No. 86694

IN THE NEVADA SUPREME COURT

John Seka,

Appellant,

v.

State of Nevada, et al.,

Respondents.

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

Appellant's Reply Brief

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NRAP 26.1 DISCLOSURE

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

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ARGUMENT

In its opposition, the State argues that (1) Seka's *Brady* claim fails, (2) he has not shown actual innocence, and (3) there was no cause for an evidentiary hearing. The State is wrong about all three. This Court cannot have confidence in a verdict rendered by jurors who heard only a fraction of the relevant evidence—and because the evidence the jurors did not consider points unerringly to reasonable doubt, Seka should be granted post-conviction relief.

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

Seka meets all the elements of a *Brady* claim: the prosecutor suppressed a latent print report, which was both favorable and material because a reasonable juror would draw inferences from the report and from other related evidence that undermine the State's rickety theory of guilt. The State has failed to meaningfully respond to Seka's arguments regarding good cause and prejudice, and regarding laches.

A. The State suppressed the fingerprint report

In his opening brief, Seka presented detailed allegations establishing that the State did not disclose the exonerating fingerprint

report in the stolen purse case. AOB at 26-30. According to declarations by attorneys Kurt London and Jennifer Springer (as well as by Seka), the fingerprint report does not appear in trial counsel's file and was not turned over until it was disclosed as a belated result of a Nevada Public Records Act request in 2017. *See* 14-AA-2878, 2882, 2887. The district court held that "whether it was inadvertent or intentional, [the fingerprint report] was not provided" until 2017. 15-AA-3048. The district court's factual finding is owed deference because it is based on substantial evidence and not clearly wrong. *See Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The State argues that Seka still "failed to establish that the State suppressed the latent fingerprint report." RAB at 13. It argues that the prosecution's file was made available to the defense through a purported "open-file" policy. RAB at 14-15. The State quotes instances in the transcript showing that defense counsel reviewed Detective Thowsen's file, which the trial prosecutor indicated matched his own file. RAB at 14-5.

The State's arguments fail for two main reasons. First, even with an open-file policy, the prosecutor still must disclose *Brady* evidence.

Here, the record supports that the latent fingerprint report was **not** in the files that defense counsel reviewed before trial, and the State does not specifically allege it was there or provide any reason to think it was. Second, even assuming there is some disagreement, that creates a factual dispute, which requires an evidentiary hearing.

To start, 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); *State v. Bennett*, 119 Nev. 589, 601, 81 P.3d 1, 8 (2003) ("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 its affirmative duty to disclose. Even with a purported open-file policy, the State must show that it 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). The burden remains on the State to disclose all favorable

evidence. Here, the prosecutor did not do that.

Moreover, the State does not allege that the prosecutor actually disclosed this report to the defense. It does not assert that this specific report was in the file that was made available to the defense for review. That alone should end the inquiry, considering the wealth of evidence Seka has introduced showing the report was not disclosed.

Indeed, the factual record shows the report was not made available to the defense. The Las Vegas Metropolitan Police Department ("LVMPD") housed the stolen purse fingerprint report in a separate file from the homicide case. The case number on the report (98-1106-0539) is different from the homicide case (98-1116-0443). *Compare* 11-AA-2288, *with* 11-AA-2243. The purse case was a burglary case with different officers involved. 14-AA-2828. The file would have been housed in a different division at LVMPD 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* 14-AA-2860-62, 2866-67. These were expansive requests. *See* 14-AA-2860-62. The relevant fingerprint report was

turned over solely in response to the public records request in the stolen purse case, after the district court granted DNA testing. *See* 14-AA-2877-78, 2887. It was not one of the records turned over in response to the request in the homicide case. This shows that the fingerprint report was not in the homicide file.

