IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN SEKA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 86694

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction) Without Evidentiary Hearing
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it is a postconviction appeal that involves a challenge to a judgment of conviction for a category A felony. NRAP 17(b)(3).

STATEMENT OF THE ISSUE(S)

1. Whether Appellant's Petition for Writ of Habeas Corpus is procedurally barred.
2. Whether the district court did not err in denying Appellant's Petition for Writ of Habeas Corpus on the merits.
3. Whether the district court did not err by denying an evidentiary hearing.

STATEMENT OF THE CASE

On June 30, 1999, John Joseph Seka (hereinafter "Appellant") 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). 1 Respondent's Appendix ("RA") 1-2. On July 26, 1999, the State filed its Notice of Intent to Seek the Death Penalty. 1 Appellant's Appendix ("AA") 130-132.

Jury trial commenced on February 12, 2001. 1 AA 133. 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. 7 AA 1490-1491. The penalty hearing commenced on March 2, 2001. 1 RA 4-10. However, the jury could not return a special verdict. Id. 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. 1 RA 11-12.

On April 26, 2001, Appellant 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. 7 AA 1492-1493. The Judgment of Conviction was filed on May 9, 2001. Id.

On May 15, 2001, Appellant filed a Notice of Appeal. 1 RA 13. On April 8, 2003, the Nevada Supreme Court issued an Order affirming Appellant's Judgment of Conviction and Remittitur issued on May 9, 2003. 7 AA 1494-1506; 1 RA 16.

On February 13, 2004, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"). 8 AA 1507. The State filed its Response on April 6, 2004. 8 AA 1569. On November 5, 2004, the district court denied the First Petition. 8 AA 1568-1573. On January 31, 2005, the Findings of Fact, Conclusions of Law and Order were filed. Id.

On February 9, 2005, Appellant filed a Notice of Appeal. 1 RA 18. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the district court's decision and Remittitur issued on July 15, 2005. 1 RA 19.

On June 19, 2017, Appellant filed a post-conviction Petition Requesting a Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. 8 AA 1588-1598. The State filed its Response on August 15, 2017. 8 AA 1627-1640. Appellant filed his Reply on September 5, 2017. 8 AA 1643-1661. On

September 13, 2017, the district court granted Appellant's Petition. 8 AA 1662-1664. The district court filed its Order granting Appellant's Petition on September 19, 2017. 8 AA 1662-1664.

On December 14, 2018, the district court held an evidentiary hearing regarding additional testing on the DNA evidence. 9 AA 1670-1787. On January 24, 2018, the District Court granted Appellant's Petition in part and denied the Petition in part. 9 AA 1820-1825. On July 24, 2019, the District Court set a briefing schedule based on the DNA testing. 9 AA 1827.

On November 19, 2019, Appellant filed a Motion for New Trial. 10 AA 1828-1873. The State filed its Response on January 30, 2020. 12 AA 2493-2510. Appellant filed his Reply on March 4, 2020. 12 AA 2511. On March 11, 2020, the District Court granted Appellant's Motion. 12 AA 2521-2523. The District Court entered its Order on March 24, 2020. Id.

On March 27, 2020, the State filed a Notice of Appeal. 1 RA 21.

On June 15, 2020, Appellant filed a Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484. 1 RA 23. The State filed its Response on June 18, 2020. 1 RA 45. On June 29, 2020, the District Court denied Appellant's Motion and noted that "proof is evident or the presumption is great" that Appellant committed the crimes charged. 1 RA 80. The District Court further noted that the

State demonstrated, by clear and convincing evidence, that the detention order was appropriate. Id.

On July 8, 2021, the Nevada Supreme Court reversed the District Court's decision granting Appellant's Motion for New Trial. 13 AA 2666-2688. Remittitur issued on November 2, 2021. 13 AA 2765-2767.

On November 1, 2022, Appellant filed a Second Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") and Request for Evidentiary Hearing. 14 AA 2768-2819. The State's Response and Motion to Dismiss Pursuant to Laches was filed on March 28, 2023. 14 AA 2896-2924. Appellant filed an Opposition/Reply on April 5, 2023. 15 AA 2992-3013. On April 12, 2023, the district court denied the Second Petition and Request for Evidentiary Hearing. 15 AA 3015-3034. The Findings of Fact, Conclusions of Law and Order was filed on May 5, 2023. 15 AA 3036-3063.

