

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

JOHN JOSEPH SEKA,

Respondent.

CASE NO.: 80925

Electronically Filed
Nov 04 2020 12:18 p.m.
District Court Case No. 99CT59915
Elizabeth A. Brown
Clerk of Supreme Court

**On Appeal from Decision and Order of the Eighth Judicial District Court,
Clark County, Nevada, the Honorable Judge Kathleen Delaney, Granting
Respondent's Motion for New Trial**

RESPONDENT JOHN SEKA'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies and makes the following representations to enable the judges of this Court to evaluate possible disqualification or recusal under NRAP 26.1(a):

There are no persons, entities, or pseudonyms required to be disclosed.

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STATEMENT OF THE ISSUE¹

1. Whether the district court properly exercised its discretion in awarding Seka a new trial when results of new DNA testing not only excluded him from all the probative physical evidence in the case, but also implicated an unknown individual.

¹ Mr. Seka believes that the State accurately sets forth the Jurisdictional Statement and Routing Statement. As such, under NRAP 28 (b) those sections will not be duplicated here.

STATEMENT OF THE CASE

Mr. Seka agrees with the State's Statement of the Case but supplements it as follows:

An arrest warrant was issued for Seka on March 15, 1999. 10 AA 002432.² Seka's preliminary hearing was held on June 28, 1999. The State admitted that their evidence connecting Seka to the murders and robberies of Peter Limanni ("Limanni") and Eric Hamilton ("Hamilton") was "extremely circumstantial". RA³ 00114.

On February 2, 2001, Seka filed a Motion to Dismiss the Charge of Murder and Robbery of Lamani [sic], or in the Alternative, to Sever the Charges of Murder and Robbery of Lamani [sic] and Hamilton into Two Separate Trials. RA 00131-00145. The State opposed⁴ and Seka's Motion was denied.

On February 15, 2018, after the district court granted Seka's petition for DNA testing, it ordered DNA testing of Hamilton's fingernails, hair identified under Hamilton's fingernails, and cigarette butts collected near Hamilton's body. RA 00154-00158.

² The arrest warrant emphasized that Seka "was involved in a *series of crimes*." 9 AA 002150 (emphasis added).

³ Reference to RA is the Respondent's Appendix.

⁴ In its opposition, the State described the two murders as being "inextricably intertwined." RA 146-153.

On December 14, 2018, the court held an evidentiary hearing on the probative value of the remaining items of evidence. 8 AA 001665-814. On January 24, 2019, the court ordered DNA testing of additional evidence including Hamilton's baseball cap that was left at the murder scene and a Skoal container and two beer bottles that police collected near Hamilton's body. 8 AA 001816-21.

STATEMENT OF THE FACTS

Cinergi and Limanni's Business Dealings

In September 1998, Seka moved from Philadelphia to Las Vegas to work for Limanni. 5 AA 001188-89. Limanni operated a HVAC business called Cinergi at 1933 Western Avenue in Las Vegas ("1933"). 2 AA 000365-66. Limanni and Seka worked at Cinergi and lived at the business. 2 AA 000452-53. Because they were transitioning Cinergi to a cigar shop, Limanni and Seka purchased lumber for a humidor. 8 AA 001970; 001977-79. Justin Nguyen, who worked at Cinergi for several months, stated that Limanni treated Seka "like his own brother" and that he never observed Limanni call Seka names or mistreat him. 9 AA 002006. Takeo Kato ("Kato") and Kazutoshi Toe ("Toe") were two Japanese investors who financially backed Cinergi and lived at the business for a short time. 8 AA 001963-64; 9 AA 002009-24, 002026-43. They described Seka and Limanni as "having a good friendship," like brothers. 8 AA 001963-66; 9 AA 002009-24, 002026-43.

Kato and Toe provided Limanni with approximately one million dollars⁵ in capital and four vans to operate Cinergi. 9 AA 002009-24, 002026-43. Kato was also on the lease for 1933. *Id.* During the transition, Limanni unsuccessfully attempted to obtain more money from Kato and Toe. 8 AA 001970. However, Limanni did receive capital from Amir Mohammed (“Mohammed”) and another investor who resided in Las Vegas. 9 AA 002059-60, 002067-69.

The investors all had access to 1933 and to the vans and Toyota truck associated with the business. 8 AA 001968-69; 9 AA 002059-60. In addition, Limanni’s girlfriend, Jennifer Harrison (“Harrison”) and numerous others who attended the frequent parties Limanni hosted, had access to the business and the business vehicles. 8 AA 001968-69; 9 AA 002082; 4 AA 000889-90. The vehicles’ keys were easily accessible inside the business. 4 AA 000956; 5 AA 001080.

In September 1998, Limanni began removing large sums of money from his bank accounts and was overdrawn. 5 AA 001105-06. On September 22, 1998, Limanni signed a lease for an office space in Lake Tahoe and paid a deposit by check. 2 AA 000485-86; 9 AA 002063. Limanni’s check bounced and he returned to Lake Tahoe on October 5, 1998, with another check. 9 AA 002063. Limanni paid

⁵ Toe indicated that he and Kato had invested one million dollars with Limanni. 9 AA 002009-24. Kato indicated that he had invested three hundred thousand dollars. 9 AA 002026-43

for three months of the lease, intending to move into the space on October 15, 1998. 9 AA 002063. Limanni left one of Cinergi's vans, tools and other equipment in Lake Tahoe, purportedly attempting to hide them from his investors. 2 AA 000485-86; 9 AA 002026-43.

Kato and Toe visited Cinergi in late summer or fall 1998. 8 AA 001968. They were angry because they believed that Limanni was diverting business funds for personal use. 8 AA 001966-67. As a result, Kato attempted to cancel the 1933 lease and told Limanni he wanted his investment returned. 2 AA 000395; 8 AA 001967. Kato and Toe confronted Limanni to recover the business vehicles, but Limanni refused and the two left. 9 AA 002020. On October 26, 1998, before Limanni disappeared, Kato repossessed one of the business vans. 2 AA 000362; 9 AA 02146. Unable to receive a return on his large investment, Kato was forced to start bankruptcy proceedings. 3 AA 000741.

Mohammed abruptly moved out of the state shortly after Hamilton's body was discovered and police began investigating the crime scene at 1929 Western Avenue ("1929").⁶ 9 AA 002047; AA 002059-60. Marilyn Mignone, Mohammed's former

⁶ Investigator Jim Thomas attempted to locate Mohammed but found no record of him in the United States. 9 AA 002159. He described Mohammed as a "ghost" and believed Mohammed presented a fictitious identity to Limanni and Seka. 9 AA 002161. Mohammed even used a social security number that belonged to another person. 9 AA 002166. Mohammed was a Syrian national and Investigator Ed Heddy believed he may have returned to Syria. 9 AA 002069.

business associate, characterized Mohammed as a dangerous person and indicated that the FBI was investigating him around the time of the murders. 9 AA 002157.

Limanni Disappears

On November 2, 1998, Limanni closed his bank accounts. 5 AA 001105-06. On November 6, 1998, the property manager, Michael Cerda (“Cerda”), saw Limanni around 10:30 a.m. outside Cinergi. 2 AA 000367-68. Limanni asked Cerda if he could pay rent late because, although he had between \$2,000.00 and \$3,000.00 in cash with him, he needed the money for a cigar show he was attending. 2 AA 000369-70. Cerda reminded him a late fee would be assessed. 2 AA 000369. Limanni agreed and left. 2 AA 000369-70. He was not seen again.⁷ *Id.* Limanni’s sister filed a missing person report on December 2, 1998. 5 AA 001133-35.

Seka called several friends in Philadelphia, informing them that he was worried because Limanni was missing. 5 AA 001203-04. Seka pawned various items from the business to keep the business afloat but was unsuccessful. 6 AA 001312.

⁷ Harrison testified she spoke with Seka on November 5 and he was upset. 2 AA 000460-63. The prosecution used this information to demonstrate Seka’s “state of mind” and imply that Seka killed Hamilton and Limanni that day. *Id.* However, Seka’s phone records show that this conversation did not take place and Harrison perjured herself by testifying to it. 5 AA 1141-43. Further, Cerda saw Limanni on November 6 and Hamilton was in jail until November 12. 2 AA 000369-70; 5 AA 001088-91. Harrison also gave police the incorrect phone number for Limanni. 10 AA 002335. The prosecution thus used the wrong phone records to prove Limanni did not use his phone during November and December, 1998. Police admitted the error but never obtained the correct phone records for Limanni. 5 AA 001139-43.

Hamilton is Found

On November 16, 1998, a construction worker found a body in a remote area with several pieces of lumber on top of the corpse.⁸ 3 AA 000517-18. The man had a ring on his finger and a note in his pants pocket with a name -- Jack-- and a telephone number. 3 AA 000521. Later, police traced the telephone number to the 1933 landline. 3 AA 000522. Crime scene analysts also collected two empty beer bottles, two cigarette butts,⁹ and a Skoal container near the body. 5 AA 001049-50; 4 AA 000817-18; 3 AA 000626.

The State determined that the man, who was later identified as Hamilton, died from three gunshot wounds to his leg, chest and abdomen. 2 AA 000423-24. The coroner also noted a minor laceration just above the right wrist that was possibly consistent with someone removing Hamilton's bracelet. 2 AA 000424. The coroner estimated Hamilton died within twenty-four hours of being found. 2 AA 000429.