The trial transcript excerpts that the State cites also show that the separate file in the stolen purse case was not 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* 3-AA-530-31. Right before trial, defense counsel reviewed Detective Thowsen's file. *See* 3-AA-530-31. 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.[1] *See* 6-AA-1271. Thus, the file that Christiansen had would be the same one as the prosecutor and Detective Thowsen had. Yet the relevant fingerprint

[1]The prosecutor indicated that these were forensic reports from Welch and Johnson. *See* 3-AA-531. The relevant report here was prepared by Boyd.

report was not in defense counsel's file. 14-AA-2878, 2882, 2887. This means it was not made available through the purported open-file policy—and it means the State never fulfilled its duty to disclose.

There are other reasons to believe the report was never made available to the defense. The most obvious 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. It has constructive possession of LVMPD's files in those cases. It is the State's burden to review what is in their actual and constructive possession to determine what must be disclosed. *See Kyles*, 514 U.S. at 437-38.

In sum, the absence of this document from defense counsel's file shows the State violated its affirmative duty to disclose. To the extent

the State's brief has created any factual disputes, this Court should reverse and remand for an evidentiary hearing.[2]

B. The suppressed fingerprint report is favorable and material because it is reasonably probable that it would cause at least one juror to have a reasonable doubt about Seka's guilt

The State disputes two of Seka's assertions regarding why the fingerprint report is favorable and material. First, in his opening brief, Seka explained that a "central tenet of the prosecution's case was its theory of access: the killer had access to the business at 1933 Western Avenue." AOB at xi. The State argues that its case "did not rely on [Seka] being the only person with access to 1933 Western." RAB at 17. Second, in his brief Seka explained that the "existence of the purse inside 1933 Western provides concrete evidence that someone else had access to 1933 Western. And this other person not only had access to 1933 Western but was hiding gun crimes inside 1933 Western." AOB at 44. The State argues that this is not true. RAB at 17.

Turning to the first point, the State mischaracterizes Seka's brief

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[2]The State appears to fault Seka for not including a declaration from trial counsel. RAB at 16. At an evidentiary hearing, trial counsel could be questioned.

and asserts he is arguing that the prosecution's theory was that Seka was "**the only one** who had access to 1933 Western." RAB at 17 (emphasis added). Seka has never argued this. Rather, he argued that a "central tenet of the prosecution's case was its theory of access: the killer had access to the business at 1933 Western." AOB at xi.

The State then argues that the "[e]vidence presented at trial showed that many people had access to 1933 Western." RAB at 17. The State then lists the numerous people who had access to a conman's commercial space: a woman whom Limanni was with the last day he was seen alive on November 6; his girlfriend Jennifer Harrison; another employee of the business; another unknown woman who had been with Seka; other people who came and went; investors Takeo Kato and Kazutoshi Toe; and others. RAB at 17-18. "[T]he jury knew many people had access to 1933 Western." RAB at 18.

However, this all just shows that the State's theory of access was **weak to start**, not that it wasn't the State's theory. Seka's access to 1933 Western was still the central tenet of the prosecution's circumstantial case against Seka for Hamilton's murder, although Seka was never the only person who could access 1933 Western. *See* 7-AA-

1398 ("Who had control over the business? The defendant did.").

Even while the State insists it did not pursue a theory of access, it fails to point to a single piece of concrete evidence that connects Seka to Hamilton's murder, as opposed to any other person with access to 1933 Western. The wood boards on Hamilton's body, some with Seka's fingerprints on them? AOB at 6. These came from the lumber piles for the humidor that Seka was helping Limanni build in 1933 Western. AOB at 3 & 42 n.7. Hamilton's blood in the Cinergi truck? AOB at 12. Anyone with access to 1933 Western could drive that company truck. AOB at 4; *see also* 10-AA-1994; 6-AA-1086, 1210. Hamilton's fingerprints on a beer bottle in the trash in 1933 Western? AOB at 14. These likely resulted from when Hamilton worked at 1933 Western. AOB at 7. The card with Seka's name and Cinergi's phone number on it, found in Hamilton's pocket? AOB at 6. It would have come about the same way. AOB at 7.