On May 25, 2023, Appellant filed a Notice of Appeal. 15 AA 3069-3071.

STATEMENT OF THE FACTS

The Nevada Supreme Court summarized the facts of the case as follows:

> 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. Limanni 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.

13 AA 2-7; State v. Seka, 13 Nev 305, 306-08, 490 P.3d 1272, 1273-75 (2021).

SUMMARY OF THE ARGUMENT

Appellant constructed his Second Petition and his Opening Brief around two pieces of evidence: (1) A latent fingerprint report about a stolen purse found in Appellant's place of business, which did not have Appellant's fingerprints, and (2) a DNA analysis on one victim's fingernails that contained 1% of DNA from an unknown source. Appellant makes extravagant claims about what these items prove. Neither item exonerates Appellant, and there is a vast weight of evidence supporting his conviction.

The district court correctly found the State did not violate Appellant's due process rights regarding the latent fingerprint report. Appellant fails to establish that the State withheld the latent fingerprint report, that the report was favorable to him, or that the report was material. Additionally, Appellant failed to show the report generated the good cause and prejudice necessary to overcome the procedural bars.

The district court correctly denied Appellant's claim of actual innocence based on the DNA evidence. This claim and the DNA evidence upon which it is

based were already considered by the Nevada Supreme Court. Like the Supreme Court, the district court found the claim to be meritless. This claim is not permitted as a freestanding actual innocence claim and barred by the law of the case.

The district court appropriately denied an evidentiary hearing because Appellant did not allege any new evidence that would change the outcome of the case, and there was no need to further expand the record.

ARGUMENT

A. Standard of Review

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). A district court's factual findings will be given deference by this Court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

I. THE STATE DID NOT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS BY SUPPRESSING EXONERATING MATERIAL

Appellant claims a Brady violation and alleges that the State failed to provide a latent fingerprint report. Appellant's Opening Brief ("AOB") at 37. Appellant

claims a Brady violation by alleging the report, showing that a stolen purse recovered from 1933 Western Avenue had only fingerprints that did not match Seka's, was not disclosed to Appellant. AOB at 37-40. Appellant's Brady claim must be denied because (1) Appellant fails to establish that the State withheld the report; (2) Appellant fails to establish that report was favorable to him; and (3) Appellant fails to establish that the report was material.

Additionally, while the district court arrived at the correct result regarding the Petition on the merits, the State maintains that Appellant's Second Petition is procedurally barred. Appellant failed to establish both good cause and prejudice necessary to overcome the procedural bars. Appellant also failed to establish actual innocence.

A. Appellant Failed To Establish a Meritorious Brady Claim

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 v. Whitley, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 1565 (1995) (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. Appellant failed to establish that the State suppressed the latent fingerprint report.

Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and

presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980). When defendants miss the exculpatory nature of documents in their possession *or to which they have access*, they cannot miraculously resuscitate their defense after conviction by invoking Brady. White 970 F.2d at 337 (emphasis added).

Appellant claims the fingerprint report from 1999 was not turned over to the defense; and "defense did not see it until November 2017, after the district court granted Seka's DNA petition." AOB at 38. Appellant's claim does not prove that the State withheld the report from him until November 2017 because Appellant fails to provide sufficient supporting evidence.

During the trial, both the State and Appellant's counsel stated that Appellant's counsel looked at the State's and LVMPD's case files. On February 14, 2001, trial counsel for the State informed the Court:

> For that record, I have never believed that the open file policies instituted by our office is the most effective means to make sure that needed information gets into the hands of the Defense.
>
> I've got my own policy, and my own policy which I implement in every case, and did in this case, was to make my file available to the Defense at any time. As we get close to a firm trial date - - and the Court well knows that usually several trial dates are set in a homicide case, and finally you get one where you know it's pretty much going to go.
>
> And as you get close to that date, it has always been my policy, and I did it in this case, told Defense counsel: Please, come to my office, go over my file page by page to make sure that there's nothing that I've got

> here that you haven't got. That was done within the last two to three weeks.
>
> After that, Mr. Christiansen told me that he wanted to go to homicide and take a look at the homicide detective's file just to make double sure that I had everything the homicide detective had, and that Mr. Christiansen had everything that I had.
>
> We did that and we spent a couple of hours with the homicide detective one afternoon. Mr. Christensen pulled out several pages of reports. I think they were all reports of forensic examination, one by Terry Johnson, one by Mr. Welch.

