No. 86694

IN THE NEVADA SUPREME COURT

John Seka,

Petitioner-Appellant,

v.

State of Nevada, et al.

Respondents-Appellees.

Petitioner-Appellant's Appendix
Volume 15 of 15

Rene L. Valladares
Federal Public Defender,
District of Nevada
*Jonathan M. Kirshbaum
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Jonathan_Kirshbaum@fd.org

*Counsel for John Seka

ALPHABETICAL INDEX

CHRONOLOGICAL INDEX

Remittitur	11/2/2021	2765
Volume 14 of 15		
Petition for Writ of Habeas Corpus (Post-Conviction)	11/1/2022	2768
Index of Exhibits in Support of Petition for Writ of Habeas Corpus and Exhibits 1-15	11/1/2022	2822
Motion for the Court to Take Judicial Notice of the Filings in Mr. Seka's Criminal Case Number	11/1/2022	2888
Order for Petition for Writ of Habeas Corpus	2/13/2023	2893
State's Response to Petition for Writ of Habeas Corpus and Motion to Dismiss	3/28/2023	2896
Volume 15 of 15		
Opposition to State's Response to Petition for Writ of Habeas Corpus	4/5/2023	2992
Petition for Writ of Habeas Corpus Transcript	4/12/2023	3015
Notice of Entry of Findings of Fact, Conclusions of Law and Order	5/10/2023	3035
Case Appeal Statement	5/25/2023	3065
Notice of Appeal	5/25/2023	3069

Dated October 4, 2023.

Respectfully submitted,

Rene L. Valladares
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:

John Joseph Seka, #69025 High Desert State Prison P.O. Box 650 Indian Springs, NV 89070	

/s/ Kaitlyn O'Hearn

An Employee of the Federal Public Defender, District of Nevada

OPPS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
*JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C
Shelly Richter
Assistant Federal Public Defender
Nevada State Bar No. 16352C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-6419 (Fax)
Jonathan_Kirshbaum@fd.org

Attorneys for Petitioner John Seka

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

John Seka, Petitioner, v. Calvin Johnson, Respondents.	Case No. A-22-860668-W C-99-159915 Dept. No. XXV Date of Hearing: April 12, 2023 Time of Hearing: 9:30 a.m. (Not a Death Penalty Case)

OPPOSITION TO STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Petitioner John Seka, by and through his attorneys, Assistant Federal Public Defenders Jonathan M. Kirshbaum and Shelly Richter, hereby files this opposition to the State's Response to Petition for Writ of Habeas Corpus (Post-Conviction). This

opposition is based on the attached points and authorities, as well as all other pleadings, documents, and exhibits on file.

POINTS AND AUTHORITIES

I. Introduction

In his post-conviction petition, Seka argued in Ground One that the State violated *Brady* by suppressing an exonerating fingerprint report, and in Ground Two that he is actually innocent. The State filed a response, arguing the claims lack merit and are procedurally barred as untimely and successive. The State argues Seka cannot show good cause on Ground One because defense counsel reviewed the prosecutor's file pursuant to open file discovery, and so the report must not have been withheld. They also argue that the report is not material. Additionally, they argue the Ground is untimely. On Ground Two, they argue that the claim is barred by law of the case and that Seka cannot establish he is actually innocent, relying on the Nevada Supreme Court's decision denying his prior motion for a new trial based on new DNA evidence. The State's arguments should all be rejected.

Seka can establish good cause and prejudice to overcome the procedural bars related to Ground One. The exonerating fingerprint report was suppressed. As discussed in more detail below, the State's open file discovery policy does not protect them from *Brady* violations when the record shows that the relevant report was not part of the file given to the defense to review. Seka can show prejudice because the exonerating fingerprint report was material—it undermines the foundation of the State's entirely circumstantial case in the Hamilton murder and robbery. Seka can also show that the petition is timely because he filed it within a reasonable time after discovering the report. And to the extent the Court disagrees, Seka can show that the failure to review the claim now would result in a miscarriage of justice. *Schlup v.*

Delo, 513 U.S. 298 (1995); *Berry v. State*, 131 Nev. 957, 363 P.3d 1148 (2015). Considering the new evidence in conjunction with the record as a whole, it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt of the Hamilton murder and robbery.

Further, Ground Two is not barred by law of the case because law of the case does not apply: Ground Two presents a different legal claim than the one in the prior proceeding. In addition, the doctrine does not apply because Seka is presenting different evidence, the prior decision was clearly erroneous, and applying law of the case would result in a manifest injustice. Indeed, Seka can establish that he is actually innocent of the Hamilton murder and robbery, which allows Seka to overcome all procedural hurdles related to this Ground and to obtain relief.

Because Seka can establish good cause and actual prejudice, or that a miscarriage of justice would result if the grounds are not addressed, the grounds are not procedurally barred, and this Court should review their merits and order an evidentiary hearing.

II. Seka can show good cause and prejudice on Ground One because he has established a *Brady* violation

A. A meritorious *Brady* claim provides good cause and prejudice to overcome procedural bars

Seka can show good cause for Ground One because he can meet the elements of a *Brady* claim. The State 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 State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95-96 (2012); *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). As the Nevada Supreme Court explained in *Huebler*:

> "'*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or

> to punishment.'" *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) " 'prejudice ensued, i.e., the evidence was material.' " *Id.* (quoting *Mazzan*, 116 Nev. at 67, 993 P.2d at 37). When a *Brady* claim is raised in an untimely post-conviction petition for a writ of habeas corpus, the petitioner has the burden of pleading and proving specific facts that demonstrate both components of the good-cause showing required by NRS 34.726(1). *Id.* Those components parallel the second and third prongs of a *Brady* violation: 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. *Id.*

Huebler, 128 Nev. at 198, 275 P.3d at 95-96.

So, to establish a *Brady* violation, a petitioner must demonstrate: (1) the evidence at issue is favorable; (2) the evidence was suppressed by the State, either intentionally or inadvertently; and (3) the suppressed evidence is material. *Bennett*, 119 Nev. at 599, 81 P.3d at 8.

Brady 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 "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* In other words, 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). Reversal is required 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.

B. Seka can show good cause because the State suppressed the fingerprint report in the stolen purse case

In his petition, Seka presented detailed allegations establishing that the State did not disclose the exonerating fingerprint report in the stolen purse case to Seka. The fingerprint report does not appear in trial counsel's file and was not turned over to Seka until it was disclosed as a result of a Nevada Public Records Act request in 2017. *See* Ex. 12, ¶ 15; Ex. 14, ¶ 5; Ex. 15, ¶ 17.

In response, the State argues that Seka has not shown that the State "affirmatively withheld" the report. *See* State's Response at 13. Rather, they claim that the prosecution's file was made available to the defense through their purported "open file" policy. They quote instances in the transcript showing that defense counsel reviewed Detective Thowsen's file, which the trial prosecutor indicated matched his own file. *Id.* at 18-19.