Hamilton was a drifter with a history of drug abuse and mental illness who used multiple names and social security numbers. 5 AA 001092-93. He moved to

⁸ Three boards contained fingerprints from Seka and Limanni. 10 AA 002446-56. Another two boards contained latent prints that *did not match Seka or Limanni. Id.* These unidentified latent prints were never compared to the latent prints identified on the beer bottle found near Hamilton's body or to any of the alternative suspects. 5 AA 001051-52.

⁹ The cigarette filters did not match the type Seka smoked at the time. 5 AA 001117-18.

Las Vegas shortly before his death and worked sporadically at Cinergi doing construction. 3 AA 000708, 000710-11. When questioned, Seka realized that he knew Hamilton by the name “Seymour.” 2 AA 000346-47, 000360; 5 AA 001053. According to Seka, Hamilton would come to Cinergi looking for work. 8 AA 001989-91. Seka gave Hamilton the Cinergi phone number so Hamilton could call instead of dropping by. 9 AA 002140.

Hamilton’s sister testified that Hamilton had approximately \$3,000 dollars when he moved to Las Vegas. 3 AA 000706. However, Hamilton had been in jail on a trespassing charge from November 6 until November 12, 1998, four days before his body was found, and three days before he was thought to have been killed. 5 AA 001088-91. When booked into the jail, (and released on November 12, 1998) he had no money with him. *Id.*

1929 Crime Scene

On November 17, 1998, the day after Hamilton’s body was found, a neighboring business owner called Cerda and police about an alleged break-in at 1929.¹⁰ 2 AA 000437-38. Upon arrival, police noticed broken glass and blood in 1929. 4 AA 000820-21. In the parking lot in front of 1929, police found a piece of

¹⁰ 1929 Western was next door to Cinergi and had been home to an illegal boiler room operation. 2 AA 000384.

molding from the broken window with what appeared to be a bullet hole. 3 AA 000546. Finally, a lead projectile (assumed to be from a bullet) was found on the sidewalk outside of 1929 next to droplets of blood. *Id.*; 3 AA 000587.

All indications were that Hamilton was murdered in 1929. 3 AA 000523, 000546-47, 000550. Police found blood on the entryway carpet and on the broken glass that was later matched to Hamilton. 3 AA 000546-47; 4 AA 000821. There were bloody drag marks across the carpet, one of which led to the broken window. 3 AA 000546-47; 9 AA 002242. Police recovered latent fingerprints from the point-of-entry window, the glass pane on the interior of the front door, and from a glass fragment inside the point-of-entry.¹¹ 9 AA 002249. A black baseball cap that Hamilton always wore, his gold bracelet, and a rolled-up jacket with blood and bullet holes were also found in 1929. 9 AA 002248, 002242; 4 AA 000821; 2 AA 000345. The bullet holes were consistent with Hamilton's wounds. 3 AA 000523-24; 9 AA 002242. Police also found three jacketed bullets and three bullet fragments in 1929. 3 AA 000523. The bullet fragments were "class consistent" to the bullets used to kill Hamilton. 5 AA 001009-10.

¹¹ Nothing in the record indicates that these latent prints, purportedly belonging to the perpetrator, were ever compared to Seka's fingerprints. Nor were they compared to other latent prints recovered from the physical evidence or to the alternative suspects.

While Police were investigating 1929, Seka arrived in Cinergi's Toyota truck. 4 AA 000824. The police informed Seka about the 1929 break-in and asked him if they could search 1933 in case anyone inside needed medical attention. *Id.*; 4 AA 000826-27. Seka signed a consent to search card, allowing police to "search for items directly or indirectly related to the investigation of MURDER W/DW." 4 AA 000827; 10 AA 002255. Seka and Cerda accompanied the police into 1933. 10 AA 002264-66. After noticing a bullet and some knives in 1933, police searched Seka and handcuffed him as they continued to search 1933. 4 AA 000827-28. Cerda stayed with Seka while the officers searched the business. 10 AA 002264-66. Cerda informed officers that he had the only key to 1929 and that the business had been vacant for approximately a month and a half. 10 AA 002263.

Seka was then taken to the Las Vegas Metro Police Department where he voluntarily submitted to a taped interview. 5 AA 001071; 8-9 AA 001981-2003. During the interview, Seka was fully cooperative. 9 AA 002001. Seka consented to police fingerprinting him and taking a buccal swab. 10 AA 002255; 5 AA 001078-79. Police advised Seka that he was not under arrest and took him back to 1933. 5 AA 001078. However, Seka could not enter 1933 because it was still being processed. 5 AA 001079.

Seka told police that he had a dinner appointment and needed a vehicle. *Id.* Police would not let Seka take the Toyota truck because they were impounding it to

process as evidence. 5 AA 001079. Seka gave police the Toyota key and asked if he could retrieve the keys to one of two remaining vans. 5 AA 001079-80. Police gave Seka keys to an unmarked van without license plates. 5 AA 001080-81; 001104-05. Police reconsidered and suggested that Seka drive the van with the large business decals. 5 AA 001081. Before giving him the keys, police asked Seka if they could search the van and he consented. *Id.* After discovering what appeared to be blood, police impounded the vehicle. 5 AA 001081-82. Police then searched the unmarked van and found no apparent “evidentiary connection to any of the cases,” and gave Seka the keys, telling him he was free to leave. 5 AA 001082.

When police searched the impounded vehicles, they discovered drops of blood in the van and in the bed of the Toyota truck. 5 AA 001081-82; 2 AA 000404; 3 AA 000620, 000674-76. The blood in the van matched Limanni. 3 AA 000614, 000617. The blood in the truck matched Hamilton. 3 AA 000624. Police also lifted footprints in the rear cargo area of the van. 10 AA 002274. Nothing in the record indicates these footprints were compared to Seka’s.¹²

1933 Western Avenue

Police thoroughly searched 1933 where Cinergi was located and where Limanni and Seka worked and lived before Limanni disappeared. 2 AA 000452-

¹² When defense counsel asked whether the footprints were ever compared to Seka’s, crime scene analyst Randall McPhail responded, “I don’t know.” 4 AA 000982.

53; 9 AA 002242-44. Among the clothes, papers and other items scattered around 1933, police found several items they deemed significant. 4 AA 000827-28; 9 AA 002242-44.

First, police found Limanni's wallet in the ceiling above his desk. 3 AA 000526-27. Police also found a purse containing \$36.06 in the ceiling which had been reported missing on November 6, 1998 by Lydia Gorzoch ("Gorzoch"). 8 AA 002057; 10 AA 002276. Gorzoch's purse was stolen out of her vehicle after someone fired a .357 bullet through the window, the same caliber as those found in 1933 and at the 1929 crime scene. 10 AA 002284, 002286-87; 9 AA 002079. Gorzoch was later contacted and denied knowing either Limanni or Seka. 10 AA 002280. When the prosecution asked about the purse at trial, Detective James Buczek stated it was "not important." 3 AA 000527. However, *before* trial, fingerprints were identified on the purse which did not belong to Seka. 10 AA 002282. That information was not provided to Seka until 2018. *Id.*

On November 23, 1998, while police were still investigating Hamilton's homicide and while Limanni was still missing, LVMPD released the "purse with wallet, personal items and ID . . . [and] \$36.06 in U.S. Currency" to Gorzoch and, as a result, it was never available for DNA testing. 10 AA 002289.

Second, police found several beer bottles in the dumpster behind Cinergi and in two trash cans in the business. 4 AA 000938. Fingerprints identified on the beer

bottles from the trash can in the south-central office matched both Hamilton and Seka. 4 AA 000938; 5 AA 001028-29. Because Hamilton worked sporadically at Cinergi, the presence of his fingerprints on the bottles was not significant. 8 AA 001989-91; 3 AA 000705, 000708-11.

Third, police found several small stains in the 1933 office and living spaces that tested positive for presumptive blood. 9 AA 002074; 3 AA 000650. Seka's blood was identified on the front right pocket area of a pair of his jeans, a drop was identified on a wall being remodeled, and on the sink counter. 3 AA 000617-18, 000625-26; 10 AA 002270. However, his blood was not found anywhere in 1929, the actual crime scene. 3 AA 000615-27. Further, no blood belonging to Hamilton or Limanni was found in the 1933 offices.¹³ *Id.*

Fourth, bullet cartridges and empty shell casings of different calibers, were found in 1933. 3 AA 000526; 10 AA 002271; 4 AA 000913. Harrison had seen bullets in the business well before the murders occurred. 9 AA 002307. In their search, police found a .357 cartridge case in the false ceiling in the northwest office, another near the center of the south wall in that office, and a third on the light fixture in front of the double doors leading into the humidor. 4 AA 000912-13. Police also discovered a single .357 bullet fragment in the wall of 1933 that had been shot

¹³ It did not appear that 1933 had been cleaned. 4 AA 000911.

through the couch.¹⁴ 4 AA 000913, 000981. The bullet fragment had no blood on it. 4 AA 000981. All the .357 cartridges had the same characteristic markings, suggesting they were all shot from the same firearm although the State could not identify which type of firearm. 5 AA 001000-01. Police also found .32 caliber bullets in the toilet bowl and in the northeast office. 4 AA 000913; 000929-30. A .24 caliber cartridge was found in the false ceiling above the chair in the northeast office. 4 AA 000913.

