IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. JOHN JOSEPH SEKA, Respondent.	)))))))))	CASE NO.: 80925 District Court No. 99C159915

RESPONDENT JOHN SEKA'S PETITION FOR REHEARING

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RESPONDENT'S PETITION FOR REHEARING

Respondent John Joseph Seka ("Mr. Seka"), by and through his attorneys, Paola Armeni of the law firm of Clark Hill in conjunction with Jennifer Springer, of the Rocky Mountain Innocence Center, petitions this Court for a rehearing of the published decision issued in the above-captioned case on July 8, 2021 (attached as Exhibit A). This Petition for Rehearing is based on the following Memorandum of Points and Authorities and all papers and pleadings on file in this case.

TIMELINESS OF THE PETITION

The Court filed its published decision on July 8, 2021. Accordingly, this Petition for Rehearing is timely filed in accordance with Nev. R. App. P. 40(a)(1).

THE COURT'S *PUBLISHED DECISION*

Nevada R. App. P. 40(c)(2) permits this Court to rehear and reconsider a panel decision under the following circumstances:

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

As set forth below, the Court's decision should be reheard because the panel applied the incorrect standard of review, the panel addressed issues that were not preserved below and therefore not properly before them, and the panel overlooked or misapprehended material facts and the application of the law to those facts that

wholly supported the district court's decision to grant Mr. Seka's Motion for a New Trial.

ARGUMENT

I. The Panel Inappropriately Conducted a De Novo Review of the District Court's Decision to Grant a New Trial and Therefore Should Reconsider Its Decision Using the Appropriate Abuse of Discretion Standard of Review.

As outlined in Mr. Seka's Answering Brief[1] and as both the State[2] and the panel acknowledged,[3] a lower court's decision on a new trial motion is reviewed for abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991); *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." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Although the panel disagreed with the district court's decision, reversal is only permitted if the district court "manifestly abused or arbitrarily or capriciously exercised its discretion." *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931–32, 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

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[1] *See* Respondent's Answering Brief, p. 24-26.
[2] *See* Appellant's Opening Brief, p. 27-28
[3] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 13.

established rules of law." *City of Henderson v. Amado*, 133 Nev. 257, 259, 396 P.3d 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.*

The abuse of discretion standard is a high bar, one that does not provide the basis for a reversal in this case. However, the panel did not conduct an abuse of discretion review. Rather, the panel conducted a de novo review asserting that this case involved only issues of statutory interpretation.[4] This was error.

Here, the parties agreed, as did the panel, that Mr. Seka's Motion for a New Trial is governed by this Court's long-standing precedent in *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279.[5] Indeed, under the plain language of the DNA Testing Statute, the only difference between a traditional new trial motion and a motion for a new trial based upon DNA is that the time bar "set forth in subsection 3 of NRS

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[4] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 13.

[5] To establish a basis for a new trial under NRS 198.515, 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).

176.515 is not applicable" in a new trial motion involving DNA. NRS 176.0918(10)(b). As such, the panel was not required to engage in statutory interpretation but was simply asked to determine whether the district court abused its discretion when it granted Mr. Seka's Motion for a New Trial.[6]

In this case, there is nothing in the record to indicate that the district court acted arbitrarily, capriciously or with prejudice or preference. Rather, the record reflects that the district court did not make the decision to grant Mr. Seka's Motion for a New Trial lightly. On June 19, 2017, Mr. Seka filed his petition requesting post-conviction DNA testing. The district court, having been fully briefed on the DNA testable evidence, held several hearings over more than two years, including an evidentiary hearing where two highly qualified DNA experts[7] testified on December 14, 2018. The district court ordered DNA testing of evidence two separate times. Nearly three years after the district court began presiding over this case, taking evidence, carefully evaluating that evidence using the proper *Sanborn* standard, it granted Mr. Seka's Motion for a New Trial on March 23, 2020. Accordingly, the

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[6] Even if the panel properly reviewed the meaning of the term "favorable" in the DNA Testing Statute under a de novo standard, once it determined that term should be interpreted in accordance with existing law, the district court's decision to grant a new trial based upon the newly discovered DNA evidence still should have been reviewed under an abuse of discretion standard. *See Zahavi v. State*, 131 Nev. 51, 55, 343 P.3d 595 (2015) (applying different standards of review to different issues in the same case).

[7] 7 AA 1666-1750; 8 AA 1751-1764.

panel's use of the wrong standard of review alone dictates that the panel should reconsider its decision to reverse and permit the district court's decision to stand.