3 AA 530-531.

On February 22, 2001, while cross-examining LVMPD homicide Detective Thomas Thowsen, Appellant's counsel stated that he went to Detective Thowsen's office three (3) or four (4) weeks prior:

> Q: I went through your file with you and Mr. Kane and identified things that I didn't know if I had or think I had and you were kind enough to even go yourself and make copies of those?
> A: That's correct.

6 AA 1271.

The record shows that Appellant had access to all of the files of the State and the LVMPD detectives assigned to his case. Appellant's Exhibits 12-15 in his Second Petition (declarations from Appellant, a former investigator, and two employees from the Rocky Mountain Innocence Center who worked on Seka's case) fail to show that the State withheld the report from Appellant's defense counsel. 14 AA 2875-2887. The declarations merely show that individuals did not read and/or

remember reading the report when they worked on Appellant's file. Id. None of these individuals were the attorneys involved in his trial defense. Id. As additional information, Appellant has made a different representation when he claimed in his Answering Brief to the Nevada Supreme Court that he did not receive the report until 2018. 14 AA 2942. Thus, Appellant failed to sufficiently support his claim that the State suppressed the latent fingerprint report.

2. Appellant failed to show that the fingerprint report was favorable or material.

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

AOB at 40.

Appellant makes several leaps of logic to arrive at this argument. Appellant argues that the report undermines the State's theory that he was guilty of murdering Hamilton because the State's case depended "almost entirely" on the Appellant being the only one who had access to 1933 Western. AOB at 43. Appellant also argues that the existence of the purse inside 1933 Western provides "concrete physical evidence" that someone else, the true purse thief, had access to 1933 Western. AOB at 44. Neither of these assertions is supported by the fingerprint report.

First, the State's case did not rely on Appellant being the only person with access to 1933 Western. Much of the evidence is relevant because Appellant lived and worked in the building, but the State's case did not depend on the building being closed to others. Evidence presented at trial already showed that many 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. 3 AA 513. 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 Appellant. 3 AA 572, 595. Harrison further testified that when she was looking for Limani on the first day that he was missing, she went to Cinergi and found Appellant passed out on the floor while an unknown woman was sleeping on the couch. 3 AA

588. Christine Caterino further testified that when she visited Appellant in September 1998 and stayed at Cinergi, there were other people coming and going from the store. 7 AA 1326. Takeo Kato testified that he and Kazutoshi Toe also both lived in the building for a time, and they had access to the vans. 4 AA 863-865.

From the trial testimony, the jury knew many people had access to 1933 Western. They found Appellant guilty anyway because the State's case did not depend on Appellant having exclusive access to the building. Appellant's argument that the fingerprint report would undermine the State's case by showing someone else had access to 1933 Western is without merit.

Second, there was overwhelming evidence that Appellant killed Hamilton and Limanni. On Appellant's first appeal, the Nevada Supreme Court summarized some of the evidence:

> 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.

13 AA 2742-2744; Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281.

The State did not charge Appellant with any crime related to the stolen purse and did not need any evidence related to the purse to prove Appellant's connection to Hamilton's or Limanni's murder. 1 RA 1-2.

Finally, the fingerprints on the purse inside 1933 Western do not prove, as Appellant argues, that some other perpetrator—the true purse thief—had access to 1933 Western.

The State is not required to show that Appellant's fingerprints were on every piece of evidence recovered by the police. 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 Appellant or the victims, yet the jury found Appellant guilty of his murder. 6 AA at 1180, 1182-1188. An individual can handle an object without leaving recoverable fingerprints. 6 AA 1152-1155. Boyd testified that whether a fingerprint is recoverable depends on a number of factors beyond mere contact. 6 AA 1155. The fact that Appellant's fingerprints are absent from an object, whether it is the wooden boards or the purse, does not establish he had nothing to do with them.

Nor does the latent fingerprint report prove, as Appellant states, that the fingerprints on the bag belonged to a separate thief who had access to 1933 Western. See AOB at 44. Appellant's own trial counsel made a point to ask if fingerprint analysis reveals anything about the time when an object was previously handled, or who last moved it. 6 AA 1179. Boyd testified that it does not. Id. The fingerprints on the purse did not necessarily belong to the person who most recently handled it. They did not necessarily belong to the person who placed the purse in 1933 Western. The report does not support the existence of Appellant's hypothetical purse thief.