Finally, officers searched the dumpster located behind 1933; however, what was found there varies depending on the report. 4 AA 000913-14; 8 AA 002052-53; 9 AA 002367. Detective Thowsen reported that when the initial officers looked in the dumpster it was empty, but when they checked later, it contained several items of clothing and checks purportedly belonging to Limanni. 4 AA 000847, 000851-52; 9 AA 002052-53. Officer Nogues reported there were miscellaneous papers and trash at the bottom of the dumpster when he arrived on the scene. 10 AA 002367. Later, Officer Nogues noted several pieces of clothing, including a tennis shoe, along

¹⁴ The State's expert witness, Torrey Johnson, characterized this bullet fragment as "class consistent" to those found in Limanni's body. 5 AA 001009-10. Johnson testified that more than ten different types of ammunition and various types of firearms could have been associated with the bullet fragment. *Id.* While the State suggested that this bullet is proof that Limanni was killed in 1933, nothing indicates how or when that bullet was shot into the wall. *See* 4 AA 000913.

with six inches of paper and other “debris” in the dumpster, none of which was there before. 10 AA 002368.

Police implied that Seka somehow put the items in the dumpster attempting to destroy evidence. 10 AA 002371, 002372-73. However, between the police’s first and second examination of the dumpster, Seka was either with Cerda or police. 10 AA 002266. Furthermore, numerous officers responded to the scene and remained there for between eight and nine hours. 5 AA 001068; *see also* 9 AA 002241-45. Police were at the scene “constantly, continually” throughout the day investigating. 3 AA 000539.

Seka Leaves Las Vegas

Police did not ask Seka to return to 1933 after his dinner appointment on November 16, so he went to a friend’s home where he had been staying after Limanni disappeared and the business closed. 5 AA 001082, 0001125-26; 10 AA 002252. Seka had no money or employment after Limanni disappeared, so in December of 1998 he returned to his home on the East Coast. 5 AA 001194-95; 10 AA 002329-30; 8 AA 001984. Before leaving Nevada, Seka informed police that his family lived on the East Coast and provided them with several addresses and

phone numbers where he could be reached. 8 AA 001984; 5 AA 001128, 001178.

Police never attempted to contact Seka.¹⁵

Limanni is Found

On December 23, 1998, Limanni's body was found partially buried off a service road in the California desert near the Nevada border. 3 AA 000508-09; 4 AA 000752, 000755. The body was badly decomposed, but police noted several distinctive tattoos and a fingerprint was matched to Limanni. 4 AA 000755, 000757-58. The body showed varying degrees of decomposition and mummification consistent with a body that had been outdoors partially buried for several weeks. 3 AA 000694-95. The coroner found eight gunshot wounds in the head and neck area and two additional gunshot wounds in the heart. 3 AA 000695, 000697.

Cramer¹⁶

When Seka returned to Philadelphia, he reconnected with his old friend, Thomas Cramer ("Cramer"). Cramer suffered from severe drug addiction, and frequently became physically and emotionally abusive.¹⁷ 5 AA 001175. During

¹⁵ Harrison also testified Seka told her in November 1998 that he was going "underground" in Arizona. 2 AA 000469-70. However, Seka had provided police with contact information in Philadelphia where he was ultimately arrested in March of 1999. 8 AA 001984; 5 AA 001128, 001178.

¹⁶ Cramer's name is spelled both "Cramer" and "Creamer." For the sake of clarity, he will be referred to "Cramer" throughout this brief.

¹⁷ Cramer testified that Paxil made him feel really violent. 4 AA 000788.

these abusive episodes, his girlfriend, Margaret Daly (“Daly”), would contact Seka for assistance in calming Cramer. 5 AA 001176-77, 001181.

On January 23, 1999, Daly frantically contacted Seka from the residence she shared with Cramer and Cramer’s grandmother to request assistance controlling Cramer. *Id.* When Seka arrived, Cramer became incensed, and at one point, pushed Seka down the stairs. 5 AA 001181-82. Cramer also physically attacked Daly who finally called the police. 5 AA 001183. Police arrived and involuntarily committed Cramer to a mental institution for ten days because of his erratic and violent behavior. 5 AA 001173-74, 001181-83; 10 AA 002382. Daly subsequently filed for a restraining order against him. 5 AA 001174.

After being released from the mental institution, Cramer claimed he pushed Seka down the stairs because Seka said, “Do you want me to do to you what I did to Pete Limanni?” 4 AA 000776-77. However, in 2017, Daly (who changed her name to McConnell) signed a declaration stating she was present during the altercation and that Seka never confessed to Cramer. 10 AA 002425-27. McConnell suggests that Cramer fabricated the confession because he believed Seka was attempting to steal McConnell’s affection and was responsible for committing him to the mental institution. 10 AA 002426.

2001 Trial

Based in large part on Cramer's statement, the State arrested, charged and tried Seka for the Hamilton and Limanni murders and robberies. *See supra* Statement of the Case. The State's case against Seka was wholly circumstantial, but nonetheless, Seka was convicted and sentenced on all charges, including two life sentences without the possibility of parole. *Id.* Seka continued to maintain his innocence and challenge his convictions through the courts. *Id.*

Post-Conviction DNA Testing

On June 19, 2017, Seka filed a Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. 7 AA 001586-624. On February 15, 2018, the court ordered DNA testing of Hamilton's fingernail clippings, hair identified under Hamilton's fingernails, and cigarette butts collected near Hamilton's body. RA 00154-00158. On January 24, 2019, the court ordered DNA testing of additional physical evidence including Hamilton's baseball cap that was left at the murder scene and a Skoal container and two beer bottles police collected from the area where Hamilton's body was discovered. 8 AA 001816-21. The background and results of the DNA testing on those items is as follows:

A. Hamilton's Fingernails: At the autopsy, fingernails were collected from Hamilton's left and right hands. Detective Thowsen requested DNA testing

and David Welch (“Welch”), a criminalist with the LVMPD, performed PCR-RFLP testing on the left-hand clippings. 3 AA 000620; 10 AA 002437. Welch testified that he was unable to determine if the blood found on Hamilton's fingernails belonged to a male or female but that he could exclude Seka as a contributor. 3 AA 000655-56. Welch only tested the blood identified under Hamilton’s fingernails, but could not test the epithelial cells potentially available under the fingernails. 10 AA 002437-41. The 2018 STR DNA testing, which included both blood and epithelial cells, concluded that assuming Hamilton was a contributor, a second foreign contributor was detected on Hamilton’s fingernails from both his left and right hands.¹⁸ 10 AA 002443-44. Seka was excluded as the other contributor. *Id.*

B. Hair: At autopsy, hairs with apparent blood were collected from under Hamilton’s fingernails. 10 AA 002437. Welch tested the apparent blood identified on the hairs, but not the hairs themselves. 10 AA 002437-41. In 1998, Seka was excluded as a possible contributor to the blood identified on the hair. *Id.* The 2018 DNA testing showed that the hair belonged to Hamilton. 10 AA 002443-44. Seka was excluded as a possible source of the hair. *Id.*

¹⁸ Hamilton was also the contributor of the hair underneath his fingernails. 10 AA 002443. Seka was also excluded as a contributor of that hair. *Id.*

C. Marlboro cigarette butt:¹⁹ Police collected this item near Hamilton's body, 2.1 miles south of State Route 146 on Las Vegas Blvd. 9 AA 002084. Officer Vincent Roberts collected the cigarette butt, Detective Thowsen requested it be tested for DNA, and Welch attempted to conduct PCR-RFLP DNA testing on it in 1998. 10 AA 002437-41. Welch was unable to obtain any results. 3 AA 000664. The 2018 DNA testing produced a full DNA profile and excluded both Hamilton and Seka as contributors. 10 AA 002443-44. Because the LVMPD crime lab believed that the DNA was from the "putative perpetrator," the DNA profile was eligible to be uploaded to the Local DNA Index System and the National DNA Index System (CODIS) for comparison.²⁰

C. Skoal Container: Police also collected this item near Hamilton's body. In 1999, the container was examined for latent fingerprints, to no avail, and it was not DNA tested. 10 AA 002446-48. The 2019 DNA testing identified two DNA profiles and excluded Hamilton and Seka as possible contributors. 10 AA 002482-83.

¹⁹ Two cigarette butts were collected and tested. The other cigarette butt, Lab Item 1, did not produce a DNA profile. 10 AA 002443.

²⁰ National DNA Index System (NDIS) Operational Procedures Manual, <https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view> (last visited October 17, 2020).

D. Beck's beer bottle:²¹ Police also collected this item near Hamilton's body. In 1999, it was examined for latent prints. 10 AA 002446-47. Seka, Limanni and Hamilton were excluded as the source of the latent prints, but no DNA testing was conducted at the time. *Id.* The 2019 STR DNA testing identified a female profile on the bottle. 10 AA 002482-83. Both Hamilton and Seka were excluded as possible contributors. *Id.* The DNA profile was eligible to be uploaded to the Local DNA Index System and the National DNA Index System (CODIS) for comparison because the LVMPD crime lab believed that the DNA was from the "putative perpetrator,"²² *Id.*

E. Hamilton's baseball cap: Police collected this item belonging to Hamilton in 1929 where Hamilton was likely killed but it was not DNA tested before trial. The 2019 DNA testing identified three profiles on the cap, one belonging to Hamilton and two unknown profiles. *Id.* No further conclusions could be drawn from the DNA mixture. *Id.*

As outlined above, fingerprint analysis was conducted on several items of evidence. 10 AA 002446-48. Latent fingerprints were identified and examined on

²¹ A second beer bottle was collected, and a DNA profile was obtained. However, although that profile was consistent with at least one contributor, it is unsuitable for interpretation and comparison.

²² National DNA Index System (NDIS) Operational Procedures Manual, <https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view> (last visited October 17, 2020).