This argument has no merit. Preliminarily, the State misstates the *Brady* rule. Seka does not need to prove the State "affirmatively withheld" the report. Even a good faith or inadvertent failure to disclose evidence violates *Brady*. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Indeed, under *Brady*, the State has an "affirmative duty" to disclose favorable evidence. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *Bennett*, 119 Nev. at 601, 81 P.3d at 8 ("The State, of course, has an affirmative duty to provide favorable evidence . . . .").

That affirmative duty is critical here. An open file policy does not shield the State from their affirmative duty to disclose. Rather, the burden remains on the State to disclose all favorable evidence. Here, they did not do that. The State does not allege that they actually disclosed this report to the defense. In addition, even with a purported open file policy, the State must show that they made this particular piece of evidence available to the defense. *See McKee v. State*, 112 Nev. 642, 647-48, 917 P.2d 940, 943-44 (1996) (reversing conviction because relevant evidence was not in

the deputy district attorney's file, which defense counsel viewed as part of an open file policy); *In re Jenkins*, Case No. S267391, 2023 WL 2639727, at *1 (Cal. March 27, 2023) (Opinion) (explaining the State's continuing duties to disclose evidence in response to a petition alleging a *Brady* violation). The State has not done that. Most critically, the State does not allege that this specific report was in the file that was made available to the defense for review. That alone ends the inquiry.

Further, the factual record shows that it was not made available to the defense. Metro housed the stolen purse fingerprint report in a separate file from the homicide case. The fingerprint report was created exclusively in the stolen purse case. The case number on the report (98-1106-0539) is different than the homicide case (98-1116-0443). The purse case was a burglary/robbery case with different officers involved. The file would have been housed in a different division at Metro than the homicide cases. In fact, the 2017 public records requests show that these files were kept separate. Seka made separate public records requests: one under the case number for the homicides, and one under the case number for the stolen purse. *See* Exs. 7, 9. These were expansive requests. *See* Ex. 7. The relevant fingerprint report was turned over solely in response to the public records request in the stolen purse case. *See* Ex. 12, ¶ 15; Ex. 15, ¶ 17. It was not one of the records turned over in response to the request in the homicide case. This clear evidence shows that the stolen purse fingerprint report was not in the homicide file.[1]

Moreover, the trial transcript excerpts the State cites show that the separate file in the stolen purse case was not a part of the file shown to defense counsel as part of the purported "open file" discovery. The deputy district attorney indicated that he made sure that his file was the same as the one that Detective Thowsen had. *See*

---

[1]Not only that, upon information and belief, documents that were exclusively in the stolen purse file and only list the case number in the stolen purse case, such as the incident report (Ex. 1), also do not appear in trial counsel's file.

State's Response at 18 (quoting 02/14/2001 Trial Tr. vol. 1 at 7-8.) Right before trial, defense counsel reviewed Detective Thowsen's file. Upon his review of the detective's file, trial counsel Christiansen asked for, and received, a copy of some reports that he either didn't have or was unsure whether he had seen.[2] *See* State's Response at 19 (quoting 02/22/2001 Trial Tr. vol. 1 at 34.) Thus, the file that Christiansen had would be the exact same one as both the prosecutor and Detective Thowsen had. As Seka has shown, the relevant fingerprint report was not in defense counsel's file. This means it was not made available to him through the purported "open file" policy—and it means the State never fulfilled their "affirmative duty" to disclose it.

There are additional reasons to believe the report was never made available to the defense. The most obvious reason is that there is no doubt that if trial counsel knew about the report, he would have obtained a copy of it. Its absence from trial counsel's file is essentially conclusive evidence that he was never shown or given the report. Additionally, the State never charged Seka with stealing the purse. There is no reason to believe a file in an uncharged case would necessarily be shown to the defense through "open file" discovery on the eve of trial on the homicides. Indeed, this is precisely why the *Brady* obligation exists. The prosecution has exclusive possession of all the relevant files, including those in uncharged cases. They have constructive possession of Metro's files in those cases. As the United States Supreme Court has explained, it is the State's burden to review what is in their actual and constructive possession to determine what needs to be disclosed. *Kyles*, 514 U.S. at 437-38.

In sum, the absence of this document from defense counsel's file shows the State violated their affirmative duty to disclose. Because the State suppressed the report, Seka has good cause to overcome the procedural bars. *See Huebler*, 128 Nev.

---

[2]The prosecutor indicated that these were forensic reports from Welch and Johnson. *See* State's Response at 18. The relevant report here was prepared by Boyd.

at 198, 275 P.3d at 95-96 (explaining that a petitioner who establishes that the State withheld evidence "demonstrates that the delay was caused by an impediment external to the defense"). To the extent there are any factual disputes, this Court should order an evidentiary hearing.

C. Seka can show prejudice because the report is material

In the petition, Seka demonstrates at length the materiality of the fingerprint report from the stolen purse case. *See* Petition at 44-47. Seka's main materiality argument is that the previously undisclosed fingerprint report shows Seka is innocent of the murder of Eric Hamilton. A purse was found in the ceiling at the business where Seka had been working and living. The purse had been stolen from a car around the time of the murder. The thief had shot out a window of the car and taken the purse. A bullet was recovered from the car.

Latent fingerprints were recovered from the purse found in the ceiling. They were compared against Seka's. The prints did not match Seka's prints. This report was never disclosed to the defense.

A ballistics comparison was conducted between the bullet from the purse theft and two bullets found in connection with the murder of Eric Hamilton. The markings on these bullets were class consistent. The comparison established a likely connection between the gun used in the theft and the one used in the murder. Indeed, it was a stronger connection than the one the State advanced at trial to convict Seka, which focused on the similarity between the caliber of bullets found at the murder location and those found at the business location where Seka was staying.

The fingerprint exclusion shows that Seka did not commit the purse theft. And, if Seka is innocent of the theft, the ballistics report provides a compelling reason to believe he is innocent of the Hamilton murder, given that the ballistics evidence points to the same person committing both crimes. This argument standing alone

demonstrates the report's materiality. There is more than a reasonable probability this connection would create a reasonable doubt in a juror's mind.

The State does not address this argument. Instead, they primarily focus on Seka's secondary argument that the fingerprint exclusion on the purse shows that other people had access to 1933 Western. State's Response at 20. They point to testimony from trial in which witnesses stated that other people would visit 1933 Western. *Id.* However, there is a qualitative difference between witness testimony saying that other people visited 1933 Western and physical evidence establishing it. More important, the physical evidence was the proceeds of a crime. Ballistics testing connected that evidence to the Hamilton murder. Thus, there was physical evidence showing someone other than Seka not only had access to 1933 Western, but was hiding crimes inside 1933 Western. This means that the evidence found in 1933 Western—including keys to the truck in which the police found Hamilton's blood—can actually be used to connect the *purse thief*. This evidence fully undermines a central tenet of the State's case.