Turning to the second point, the State asserts it does not need to show that Seka's fingerprints "were on every piece of evidence recovered by the police." RAB at 20. The State points to other material pieces of evidence recovered by police that did not have Seka's prints on them,

including "a beer bottle and wooden boards found near Hamilton's body." RAB at 20-21. Yet once again, all the State has done is highlight how weak its case against Seka already was at trial: there were other people coming and going from 1933 Western, and there were other people touching the evidence found on top of Hamilton's body. Further, the State is anyway attacking a straw man; Seka is not arguing that the State must show his prints were on every piece of evidence. It is both the absence of Seka's prints on this particular piece of evidence, and the presence of another person's prints on it, that are highly relevant and material under these circumstances.

The State goes on to argue that the fingerprints on the purse "did not necessarily belong to the person who most recently handled it"; so, the report "does not support the existence of [a] hypothetical purse thief." RAB at 21. But for evidence to create reasonable doubt, Seka does not have to disprove all other speculative inculpatory scenarios. Jurors properly applying the *Winship*[3] standard would likely conclude that the report creates reasonable doubt. There is a sufficient

[3]*In re Winship*, 397 U.S. 358, 364 (1970).

likelihood that the latent prints belong to the purse thief, considering that police reports show the thief shot out the window of Gorzoch's car on November 5 or 6 and took the purse, which was then found hidden in the ceiling tiles of 1933 Western on November 17. 10-AA-2063.

Ultimately, the State fails to grapple with how the fingerprint report would alter a juror's perception of reasonable doubt—the only question under *Brady*. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."). The fingerprint report presents information that is qualitatively different from anything the jury heard. It allows the jury to conclude that a person other than Seka was committing gun crimes in Las Vegas at the same time that Limanni and Hamilton were killed. This other person not only had access to 1933 Western but was hiding gun crimes inside 1933 Western. This means the purse thief had ready access to the evidence found in 1933 Western—including to the truck in which the police found Hamilton's blood and the lumber on his body.

The police's own firearms identification evidence even suggests a

stronger connection between the unknown criminal and Hamilton's murder than the prosecution argued to convict Seka. AOB at 44-45. Torrey Johnson examined the bullet recovered from Gorzoch's car and found it was a nominal .38/.357-caliber bullet. 11-AA-2290. He found the "class characteristics on this bullet are consistent with those found on bullets TJ1—items 2 and 3." 11-AA-2290. In turn, those items were nominal .38/.357-caliber bullets recovered from the scene at 1929 Western, where Hamilton was killed. 11-AA-2292. Class characteristics typically include "the number of lands and grooves," "the twist of the rifling (left or right)," and "the widths of the land and groove impressions." Robert M. Thompson, *Firearm Identification in the Forensic Science Laboratory* 15, National District Attorneys Association (2010), available at https://www.nist.gov/system/files/documents/forensics/Firearms_identity_NDAAsm.pdf; *see also* Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification*, 6 Colum. Sci. & Tech. L. Rev. 2, 8 (2005) (explaining "the rifling impressions on bullets are class characteristics reflecting the number, width and direction of twist of the lands and grooves in the types of

barrels that fired them"). Johnson used the term "class characteristics" in this sense. *See* 6-AA-1126 (explaining he first analyzes caliber, then "look[s] at the markings" on the bullets).

At trial, all the prosecution argued was that there were .357-caliber bullets in 1929 Western, and there were spent .357 cartridge cases in 1933 Western. 7-AA-1403, 1405, 1411. This caliber-only connection is so weak as to be virtually meaningless. By contrast, the class consistency between the bullet recovered from the Gorzoch scene and those recovered from 1929 Western is unusual. The fact that someone other than Seka shot out the window of Gorzoch's car, took her purse, and hid it in the 1933 Western ceiling would cause reasonable jurors to believe that this same person may have killed Hamilton due to the ballistics connection, creating a reasonable doubt about Seka's guilt. Hearing this evidence, a juror is not likely to "reach a subjective state of near certitude of the guilt of the accused," as the Due Process Clause requires. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

All told, Seka's *Brady* claim is meritorious. The evidence is favorable and material.