Miller beer bottles found inside and outside of 1933, inside the Toyota truck, on the assorted wood covering Hamilton's body, on the beer bottle recovered near Hamilton's body and on Ms. Gorzoch's purse collected from the ceiling of 1933. 10 AA 002446-48, 002282. Seka's fingerprints were identified on the Miller beer bottles collected from inside 1933 and the dumpster just outside 1933. 10 AA 002446-48. Seka and Limanni's fingerprints were identified on the lumber that was taken from 1933 and used to cover Hamilton's body; however, additional unknown fingerprints, not belonging to Seka or Limanni, were also identified on the lumber. *Id.* The unknown fingerprints identified on the beer bottle and Ms. Gorzoch's purse did not belong to Seka, Limanni or Hamilton. 10 AA 002446-48, 002282. Fingerprints were also identified and collected from 1929 "north vertical metal frame edge to the west front point-of-entry window, the interior front west door on the glass pane, and from a glass fragment inside the point-of-entry on the office floor." 10 AA 002446-48; 9 AA 002249. Unfortunately, the unidentified prints found on important physical evidence -- the three separate sets of prints around the point of entry to the 1929 crime scene, the prints on the lumber found covering Hamilton's body, the beer bottle found near Hamilton's body, and prints identified on Ms. Gorzoch's purse -- were never compared to each other and were never compared to the alternative suspects fingerprints. 10 AA 002282.

Based upon the exculpatory results of the post-conviction DNA testing, the district court granted Seka's Motion for a New Trial on May 11, 2020. 11 AA 002517-19.

SUMMARY OF THE ARGUMENT

In the underlying criminal conviction, the State's case against Seka was wholly circumstantial -- no physical evidence linked Seka to either homicide. In 2018-19, Seka requested DNA testing of evidence from the crime scene and the scene where Hamilton's body was discarded, testing that was not available at the time of trial. That DNA testing produced evidence that not only excludes Seka, but also includes an unknown individual. As a result, Seka filed a new trial motion which the district court granted.

First, the district court properly exercised its discretion granting Seka's new trial motion. Absent the State showing that the district court acted arbitrarily or capriciously, or that its interpretation of the law was clearly erroneous, the district's court decision should be affirmed. Further, the State cannot raise issues that it did not raise at the district court to meet its burden on appeal.

However, if this Court considers all the State's arguments, the district court's decision should still stand. First, the new DNA evidence meets all of the required elements for a new trial -- specifically that it is newly discovered, material to the defense; non-cumulative; and as such as to render a different result probable upon

retrial.²³ Second, because the State has consistently alleged that the crimes for which Seka was convicted were part of the same incident, the new DNA evidence supports a new trial on all Seka's convictions. Third, the new DNA evidence is favorable to Seka as it not only excludes him as the perpetrator but also identifies an unknown contributor. Finally, this is not a sufficiency of the evidence appeal so applying that standard, which the State advances, is inappropriate because the grant of a new trial was based upon new DNA evidence.

Accordingly, Seka requests this Court to find that the district court did not abuse its decision and in so doing, affirm the district's court grant of his Motion for a New Trial.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING SEKA'S NEW TRIAL MOTION.

In reviewing a lower court's decision on a new trial motion, this Court is tasked with determining whether the court abused its discretion. *Flowers v. State*, 136 Nev. 1, 18, 456 P.3d 1037, 1052 (2020) (citing *Funches v. State*, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997)). Reversal is appropriate "only for clear legal error or for a decision that no reasonable judge could have made." *Gonzalez v. State*, 2017

²³ The State concedes that the new DNA evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; it is not an attempt to contradict, impeach, or discredit a former witness; and it is the best evidence the case admits.

WL 2950017 (Nev. Ct. App. 2017); *see also Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (stating an abuse of discretion occurs only “when no reasonable judge could reach a similar conclusion under the same circumstances”). Even if this Court disagrees with the district court's decision, reversal is only permitted if the district court “manifestly abused or arbitrarily or capriciously exercised its discretion.” *City of Las Vegas v. Eighth Judicial Dist. Court (Seaton)*, 131 Nev. 1264, *1, 2015 WL 4511922 (citing *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 929, 267 P.3d 777, 780 (2011)). This Court has defined an arbitrary or capricious exercise of discretion as “one founded on prejudice or preference rather than on reason or contrary to the evidence or established rules of law.” *City of Henderson v. Amado*, 133 Nev. 257, 259, 396 P.2d 798, 800 (2017)(citing *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)). This Court has defined a manifest abuse of discretion as “a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *Id.*

Here, nothing in the record or in the State’s opening brief, suggests the district court manifestly abused its discretion. The district court’s decision was neither arbitrary nor capricious and was not clearly erroneous. Specifically, the record shows no prejudice or preference and the decision is not contrary to established law. And, while the State may disagree with the district court’s decision, nowhere in its

opening brief has the State indicated how the district court's decision specifically meets this high bar for reversal. Thus, on the standard of review alone, the district court's decision granting Seka's Motion for New Trial should stand.

II. THE STATE ONLY DIRECTLY ARGUED TWO ISSUES AT THE DISTRICT COURT AND THUS ANY OTHER ISSUES URGED IN THE STATE'S OPENING BRIEF SHOULD BE DEEMED WAIVED.

Well-established law provides that “[a] point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.” *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). For example, in *State v. Lopez*, this Court affirmed a favorable ruling on a defendant's motion to suppress after the State attempted to raise a new argument on appeal. 457 P.3d 245, *1, 2020 WL 754335. Specifically, at the district court, the State argued that precedent should be overruled and on appeal, argued that even if the precedent was not overruled, it would still support their position. *Id.* This Court summarily rejected the State's new argument holding the State had waived it by not raising it below. *Id.*

In his district court briefing, Seka outlined why the new DNA evidence, when considered with the other evidence, warrants a new trial. The State, however, failed to explicitly address any of Seka's arguments in its responsive briefing, ignoring the required elements for a new trial. Instead, the State only argued two specific issues. First, the State claimed the DNA evidence was “not favorable” to Seka under NRS

176.09187. 8 AA 001625-40. Second, the State argued Seka's motion was "procedurally barred" under the two-year statute of limitations in NRS 176.515. *Id.*

In its opening brief, the State continues to maintain the new DNA evidence is "not favorable" but abandons its statute of limitations argument. However, the State raises new issues, none of which were directly argued below and none of which should be considered here. Specifically, in its opening brief, the State urges four new issues. First, the State argues the DNA testing results are not newly discovered evidence. Second, the State claims the DNA testing results are not material to Seka's defense and are cumulative. Third, the State alleges, without support, that because the DNA evidence is from the Hamilton crime scene and dump site, the court abused its discretion by ordering a new trial on the Limanni homicide. Finally, the State mistakenly argues that a "sufficiency of the evidence" standard should apply to Seka's new trial motion.

The State did not urge any of these arguments in the district court, and therefore they should not be considered on appeal. However, if this Court were to consider them, the State still has not shown that the district court acted arbitrarily, capriciously or in direct contradiction of the law. As shown below, this Court should find that the district court properly exercised its discretion in granting Seka's new trial motion for the following reasons: (A) The new DNA evidence meets the required elements for a new trial; (B) The new DNA evidence supports a new trial

on all Seka's convictions; (C) The new DNA evidence is favorable to Seka's defense; and (D) The sufficiency of the evidence standard is inapplicable to a new trial motion based upon newly discovered DNA evidence.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE NEW DNA EVIDENCE MEETS THE REQUIREMENTS FOR THE GRANT OF A NEW TRIAL.

For more than twenty years, Seka has maintained his innocence. The prosecution's case against Seka was wholly circumstantial and no physical evidence linked Seka to either homicide. Now, DNA evidence from the Hamilton crime scene and dump site not only excludes Seka, but also includes an unknown individual. If the actual physical evidence exonerating Seka and implicating someone else is presented to a jury, the result of Seka's original trial will not stand. Thus, the district court did not abuse its discretion in granting Seka a new trial.

"The court may grant a new trial to a defendant . . . on the ground of newly discovered evidence." NRS 176.515(1). The evidence must be:

(1) newly discovered, (2) material to the defense; (3) such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; (4) non-cumulative; (5) such as to render a different result probable upon retrial; (6) not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable (7) and the best evidence the case admits.

Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991) (quoting *McLemore v. State*, 94 Nev. 237, 577 P.2d 871 (1978)).

As demonstrated below, the new DNA evidence meets the elements required for a new trial. Importantly, the State does not argue that, even with the exercise of reasonable diligence, the new DNA evidence could have been discovered and produced at trial. The State does not claim that the new DNA evidence is an attempt to impeach or discredit a witness. The State also concedes the new DNA evidence is the best evidence the case admits. However, the State challenges, albeit without legal authority, the other required elements for the granting of a new trial. The State's arguments are erroneous, at the very least, do not demonstrate the district court abused its discretion. First, the DNA testing results are newly discovered evidence; second, the new DNA evidence is not merely cumulative; and third, the new DNA evidence is both material to the defense and such as to render a different result probable upon retrial.

1. The Results of the DNA Testing are Newly Discovered Evidence.

The type of DNA testing used on the evidence in 2018-19 was not available when the evidence was collected in 1998 or when it was presented at trial in 2001. This advanced scientific testing makes the results of the 2018-19 DNA testing newly discovered evidence despite the State's contentions otherwise.