The State also questions Seka's argument that the case against Seka relied almost entirely on these connections between the two locations. State's Response at 20-21. They argue that the report is irrelevant to those connections because Seka was not charged with the purse and the State didn't use the purse to connect Seka to the Hamilton or Limanni murders. *Id.* This argument does not make much sense. Seka did not need to be charged with stealing the purse to present evidence to the jury that the purse found at 1933 Western (which was mentioned at trial) was connected to the Hamilton murder and Seka was excluded from stealing the purse. Further, it does not matter whether the State tried to use the purse to connect Seka to the murders. The materiality question is whether, in light of the discovery of the exonerating fingerprint report, *Seka could have used the purse to make those connections*. Seka

clearly could have. Those connections point to Seka's innocence and would certainly have created a reasonable doubt in a juror's mind.

The State also argues that the report does not undermine the overwhelming evidence against Seka. State's Response at 21.[3] The State predominantly relies upon the Nevada Supreme Court's decision for that assertion. *Id.* at 14-16. However, as even that decision shows, there is no dispute that the evidence against Seka on the Hamilton murder and robbery was almost entirely circumstantial.[4] The Nevada Supreme Court's decision focuses primarily on the evidence in the Limanni case. But the exonerating fingerprint report is connected to the Hamilton murder and robbery, and Seka is predominantly arguing that it is material to those convictions.

It is precisely because the Hamilton case relied so heavily on circumstantial evidence that the exonerating fingerprint report matters so much. As explained in the petition, by removing the purse from the jury's consideration, it bolstered the State's circumstantial case. *See* Petition at 46-47. But Seka's exclusion from stealing the purse pointed the circumstantial finger away from Seka and toward someone else as the murderer. The exonerating *Brady* evidence undermines the very foundation of the State's circumstantial case. The failure to disclose the exonerating fingerprint report undermines confidence in the verdict as to the Hamilton murder and robbery.

---

[3]The State also makes an incoherent argument that they didn't need to show Seka's fingerprints were on every piece of evidence. State's Response at 21. Nowhere does Seka suggest such an argument. The State also claims that Seka's exclusion from the fingerprints on the purse is not important because Seka was excluded from fingerprints found on a beer bottle and wooden boards near Hamilton's body, and the jury still convicted him. *Id.* This argument is frivolous. First, this demonstrates that there were obvious weaknesses in the State's case, making it far from overwhelming. More important, Seka has shown that it is not just that there was another fingerprint exclusion here, but that this particular exonerating exclusion was significant and material.

[4]Regardless of the ease with which the State characterizes evidence as "overwhelming," the evidence against Seka was anything but—the jury struggled to reach a verdict in this case, deliberating for five days.

Accordingly, because the exonerating fingerprint report is material, Seka can show prejudice to overcome the procedural bars on Ground One.

D. Seka filed the petition within a reasonable time after discovering the report

Seka can also establish that he filed the petition within a reasonable time after the *Brady* claim became available. *See Rippo v. State*, 132 Nev. 95, 101, 368 P.3d 729, 734 (2016); *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). Under this standard, Seka's petition was timely filed. As discussed in the petition, Seka discovered the suppressed fingerprint report in November 2017. Importantly, Seka discovered the report while his 2017 DNA petition, brought under the special procedure set forth in NRS 176.0918, was pending in this Court. At the time he discovered the report, this Court had already granted the petition. That grant in turn led to DNA testing, which was favorable to Seka. Once testing was complete, Seka brought a motion for new trial based on those results, which this Court also granted. Seka had no reason to raise this claim in a separate petition while those proceedings were pending. In fact, once the 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 remittitur in the appeal from the grant of the motion for a new trial. Seka filed the instant petition on November 1, 2022, within one year of the conclusion of the prior proceedings, making it reasonable.

E. The failure to address Ground One would result in a miscarriage of justice

Alternatively, Seka can establish that the failure to consider the *Brady* claim would result in a miscarriage of justice. Seka can show that, looking at the evidence

as a whole in light of the new evidence, it is more likely than not no reasonable juror would find him guilty beyond a reasonable doubt. *See Berry*, 131 Nev. at 966, 363 P.3d at 1154. As discussed in more detail below in subsection III.B., the previously undisclosed exonerating fingerprint report in the purse case shows Seka is innocent of the murder of Eric Hamilton. His prints were not on the stolen purse. And the ballistics evidence connects the stolen purse to the Hamilton murder. It indicates the same person who committed one crime committed the other. Thus, if Seka did not steal the purse, then he was not the one who committed the Hamilton murder. The new DNA evidence bolsters this conclusion, given that it excluded Seka as the contributor to DNA found on Hamilton's fingernails. Likewise, the bench notes attached to the fingerprint report in the murder cases (11/19/2019 Motion for New Trial ("Motion"), Ex. 50 – 02/17/1999 Fingerprint Report) indicate Seka's innocence because they show he was excluded as the contributor of the fingerprints found in crucial locations at 1929 Western, the Hamilton murder scene. Hamilton was also excluded, which strongly suggests that an unknown perpetrator left the prints.

Thus, all the new evidence points in the same direction: away from Seka. When this evidence is looked at in conjunction with the weak circumstantial evidence of guilt at trial—which resulted in the jury deliberating for five days—Seka can establish that it is more likely than not no reasonable juror would find him guilty beyond a reasonable doubt of the Hamilton murder and robbery.

III. Ground Two is not barred by law of the case, and Seka can establish he is actually innocent, both to overcome the procedural bars and to obtain substantive relief

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

The State argues that law of the case bars Ground Two, the freestanding actual innocence claim. *See* State's Response at 14. However, 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 applies, this Court is justified in revisiting the claim because it relies upon 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. County of Clark*, 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." *Id.* And even when law of the case nominally applies, courts are empowered to revisit prior decisions. *See id.* 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 an exception to the law of the case doctrine occurs when the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the decision is clearly erroneous and, if implemented, 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 that 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 as a whole, including both new evidence and old, Seka can show that he is actually innocent by clear and convincing evidence. *See* Petition at 48-51. That is different than what was decided in the prior appeal, which was significantly more limited. In that appeal the issue was limited to whether the results of the DNA testing only would probably lead to a different result at a new trial. *See* Answering Brief in 80925 (attached to State's Response) at 28-44.

In any event, to the extent law of the case does apply, this Court should revisit Seka's claim because it relies upon 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. 518, 537 (2006) ("[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. Here, the evidentiary basis of the claim is far broader. To be sure, Seka does rely upon 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, as discussed in the petition. *See* Petition at 44-47. In addition, Seka is relying upon other previously unpresented evidence, namely the bench notes attached to the fingerprint report in the homicide case. (Motion, Ex. 50 - 02/17/1999 Fingerprint Report at 4.) Those notes were not discussed at the trial. Moreover, the fingerprint examiner's testimony at trial did not explicitly state that Seka was not identified as the contributor of the prints left at 1929 Western. (02/21/2001 vol. 2 at 9.) However, the underlying bench notes show that Seka was excluded as the contributor of the fingerprints found at crucial locations at the Hamilton murder scene.[5] So, to the extent law of the case is even in play, this Court is fully justified in departing from the Nevada Supreme Court's resolution because subsequent proceedings have produced "substantially new or different evidence." *Hsu*, 123 Nev. at 630, 173 P.3d at 729.