Because the latent fingerprint report does not undermine the State's theory of the case as Appellant suggests, the report is neither material nor favorable. The district court was correct in finding that Appellant failed to establish a Brady violation.

/ / /

B. Appellant's Second Petition is Procedurally Barred

The district court arrived at a correct decision regarding Appellant's Second Petition on the merits. However, the State maintains that Appellant's Second Petition is procedurally barred. The district court found that Appellant demonstrated good cause, but that Appellant failed to establish the prejudice necessary to overcome the procedural bars. 15 AA 3048-3056.

1. 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 no discretion in applying 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).

2. The Second Petition is time-barred.

The Second Petition is 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, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), 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.

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. 571, 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, Appellant had one year from the filing of his original Judgment of Conviction to file a timely petition. Absent a showing of good cause to excuse this delay, Appellant's Petition must be dismissed.

Appellant failed to file this Second Petition prior to the one-year deadline. Remittitur issued from Appellant's direct appeal on May 9, 2003. 1 RA 16. Therefore, Appellant had until May 9, 2004, to file a timely habeas petition. Appellant filed this Second Petition on November 1, 2022. 14 AA 2768. This is over nineteen (19) years and five (5) months after Appellant's one-year deadline. Absent a showing of good cause and prejudice to excuse this delay, Appellant's Second Petition is time-barred.

3. The Second Petition is 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.

(emphasis added).

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, Appellant has filed a prior petition for habeas relief. On February 13, 2004, Appellant filed his First Petition. 8 AA 1507. On November 5, 2004, the district court denied the First Petition. 8 AA 1568-1573. On January 31, 2005, the Findings of Fact, Conclusions of Law and Order were filed. 8 AA 1568. On February 9, 2005, Appellant filed a Notice of Appeal. 1 RA 18. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the district court's decision and Remittitur issued on July 15, 2005. 8 AA 1574; 1 RA 19. Thus, the Second Petition is successive and constitutes an abuse of the writ.

4. Appellant failed to establish good cause to overcome the procedural bars.

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, 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, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev.

at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

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 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).

The very purpose of the procedural bars is to compel habeas petitioners to pursue their claims expeditiously. According to the United States Supreme Court, "the purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence. Diligence … depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims[.]" Williams v. Taylor, 529 U.S. 420, 434-435, 120 S.Ct. 1479, 1490 (2000). Indeed, the High Court has explicitly stated "that 'cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot be fairly attributed to him." Coleman v. Thompson, 501 U.S. 722, 753, 111 S.Ct. 2546, 2566 (1991). Similar to the procedural bars at issue in Williams and Coleman, Nevada also requires a habeas petitioner to demonstrate a lack of fault. NRS 34.726(1)(a) ("good cause for delay exists if the petitioner demonstrates … [t]hat the delay was not the fault of the petitioner"); NRS 34.800(1)(a) ("A petition may be dismissed … unless the petitioner shows that the

petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence").

Appellant was required to bring this claim within a reasonable time of it becoming available, which is one year. Rippo v. State, 134 Nev. 411, 412, 423 P.3d 1084, 1090 (2018) ("[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, 117 Nev. at 874-75, 34 P.3d at 529 ("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.").

Additionally, in order 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.

Appellant 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. AOB at 48-50. Appellant 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 until 2017. AOB at 48.

To qualify as good cause, a petitioner must demonstrate that the State affirmatively 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. Id.

Here, Appellant cannot use this Brady claim as good cause and prejudice because his Brady claim is meritless. See Section I.(A)(2), *supra*. As shown above, Appellant fails to establish that the State withheld favorable information from him. See Section I.(A)(1), *supra*. Furthermore, Appellant cannot use his Brady claim to prove good cause and prejudice because it is untimely. The State does not concede that the fingerprint print report was withheld from Appellant until 2017. However, assuming that Appellant did not receive it from the State until 2017, Appellant had until 2018 to raise this Brady claim to the Court. Appellant's failure to do so precludes him from using this claim as good cause and prejudice to file a procedurally barred habeas petition.