When the evidence in this case was collected, the only available DNA testing at the LVMPD Crime Lab was Polymerase Chain Reaction ("PCR") testing called Restriction Fragment Length Polymorphism ("PCR-RFLP"). 3 AA 000631-32. At

the time of trial, newer PCR testing was used in the field, but it was not conducted on any of the evidence in this case. 3 AA 000631-32. Welch testified at trial that the PCR-RFLP testing was only a test to eliminate, not a test to identify. *Id.*; 3 AA 000661-62. In other words, Welch testified that if he could produce a profile at all, he could exclude the victims or Seka as contributors, but he could not include any other individual. Using this PCR-RFLP testing, Welch testified that no DNA results were obtained from the cigarette butts found near Hamilton's body. 3 AA 000664. Welch further testified that using PCR-RFLP he was unable to determine if the blood found on Hamilton's left-hand fingernails belonged to a male or female but that he could exclude Seka as the contributor. 3 AA 000655-56. None of the other pieces of evidence collected in 1998 were DNA tested at the time of trial. Considering the PCR-RFLP testing method used at the time, DNA profiles likely would not have been obtained from the beer bottle, cap or Skoal container using this outdated PCR-RFLP testing method, and if they had, they simply would have been able to exclude Seka, not include the actual perpetrator.

However, in 2018-2019, DNA testing was conducted on the remaining key pieces of evidence. 8 AA 001816-21. Short Tandem Repeats (“STR”) DNA testing using a twenty-one Combined DNA Index System (“CODIS”) loci was used and the results were deeply probative – not only did the results fully exclude Seka but also identified at least one unknown profile on each piece of evidence. *Id.*

First, an unknown contributor was identified on the fingernails from Hamilton's left and right hands during the STR DNA testing. 10 AA 002443-44. Although at trial Seka was excluded as a contributor of the *blood* identified under Hamilton's left-hand nails, the PCR DNA testing was unable to identify epithelial cells belonging to the perpetrator. 10 AA 002437-41. The right-hand fingernails were not DNA tested before trial. The 2018 STR DNA testing fully excluded Seka as a contributor of the blood and epithelial DNA from Hamilton's fingernails and identified a second DNA profile in addition to Hamilton's. 10 AA 002443-44.

Second, one of the cigarette butts produced a full DNA profile which belonged to neither Seka nor Hamilton. *Id.* Third, both the Skoal container and the beer bottle found near Hamilton's body produced full DNA profiles, neither of which belonged to Seka or Hamilton. 10 AA 002482-83.

Finally, Hamilton's cap, which he always wore and was removed from his head and left at the crime scene, produced two profiles in addition to Hamilton's, but no further inferences could be drawn because of the inconclusive mixture. *Id.*

The new DNA testing results were reported eighteen years after Seka's conviction using a testing method that was not available at the time of Seka's trial. Seka was excluded as a contributor to *all* the physical evidence, but perhaps more importantly, the physical evidence included an unknown contributor which can now be compared to alternative suspects. This DNA evidence can only be described as

newly discovered, and the district court properly determined that a jury should be allowed to consider at Seka's new trial.

2. The District Court Properly Determined the New DNA Evidence Is Not Cumulative.

To support a new trial motion, new evidence must not be merely cumulative of evidence that was known at the time of trial. *Sanborn*, 812 P.2d at 1284. The State mistakenly contends that the mere mention of the physical evidence at Seka's original trial is sufficient to make the new DNA evidence cumulative. While cumulative is not expressly defined in Nevada law, this Court has held that evidence is cumulative if it was "significantly referred to during trial." *Porter v. State*, 92 Nev. 142, 150, 576 P.2d 275, 280 (1978). Additionally, this Court has characterized evidence as cumulative if it is "in addition to or corroborative of what has been given at the trial." *Gray v. Harrison*, 1 Nev. 502, 509 (1865).

For example, in *O'Briant v. State*, 72 Nev. 100, 295 P.2d 396 (1956), defendant was charged with arson for setting fire to his own business. At trial, defendant claimed the fire was accidental when flammable materials kept in the business spontaneously combusted. *Id.* at 397. On a new trial motion, defendant's presented expert testimony that polishing cloths, similar to those stored at the business, were "subject to spontaneous combustion." *Id.* at 398. In determining the expert testimony was cumulative, this Court held that defendant's theory was presented to the jury and was rejected because it did not explain two other

independent fires or defendant's presence in the building moments before the fires began. *O'Briant v. State*, 295 P.2d at 398-399. In other words, this Court held that the jury was "well aware" of defendant's theory of how a fire started and evidence simply adding to defendant's specific theory, and not refuting other determinative evidence, was cumulative. *Id.* at 398. *See also Lapena v. State*, 429 P.3d 292, 2018 WL 5095822 (Nev. 2018) (finding DNA evidence confirming medical examiner's trial testimony was cumulative).

Alternatively, in *Hennie v. State*, 11 Nev. 1285, 1286, 968 P.2d 761, 761-762 (1998), defendant claimed his two roommates framed him for burglary. Both roommates testified against him and he was convicted. *Id.* at 763. At sentencing, defendant learned that both witnesses had been involved in a prior murder conspiracy and one had testified untruthfully about his indebtedness. *Id.* As a result, defendant moved for a new trial. *Id.* This Court held the evidence was not cumulative because "the newly discovered evidence, which the jury never heard, severely undermine[d] the credibility of the State's two key witnesses upon whose testimony [defendant] was largely convicted." *Id.* at 764. Thus, this Court held defendant deserved a new trial. *Id.* at 765.

Here, the new DNA evidence is not cumulative as the State's case was not based upon physical evidence connecting Seka to the crimes, but rather on circumstantial evidence. No similar evidence was or could have been offered at trial.

Most of the evidence that was DNA tested in 2018-2019 could not be tested at the time of trial and therefore could not exculpate Seka at that time. Further, the evidence that was tested at the time of trial provided no probative results. Specifically, the State's criminologist testified that no DNA results were obtained from the cigarette butts found near Hamilton's body. Although he excluded Seka from the blood under the fingernails on Hamilton's left-hand, he could not positively identify the contributor or produce a DNA profile for any epithelial cells. 3 AA 000655-56; 10 AA 002437-41. His testimony added nothing to the State's circumstantial theory that Seka was the perpetrator or to Seka's defense that he was wholly innocent. Thus, unlike in *O'Briant*, the new DNA evidence is not cumulative. The 2018 testing identified a DNA profile from one of the cigarette butts found near Hamilton's body – both Hamilton and Seka were excluded. 10 AA 002443-44. Further, the recent DNA testing identified two profiles under Hamilton's fingernails. *Id.* Hamilton is presumed to be one of the contributors, but Seka is fully excluded from the fingernails on both of Hamilton's hands. *Id.* He is also excluded as a contributor on the beer bottle and the Skoal container found at the dumpsite. AA 002482-83. This new DNA evidence is of a totally different caliber than the evidence produced at trial, it was not available at the time of trial, and it is not corroborative of any other evidence presented in this fully circumstantial case. Simply put, the district court did not abuse its discretion in finding the new DNA evidence is not cumulative.

3. The New DNA Evidence is Material to the Defense and Such as to Render a Different Result Probable upon Retrial.

Materiality of evidence is synonymous with the probability of a different result upon retrial, so these two elements supporting Seka's new trial motion will be discussed together. *Sanborn*, 812 P.2d at 1284-85. Viewed strictly, material evidence is evidence that "goes to the essence of [the defendant's] guilt or innocence." *State v. Crockett*, 84 Nev. 516, 444 P.2d 896, 897 (1968). In short, evidence is "material" if the evidence leads to the conclusion that "there is a reasonable probability that . . . the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Steese v. State*, 114 Nev. 479, 960 P.2d 321 (1998); *Crockett*, 444 P.2d at 897. In determining whether the evidence "renders a different result reasonably probable," the court should consider whether the new evidence undermines the dispositive evidence, which "incorporate[s] assessing whether the new evidence materially strengthen[s] the defense theory." *Lapena v. State*, 429 P.3d 292, 2018 WL 5095822 (Nev. 2018). Importantly, "credibility is not the test of the motion for new trial, instead the trial judge must review the circumstances in their entire light, then decide whether the new evidence will probably change the result of the trial." *Crockett*, 444 P.2d at 897-898.

For example, in *Crockett*, the court granted a new trial when a previously unavailable witness revealed that he, and not the defendant, was the individual seen

leaving the crime scene. *Crockett*, 444 P.2d at 896. In affirming, this Court reasoned “the guilt or innocence of [the defendant] might well turn on that evidence.” *Id.* at 897. Furthermore, this Court explained “identifying the real killer as someone other than the defendant is not only material to [the] defense but establishes a real possibility of a different result on retrial.” *Id.* at 896.²⁴

Similarly, other state courts have granted new trials based upon new DNA evidence. For example, in *Aguirre-Jarquin v. State*, defendant was charged with murder after his DNA was found on the murder weapon and the victims’ blood was found on his clothing. 202 So. 3d 785, 791-792 (Fla. 2016). Defendant admitted he touched the murder weapon but explained that he entered the victims’ home innocently and discovered they had been killed and tried to revive them. *Id.* at 788. Nonetheless, he was convicted of both murders. *Id.* Post-conviction DNA testing showed eight bloodstains found at critical locations around the house belonged to someone else. *Id.* at 791. The court held the new DNA evidence, along with an alleged confession from the actual perpetrator, conflicted with the evidence presented at trial and gave “rise to a reasonable doubt as to his culpability.” The court remanded the case for a new trial. *Id.* at 795.

²⁴ Nevada appellate courts have only been faced with a Motion for New Trial in one DNA testing case. *See Lapena*, 429 P.3d 292. As noted above, the *Lapena* court denied a Motion for a New Trial because the DNA was cumulative and therefore did not “suggest that a different result was reasonably probable.” *Id.* at *2.