Moreover, 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 was not supported by the

---

[5] In addition, the jury also 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. (Motion, Ex. 43 - 04/09/1999 Cramer Interview, p. 3.)

record. The court acknowledged that a foreign profile was found on Hamilton's fingernails. However, the court stated that it was not favorable because only a small amount was found. It opined that such a small amount could mean another profile did not actually exist. It further stated that the facts of the killing do not indicate that another DNA profile would be present. *See* State's Response at 25-26.

The factual record shows that both these reasons are unsupportable and belied by the record. First, the State's expert acknowledged that, using new DNA technology, a second profile was found on the fingernail clippings from both Hamilton's hands. (Motion, Ex. 49 - 07/24/2018 DNA Report.) Contrary to the Nevada Supreme Court's conclusion, there was not any dispute that a second profile was present. What's more, the expert indicated *the same foreign profile was found on both hands*. (12/14/2018 Hearing Tr. at 28-29.) That fully undermines any contention that there was not enough DNA to show a profile existed. There was enough to show that the same profile was present in two places. 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. And 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 that was otherwise present on the fingernails.

Moreover, the factual record supported 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. 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. All these actions could have potentially led to the murderer's skin cells being left on Hamilton's fingernails. (*See* 12/14/2018 Hearing Tr. at 23 (DNA examiner testifying, "[a]ny kind of contact with somebody else may end up with your DNA underneath there")).

Thus, there are clear errors in the Nevada Supreme Court's prior decision. Implementing that decision here would work a manifest injustice. For the reasons discussed below in subsection III.B., Seka can show he is actually innocent of the Hamilton murder and robbery. Barring review of the petition would result in a miscarriage of justice.

B. Seka can show he is actually innocent of the Hamilton murder and robbery both to overcome the procedural bars and to obtain substantive relief

Seka has raised two separate actual innocence arguments. First, he has raised a "gateway" actual innocence claim to overcome any procedural bars on both Grounds. Second, he has raised a freestanding actual innocence claim under Ground Two. Although the two arguments require different levels of proof, the analysis on them is the same. They will be discussed jointly in this section.

The Nevada Supreme 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*, 513 U.S. at 314-15). This standard is met when the "petitioner makes a colorable showing he is actually innocent of the crime." *Id.* (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." *Id.* (quoting *Schlup*, 513 U.S. at 327).

A court "must make 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 must review both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires examining the quality of the evidence that produced the original conviction. *Id.* (citing *House v. Bell*, 547 U.S. at 538). 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.

The standard for a freestanding actual innocence claim, whether as a matter of federal law or the Nevada Constitution, has not yet been articulated. However, it would likely require that a petitioner affirmatively show that he is probably innocent. *See generally Carriger v. Stewart*, 132 F.3d 463, 477-78 (9th Cir. 1996) (citing *Herrera v. Collins*, 506 U.S. 390, 442-44 (1993) (Blackmun, J., dissenting)); *accord Herrera*, 506 U.S. at 399-400 & 407 n.6.

Seka can meet the *Schlup*/*Berry* standard to overcome the procedural bars and can also affirmatively show he is probably innocent of the Hamilton murder and robbery. The recent DNA evidence establishes Seka's innocence. It shows that a foreign DNA profile was found on Hamilton's right and left fingernails. It was the same profile on both hands, and Seka was excluded as the contributor of this DNA.

This exclusion alone establishes that Seka is innocent by any standard. As discussed previously, 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. The murderer also likely dragged Hamilton by the wrist. Any of these actions could have potentially led to the murderer's skin cells being left on Hamilton's fingernails. (*See* 12/14/2018 Hearing Tr. at 23 (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 evidentiary value and attempted to test it before trial, with not much success. However, the new DNA testing of the cigarette butt found right next to Hamilton's body excludes Seka as a contributor.

Seka was also excluded from the evidence collected at the site where Hamilton was murdered. The bench notes for the fingerprint report in the homicide case show that Seka was excluded as the contributor of the fingerprints found in crucial locations at 1929 Western. This exclusion was not clearly conveyed to the jury at trial. Moreover, because Hamilton was also excluded from the fingerprints, they likely belonged to the perpetrator. And they did not belong to Seka.

The exonerating fingerprint report from the purse case also shows that Seka is innocent, undermining confidence in the verdict. The report shows that Seka, as well as Hamilton and Limanni, were excluded as the source of the fingerprints connected to the purse, which was found in the ceiling at 1933 Western. Ballistics evidence found where the purse was stolen and at 1929 Western connected the purse to the Hamilton murder. If Seka did not steal the purse, then he very likely did not commit the Hamilton murder due to this ballistics connection. This evidence standing alone would raise a reasonable doubt in any reasonable juror's mind as to whether Seka committed the Hamilton murder.

All this evidence of innocence becomes even more impactful in light of the poor quality of evidence presented at trial. The State's case on the Hamilton murder was entirely circumstantial, causing the jury to deliberate for five days. 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. The State presented no real motive. There was no evidence that Hamilton was robbed, given that his property was left at 1929 Western and his recent jail records showed he had no money. In such a tenuous circumstantial case, evidence affirmatively showing that Seka was not connected to the crime is highly material.

As discussed previously in the materiality analysis, the exonerating fingerprint report in the purse case diminishes the strength of the evidence presented at trial. *See Berry*, 131 Nev. at 973, 363 P.3d at 1159. The State's case on the Hamilton murder relied almost entirely on the purported connections between evidence related to the Hamilton murder and evidence found in or connected to 1933 Western. The State argued Seka was guilty because he had control over 1933 Western. (02/23/2001 Trial Tr. vol. 1 at 51.) However, this fingerprint report shows that someone other than Seka not only had access to 1933 Western but was storing criminal proceeds at the location. This means that the same connections the prosecution presented at trial to convict Seka can actually be used to connect the purse thief to the murder.

Further, as discussed in the materiality section, the exonerating fingerprint report in conjunction with the ballistics evidence provided a stronger circumstantial connection pointing the finger away from Seka on the Hamilton murder than the circumstantial connections presented at trial to convict Seka of that murder. Removing the purse from the jury's consideration, including its circumstantial connection to the murder, bolstered the State's circumstantial case against Seka. The full evidentiary record *with the fingerprint exclusion* clearly diminishes the strength of the State's case against Seka. Indeed, it undermines its very foundation.

