 198 n.3, 275 P.3d at 95 n.3; *In re Robbins*, 959 P.2d 311, 334 (Cal. 1998) (explaining a habeas petitioner should assert claims without substantial delay, or demonstrate good cause, such as can be shown by pointing to particular circumstances sufficient to justify the delay). It is both reasonable and serves judicial economy for a petitioner to delay bringing a ripe claim while the petitioner is investigating other potentially meritorious claims. *See, e.g.*, *In re Gallego*, 959 P.2d 290, 299 n.13 (Cal. 1998) (finding "a petitioner may establish good cause for substantial delay in the filing of a claim if he or she was conducting a bona fide ongoing investigation . . . into another claim or claims"); *id.* at

301 (Kennard, J., concurring & dissenting); *In re Robbins*, 959 P.2d 311, 318 (Cal. 1998); *In re Clark*, 855 P.2d 729, 781 & n.17 (Cal. 1993).

Under this standard, Seka timely filed his petition. Seka discovered the suppressed fingerprint report in November 2017. 14-AA-2878. Importantly, he discovered the report soon after the district court granted his post-conviction petition requesting DNA analysis under NRS 176.0918. 8-AA-1662. That grant in turn led to DNA testing, which was favorable to Seka. Once testing was complete, Seka brought a motion for new trial under NRS 176.09187 based on those results, which the district court also granted. 10-AA-1828; 12-AA-2521. Seka had no reason to raise this claim in a separate petition while those proceedings were pending. In fact, once the district court granted Seka's motion for new trial in March 2020, he could not file a separate petition raising the claim. Those proceedings then ended on November 2, 2021, when the Nevada Supreme Court issued the remittitur in the appeal from the grant of the motion for a new trial. 13-AA-2765. New counsel began representing Seka, and he filed the instant petition on November 1, 2022, 14-AA-2768, within one year of the conclusion of the prior proceedings, making it reasonable.

C. The district court did not abuse its discretion by finding Seka overcame the application of laches

Unlike the statutory procedural bars, laches is a discretionary doctrine, whose application this Court reviews for abuse of discretion. *Thomas v. State*, 138 Nev. Adv. Op. 37, 510 P.3d 754, 775-76 (2022). The district court here held that laches does not apply to Seka's petition given that the State withheld a relevant report for years. 15-AA-3046. Substantial evidence supports the factual finding regarding suppression, *see Mazzan*, 116 Nev. at 69, 993 P.2d at 38, and the court did not abuse its discretion by finding that as a result, laches does not apply.

The district court's laches holding is not "arbitrary or capricious," nor does it exceed the bounds of law or reason. *Menendez-Cordero v. State*, 135 Nev. 218, 227, 445 P.3d 1235, 1243 (2019). Seka can overcome the presumption of prejudice to the State that arises under NRS 34.800(2). First of all, the petition's filing was not the result of inexcusable delay. *See State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (finding laches inapplicable where 15-year delay was not attributable to petitioner). In fact, the alleged delay cannot be

attributed to Seka, who has spent many years diligently litigating challenges to his convictions and sentence. In all that time, the State never turned over the exonerating fingerprint report. *See Bennett*, 119 Nev. at 601, 81 P.3d at 9 (finding the State's *Brady* obligation persists "regardless of whether the State uncovers the evidence before trial, during trial, or after the defendant has been convicted"). Seka only discovered this evidence as part of the 2017 public records requests, while he already had proceedings pending under the DNA statute. The State should not be allowed to benefit from their own failure to disclose this report. Whatever prejudice they allege now is due to their own actions. And given that Seka can show reasonable diligence, the district court properly exercised its discretion to decline to dismiss his grounds due to laches, as in *Thomas*, 510 P.3d at 775-76.

In any event, for the reasons discussed in the next sections, Seka can establish that the failure to review the petition would be a fundamental miscarriage of justice. This showing alone is sufficient to overcome laches. *See* NRS 34.800(1)(b); *Berry v. State*, 131 Nev. 957, 974, 363 P.3d 1148, 1159 (2015).