Similarly, in *State v. Parmar*, two eyewitnesses identified defendant as the sole perpetrator of a robbery and murder. 808 N.W.2d 623, 626-27 (Neb. 2012). Post-conviction DNA testing excluded defendant as the contributor of physical evidence at the scene and, although no actual perpetrator was identified, the court granted a new trial emphasizing that DNA evidence, even in light of contradictory eyewitness testimony, was highly probative. *Id.* at 631-632 (citing *State v. White*, 740 N.W.2d 801 (Neb. 2007)). The court specifically held where “DNA [evidence] create[s] a reasonable doubt about [defendant’s] guilt and [is] probative of a factual situation different from the ... State’s [witnesses]” a new trial is warranted. *Id.* at 634. The court stressed that even if the DNA evidence “cannot prove the witnesses’ testimonies were false” it is sufficient if it “makes their version of the facts less probable” because defendant need not “show that the DNA testing results undoubtedly would have produced an acquittal at trial” but only that a reasonable probability exists. *Id.*; see also *Arrington v. State*, 983 A.2d 1071 (Md. 2009); *State v. Peterson*, 836 A.2d 821 (N.J. Sup. 2003); *People v. Waters*, 764 N.E.2d 1194 (Ill. App. Ct. 2002) (all holding that new DNA evidence warranted the grant of defendant’s new trial motion).

Here, as in *Crockett* and *Parmar*, the new DNA evidence is material because Seka’s guilt or innocence turns on it. Although the DNA has not been matched to the real perpetrator, it conclusively excludes Seka from the crime scene and from the

dump site of one of the victims. Importantly, it also identifies the contributor of the DNA, telling the story of a different perpetrator than Seka. In what otherwise is a fundamentally circumstantial case, this evidence, as outlined below, can show Seka's guilt or innocence and "establishes the real possibility of a different result on retrial."

First, Seka is excluded from the DNA under Hamilton's fingernails²⁵ and another individual's profile was identified. 10 AA 002443-44. This evidence alone calls into question the prosecution's theory that Seka is responsible for Hamilton's death. The actual perpetrator removed Hamilton's jacket from his body and left it at the crime scene before dragging Hamilton's body from the business to the parking lot. *Id.* Hamilton was likely dragged by his wrists and hands because his gold bracelet was broken and left at the crime scene. *Id.* The perpetrator's DNA could have been transferred to Hamilton's hands and fingernails at any time during this process or when the perpetrator disposed of Hamilton's body.²⁶ The police saw this

²⁵ DNA testing of fingernails has led to a number of exonerations. Sample cases include Daniel Anderson (Illinois), Michael Blair (Texas), Malcolm Bryant (Maryland), Chad Heins (Florida), Jose Caro (Puerto Rico), Nevest Coleman (Illinois), Larry Davis (Washington), Robert Dewey (Colorado), Tyrone Hicks (New York), Harold Hill (Illinois), Paul House (Tennessee), Paul Jenkins (Montana), Anthony Johnson (Louisiana), Evin King (Ohio) and Curtis McCarty (Oklahoma). All cases are detailed in the National Registry of Exonerations at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited October 14, 2020).

²⁶ Locard's exchange principle states that whenever perpetrators enter or leave a crime scene, they will leave something behind and take something with them.

evidentiary potential and tested the blood found under Hamilton's fingernails before Seka's trial. 3 AA 000655-56. However, the PCR-RFLP DNA testing that was used at the time was limited and was only able to be used for exclusionary purposes and could not identify epithelial cells. 3 AA 000631-32. While Seka was excluded as a possible contributor of the blood under Hamilton's left-hand fingernails, both the left and right hand fingernails have now produced two DNA profiles, one that does not belong to Seka or Hamilton. This physical evidence now goes beyond merely an exclusion from the victim source blood identified – it allows the State to determine who the actual perpetrator is. It also gives a jury the opportunity to understand not only that Seka is excluded from those fingernails but that someone else, in addition to Hamilton, is included. If this evidence had been available at the time of Seka's trial, investigators could have made reasonable efforts to identify the actual perpetrator. This DNA evidence would, at the very least, create reasonable doubt and thus lead to a probable different result at retrial.

Second, Seka is excluded from the evidence that was DNA tested in 2018-19 collected where Hamilton's body was discarded. Police collected two cigarette butts,

Examples include DNA, latent prints, and hair. *Anal. Chem.* 2019, 91, 1, 637–654 (2018) <https://doi.org/10.1021/acs.analchem.8b04704> (last visited October 22, 2020); Science Direct, Exchange Principle, <https://www.sciencedirect.com/topics/computer-science/exchange-principle> (last visited October 22, 2020).

two beer bottles, and a Skoal container. 5 AA 001049-50; 4 AA 000817-18; 3 AA 000626. Although there was a freeway within sight, the actual location of his body was on the side of a road that was not well-travelled. 3 AA 00517-18. Although the State argues the collection of items where Hamilton's body was discarded was done out of an "abundance of caution," police not only deemed the items important enough to collect, they attempted to get latent prints from the Skoal container and beer bottles and attempted to DNA test the cigarette butts. 10 AA 002437-41; At the time, the DNA testing results of the cigarette butts were inconclusive. 3 AA 000664. A latent fingerprint was identified on one of the beer bottles, but was dissimilar to Seka's, Limanni's and Hamilton's fingerprints and was not tested for DNA. 10 AA 002446-47. No latent prints were identified on the Skoal container. 10 AA 002446-48. Now, Seka is excluded as a contributor to the DNA on all of those items. 10 AA 002443-44, 002482-83. The DNA evidence on the items found near Hamilton's body are as probative now as they would have been at the time of trial – and Seka should have the opportunity to tell a jury that he could not have been the person who deposited those items around Hamilton's body, items that police collected *and* tested at the time of the crime. Additionally, now that a full profile exists, investigators may be able to identify the person who left their DNA and fingerprints on this evidence.

In sum, the new DNA evidence is undeniably material to Seka's defense, and as such, a different result is probable upon retrial. The district court did not abuse its discretion in finding that Seka meets not only this element, but all other elements necessary for the award of a new trial.

B. The New DNA Testing Results Support Seka's Motion for a New Trial for *All* of the Charges for Which He was Convicted, Not Just for Hamilton's Murder.

While the new DNA results support Seka's new trial for Hamilton's murder, they also, by extension, support a new trial for Limanni's murder and the two robberies for which he was also convicted. The State has always claimed Seka killed Hamilton and Limanni in one incident. Now, the State seeks to change its theory and separate the two murders. However, because new DNA evidence supports a new trial on Hamilton's murder, it also supports a new trial on all other charges despite the State's contrary assertion.

Although Nevada courts have never decided this issue, the New York Supreme Court directly addressed it in *People v. Wise*, 194 Misc. 2d 481, 752 N.Y.S.2d 837 (2002). In *Wise*, five defendants confessed to and were convicted of raping one woman and robbing one man during a night of "wilding" in Central Park. *Id.* at 483. When the actual perpetrator of the rape confessed and the rape kit DNA matched him, defendants moved for a new trial on all charges. *Id.* at 488. In considering whether the new DNA evidence warranted a new trial on all charges,

the court reasoned “[t]he crimes the defendants were charged with were . . . all . . . part of a single incident” *People v. Wise*, 194 Misc. 2d at 495. The court emphasized that the People had relied upon the “single incident” theory both in their case investigation and prosecution. *Id.* Indeed, in its closing argument, the People encouraged the jurors to consider the “overall pattern of behavior” and the defendants’ “joint purpose.” *Id.* The court found “there was no significant evidence at trial establishing the defendants’ involvement in the other crimes of which they stand convicted that would not have been substantially and fatally weakened by the newly discovered evidence in this matter.” *Id.* at 496. The court further held “[a]ssessing the newly discovered evidence is required solely in light of the proof introduced at the earlier trials, we conclude that there is a probability that the new evidence, had it been available to the juries, would have resulted in verdicts more favorable to the defendants, not only on the charges arising from the attack on the female . . . , but on the other charges as well.” *Id.* at 496. Ultimately, the *Wise* court found the newly discovered evidence was “so intertwined with all the crimes charged against the defendants . . . that the newly discovered evidence would create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendants as to *all* the convictions.” *Id.* (emphasis added).

Accordingly, defendants' motion for a new trial, based was granted for all the convictions. *People v. Wise*, 194 Misc. 2d at 498.²⁷

Here too, the crimes for which Seka was convicted are "intertwined." The State connected them from the time it first sought to arrest Seka through post-conviction appeals. For example, the arrest warrant states,

It appears that Seka ...was involved in a *series of crimes* in order to obtain money which included the theft of the purse . . . , the pawning of construction equipment believed to belong to Peter Limanni, and the murder and apparent robbery of Eric Hamilton in which Hamilton was shot to death with a .38/357 handgun and transported to Las Vegas Boulevard near Lake Mead in the 1998 brown Toyota pickup truck..."

9 AA 02146 (emphasis added). Further, when Seka's trial counsel sought to sever the two cases, the State objected arguing the Hamilton's murder and robbery and the

²⁷ The *Wise* decision is not unique. For example, Ronald Cotton was convicted of two rapes. When DNA testing cleared Cotton of one of the rapes, the State dismissed all charges against Cotton because the two rapes were similar and occurred on the same night. *See* <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3124> (last visited October 14, 2020). Similarly, Steven Phillips was implicated in a eleven incidents where at least 60 women were sexually assaulted. Phillips was convicted in one case and pled guilty in five others. However, when DNA testing exonerated him in one case, charges were dismissed in all of his convictions. *See* <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3533> (last visited October 14, 2020). Finally, Richard Alexander was arrested for four sexual assaults and was convicted of two of them. Later DNA testing excluded him in one of the sexual assaults. However, because of the similarity between the two assaults, the prosecutor vacated both his convictions. *See* <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2990> (last visited October 14, 2020).