5. Appellant failed to establish prejudice to overcome the procedural bars.

Appellant 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. AOB at 62. Appellant's claim fails due to the overwhelming evidence presented against him at trial, which had been noted previously by the Nevada Supreme Court. See Section I.(A)(2), *supra*.

Because Appellant failed to establish good cause and prejudice to overcome the procedural bars, the Second Petition should also have been denied on procedural grounds.

6. The Second Petition should be dismissed under the doctrine of 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. 14 AA 2905-2906. The Second Petition was filed on November 1, 2022, twenty-one (21) years after the Judgment of Conviction was filed on May 9, 2001. 14 AA 2768. Also nineteen (19) years after the Nevada Supreme Court filed its order affirming the Judgment of Conviction on April 8, 2003. 7 AA 1494.

Because these time periods exceed five (5) years, the State is entitled to a rebuttable presumption of prejudice under NRS 34.800(2). Appellant failed to demonstrate evidence to rebut prejudice to the State. Thus, the Second Petition must be dismissed pursuant to the doctrine of laches.

/ / /

7. Appellant's claim of Actual Innocence fails because it is meritless and barred by the law of the case.

Appellant claims he has good cause to overcome the procedural bars because he is actually innocent as shown by a report excluding Appellant as a contributor of DNA found under Hamilton's fingernails. AOB at 53-54, 60-63. While Appellant raises this claim in Section I of his opening brief, he discusses the claim at length in Section II. AOB at 54. This brief will follow a similar pattern. See Section II, *infra*.

The DNA evidence was already presented before the Nevada Supreme Court, and Appellant's claims about the DNA under Hamilton's fingernails were meritless. See 13 AA 2723, 2739-2740. The Nevada Supreme Court held in 2021 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." 13 AA 2741; see Section II. (B), *infra.* As shown below, Appellant fails to establish good cause and prejudice because his claim of actual innocence is meritless and barred by the law of the case.

II. APPELLANT'S CONVICTION AND SENTENCE ARE VALID BECAUSE THE REPORT AND DNA EVIDENCE DO NOT ESTABLISH APPELLANT'S ACTUAL INNOCENCE OF FIRST-DEGREE MURDER, SECOND-DEGREE MURDER OR ROBBERY.

Appellant 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." AOB at 54. Appellant

argues he is actually innocent because the DNA result excludes him as a contributor to the "DNA profile found on Hamilton's right and left fingernails." AOB at 60.

The district court found that this was a freestanding innocence claim that was not cognizable grounds for relief. 15 AA 3055-3056. The district court also found that even if it was cognizable, it was barred by the law of the case. Id. at 3056-3059. The district court also found the claim was without merit. Id.

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.

A. 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).

Appellant 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. Appellant 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 Appellant's claim. Id. However, as shown below, Appellant's claim for actual innocence lacks merit. Therefore, Appellant cannot meet the "stringent standard" for demonstrating actual innocence sufficient to overcome Appellant's various procedural bars.

B. Appellant's Actual Innocence Claim is Meritless In Light of the Overwhelming Evidence In Support of His Conviction

Appellant claims that the recent DNA evidence establishes that he is innocent by clear and convincing evidence, and that "no reasonable juror would now convict Seka of the Hamilton murder." AOB at 60. This claim is hollow when actually considering the DNA report. See 13 AA 2739-2741. Appellant's claim is barred by the Nevada Supreme Court's prior holding.

Like the latent fingerprint report, Appellant's DNA analysis report does not establish his innocence. Appellant presents the same DNA results that were considered by the Nevada Supreme Court in 2021. 12 AA 2448-2450. The report revealed that 99% of the DNA found on the victim's fingernail clippings belonged to the victim, and the blood was likely his own blood. 12 AA 2449. The other 1% of

unidentifiable DNA does nothing to exonerate Appellant, since it was in such a small amount, and it was not necessary to convict the victim's murderer. The Nevada Supreme Court had the following to say of the DNA analysis:

> 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.

13 AA 2732-2734; Seka, 13 Nev. at 316-318, 490 P.3d at 1280-1281 (emphasis added).

The Nevada Supreme Court's discussion of the DNA results negates Appellant'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.