C. Seka can show good cause and prejudice because he timely asserted a meritorious *Brady* claim

As explained in the opening brief, Seka has good cause because he has asserted a meritorious *Brady* claim. AOB at 49-50. The State argues that Seka cannot use his *Brady* claim to prove good cause and prejudice because it is untimely. It argues that "assuming that [Seka] did not receive [the fingerprint report] from the State until 2017, [he] had until 2018 to raise this *Brady* claim to the Court." RAB at 31.

In his petition and opening brief, Seka provided a detailed explanation showing he raised his claim diligently. AOB at 49-50. The district court agreed, finding he had good cause. 15-AA-3048. The State has failed to engage with Seka's meritorious arguments. Its conclusory statement should not be a basis for affirmance. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (explaining parties, including prosecutors, "are responsible for advancing the facts and arguments entitling them to relief" (internal citation omitted)); *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d

1280, 1288 n.38 (2006) (recognizing that an appellate court need not consider points that are not cogently argued or supported by authority).

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

As explained in detail in the opening brief, the district court did not abuse its discretion by finding Seka overcame the doctrine of laches. AOB at 51-52.

The State has failed to engage with those meritorious arguments or provide any explanation of why the district court abused its discretion. RAB at 33. It states only that Seka "failed to demonstrate evidence to rebut prejudice to the State." RAB at 33. Its conclusory statement should not be a basis for affirmance. *See Greenlaw*, 554 U.S. at 244; *Dreyer*, 804 F.3d at 1277 (finding an appellee waives any argument it fails to raise in its brief); *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

II. Seka's convictions and sentence are invalid because new evidence, including exonerating DNA evidence, establishes he is actually innocent of first-degree murder, second-degree murder, and robbery

Seka can show he is actually innocent, which both overcomes the procedural bars to his *Brady* claim and leads to substantive relief. The

State fails to adequately brief its position that freestanding innocence claims are not cognizable, while an abundant body of law shows they are. The State also fails to provide any original argument to support its misguided claim that the evidence against Seka was overwhelming.

Law of the case does not apply here because the issue in the prior appeal was limited to the effect of new DNA evidence, which differs from the broader issues here. To the extent law of the case does apply, following the Court's prior opinion would work a manifest injustice.

A. This Court should find that freestanding innocence claims are cognizable

The State argues that "Nevada law does not recognize freestanding claims of actual innocence," 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." RAB at 36. The State argues that Seka "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." RAB at 38.

The Nevada Supreme Court has not expressed whether freestanding innocence claims are cognizable in a post-conviction

petition. As explained in the opening brief in detail, the Court should recognize freestanding innocence claims both under the United States Constitution and under the Nevada Constitution. AOB at 55-60.

There is nothing "improper" about Seka making a well-supported argument for an extension of the law. *See* RAB at 38 (arguing the suggestion of an innocence claim is improper). An attorney may raise arguments where there is a "basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Nev. R. Prof. Conduct 3.1.

The State has failed to engage with any of the arguments and extensive case law that Seka provided in his opening brief, including from the Ninth Circuit and state supreme courts. AOB at 55-60. Its conclusory argument dismissing the idea as "improper" should not be a basis for affirmance. *See Greenlaw*, 554 U.S. at 244; *Dreyer*, 804 F.3d at 1277; *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

B. The State fails to provide any original argument to support its blanket claim that the evidence against Seka was overwhelming

The State asserts there was "overwhelming evidence" to support Seka's convictions. RAB at 38. However, as explained in detail in

Seka's opening brief, there was not. To counter Seka's arguments, the State merely transposes the language of this Court's prior opinion without supplying any original arguments. RAB at 38-42.