Limanni's murder and robbery were "inextricably intertwined." The court agreed with the State and refused to sever the two cases.

In closing arguments at trial, the State explicitly discussed the "series of events" that led to the deaths of Hamilton and Limanni. 6 AA 001354. The State continually connected the crimes, postulating that Hamilton was an innocent bystander when Limanni was killed, and perhaps Hamilton helped dispose of Limanni's body and then became a "loose end" that needed to be "cleaned up." 6 AA 001358.

On direct appeal, the State continued to emphasize the connection between the two murders. This Court adopted the State's theory of a "common scheme or plan" stating:

In the present case, we conclude that the district court did not err in finding that there was sufficient evidence to support a conclusion that the murders of Limanni and Hamilton were conducted and concealed by Seka in roughly the same manner as part of a *common scheme or plan* for financial gain. Both individuals disappeared in November of 1998. Both bodies were transported in Cinergi vehicles and were discovered partially concealed by dirt or wood in shallow graves. An intensive amount of forensic evidence was introduced at trial, including bullets, fingerprint evidence, and DNA evidence indicating that both men were murdered at the businesses owned by Limanni at 1929 and 1933 Western Avenue. Also, both victims died as a result of gunshot wounds. Lastly, witnesses testified that both victims had large amounts of cash in their possession shortly before they were missing, and no such cash was found on their bodies or amongst their personal possessions.

6 AA 001468.

The State connected the two murders and robberies before, during and after trial. In so doing, the State must now accept that the new DNA evidence calls their entire theory of the case into question. Much like the court in *Wise*, the district court properly found Seka is entitled to a new trial on all charges because the new DNA evidence not only proves he did not kill Hamilton, but it also casts reasonable doubt on the entire “series of crimes” for which the State contends Seka is responsible.

C. THE NEWLY DISCOVERED DNA EVIDENCE IS FAVORABLE AND THUS, THE DISTRICT COURT’S ORDER GRANTING HIM A NEW TRIAL SHOULD BE AFFIRMED.

The new DNA evidence exculpates Seka and inculpates someone else in the murders of Limanni and Hamilton -- therefore it is favorable. The State’s arguments to the contrary are meritless. Further, the State mischaracterizes the facts surrounding the collection and original testing of the evidence and changes its pre-trial and trial positions on the importance of the evidence.

Under NRS 176.09187, a defendant may move for a new trial where the DNA testing results are “favorable.” “Favorable” is not defined in the statute but appears to be synonymous with the material standard discussed above. *See supra* section A.3. Further, in criminal cases, the absence of physical evidence can be favorable to a defendant, just as the presence of inculpatory physical evidence can assist

prosecutors seeking conviction.²⁸ Here, the new DNA evidence is favorable to Seka's defense, and Seka should be given the opportunity to present it to a jury.

i. Hamilton's Fingernails

At the time of trial, Seka was not fully excluded as a contributor to the DNA samples under Hamilton's fingernails. The State's assertion otherwise is inaccurate. To clarify, at the time of trial, Welch performed PCR-RFLP testing on Hamilton's left-hand fingernails. Welch subsequently excluded Seka as a contributor of the *blood* identified under Hamilton's left-hand fingernails. 3 AA 000655-56; 10 AA 002437-41. In 2018, through more advanced STR DNA testing, Seka was excluded as a contributor of the blood *and* epithelial DNA from both Hamilton's left and right-hand fingernails. 10 AA 002443-44. However, not only was Seka excluded, but assuming Hamilton was a contributor, a second foreign contributor was identified. *Id.* Seka's exclusion from the biological material under both sets of Hamilton's fingernails was not presented to Seka's jury in 2001. Even more compelling, Seka's 2001 jury did not learn that a foreign contributor was detected. Had the jury understood not only Seka's exclusion, but also the identification of another foreign contributor, their decision on Seka's guilt may have been different.

²⁸ In 151 of the 367 DNA exonerations to date, the DNA evidence excluded defendant but did not identify the actual perpetrator. <https://www.innocenceproject.org/exonerate/> (last visited October 18, 2020). In those exonerations, the absence of defendant's DNA was sufficient for the court to order a new trial, vacate the conviction or fully exonerate the defendant. *Id.*

ii. Hair Under Hamilton's Fingernails

The State is confused when it asserts that “[h]airs found under [Mr.] Hamilton’s nails were also tested” at the time of trial. Welch did test the blood on the hairs but not the hairs themselves. 10 AA 002437-41. And although Seka was excluded from the blood on the hairs, Welch was unable to come to any conclusion on the hairs themselves. *Id.* The possibility that this untested hair belonged to Seka loomed over Seka’s case. In 2018, STR DNA testing conclusively showed this hair did not belong to Seka. 10 AA 002443-44. The exclusion of Seka on both the hair and the blood on the hair was not presented to Seka’s jury in 2001 and may have led the jury to a different conclusion in the wholly circumstantial case against him.

iii. Cigarette Butts, Skoal Container, and Beer Bottle Found Near Hamilton’s Body

Hamilton’s body was found in a remote area, 2.1 miles south of State Route 146. 3 AA 000517-18. The value of the evidence found around his body cannot be underestimated. Indeed, the police and prosecution recognized its importance during the investigation and trial. Not only did police collect these items, but crime lab technicians processed them, and the prosecution presented the findings, or lack thereof, at trial. For the State to now claim that the evidence is irrelevant “trash” and that Seka’s position that these items are related to the crime is “laughable” is wholly contrary to their position at trial.

In 2001, Welch attempted but was unable to obtain any DNA results from the cigarette butt. 3 AA 000664. The 2018 STR DNA testing produced a full DNA profile excluding Hamilton and Seka. 10 AA 002443-44. In 2001, the Skoal container was examined for fingerprints but none were identified. 10 AA 002446-48. The 2019 STR DNA testing identified two DNA profiles excluding both Hamilton and Seka. 10 AA 002482-83. In 1999, the beer bottle was examined for latent prints and Seka's, Limanni's, and Hamilton's fingerprints were excluded. 10 AA 002446-47. The 2019 STR DNA testing excluded Hamilton and Seka as possible contributors. 10 AA 002482-83.

Police did not “merely” collect these items of evidence – police believed them to be relevant and had the items analyzed to the extent of their scientific abilities at the time. The recent STR DNA testing conclusively excludes Seka as a contributor. Therefore, this Court should find that the district court did not abuse its discretion when it granted Seka's new trial motion so a jury can properly consider the evidence.

iv. Hamilton's Baseball Cap

DNA testing was not conducted on Hamilton's cap in 2001. The 2019 STR DNA testing identified three profiles on the cap: one belonging to Hamilton, and two unknown profiles. 10 AA 002482-83. Hamilton's cap was left at the murder scene and a jury should be allowed to consider whether the two unknown profiles could belong to the actual perpetrators.

Whether considered individually or in combination, each piece of physical evidence is favorable to Seka and meets the standard under NRS 176.09187 and thus the district court did not abuse its discretion in granting Seka's new trial motion.

v. The Physical Evidence Recently Submitted to STR DNA Testing Was Relevant in 1999 and Is Relevant Now.

Despite the State's contrary arguments, Seka has no obligation to show definitively how the new DNA evidence found under Hamilton's fingernails, on the beer bottle, Skoal container, and cigarette butt found next to Hamilton's body, and on Hamilton's cap ("the physical evidence") got there. Rather, Seka need only show the physical evidence is material to the determination of his guilt or innocence in Hamilton and Limanni's murders. Seka has repeatedly shown the relevance of the exculpatory DNA results and now it is a jury's job to consider the physical evidence and its impact on what was a wholly circumstantial case.

Further, in claiming that the physical evidence that has now been tested and shows Seka had no connection to Limanni's and Hamilton's murders is not relevant, the State is conveniently changing their theory regarding the physical evidence. In *House v. Bell*, the United States Supreme Court rejected an argument similar to the State's argument here. 547 U.S. 518 (2006). In *House*, the State alleged semen evidence found on the murder victim was consistent with defendant. *Id.* at 518. Post-conviction DNA testing established the evidence belonged to the victim's husband's

-- the State then claimed the evidence was immaterial as it did not definitively show defendant did not commit the murder. *House v. Bell*, 547 U.S. 518 (2006). The Supreme Court disagreed and found the new evidence “of central importance.” *Id.* at 540. The Court stated that “[p]articularly in a case like this where the [state’s evidence] was... circumstantial... a jury would have given this evidence great weight.” *Id.* at 540-41.

In 1999, police collected the physical evidence, processed it for fingerprints, and tested it with the best DNA testing available at the time. The police and prosecution saw the evidentiary value of the physical evidence and when the best scientific technology available at the time produced no usable results, they went forward with their wholly circumstantial case against Seka. Now, that the same evidence the State once considered material exonerates Seka, the State calls the evidence “trash.” The State’s position is disingenuous and contrary to the decision in *House*. Accordingly, this Court should reject it and affirm the district court’s decision to grant Seka the new trial he deserves.