13 AA 2739-2741; Seka, 13 Nev. at 315-316, 490 P.3d at 1280-1281 (emphasis added).

Appellant fails to establish actual innocence because he supports his claim with DNA evidence that the Supreme Court found to be of little value. Neither the latent fingerprint report, nor the DNA evidence shows Appellant's actual innocence. Additionally, Appellant cannot establish actual innocence due to the overwhelming evidence supporting his murder convictions. See Section I.(A)(2), *supra*. At most, Appellant is merely suggesting legal insufficiency and not actual innocence. The district court correctly denied Appellant's Second Petition as to this claim.

C. Appellant's Actual Innocence Claim Is Barred By The Law Of The Case

The doctrine of res judicata precludes a party from re-litigating an issue which has been finally determined by a court of competent jurisdiction. Exec. Mgmt. v.

Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)); see also Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237, 239 (1948) (recognizing the doctrine's availability in criminal proceedings). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources." Id.

Moreover, "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, the district 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).

Appellant argues that the law of the case doctrine does not apply because his claim of actual innocence is different than the one decided in the prior appeal. AOB at 63. Appellant also argues that even if the law of the case applies, the Court may revisit the claim because it relies on different evidence. AOB at 63. Both of these arguments fail.

Appellant tries to avoid being bound by the law of the case by arguing his current claim—that DNA evidence warrants a finding of actual innocence—is different than his 2021 claim—that DNA evidence warranted a new trial. AOB at 65. But "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." Hall, 91 Nev. at 316, 535 P.2d at 799. This is precisely what Appellant attempts to do—avoid the law of the case with a subsequent argument that does little more than allege the same facts as before.

The Nevada Supreme Court's decision on the 2021 claim clearly dictates the result on the current claim. If the Court found that the DNA evidence did not warrant a new trial, then the Court cannot decide now that the DNA evidence proves actual innocence, which is the more stringent standard. Compare Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (to warrant a new trial, new evidence must render a different result probable upon retrial) with Schlup v. Delo, 513 U.S. 298, 315, 115 S. Ct. 851, 861 (to establish actual innocence, evidence suggesting the

defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial"). Appellant's DNA evidence would not even make a different result at trial more probable. It certainly does not establish actual innocence.

Appellant also argues that if the law of the case applies, the Court should still revisit the claim because Appellant relies on additional evidence this time—the latent fingerprint report. AOB at 65-67. He argues the additional evidence will show the Court's first decision was "clearly erroneous." AOB at 65.

This is incorrect because the Appellant *did* use the latent fingerprint report the first time around. Appellant presented the latent fingerprint report as evidence in his argument for a new trial. 10 AA 1841, 1851; 11 AA 2287-2288. He then relied on the report in his argument for the first appeal, making similar arguments as he does now. 13 AA 2601, 2622, 2632-2633. The only other piece of "additional" evidence Appellant includes now are the bench notes to the fingerprint report. AOB at 66-67. Those were submitted as Exhibit 50 in his motion for a new trial, and their results were discussed in his Respondent's Brief on appeal. 10 AA 1850-1851;12 AA 2451-2463; 13 AA 2599-2601, 2619. The Nevada Supreme Court had all of the same information in 2021 when it issued its opinion denying a new trial as it does now.

Appellant introduces no new evidence in the Second Petition or in this current appeal that he had not introduced for the Supreme Court's consideration in 2021.

Appellant makes substantially the same claim as he did the first time around. Therefore, the current claim of actual innocence is barred by the law of the case.

III. THE DISTRICT COURT DID NOT ERR BY DENYING APPELLANT'S REQUEST FOR 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).

Appellant claims he was entitled to an evidentiary hearing because his Petition made specific factual allegations which, if true, would entitle him to relief. AOB at 71-72. The district court disagreed.

The district court was not persuaded from a substantive standpoint that there was any alleged evidence that would change the outcome of the case or what the Nevada Supreme Court had previously found. 15 AA 3061. The district court found that Appellant's Brady claim based on the latent fingerprint report fails because even if the report was excluded, it did not establish a violation of Appellant's due process rights. 15 AA 3049-3054. The district court found that Appellant's actual innocence claim based on DNA evidence was without merit and barred by the law of the case. 15 AA 3054-3059. The district court correctly found no need to expand the record, as all claims can be disposed of based on the existing record. 15 AA 3061. Thus, Appellant's request for an evidentiary hearing was properly denied.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM the district court's denial of Appellant's Second Petition and its denial of an evidentiary hearing.

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Dated this 1st day of November, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,085 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of November, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 1, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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