Given the State's insufficient briefing, Seka addresses the conclusions this Court previously came to in the next section, which shows why he can overcome law of the case. *See Greenlaw*, 554 U.S. at 244; *Dreyer*, 804 F.3d at 1277; *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

C. Law of the case does not apply; but to the extent this Court finds it does, Seka can overcome it

Under NRS 176.09187(1), the issue in the prior appeal was limited to the effect of new DNA evidence. The issues here are different—they rely on additional evidence and different legal arguments. Therefore, the prior opinion has no law of the case consequences. To the extent law of the case does apply, following the Court's prior opinion here would work a manifest injustice.

1. The State misunderstands the limited scope of the issue decided in the prior appeal

The State argues that law of the case applies because this Court "had all of the same information in 2021 when it issued its opinion

denying a new trial as it does now." RAB at 45. It goes on to say that Seka "makes substantially the same claim as he did the first time around." RAB at 46. However, the State fundamentally misunderstands the narrow scope of the prior appeal.

The State's law of the case argument must be dismissed under the Court's longstanding view that for the "doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication. . . . [T]he doctrine does not bar [the 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." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44-45, 223 P.3d 332, 334 (2010); *see also, e.g.*, *Las Vegas Review-Journal v. Clark Cty. Office of the Coroner/Med. Exam'r*, 138 Nev. Adv. Op. 80, 521 P.3d 1169, 1176 (2022) (finding that an order that dismissed an appeal and ordered each party to bear its own fees and costs did not decide, "expressly or implicitly," the availability of attorney fees under the NPRA); *Recontrust Co. v. Zhang*, 130 Nev. 1, 8, 317 P.3d 814, 818 (2014).

The answering brief cites *Hall*, but it is not to the contrary. RAB

at 44 (citing *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975)). In *Hall*, the petitioner filed two petitions: in one, he asserted his plea was involuntary; in the other, he asserted his plea was involuntary because he was incompetent. The only difference was Hall placed more emphasis on incompetence in the second petition. *Hall*, 91 Nev. at 315-16, 535 P.2d at 798. But *Hall* shows the Court discussing and deciding a subject (the voluntariness of a plea), not failing to decide a question because it was not raised, as here.

As this Court explained in the prior appeal, "NRS 176.515(1) allows a court to grant a new trial within two years after the original trial 'on the ground of newly discovered evidence.'" 13-AA-2667. "But NRS 176.09187(1) allows a defendant to move for a new trial at any time **where DNA test results** are 'favorable' to the defendant." 13-AA-2667 (emphasis added). The Court had not previously explained what "constitutes 'favorable' results under that statute." 13-AA-2667. Its opinion clarified that results are favorable "where they would make a different result reasonably probable upon retrial." 13-AA-2667.

This means that the only issue this Court faced in the prior appeal was whether the DNA test results would make a different result

reasonably probable upon retrial. It even said so: "the narrow question before us is whether the new DNA evidence supports the granting of a new trial." 13-AA-2682 n.10. Thus, even though Seka filed other newly discovered records, they were not relevant in that procedural posture. And because the records were not relevant, it is unsurprising that this Court did not discuss their effect—this Court only looked at the limited question of what effect the DNA test results might have.

The Court's limited focus can be seen in its approach to the Thomas Cramer issue. After being released from a mental institution, Cramer claimed he pushed Seka down the stairs because Seka said, "Do you want me to do to you what I did to Pete Limanni?" 5-AA-906-07. However, in 2017, Margaret McConnell (née Daly) explained in a declaration that she was there during the altercation; she could hear them talking; and Seka never said that to Cramer. 12-AA-2430-33. She believed Cramer fabricated the confession because he was angry at Seka for getting him committed and for allegedly trying to steal her away. 12-AA-2430-33. This declaration was before the Court in the prior appeal, *see* 10-AA-1875, but the Court did not reference it.

Instead, the Court explained, "Seka argues on appeal that

Cramer's testimony was not credible. However, the defense attacked Cramer's credibility at trial and the jury nevertheless convicted Seka, **and we do not reweigh the evidence on appeal.**" 13-AA-2687 n.13 (emphasis added). The Court cited a case regarding sufficiency of the evidence review. 13-AA-2687 n.13. If the Court had been considering all the new evidence Seka presented to see what effect it might have had on the jury, the Court could not have rejected the new evidence on the ground that the Court does not "reweigh the evidence on appeal." 13-AA-2687 n.13. Instead, that holding only makes sense in the context of the Court's limited focus: how would the new DNA evidence have changed a juror's perception of the trial evidence?