Seka has shown that this is the "extraordinary" case that permits review of procedurally barred grounds. Multiple pieces of compelling new evidence—never presented to the jury—show that Seka is actually innocent of the Hamilton murder and robbery. It would be a miscarriage of justice for this Court not to review the grounds on the merits. Further, this evidence affirmatively shows that Seka is probably innocent. As a result, an evidentiary hearing should be ordered.

IV. Laches does not bar consideration of this petition

The State asserts a laches defense under NRS 34.800(2), arguing the rebuttable presumption of prejudice applies. *See* State's Response at 10-11. Unlike the statutory procedural bars, laches is a discretionary doctrine. *Thomas v. State*, 138 Nev. Adv. Op. 37, 510 P.3d 754, 775-76 (2022).

Seka can overcome the presumption of prejudice to the State that arises under NRS 34.800(2). First of all, the filing of this petition was not the result of inexcusable delay. *See State v. Powell*, 122 Nev. 751, 138 P.3d 453 (2006) (refusing to grant laches relief where 15-year delay was not the result of inexcusable delay). In fact, the alleged delay was in no way Seka's fault. Seka has spent many years diligently litigating challenges to his convictions and sentence. However, the State never turned over the exonerating fingerprint report. 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 can exercise 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 section III.B., 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*, 131 Nev. at 974, 363 P.3d at 1159.

V. Conclusion

For the reasons discussed herein, this Court should order an evidentiary hearing and grant Mr. Seka habeas relief.

Dated April 5, 2023

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2023, I electronically filed the foregoing with the Clerk of the Eighth Judicial District Court by using the Court's electronic filing system.

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

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

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

/s/ Rosana Aporta
An Employee of the Federal Public Defender, District of Nevada

Electronically Filed
4/21/2023 9:58 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JOHN SEKA, Plaintiff, vs. CALVIN JOHNSON, Defendant.	CASE NO. A-22-860668-W DEPT. NO. XXV

BEFORE THE HONORABLE KATHLEEN E. DELANEY,
DISTRICT COURT JUDGE
WEDNESDAY, APRIL 12, 2023

RECORDER'S TRANSCRIPT OF HEARING:

PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff: JONATHAN M. KIRSHBAUM, ESQ.
SHELLY RICHTER, ESQ.
Assistant Federal Deputy Public Defenders

For the Defendant: AGNES M. BOTELHO, ESQ.
Chief Deputy District Attorney

RECORDED BY: AIMEE CURAMENG, COURT RECORDER

Case Number: A-22-860668-W

Las Vegas, Nevada; Wednesday, April 12, 2023
[Hearing commenced at 10:51 a.m.]

THE COURT: Are we expecting someone else, Ms. Botelho, on this?

MS. BOTELHO: I have the paper file and I'm going rest on the -- submit on the pleadings?

THE COURT: It's a -- it's a lot of briefing, a lot of information. Let's go ahead and get counsel's appearance and then we'll go from there.

MR. KIRSHBAUM: Okay. Jonathan Kirshbaum from the Federal Public Defender's Office, bar number 12908-C. And I'm here with co-counsel, Shelly Richter.

THE COURT: All right. I know, we don't have chairs. Sorry. You can pull them forward if you want, if it's more convenient for you so you don't have to stand the whole time.

THE COURT CLERK: One moment, Judge. Ms. Richter, can I have your bar number, please?

MS. RICHTER: Sure, its 16352-C.

THE COURT CLERK: Is it R-I-C-H-T-E-R?

MS. RICHTER: Yes, thank you.

THE COURT CLERK: Thank you.

THE COURT: Thank you. And I was just checking with Ms. Botelho on behalf of the State to see if we were expecting some other counsel to be present, it was Ms. Pandukht who did the State's response on this matter. It sounds like she did provide the paper file for

track counsel today.

And so, this is the first hearing on this Petition for Writ of Habeas Corpus post-conviction, basically second matter. There have been other post-conviction matters and they do tie into this, of course, because there was a prior petition in which DNA was sought, approved to be reviewed, hearing undertaken, and a new trial granted. Which then was later reversed by the Appellate Court upon review. And I think that reversal does have some significant impact based on what the Supreme Court found on this case.

But I certainly want to give the opportunity for counsel to make any argument they wish to highlight. The briefing is very thorough, as always, from your office and we're always very complementary. It was very thorough from the State as well. But it is something that we always appreciate in these matters. But we do want to give you the opportunity, if you want to highlight from your arguments, that basically the two grounds.

And I have a little confusion, I'll be candid, on whether the actual innocence argument but ultimately both arguments are more tied to the Hamilton murder only or because there's reference to should the, shall we say, Hamilton murder be, you know, fall in the sense that the relief would be granted as to that and some opportunity given to revisit that, that that would also affect the other case. And -- but it's not clear to me that that is what you're seeking. It just, there was reference to that. So --

MR. KIRSHBAUM: Yeah.

THE COURT: -- some clarification on that would be helpful.

MR. KIRSHBAUM: That's great, Your Honor. And I just want to take one step back before I get the legal claims.

We -- one other pending pleading was our motion for judicial notice which the State didn't oppose. And I just kind of wanted to explain that one. I mean, ever since that Eighth JDC moved the petitions into separate civil cases, we've been filing these motion just as, you know, just to make sure that the criminal case is considered part of the civil case so when we, you know, appeal up, if we -- if we have to --

THE COURT: I'm glad that you raised it and generally what the Court does in these matters and I think we may have done it previously, if we've neglected to do that, I -- I regret that, is we acknowledge from the bench that these habeas cases -- and the reason they were placed on A case numbers is so we can actually track them --

MR. KIRSHBAUM: Mm-hmm.

THE COURT: -- and we understand that what was happening. Because they were being filed in C cases and nothing was actually being separately tracked for them other than within the case itself. And that really wasn't helping us understand how many of these we were receiving, how we were handling them. They carry with them their own, you know, civil burdens.

In this particular case though, I would, to the extent that the other motion is seeking to ensure that the case 99C159915 is incorporated into this case. That -- that would be granted and that is understood to be the case regardless.

MR. KIRSHBAUM: Okay. Thank you, Your Honor.

THE COURT: I didn't see that separate motion on the calendar, unless I missed it, but --

MR. KIRSHBAUM: No, I don't know if it's on the calendar -- we didn't ask for a hearing date on it. So -- so, that might be why it's not on the calendar. But that -- we definitely -- it's definitely been filed. So --

THE COURT: Okay. My clerk is just checking to make sure that how it's styled and she can dispose of it with our discussion here today.

MR. KIRSHBAUM: Okay.

THE COURT: And I don't really need any input from the State on that --

THE COURT CLERK: There was a motion, it was filed back on November 1st, 2022, no hearing requested.

THE COURT: And it's styled as again?

THE COURT CLERK: Motion for the Court to take judicial notice of the filings in Mr. Seka's criminal case number.

THE COURT: Yes. And so the Court grants that motion and has done so and will continue to do so for purposes of any post-conviction matter.

And again, for that record that criminal case number as noted is C -- 99C159915.