D. Alternatively, Seka can overcome all procedural issues because he is actually innocent

This Court has set forth the standards for a gateway innocence claim. A habeas petitioner may overcome procedural bars and secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice. *Berry*, 131 Nev. at 966, 363 P.3d at 1154 (citing *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995)). A petitioner meets this standard by making a "colorable showing he is actually innocent of the crime." *Ibid.* (quoting *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001)). This means "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Ibid.* (quoting *Schlup*, 513 U.S. at 327).

A court makes "this determination concerning the petitioner's innocence in light of all the evidence." *Berry*, 131 Nev. at 968, 363 P.3d at 1155 (quoting *Schlup*, 513 U.S. at 328). It reviews both the reliability of the new evidence and its materiality to the conviction, which in turn requires examining the quality of the evidence that produced the original conviction. *Ibid.* (citing *House v. Bell*, 547 U.S.

518, 538 (2006)). The analysis is a probability assessment as to what a hypothetical reasonable jury would do when faced with the entire evidentiary record. *Berry*, 131 Nev. at 968, 363 P.3d at 1155-56. "[I]t is not only the strength of the new evidence that is material. A district court should examine the evidence that led to the original conviction and especially whether the new evidence diminishes the strength of the evidence presented at trial." *Id.* at 973, 363 P.3d at 1159. An appellate court assesses actual innocence de novo. *See Fontenot v. Crow*, 4 F.4th 982, 1034 (10th Cir. 2021) (citing *House v. Bell*, 547 U.S. at 539).

A related, but more demanding standard applies to a freestanding actual innocence claim. For brevity and ease of reading, Seka discusses the substantial evidence of his innocence, which supports a gateway actual innocence argument, *See Berry*, 131 Nev. at 966, 363 P.3d at 1154, and a freestanding actual innocence claim, in the next section.

II. Seka's convictions 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

Federal and Nevada constitutional law support Seka raising a freestanding actual innocence claim. No reasonable juror would have

convicted him in light of the clear and convincing evidence he presents. Seka's actual innocence arguments are not barred by law of the case.

A. Federal and Nevada constitutional law support Seka raising a freestanding actual innocence claim

The U.S. and Nevada Constitutions both prohibit the conviction and imprisonment of someone who is actually innocent. That is true as a matter of procedural and substantive due process, as well as the right to a fair trial, not to be subject to cruel and unusual punishment, and to state-guaranteed inalienable rights. *See* U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 6, 8.

Although it has yet to resolve this issue squarely, the U.S. Supreme Court has strongly indicated that the imprisonment (and especially the execution) of an innocent person violates the Constitution. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief." *Id.* at 417; *see also In re Davis*, 557 U.S. 952 (2009) (remanding original habeas petition for a hearing on the petitioner's innocence); *House v.*

Bell, 547 U.S. at 554-55; *Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (assuming without deciding that *Herrera* claims are available in non-capital habeas cases). A majority of justices in *Herrera* would have explicitly held that proof of actual innocence warrants relief. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1996).

The Ninth Circuit has assumed a freestanding actual innocence claim is cognizable in a federal habeas petition. *See, e.g.*, *Ayala v. Chappell*, 829 F.3d 1081, 1116-17 (9th Cir. 2016); *Jones v. Taylor*, 763 F.3d at 1246; *Boyde v. Brown*, 404 F.3d 1159, 1168 (9th Cir. 2005), *as amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005); *Jackson v. Calderon*, 211 F.3d 1148, 1164-65 (9th Cir. 2000). That court has also elaborated on a petitioner's burden of proof, explaining in *Carriger* that "to be entitled to relief, a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt and must affirmatively prove that he is probably innocent." 132 F.3d at 477-78 (citing *Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting)); *accord Herrera*, 506 U.S. at 399-400 & 407 n.6.