Not only that, but the Court repeatedly drew inferences against Seka that it could not have drawn had it considered the new evidence. For one, the Court noted that officers "looked above the ceiling tiles [at 1933 Western] 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." 13-AA-2727. The Court then explained that the "physical and circumstantial evidence overwhelmingly supported a guilty verdict": "Limanni's belongings were hidden at Cinergi, which

Seka had access to after Limanni disappeared." 13-AA-2742. In other words, the Court concluded that the presence of Limanni's belongings above the ceiling tiles suggested Seka was guilty. But the purse that was also found above the ceiling tiles had another person's prints on it, indicating the Court's conclusion wasn't true. The Court's failure to note this evidence shows what is already evident: the Court had a narrow focus.

Accordingly, the State is wrong to insist that this Court has already decided the question at hand. That question is what **all** the evidence, old and new, admissible or not, would suggest to a reasonable jury. *House v. Bell*, 547 U.S. 518, 538 (2006). The Court has not decided that question.

2. Applying the Court's prior opinion here would work a manifest injustice

This Court will depart from its prior holdings where it determines "that they are so clearly erroneous that continued adherence to them would work a manifest injustice." *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003). If this Court finds its prior opinion has law of the case consequences, applying it here would work a manifest injustice for

the following five reasons.

First, this Court held that "[a]s 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." 13-AA-2682. The opening brief explains why this is a clearly erroneous reading of the record. AOB at 69-70.

Second, the Court found "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." 13-AA-2682-83. The opening brief explains why this is a clearly erroneous reading of the record. AOB at 68-69.[4]

Third, looking at the rest of the evidence, it does not overwhelmingly support guilt. The Court found none of the new evidence "from Hamilton's crime scenes affects the evidence supporting

[4]An independent DNA examiner could also speak to this point at an evidentiary hearing, further supporting the need for a hearing.

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-2684. The Court then found four pieces of evidence significant:

1. Hamilton was killed next door to Seka's business and residence at 1933 Western.
2. The .357 bullet casings found at 1933 Western were consistent with the caliber of gun that was used to shoot Hamilton.
3. Hamilton's blood was found in the truck Seka was driving the morning after Hamilton's body was discovered.
4. The truck's tire impressions were similar to the tire tracks found near Hamilton's body.

13-AA-2684. All that these pieces of evidence show is that someone with access to the Cinergi truck transported Hamilton's body. But anyone with access to 1933 Western would have had access to the truck. *See* 10-AA-1994; 6-AA-1086, 1210. Considering how weak this evidence is, it is unreasonable to conclude that the presence of another person's DNA under the victim's fingernails would not affect a juror's perception of reasonable doubt. By contrast, that is a dramatic cause for doubt.

The Court went on to note other pieces of evidence regarding

Hamilton's murder, but these are all even less meaningful, considering that Seka and Hamilton knew each other:

1. The truck Seka drove had been cleaned shortly before officers responded to Hamilton's murder scene. 13-AA-2742.
2. *Hamilton had a note with Seka's name and business number in his pocket.* 13-AA-2742. If anything, this supports that Seka is innocent. A murderer is not likely to leave his business card in his victim's pocket, unless in a poorly written TV show.
3. *Hamilton's body was covered in wood taken from 1933 Western that contained Seka's fingerprints.* 13-AA-2742. There were also Limanni's prints and prints from an unknown person on the wood. 6-AA-1151, 1153-54. It is likely Seka's and Limanni's prints were on the lumber from their joint handling of the wood to build the humidor at 1933 Western. The presence of unknown prints on the wood suggests a third person killed Hamilton.
4. 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 1933 Western just prior to the altercation next door. 13-AA-2742. The Court's inference

that the bottles in 1933 Western indicate the two had been drinking "just prior to the altercation" is flawed because 1933 Western was described as a pig sty, "just trashed." 3-AA-601; 7-AA-1442; 12-AA-2349. It is equally likely the bottles had been there for weeks.