MR. KIRSHBAUM: Thank you, Your Honor.

THE COURT: Okay. Now that we've disposed of that

procedural, thank you.

MR. KIRSHBAUM: And I actually have one other procedural thing I want to mention first because when we filed the petition -- at the time we filed the petition, we actually had sought authorization in the 9th Circuit to file second or successive petition. And how it works in Federal Court is that, you know, there's a bar on second or successive petitions unless you meet a standard that's set forth in statute. And basically that standard asks whether or not the petitioner has shown with new evidence that essentially that he's innocent by clear and convincing evidence. And the 9th Circuit about 6 weeks ago granted our request and the federal petition's now filed. So now there is a federal petition pending in the Federal District Courts at this point. So that's kind of an update on where we were when we filed the petition.

And the case number, that one, is 2:22-CV-02184-RFB-BMW just because --

THE COURT CLERK: Okay --

THE COURT: I got it, do you want me to say it again? It's 2:22-CV-02184 and that's really all we need, we don't the letters.

MR. KIRSHBAUM: Okay.

THE COURT: But the rest of it is -RFB-BMW.

MR. KIRSHBAUM: Yes, that's right.

THE COURT CLERK: Okay. Thank you.

THE COURT: All right.

MR. KIRSHBAUM: Okay.

THE COURT: And say again now in terms of what impact, if

any, you think that has here.

MR. KIRSHBAUM: It doesn't. It's just that when we filed the petition, the petitions usually ask for any pending litigation. So I just wanted to say --

THE COURT: Okay.

MR. KIRSHBAUM: -- give an update because there's now a new case.

THE COURT: Because there's obviously procedural bar arguments being made by the State in this case in terms of --

MR. KIRSHBAUM: Mm-hmm.

THE COURT: -- whether or not it's successive, untimely, --

MR. KIRSHBAUM: Mm-hmm.

THE COURT: -- and/or laches should apply. So --

MR. KIRSHBAUM: Mm-hmm.

THE COURT: -- and then arguments being made with regard to those procedural bars not being able to be overcome --

MR. KIRSHBAUM: Mm-hmm.

THE COURT: -- based on what is being presented. So -- so, you know, that is something that we will addressing here --

MR. KIRSHBAUM: Right.

THE COURT: -- but whether or not they've dealt with it there is, like you said, doesn't directly.

MR. KIRSHBAUM: Yeah. And -- and just to clarify, there hasn't been activity since -- since the 9th Circuit granted it and the petition was filed in District Court. There hasn't been any activity since

then.

THE COURT: Okay.

MR. KIRSHBAUM: Okay, so, to directly address Your Honor's questions.

First with respect to the prior Nevada Supreme Court decision. We don't think that that decision has an impact on the *Brady* claim itself. The *Brady* claim has a different standard. It has different factual questions that were not addressed in that claim -- or that were not addressed in that previous appeal. In -- in particular, the materiality argument and the factual inferences that can be drawn from the fingerprint report that was in the stolen purse case. None of those were present in the prior case. And there's reason for that because this is really about the materiality of that suppressive evidence.

And, you know, to answer the second question about materiality. We are focusing primarily on Hamilton and we think that if we --

THE COURT: Okay.

MR. KIRSHBAUM : -- the materiality question goes towards the Hamilton conviction because the suppressed evidence does as well. And the connection between the evidence that was suppressed and the connections that can be made to that Hamilton murder, that's where the materiality lies.

And so, we think the materiality question can end there. However, we do bring up the materiality of whether all of this impacts the Lamanni conviction as a -- as a secondary sort of spillover effect. And

so, primarily we believe that we are entitled to an evidentiary hearing and relief with respect to the Hamilton murder conviction -- or, I'm sorry, murder and robbery. However, there is a spillover effect on the Lamanni case and we think that because of that spillover effect that there should be a hearing and relief should be extended that far. But we are focusing primarily on Hamilton.

THE COURT: I appreciate the clarification. And I do have a follow up question and based on what you said about why you don't -- with the different *Brady* standard, but ultimately why as far as materiality and other things you think that this is not affected by the Court's prior decision. One of the things that's raised, and this is obviously focusing on the purse and the fingerprint with relation to the purse, one of the things that raised in the opposition is it's -- it's not the report in which this was contained, the State is not conceding that they didn't give it over, they're taking the position, I believe, that they did or that -- that they believe that they did but that your arguments don't indicate that it wasn't received, they simply indicate that they -- it wasn't seen. And --

MR. KIRSHBAUM: I don't --

THE COURT: -- I'm wondering --

MR. KIRSHBAUM: -- oh, I'm sorry, I don't mean to interrupt.

THE COURT: -- if you want to distinguish between that. Because it is difficult for me having had the history being the Judge who actually was the one previously who granted the opportunity for DNA to be reviewed and -- and ultimately granting the new trial and having gone through that process and while I have enough recollection and, of

course, in reviewing all the paperwork, recognize the purse was not part of that discussion.

But, there's argument about how prevalent arguably the -- the purse was in the original proceedings and how at some point it was understood and known at some point then it was downplayed. But really to argue now -- and this is, I'm thinking in terms of the procedural bars, to sort of argue now that this is something that we didn't know about or couldn't know about and only came up because after we granted and there was a subpoena after granting a new trial or granting the DNA requirements to be met. And then, I think, you argued that the DA must have viewed it or Metro viewed it as a subpoena of some kind and then provided this report. And now lo and behold we see this other thing on here.

It just seems to me like it's difficult on the procedural bars to not believe that the purse and the issues with the purse were already out there and if you're indicating that they were in the report and they didn't have the report, that they're still indicating that they didn't suppress it, that it's just an indication that certain things weren't seen.

So, I'm just trying to get a little distinction here on the position that we're taking.

MR. KIRSHBAUM: Your Honor, I appreciate that question, Your Honor, and some clarification is definitely in order. Because suppression doesn't require an intentional withholding. It -- it can be based on inadvertence, it can be based on even good faith. And there is reason in the records to believe that this was never shown. But clearly I

think, I believe, our factual allegations are sufficient to show that it was never turned over to the defense.

We have the declaration from Mr. London which says that, you know, he reviewed, he had the entire defense counsel file from prior counsel and it was not in any of them. And so that's sufficient to establish that, well he didn't have it before it was turned over with respect to the public records request on the stolen purse case.

And then, the -- the open file part of it and whether it was actually shown to defense counsel. I kind of look at it as the transitive property of files. Because from the -- the transcript quotes that were provided, it was clear that the prosecutor was saying, well my file's the same as the detectives file. And then the -- and then defense counsel was saying that, well my file -- I've reviewed your file and what I didn't have I asked for. So defense counsel's file is the same as the detectives which is the same as the prosecution. And if it's not in defense counsel's file, then that means it was never turned over to him.