State courts around the country have found that petitioners may raise freestanding actual innocence claims under their state

constitutional provisions as well. For example, the Iowa Supreme Court held that the incarceration of an actually innocent person implicates substantive and procedural due process, and it may constitute cruel and unusual punishment. *Schmidt v. State*, 909 N.W.2d 778, 793-94 (Iowa 2018). Other courts have similarly held. *See People v. Hamilton*, 979 N.Y.S.2d 97 (2014) (interpreting New York Constitution's Due Process and Cruel and Unusual Punishments Clause)[10]; *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007) (interpreting same clauses of New Mexico Constitution); *People v. Washington*, 665 N.E.2d 1330, 1335-37 (Ill. 1996) (interpreting Illinois Constitution's Due Process Clause); *Summerville v. Warden, State Prison*, 641 A.2d 1356, 1369 (Conn. 1994). The New Mexico Supreme Court observed it has a structurally greater interest in ensuring the accuracy of state criminal convictions than federal habeas corpus courts do. *Montoya*, 163 P.3d at 483.

The history, text, and principles underlying the Nevada Constitution further support that there is a freestanding right to raise

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[10]New York's state constitution is one of three documents that most directly influenced Nevada's Constitution. Michael S. Green, *Nevada: A History of the Silver State*, at 93 (2015).

actual innocence claims. *See Mack v. Williams*, 138 Nev. Adv. Op. 86, 522 P.3d 434, 444 (2022) (explaining that similarities between the state and federal constitutions do not mandate the same results); *State v. Bayard*, 119 Nev. 241, 247, 71 P.3d 498, 502-03 (2003) (interpreting Nevada's search and seizure clause to prohibit law enforcement conduct the U.S. Constitution permits); Michael S. Green, *Nevada: A History of the Silver State*, at 95 (2015) ("Because the [Nevada] delegates included old Jacksonian Democrats who prized individual freedom over government interference, their Declaration of Rights restricted the state more than the federal Bill of Rights does the U.S. government."). It provides that Nevadans have "certain inalienable rights among which are those of enjoying and defending life and liberty." Nev. Const. art. 1, § 1; *see City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 351-52 (Iowa 2015) (finding Iowa's inalienable right to liberty has "constitutional bite"). Nevada's Eighth Amendment counterpart protects against "cruel or unusual punishments," not the more onerous "cruel and unusual punishments." Nev. Const. art. 1, § 6; *see* Ben Finholt & Kevin Bendesky*, The Neglected State Constitutional Protections Against*

Extreme Punishments, Brennan Center for Justice (July 21, 2023).[11] And certainly an amorphous interest in finality cannot outweigh Nevadans' profound interest in fair criminal trials that lead to just outcomes. *See* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 Hastings L.J. 825, 866 (1994) ("The reflection of public values only in derogation of personal liberty is uncalled for by the Constitution."); Sixth Amendment Center, *Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future*, at iv (March 2013).[12] So, the question here is less whether to recognize a freestanding actual innocence claim, and more what the contours of the right are.

Other state courts have adopted a standard requiring the petitioner to show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. *See Schmidt*, 909 N.W.2d at 796; *Montoya*, 142 N.M. at 91. This standard

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[11]Available at https://www.brennancenter.org/our-work/analysis-opinion/neglected-state-constitutional-protections-against-extreme-punishments.

[12]Available at https://sixthamendment.org/6ac/nvreport_reclaimingjustice_032013.pdf.

"balances the interest of an innocent defendant and that of the state." *Schmidt*, 909 N.W.2d at 797. Regardless of the actual innocence standard the Court adopts, Seka can meet it.

B. Considering the clear and convincing new evidence Seka presents, no reasonable juror would convict him

Previously unavailable evidence shows that no reasonable juror would now convict Seka of the Hamilton murder. The recent DNA evidence establishes Seka's innocence; it shows that a foreign DNA profile was found on Hamilton's right and left fingernails. 12-AA-2449-50. The profiles were consistent between both hands. 9-AA-1697-98. Seka was excluded as the contributor of this DNA. 12-AA-2449-50.