**D. THIS IS NOT A “SUFFICIENCY OF THE EVIDENCE”
APPEAL AND THE STATE’S ARGUMENT TO THE
CONTRARY IS MISGUIDED.**

The State argues that because a jury convicted Seka *without* the new DNA evidence, the district court abused its discretion in ordering a new trial. First, the State’s argument completely discounts the purpose of NRS 176.0918, which allows

a defendant to request post-conviction DNA testing and to request a new trial if the DNA evidence is favorable. In cases like Seka's, where DNA evidence both exculpates the defendant and inculcates the real perpetrator was not available at the time of trial, NRS 176.0918 anticipates that the court will consider the new DNA evidence and will consider the trial evidence in light of the new DNA evidence. It does not direct the court to conduct a sufficiency of the evidence analysis without considering the new DNA evidence and if it did, as the State argues, NRS 176.0918 would be meaningless. Second, the State's sufficiency of the evidence argument asks this Court to supplant the jury function -- to weigh all the evidence, to judge the credibility of witnesses in light of the new evidence, and to essentially determine Seka's guilt or innocence. If the State is convinced of Seka's guilt despite the exonerating DNA evidence, the place to argue the new DNA evidence is insufficient to overcome the State's circumstantial case is at trial, not on this appeal.

However, the court is not required to look at the new DNA evidence in a vacuum. Rather, the court should review "the circumstances in their entire light" before deciding whether "the new evidence will probably change the result of the trial." *Crockett*, 444 P.2d at 897-898. In doing so, the court should determine whether the new DNA evidence makes the State's "version of facts less probable." *Parmar*, 808 N.W.2d at 634. As outlined below, Seka asserts it does, and the district court, in a proper exercise of discretion, agreed.

First, police believed Hamilton was murdered in 1929, a space Seka could not access. 3 AA 000523, 000546-47, 000550. The business in 1929 was abandoned shortly before the murders and Cerda, the property manager, had the only key. 10 AA 002263. Police did not find Limanni's blood or Seka's blood in 1929 – or any other physical evidence that ties Seka to the scene.

Further, 1933 showed no signs of a crime. 4 AA 00913, 000981. The police did not find any victim-source blood, any signs of a struggle or break-in, or any bullet riddled clothing. *Id.* Indeed, despite Limanni being shot ten times, no blood or other evidence of such brutality was found in 1929 or 1933. Instead the police discovered a single bullet fragment buried in the wall of 1933. *Id.* The bullet fragment had no blood on it. *Id.* 3 AA 000615-27. The State's expert, Torrey Johnson, characterized the bullet as "class consistent" to those found in Limanni's body, but testified that more than ten different types of ammunition and numerous different types of firearms could have been associated with that bullet fragment. 5 AA 001009. Moreover, the other bullet cartridges found in 1933 included calibers other than those used in the murders, and Harrison testified that she saw at least one bullet in the business well before the murders occurred. 9 AA 002307. Finally, although the police discovered some of Seka's blood in 1933, it was his home and workplace. The State's assertion that Seka's blood found on the right pocket of a pair of his own jeans, on the wall and on a sink counter of his home somehow

implicates Seka in two brutal murders is untenable, particularly when all other physical evidence excludes him and includes someone else. 3 AA 000617-18, 000625-26; 10 AA 002270. In short, while the State suggested that this bullet fragment in the wall is proof that 1933 was the scene of Limanni's death, nothing supports this idea. *See* 4 AA 000913.

The police also found a beer bottle in 1933 with Hamilton's fingerprints. 4 AA 000938; 5 AA 001028-29. However, numerous beer bottles were found and collected from trash cans in 1933 and in the dumpster behind 1929 and 1933. *Id.* It was impossible to determine when Hamilton left that beer bottle in 1933, but his presence at that location was no surprise. Hamilton occasionally worked for Limanni and Seka. 3 AA 000708, 000710-11. Hamilton's employment at the business also explains why Seka's phone number was found in Hamilton's pocket. *Id.*

Moreover, physical evidence found at the dump site implicates another perpetrator – the unknown fingerprints on the lumber that covered Hamilton's body. 5 AA 001051-52. Although three boards contained Seka and Limanni's fingerprints, another two boards found at the dump site contained latent prints that did not match Seka or Limanni. *Id.* These unidentified latent prints were never compared to the latent prints identified on the beer bottle found near Hamilton's body, the three sets of fingerprints identified near the point of entry to the 1929 crime scene or the unknown fingerprints identified on Gorzoch's purse. *Id.* Nor were any of these

unknown fingerprints compared to the alternative suspects with motive to kill Limanni. Now, additional physical evidence points to a different perpetrator – evidence that cannot be ignored in the way that the unknown fingerprints on the lumber, at the 1929 crime scene and on Gorzoch’s purse was at the time of trial.²⁹

Importantly, many individuals besides Limanni, Harrison, Hamilton and Seka had access to 1933. 8 AA 001968-69; 9 AA 002082; 4 AA 000889-90.³⁰ Specifically, Kato, Toe and Mohammed had access. *Id.* These investors financed Limanni’s business and lost hundreds of thousands of dollars after Limanni mismanaged their funds. AA 001966-67. These individuals financing Limanni’s business, Kato and Toe leased the business vehicles for Limanni, and Kato was the guarantor on the business note. 9 AA 002009-24, 002026-43. These investors were angry and at least one witness, a witness that can be considered new, claims that Mohammed was capable of homicidal violence and that her investigation indicates Mohammed was the actual perpetrator. 9 AA 002157.³¹

²⁹ The report proving that Seka did not touch Ms. Gorzoch’s purse was not provided to Seka at the time of trial and, indeed, was not produced until 2018. 10 AA 002282.

³⁰ Numerous other people patronized the business as Limanni hosted frequent parties at that location. 9 AA 002082; 4 AA 000889-90.

³¹ Police did not collect DNA from the alternative suspects – Harrison, Kato, Toe or Mohammed so no comparisons could be made. Should Seka be retried, hopefully the prosecution or police will attempt to identify the unknown profiles on the evidence.

Anyone who had access to 1933 also had access to the five vehicles associated with the business. 2 AA 000488. While Limanni and Seka drove the work vehicles interchangeably, Harrison also drove the Toyota truck. *Id.* The vehicle keys were easily accessed from the business. 4 AA 000956. During the investigation, the police were even able to retrieve the vehicle keys. 5 AA 001080. On October 26, 1998, before Limanni disappeared, Kato repossessed one of the vans. 2 AA 000362; 9 AA 002146. He did not have his own keys; he simply obtained the keys from inside the business. *Id.* Although the State inferred that the blood in one of the vans and the Toyota truck showed that Hamilton and/or Limanni were transported in those vehicles, that blood does not allow the State to infer that Seka transported the bodies, particularly when so many others had access to those vehicles.

Regarding motive, it is no more certain than the use of the vehicles. The State contended that Seka's motive for killing the two men was robbery. However, everything Hamilton had of value – his bracelet, ring, jacket and cap -- remained in 1929 or with his body, except his money which was gone before he went to jail on November 5, negating any claim of robbery. 3 AA 000521; 5 AA 001088-91; 9 AA 002242, 002248; 4 AA 000821; 2 AA 000345. Further, Seka never possessed any of Limanni's valuables or money, except for those items he pawned from the business after Limanni disappeared. 6 AA 001312. In fact, Seka was forced to return to his home in Pennsylvania because he had no money and no place to stay once the

business closed which suggests he had no motive to kill Limanni. 5 AA 001194-95; 10 AA 002329-30; 8 AA 001984. Importantly, before leaving Las Vegas, Seka gave police his contact addresses and phone numbers in Pennsylvania. 8 AA 001984; 5 AA 001128, 001178.

The State further contended Seka's motive for killing Limanni was that Limanni treated him poorly. However, in a post-conviction declaration, Justin Nguyen avers that the relationship between Limanni and Seka was good. 9 AA 002006. Nguyen was an employee at Cinergi, working closely with Limanni and Seka for several months. *Id.* Nguyen states that Limanni treated Seka "like his own brother" and he never observed Limanni call Seka names or mistreat him. *Id.* Kato and Toe agreed with Nguyen's assessment. 8 AA 001963-66; 9 AA 002009-24, 002026-43.

Finally, the only direct evidence the State used to support their theory of Seka's involvement in Limanni's murder was Cramer's testimony, a mentally unstable man who was angry at Seka for committing him to a mental institution after they had a violent altercation. Cramer created a story that Seka confessed during that altercation only after he was released from the mental institution and law enforcement approached him. 4 AA 000776-77. Most notably, Cramer's girlfriend stated in a sworn declaration that Cramer was lying. 10 AA 002425-27. She states

that she was present during the altercation between Seka and Cramer and that no such confession occurred. 10 AA 002425-27.

In short, with absolutely nothing tying Seka to Limanni's murder and all other evidence showing he could not have been involved in Hamilton's murder, the State's circumstantial case is destroyed, and the district court did not abuse its discretion in ordering a new trial.

CONCLUSION

As discussed above, the district court properly exercised its discretion in awarding Seka a new trial when the results of new DNA testing not only excluded him from all the probative physical evidence in the case, but also implicated an unknown individual. This Court should therefore affirm the district court's order granting Seka's Motion for New Trial.

DATED this 4th day of November, 2020.

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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 in 14 point Times New Roman type style.

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 proportionately spaced, has a typeface of 14 points or more, and contains **13, 901 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 4th day of November, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(a)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **RESPONDENT’S JOHN SEKA’S ANSWERING BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada’s E-filing system on the 4th day of November, 2020.

I further certify that all participants in this case are registered with the Supreme Court of Nevada’s E-filing system, and that service has been accomplished to the following individuals through the Court’s E-filing System or by first class United States mail, postage prepaid, at Las Vegas, Nevada as follows:

Via Electronic Filing System:

Alexander Chen
Steven Wolfson
Aaron Ford

/s/ S. Concepcion

An Employee of Clark Hill PLLC