And it doesn't make logical sense that defense counsel would see this report and not say, oh wow, I want to see that. It shows that -- that Seka's not connected to the stolen purse. And yes the stolen purse was mentioned in the original police report, but he was never charged with it. The prosecution specifically crossed it out of the crime scene diagram. And when it came up at trial, the prosecutor said -- the prosecutor cut off the detective and said, not important.

Well, that leads the defense to believe that this isn't important. But from that fingerprint report we know that it is important to the

defense, not he's not connected to the purse.

THE COURT: Okay.

MR. KIRSHBAUM: So, it shows that we have the declaration showing that it wasn't in defense counsel's file. We have the transcripts showing that defense counsel had everything that the detective had. And there's reason also to think that it wouldn't have been in the detective's file because this was an uncharged case from a different division and that it was -- it had a different file number and Thowsen was the lead detective on the murders with the file number that was connected to the murders. So it's not necessarily clear that he would also have reports from another case. But doesn't excuse the prosecution's burden of seeking out what the -- the police have -- law enforcement has with respect to the investigation on the case. And Thowsen, I'm not sure if I'm pronouncing his name correctly, he was one of the officers who asked for that fingerprint comparison to be done.

So, part of the investigation and it was -- it was compared against Seka and Hamilton and Lamanni. So it wasn't part of the investigation then that means that the prosecution had the constructive knowledge that it was constructively in their possession.

So whether it was good faith, inadvertence, intentional, it doesn't matter. It's just that it's -- we think that the factual record shows that this was just not something that was shown to the defense. It was not something that they were aware of. The purse was removed from the case which, from a defense point of view, that's great because he was originally told that, oh, there was the -- we think that you are

connected to this purse, but it turns out he wasn't.

THE COURT: Okay. And do you want to highlight anything from the ground two argument about the actual innocence and how that's different from the *Brady* or do you just want to submit on that?

MR. KIRSHBAUM: Well we -- it's -- it goes a little broader. We think that the -- actually the evidentiary basis for the actual innocence claim is even broader than both what was presented before to the Nevada Supreme Court and, in certain respects, to the *Brady* claim as well.

And that sort of, we believe, that when it comes to actual innocence whether we're talking about the procedural bar level, meaning actual innocence to overcome any procedural bars and potentially laches. That -- that standard's a little lower, but it's going to be essentially looking at the same evidence as the free-standing claim as well.

And one thing, in my mind, and I think we laid this out in the opposition is that, there's all the -- there's not a ton of new evidence but there's different levels of new evidence. There's this fingerprint report, there's the DNA evidence, which I understand the Nevada Supreme Court didn't think was too significant. We think it still is and we think that the Nevada Supreme Court got that part wrong based on that evidentiary record before it.

But there's the fingerprints that were found at -- at the scene where Hamilton's body was found. There was the fingerprints that were found at the crime scene which were -- or the murder scene which were

never put before the jury. So all of this newly presented evidence that was not presented to the jury, all of it points away from Seka. And it builds and it builds and it builds. And when all of the circumstantial inferences are put together there is a stronger circumstantial -- there's a stronger circumstantial connection pointing away from Seka than towards him.

And it was just these weak circumstantial connections that the prosecution used to try to connect Seka to the crime. But, as I was saying, there are stronger connections away from Seka. And so we do think that we can meet whatever actual innocent standard in order -- whether it's to overcome any procedural bars or just as a free standing claim.

And I do want to mention laches, because Your Honor brought it up and I just -- and I just briefly mentioned it. Is that with respect to the *Brady* claim, we don't think that that laches should apply because we don't think that they should -- that the prosecution should be able to take advantage of the fact that evidence was suppressed. So the claim was brought, yes, 20 years after the -- after he was convicted. However, there was -- the defense was never -- didn't really have -- the onus wasn't on him to find this evidence and when the prosecution finally turns it over we don't think that that time period should be held against him. And laches is discretionary. And under those circumstances, it's not equitable to hold laches against Seka with respect to the *Brady* claim.

THE COURT: All right. Thank you. Anything else before I

hear from the State to see if they have anything they want to add to their written brief as far as oral argument today? And, of course, I'll give you opportunity if there needs to be rebuttal. Anything else? Okay.

Ms. Botelho?

MS. BOTELHO: Your Honor, I think Your Honor hit the nail right on the head when you questioned counsel about, you know, the difference between whether or not the State is indicating or acquiescing or conceding that we withheld this evidence. And I would venture to say, Your Honor, that at least according to all of our briefing and our opposition and response filed in this case, we're absolutely not conceding that.

As a matter of fact, the record, as we've outlined it from pages 16 through 21, indicate that there was a record made down below concerning, you know, this purported fingerprint favorable fingerprint report. The detective was questioned about it, trial counsel made representations as such indicating that we had every reason to know and for this Court to believe that that was turned over.

And, the language in counsel's briefing concerning, you know, the defense not seeing it until November 2017 kind of gives -- gives credence to that. The truth of the matter is they can't make the showing under *Brady*, they can't make the stringent showing as required for actual innocence.

The Court should not have to enlarge the record with an evidentiary hearing as to these claims because that's already been -- the record as it exists right now is sufficient. And they can't even overcome

or make the requisite showing that would get us to the point where we would need an evidentiary hearing on this issue.

And with that, the State would submit on our -- on our pleadings.

THE COURT: Okay. Thank you, Ms. Botelho. Any final remarks, counsel?

MR. KIRSHBAUM: Just really, really short. Is that we do think at the very least an evidentiary hearing is appropriate here. I mean, the State didn't provide any evidence with -- in connection to their response that actually indicates that District Court actually was shown to the defense. They don't even actually say that. They just imply that, well it must have been.

But that's not -- we don't believe that's a sufficient factual allegation, really, to rebut what -- what we have said and we think the transcript actually supports us. But the very least, we think that there's enough of a factual dispute her that would justify an evidentiary hearing.

THE COURT: All right. I -- I'm going to respectfully at this time deny the motion -- deny the petition, I should say. And decline to have an evidentiary hearing.

I realize that's not without some risk. Our State Appellate Courts very often, I think, when they don't see an evidentiary hearing being granted whether or not there's a full review of whether one was warranted or not, when they don't see one it's often times compelling to them to send it back and require an evidentiary hearing. So I realize it's not without risk or it's with some risk to deny the evidentiary hearing.

But the main reason I'm denying the evidentiary hearing is because I am not persuaded from a substantive standpoint that there is anything here that would change the outcome of what previously occurred in this case and what the Supreme Court previously found. And -- and let me explain.

So, first of all, obviously, the issues were raised with the procedural bars, the timeliness, the successiveness, and -- and the affirmative of them bringing in the laches argument. I am not denying this based on procedural bars. I don't -- I'm not seeing that the procedural bars apply in light of the circumstances that what is being challenged is a report that the reference and the argument being we just received this, we didn't receive this earlier, we should have received this earlier. Whether it was inadvertent or intentional, is wasn't provided.