This exclusion alone establishes that Seka is innocent by clear and convincing evidence. There is every reason to believe the murderer left his DNA on Hamilton's fingernails. The murderer removed Hamilton's jacket from his body and left it at the scene before dragging Hamilton's body from 1929 Western to the parking lot. 5-AA-951. The murderer also likely dragged Hamilton by the wrist, or at least grabbed Hamilton near his wrist at some point, because Hamilton's bracelet (found at 1929 Western) had been pulled off his arm, leaving an injury on his

wrist. *See* 3-AA-548, 653. All these actions could have led to the murderer's skin cells being left on Hamilton's fingernails. *See* 9-AA-1692 (State's DNA examiner testifying, "[a]ny kind of contact with somebody else may end up with your DNA underneath there"). This new DNA evidence is powerful exonerating evidence. Any reasonable juror would find reasonable doubt based on this DNA exclusion.

Further, Seka was excluded from the evidence collected at the site where Hamilton's body was found. The police originally deemed this evidence to be of value and attempted to test it before trial, with not much success. *See* 12-AA-2443-44. However, the new DNA testing of the cigarette butt found by Hamilton's body excludes Seka as a contributor. 11-AA-2246; 12-AA-2449-50. Not only that, but looking at the site where Hamilton was killed, the fingerprint examiner indicated he compared the latent prints found at 1929 Western to Seka's prints, and there was no identification. 12-AA-2452-53, 2455. When viewed along with the fingernail evidence, these DNA and latent print exclusions all point in the same direction—away from Seka.

The same conclusion can be drawn from the latent fingerprint report in the purse case. As discussed in Ground One, this report in

conjunction with the ballistics examination established that someone other than Seka stole the purse found at 1933 Western and that person was likely the one who killed Hamilton.

The new evidence together presents a compelling case for innocence. And it becomes even more compelling when viewed in light of the weak, circumstantial case against Seka on the Hamilton case, as discussed in detail in Ground One. The new evidence not only strongly points to Seka's innocence directly, but it would also cause a jury to draw a different set of inferences regarding the circumstantial evidence the State presented, leading to a conclusion that Seka had nothing to do with the Hamilton murder and robbery. It follows that all reasonable jurors would doubt Seka is guilty of the Hamilton murder and robbery.

Seka can also establish he is actually innocent of the Limanni murder and robbery. As discussed in detail in Ground One, the prosecutor argued that the murders were part of a plan or scheme. Thus, if Seka is innocent of the Hamilton murder, he is also innocent of the Limanni murder. Showing innocence on one necessarily establishes innocence on the other. For the same reasons discussed in the

materiality section in Ground One, the evidence as a whole shows Seka's innocence of the Limanni murder and robbery.

C. Seka's actual innocence arguments are not barred by law of the case

Law of the case does not apply to the actual innocence claim because this claim is different from the one decided in the prior appeal. Additionally, even if law of the case did apply, this Court is justified in revisiting the claim because it relies on different evidence than the prior claim, and the prior decision was clearly erroneous.

The law of the case doctrine "serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity." *Hsu v. Clark County*, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007). The doctrine stands for the principle that "the law of a first appeal is the 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).

The doctrine is distinct from the statutory procedural bars because, while it serves important policy considerations, courts apply it flexibly. *See, e.g.*, 18B *Fed. Prac. & Proc. Juris.*, § 4478 (3d ed.) ("Law-

of-the-case doctrine is a matter of practice and discretion, not a limit on power."). It does not apply, for example, absent actual decision of an issue—"[a]s compared to claim preclusion it is not enough that the matter could have been decided in earlier proceedings." *Ibid.* And even when law of the case nominally applies, courts are empowered to revisit prior decisions. *See ibid.* Indeed, the Nevada Supreme Court has recognized that most states revisit a prior ruling when "(1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in the controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced." *Hsu*, 123 Nev. at 630, 173 P.3d at 729; *see Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003) (citing *Massachusetts Mut. Life Ins. Co.,* 825 F.2d 1506, 1510 (11th Cir. 1987) for the proposition that courts depart from law of the case when new evidence dictates a different result, or when the decision is clearly erroneous and would work a manifest injustice).