5. 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. 13-AA-2743. This fails to account for all the relevant statements and unfairly makes it seem like Seka lied. When she testified, Michele Hamilton said Hamilton went to Las Vegas at the "beginning of November, end of October, something like that." 4-AA-835. Yet in her prior statement, she said Hamilton went to Las Vegas on October 11, 1998. 10-AA-2063. It is unsurprising that she may have misremembered by the time of trial. Regardless, this inconsistency is innocuous, no matter who misremembered.
6. *Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state.* 13-AA-2744. The Court's characterization that Seka "fled" Nevada is not supported by the

evidence. Seka was not detained, 6-AA-1212, 1257; 10-AA-2061-62, and he had no reason to remain in Las Vegas, as he was not from Las Vegas and had no work in Las Vegas after Limanni disappeared. He previously gave the police addresses he was associated with in Pennsylvania. 6-AA-1257; 10-AA-1990. Moreover, newly developed evidence shows Seka actually stayed in Las Vegas for a time after the police interrogated him. 10-AA-2073-74 (Sam Akkad recalling Seka helped Amir Mohammed move from Las Vegas to Tucson, after which Akkad drove Seka back to Las Vegas, in late November or early December 1998).

The Court noted other pieces of evidence related to Limanni's murder, which suffer from analogous flaws. Notably, in its prior decision, the Court interpreted different events that occurred on November 5 as signs of Seka's guilt. The Court found it meaningful, for example, that on November 5, Seka "was the last person to see Limanni alive." 13-AA-2685. And it noted various circumstances from that day that the Court seemed to find suspicious. *E.g.*, 13-AA-2685-86 (describing how Harrison found the business on November 5 and

describing statements Seka made to Harrison on November 5).[5] But property manager Cerda saw Limanni the very **next day,** on November 6, outside 1933 Western, getting ready to go to a cigar show. 3-AA-491-93, 508-09; 10-AA-2062.[6] So the conclusions the Court drew about November 5 are flawed and indicate a mistaken reading of the record.

Fourth, the Court failed to sufficiently distinguish between the evidence of the Limanni murder and the Hamilton murder. The connection between the two murders has always been highly speculative. Thus, in its prior opinion, the Court should have maintained a distinction between the evidence that supports guilt of each crime and analyzed the issues separately. At trial, the prosecutor argued, without any supporting evidence, that Hamilton must have

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[5]Harrison testified she had a long phone conversation with Seka around 8:30 a.m. on November 5. 3-AA-602-603. But his phone records show he only received two incoming calls that day, one lasting just six minutes, and the other one minute, both well after eleven. 1-ARA-10; *see also* 14-AA-2848. Although phone records were included in the original Appendix, a Reply Appendix is being filed with this brief that contains a higher quality version of the phone records.

[6]Cerda knew it was November 6 because they discussed Limanni being late on his rent, and on the sixth Limanni would have been one day overdue on his rent. 3-AA-508-09; *see also* 11-AA-2266.

been present when Seka killed Limanni, and Seka then killed Hamilton to tie up a loose end. 7-AA-1487.[7] But the evidence undermined this sheer speculation. Hamilton was in jail on November 6, 6-AA-1218-21, the same day Cerda saw Limanni still alive. He remained there until his release on November 12, and he was likely killed November 15. 6-AA-1218-21. The prosecutor insisted Limanni was killed before November 12, 7-AA-1386, but that means Limanni would have been killed while Hamilton was in jail, and Hamilton would not have seen it.