We appreciate the State has opposed that. But I'm going to give the benefit of the doubt that this is, you know, newly obtained evidence and information and that, for that basis and on those circumstances, the procedural bar is a timeliness, successiveness, or laches really should not apply.

Not applying the procedural bars, then we move to a substance of analysis. And we have a *Brady* claim, as noted, and we have effectively a free-standing of actual innocence claim, the State has argued there's not really recognized a Nevada basis for that.

But at the end of the day, here's what we have. We have DNA evidence, we have fingerprint evidence, and we have things that would indicate that these perhaps did -- or not perhaps, but did not

belong to Mr. Seka. But that was the jest of the review the Supreme Court made when the Court granted the new trail and the Court found this other DNA evidence very similar to DNA evidence that did not track to Mr. Seka.

I understand the argument that it seems to be building to something bigger, but the reality is is it's essentially all the same. What the Supreme Court recognized in reversing this Court's determination to grant a new trail to Mr. Seka, was that originally in the -- in the conviction, the jury did not rely on DNA evidence because there wasn't DNA evidence to rely on. The jury understood that there were fingerprints that did not belong to the Defendant on items that were near where Mr. Hamilton was found. The jury still convicted the Defendant.

And new evidence in regard to these same types of evidence don't seem to be persuasive in any way to the Appellate Court and nor are they persuasive to the District Court at this time in light of what the Appellate Court has found, indicating the ultimately the Defendant was guilty based on the circumstantial evidence presented at the trial and this additional physical evidence would not have changed that outcome, does not change that outcome, and ultimately I don't see how any of this physical evidence being further, again record expanded to show it, somehow would change anything here.

So, even though the *Brady* claim does differ from the actual innocence claim, we don't disagree with that, it is ultimately on the same basis that they're both being denied. Which is the finding of our Appellate Court which is the law of the case under the laws of the State

of Nevada when an Appellate Court weighs in on an issue and when the Appellate Court determines, as they did in this case, that -- that the evidence and the way in which the jury conducted its determinations and the circumstances are not overcome, would not change, and cannot be changed by additional DNA evidence not tracking to Mr. Seka or additional fingerprint evidence not tracking to Mr. Seka.

And for those reasons, I do think this is affected by what the Supreme Court did previously. And I'm going to follow my Appellate Court colleagues in their determination that this is not persuasive to in any way establish that he had any prejudice in -- in this case or that ultimately anything would have been favorable as otherwise material.

So, persuaded by the State's argument, ultimately. That's my best articulation why. And I'm going to ask the State to prepare the order denying the petition and denying the request for an evidentiary hearing. And if nothing else, I do think it's the right call, I'm not trying to be gun shy at all in any way, shape, or form and, no pun intended, to be shy about granting things like this. As we know, in this case I already did so.

But I do have to respect that my Appellate Court colleagues in the review determined that I erred in doing so for certain reasons that I think are equally applicable to this petition. So that's my basis for doing it.

I really appreciate the opportunity to revisit it. I appreciate the opportunity to review it. I think, again, it was very thoroughly and well briefed, it's just how I'm calling it this time. But nothing else, maybe that

expedites you getting to your next stage on behalf of Mr. Seka.

MR. KIRSHBAUM: I appreciate it. And I know it's typically unnecessary but I just would request that the State provide us a copy of the order before it gets submitted so we have a chance to review it.

THE COURT: Yeah. No we usually order something like that in a case like this because we want to be sure that the briefings and ultimate filings obviously track to whatever both sides have agreed to. And if not, then we have competing orders, we have a chance to review to review those and make adjustments.

So, Ms. Botelho, whoever's going to prepare this order, Ms. Pandukht, or whomever is responsible for this matter going forward needs to provide a copy of that to the defense and have them have a chance reasonably to weigh on in it before it is provided to the Court.

MS. BOTELHO: Yes, Your Honor. I will make a note.

THE COURT: All right. Thank you.

MS. BOTELHO: Thank you.

MR. KIRSHBAUM: Thank you, Your Honor.

[Hearing concluded at 11:17 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Velvet Wood
Court Recorder/Transcriber

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN SEKA,

Petitioner,

vs.

CALVIN JOHNSON,

Respondent,

Case No: A-22-860668-W

Dept No: XXV

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

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

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

☑ The United States mail addressed as follows:
John Seka # 69025
P.O. Box 650
Indian Springs, NV 89070

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

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

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

DISTRICT COURT
CLARK COUNTY, NEVADA

JOHN JOSEPH SEKA,
#1525324

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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

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

///

///

///

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

///

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

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

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

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

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

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

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

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

///

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

FACTUAL SYNOPSIS

The Nevada Supreme Court has stated:

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

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

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

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

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

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

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

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

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

ANALYSIS

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

A. Application Of The Procedural Bars Is Mandatory

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

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

///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NRS 34.810(2) reads:

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

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

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

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

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

D. The State Affirmatively Pled Laches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Petitioner claims that the fingerprint report was favorable and material:

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

Second Petition, at 44.

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

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

///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

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

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

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

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

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

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

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

ORDER

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

Dated this 5th day of May, 2023

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

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

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

///

///

///

///

///

CERTIFICATE OF ELECTRONIC FILING

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

JONATHAN_Kirshbaum, Assistant Federal Public Defender

E-mail: Jonathan_Kirshbaum@fd.org

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

CERTIFICATE OF MAILING

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

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

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

99F03542X/TRP/jh/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 5/5/2023

ECF Notifications NCH Unit	ecf_nvnch@fd.org
Jonathan Kirshbaum	jonathan_kirshbaum@fd.org
Rosana Aporta	rosana_aporta@fd.org
Steven Wolfson	Steven.Wolfson@clarkcountyda.com
ECF Notification Email CCDA	motions@clarkcountyda.com
Taleen Pandukht	Taleen.Pandukht@clarkcountyda.com
Shelly Richter	Shelly_Richter@fd.org

ASTA
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
Jonathan M. Kirshbaum
Assistant Federal Public Defender
Nevada State Bar No. 12908C
*Shelly Richter
Assistant Federal Public Defender
Nevada State Bar No. 16352C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (fax)
Shelly_Richter@fd.org

Attorney for Petitioner John Seka

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

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

CASE APPEAL STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Seka, 80925 (other)

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

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

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

Seka v. State, 37907 (direct appeal)

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

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

Dated this 25th day of May 2023.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Shelly Richter
SHELLY RICHTER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

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

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

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

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

NOAS
Rene L. Valladares
Federal Public Defender
Nevada State Bar No. 11479
Jonathan M. Kirshbaum
Assistant Federal Public Defender
Nevada State Bar No. 12908C
*Shelly Richter
Assistant Federal Public Defender
Nevada State Bar No. 16352C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (fax)
Shelly_Richter@fd.org

Attorney for Petitioner John Seka

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

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

NOTICE OF APPEAL

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

Dated this 25th day of May 2023.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Shelly Richter
SHELLY RICHTER
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

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

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

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

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