Here, as a foundational matter, law of the case does not bar consideration of the actual innocence claim because Ground Two is a different issue than the one decided in the prior appeal. *See,*

e.g., *Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014) (explaining "[s]ubjects an appellate court does not discuss, because the parties did not raise them, do not became the law of the case by default" (internal quotation omitted)); *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010) (noting law of the case "does not bar a district court from hearing and adjudicating issues not previously decided . . . and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal"). The issue in Ground Two is whether, looking at the entire evidentiary record, including both new evidence and old, Seka can show that he is actually innocent by clear and convincing evidence. *See* 14-AA-2815-18. That is different than what was decided in the prior appeal, which was significantly more limited. In that appeal the issue was whether the results of the DNA testing would probably lead to a different result at a new trial. *See* NRS 176.515(3), 176.09187(1); 13-AA-2667.

In any event, to the extent law of the case does apply, this Court should revisit Seka's claim because it relies on different evidence, and the prior decision was clearly erroneous and, if implemented, would work a manifest injustice. First, the claim relies on different evidence.

An actual innocence claim looks at **all** evidence, both new and old. This includes evidence that was "either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327-28. It also includes newly presented evidence, i.e., evidence that was available at trial, but not presented to the jury. *See House v. Bell*, 547 U.S. at 537 ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—**that was not presented at trial**.'" (emphasis added) (quoting *Schlup*, 513 U.S. at 324)); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (explaining "habeas petitioners may pass *Schlup*'s test by offering 'newly presented' evidence of actual innocence").

Here, the evidence Seka relies on to establish actual innocence goes beyond the factual record considered in the prior appeal. The issue in the prior appeal solely looked at whether the new DNA evidence in conjunction with the evidence at trial justified a new trial. Now the evidentiary basis of the claim is broader. To be sure, Seka relies on the new exonerating DNA evidence again. However, he has also presented the exonerating fingerprint report from the purse case and the factual inferences that can be drawn from that report. In addition, Seka is

relying on other previously unpresented evidence, including the bench notes to the fingerprint report in the homicide case. 12-AA-2455. Those notes were not discussed at the trial. The fingerprint examiner's trial testimony did not explain that he found Seka did not contribute any of the prints left at 1929 Western. 6-AA-1145-88. But the underlying bench notes show that Seka was excluded as the contributor of all the prints found at crucial locations at the Hamilton murder scene.[13] So, to the extent law of the case is even in play, this Court should depart from the Nevada Supreme Court's prior resolution because subsequent proceedings have produced "substantially new or different evidence." *Hsu*, 123 Nev. at 630, 173 P.3d at 729.

Besides, the prior decision was clearly erroneous and, if implemented, would work a manifest injustice. *Id.* at 630, 173 P.3d at 729. Most significantly, the Nevada Supreme Court's assessment of the favorability of the exonerating DNA evidence found on Hamilton's fingernails was clearly erroneous and not supported by the record. The

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[13]In addition, the jury was not informed that, when Cramer spoke to the police about Seka's statement, Cramer indicated that Seka told him he knew nothing about the Hamilton murder. 12-AA-2428.

Court acknowledged that the foreign DNA was found on Hamilton's fingernails. Yet the Court stated that it was not favorable because only a small amount was found. 13-AA-2739-40. It opined that such a small amount could mean another profile did not actually exist and that the facts of the killing do not indicate that another DNA profile would be present. *See* 13-AA-2739-40.

The record shows that both these reasons are unsupportable. First, the State's expert acknowledged that, using new DNA technology, a second DNA profile was found on the fingernail clippings from both of Hamilton's hands. 12-AA-2449-50 ("[A] foreign contributor was detected."). The expert considered alternative possible explanations, but they were insufficient to explain away the finding that there was additional DNA. 9-AA-1693-94 (concluding studder and pull-up theories could not explain the results, leaving only the possibility of an artifact rather than additional DNA). What's more, the expert indicated **a consistent foreign profile was found on both hands.** 9-AA-1697-98. That provides strong support for the conclusion that there was another person's DNA present. In the end, the expert reported the results out as two consistent DNA profiles on the

fingernails because **that is what the testing supported**. Not only would Seka be entitled to argue that there was a second DNA profile present on both hands based on the testing, he would be able to prove to a jury he was excluded as that second contributor, making this evidence material.