The men were also killed with different guns, in different ways, and their bodies were left in different desert locations in two different states, and their bodies were even disposed of differently. *See* 7-AA-1414 (prosecutor highlighting differences between the scenes, and noting Limanni was "stripped virtually naked and buried," unlike Hamilton); *compare* 13-AA-2726, 2731 (Hamilton's body was found 20 feet off Las Vegas Boulevard South; he had been shot through the back, in the left flank, and in the back of the right thigh with a .357 gun;

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[7]As this Court observed, the "State argued Hamilton may have either helped Seka [kill Limanni] or simply been an innocent bystander who was shot as he attempted to flee." 13-AA-2672, 2674.

there were some pieces of wood covering his body), *with* 13-AA-2729 (Limanni was found in an isolated desert area in California; he was wearing only boxer shorts; he had been shot at least 10 times with a .32-caliber gun, with seven shots to the head). Because the connection between the crimes has always been speculative, this Court should not have intermingled the evidence regarding Limanni's murder with the evidence regarding Hamilton's murder.

It is especially important to maintain a distinction between the evidence supporting each crime because much of the new evidence relates to the Hamilton murder. An unknown person's DNA was found under Hamilton's fingernails, as well as on different items near his body, including a cigarette butt. AOB at 30-32; 13-AA-2669. Firearms and toolmark identification evidence suggests the unknown person who stole and hid Gorzoch's purse in 1933 Western likely killed Hamilton. AOB at 41, 45. The latent print examiner's bench notes show that an unknown person's prints were found at 1929 Western, where Hamilton was killed, and Seka was excluded. AOB at 61, 67. Given how strongly this evidence supports a jury finding reasonable doubt, and how disturbingly weak the case for guilt is, Seka's claims are meritorious.

Lastly, ***fifth,*** one reason why the Court may have come to the flawed conclusion it did is that it tried to put itself in the shoes of the jury that decided Seka's case versus a hypothetical reasonable juror. It repeatedly relied on the unwarranted conclusions that Seka's jury reached, such as that Seka was guilty of robbing Hamilton despite the lack of any evidence of robbery. 13-AA-2688 n.14; *see* 7-AA-1472-73 (prosecutor arguing Hamilton was robbed for his jacket and bracelet, which were both left behind in 1929 Western). It devoted only one footnote to Seka's defense. 3-AA-2674 n.2. But in post-conviction matters, the Court's "function is . . . to assess the likely impact of [new] evidence on **reasonable** jurors." *House v. Bell*, 547 U.S. at 538 (emphasis added); *see also Strickland v. Washington*, 466 U.S. 668, 695 (1984) (explaining the "assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standard that govern the decision"); *Bagley*, 473 U.S. at 682 (adopting *Strickland* test of materiality for *Brady*). And Seka's abundant new evidence would be meaningful to reasonable jurors.

Accordingly, if the Court finds its prior opinion has some bearing

on this appeal, it should find that applying it here would work a manifest injustice.

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

This Court should reverse because the district court erred by not granting an evidentiary hearing. Seka's *Brady* claim states a prima facie case for relief. If there are any factual disputes regarding the elements of his *Brady* claim, those disputes should be resolved at an evidentiary hearing, not on a cold record. Additionally, a juror hearing the new evidence presented in Seka's petition would likely have a reasonable doubt about his guilt. If granted an evidentiary hearing, Seka could further develop the basis of his already strong claims. He could do this, for example, by presenting the testimony of an independent DNA or firearms and toolmark examiner, as well as testimony from Seka's prior attorneys, the trial prosecutor, the investigating officers, and lay witnesses like Margaret McConnell. By failing to grant an evidentiary hearing, the district court made a value judgment that none of the evidence Seka presented would have made a difference. Such a judgment is unsupportable.

CONCLUSION

All told, the prosecution violated *Brady*, and clear and convincing evidence shows Seka is actually innocent. This Court should grant the writ and vacate the judgment of conviction so he may have a fair trial after decades of wrongful imprisonment. Alternatively, the Court should reverse the district court's denial of an evidentiary hearing.

Dated January 2, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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

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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 January 2, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2024, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

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

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

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/s/ Rosana Aporta
An Employee of the
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