Further, the fact that only a small amount of DNA was found did not reduce its importance. The testing was done with the understanding that only a small amount would possibly be found. Advances in DNA technology made that type of testing possible. It would be expected that there would only be a small amount found for a second profile because this new technology is able to test for the presence of skin cells, which would necessarily be found in a smaller amount than the blood and hair that was otherwise present on the fingernails. 4-AA-753-54.

Moreover, the record supports a conclusion that the perpetrator's skin cells would be found under Hamilton's fingernails. Regardless of whether Hamilton was shot in the back at a distance, there was reason to believe the perpetrator came in contact with Hamilton's fingers. This is because the murderer removed Hamilton's jacket from his body and

left it at the scene before dragging Hamilton's body from 1929 Western to the parking lot. 5-AA-951. The murderer also likely dragged Hamilton by the wrist, or at least grabbed Hamilton near his wrist at some point, because Hamilton's bracelet (found at 1929 Western) had been pulled off his arm, leaving an injury on Hamilton's wrist. *See* 3-AA-548, 653. All these actions could have potentially led to the murderer's skin cells being left on Hamilton's fingernails. *See* 9-AA-1692 (State's DNA examiner testifying, "[a]ny kind of contact with somebody else may end up with your DNA underneath there").

There are other fatal flaws in this Court's prior opinion, which indicate this Court should take a skeptical approach to its prior assessment of the record. To provide a representative example, in its prior decision, the Court interpreted different events that occurred on November 5 as signs of Seka's guilt. The Court found it meaningful, for example, that on November 5, Seka "was the last person to see Limanni alive." 13-AA-2685. And it noted various circumstances from that day that the Court seemed to find suspicious. *E.g.* 13-AA-2685-86 (describing how Harrison found the business on November 5 and describing statements Seka made to Harrison on November 5). But

property manager Cerda saw Limanni the very next day, on November 6. 3-AA-491-92; 10-AA-2062. So the conclusions the Court drew about November 5 are flawed.

Thus, there are clear errors in the Nevada Supreme Court's prior decision, counseling for a skeptical approach. Implementing that decision here would work a manifest injustice. For all these reasons, Seka can show he is actually innocent of the Hamilton murder and robbery, and by extension actually innocent of the Limanni crime. Barring review of the petition would result in a miscarriage of justice.

III. The district court erred by not granting an evidentiary hearing

A petitioner is "entitled to an evidentiary hearing . . . if he supports his claims with specific factual allegations that if true would entitle him to relief." *Thomas v. State*, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004); *see also Bolden v. State*, 99 Nev. 181, 183, 659 P.2d 886, 887 (1983). Here, Seka's petition specifically described why he is entitled to relief, with the assertions not belied by the record. *See Berry*, 131 Nev. at 969, 363 P.3d at 1156 (explaining that 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"). Because his allegations were more than sufficient, the district court erred by not granting an evidentiary hearing so he could develop and prove his claims. *See Thomas*, 510 P.3d at 767, 776 (concluding the district court erred by denying claims without an evidentiary hearing); *Rippo v. State*, 134 Nev. 411, 430, 423 P.3d 1084, 1102 (2018) (finding that "[b]ecause the substantive claim therefore may have merit . . . , we conclude that discovery and an evidentiary hearing is needed to determine whether the allegations supporting the judicial-bias claim are true and, if so, whether prior post-conviction counsel provided ineffective assistance").

CONCLUSION

The facts and law are both on Jack Seka's side: the prosecution violated *Brady*, and clear and convincing evidence shows he is actually innocent. This Court should grant the writ and vacate the judgment of conviction so he may have a fair trial after decades of wrongful imprisonment. To the extent the Court is not inclined to grant writ relief without an evidentiary hearing on these claims, the Court should reverse the district court's denial of an evidentiary hearing.

Dated October 4, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 13,992 words; or

[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated October 4, 2023.

Respectfully submitted,

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Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2023., I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

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

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

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/s/ Kaitlyn O'Hearn
An Employee of the
Federal Public Defender