II. The Panel Inappropriately Relied on an Issue the State Did Not Raise Below to Support the Reversal -- Specifically that the New DNA Evidence was Cumulative of That Presented at Trial.

As Mr. Seka provided in his answering brief,[8] well-established law provides that "[a] point not urged in the trial court . . . is deemed to be waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *State v. Lopez*, 457 P.3d 245, *1, 2020 WL 754335 (Nev. Feb. 13, 2020) (unpublished). In the district court, the only issues the State addressed in its opposition to Mr. Seka's new trial motion were whether the new DNA evidence was favorable and whether the petition was time-barred.[9] On appeal, the State dropped its timeliness argument, but included several issues it had not addressed below, including whether the results of the new DNA testing were cumulative.[10] The panel not only accepted the State's unpreserved arguments but also relied on those arguments to reverse the district court.

Specifically, the panel determined that all the evidence found at the scene where Hamilton's body was dumped was "cumulative of the evidence adduced at trial."[11]

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[8] *See* Respondent's Answering Brief, p. 26.
[9] 10 AA 002487- 11 AA 2504.
[10] *See* Appellant's Opening Brief, p. 29.
[11] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.

In addition, the panel found that the DNA testing on the hairs found underneath Hamilton's fingernails was cumulative of trial evidence[12] even though the hairs themselves were not tested at the time of trial – only the blood on those hairs was tested. Considering an unpreserved issue runs contrary to all this Court's jurisprudence. The panel's reliance on the unpreserved issue of whether the new DNA evidence was cumulative of evidence presented at trial is alone sufficient for a rehearing on the State's appeal.

III. The Panel Overlooked and Misapprehended Favorable Material Facts and Misapplied the Relevant Legal Standard.

In enacting the post-conviction DNA Testing Statute and allowing an innocent individual to move for a new trial under that statute, the Nevada Legislature recognized that the traditional appeals process is often insufficient for proving a wrongful conviction. Thus, like the forty-nine other states with post-conviction DNA testing statutes, the Nevada statute allows a court to assess how reasonable jurors would react to an overall, newly supplemented record.[13] *See* NRS 176.918; *see also* NRS 176.515; *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279 (1991). In short, when new DNA testing results are presented, along with other evidence, the Nevada Post-conviction Testing Statute poses the question of whether the jury would have found the existence of a reasonable doubt if it was presented with all the relevant

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[12] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.
[13] *See also Schlup v. Delo*, 513 U.S. 298 (1998)

evidence.[14] *See* NRS 176.918; *see also* NRS 176.515; *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279 (1991). The district court correctly held that a new trial was warranted under this standard; the panel incorrectly reversed by imposing impossible legal burdens on Mr. Seka and ignoring favorable material facts that could lead a jury to find reasonable doubt.

First, the panel approached Mr. Seka's case as a prosecutor would rather than with the objective eye of a juror. Specifically, the panel added additional elements to the *Sanborn* test including that the individual requesting a new trial based on post-conviction DNA testing essentially solve the crime, identify the actual perpetrator, or challenge all of the evidence that was presented at trial.[15] Inexplicably, the panel also held that to deserve a new trial, Mr. Seka was required to "contradict or refute the totality of the evidence supporting the verdict."[16] These heavy burdens do not comport with "long-honored caselaw" as the panel claims to rely on in its decision.[17] Rather, the panel's decision creates new, unattainable burdens on the potentially innocent defendant, and essentially negates the ability of anyone to receive a new trial using newly discovered DNA evidence. Further, these burdens go far beyond *Sanborn* which requires the petitioner to show a reasonable probability of a different

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[14] *See* Respondent's Answering Brief, p. 35-37.
[15] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.
[16] *See id.*
[17] *Id.* at 14.

outcome, and instead require the petitioner to prove beyond a reasonable doubt that he or she did not commit the crime.[18] This certainly cannot be what was intended in the Post-conviction DNA Testing Statute.

Second, although the panel acknowledges that the case against Mr. Seka at his trial in 2001 was purely circumstantial, it discounts the importance and relevance of the newly exonerating DNA evidence. It also wholly discounts any evidence pointing to Mr. Seka's innocence. In short, the panel focuses entirely on facts it deems inculpatory, including those that have been undermined through post-conviction investigation, and fails to objectively consider the exculpatory DNA and other evidence as summarized below:

Fingernail clippings: The panel argues that Hamilton's fingernail clippings are irrelevant because there was no evidence of a struggle and that the fingernail clippings provided minimal testable DNA.[19] The panel is wrong. At the time of trial, police requested testing of Hamilton's fingernail clippings, but only the blood under the left-hand clippings was tested.[20] Although the jury was told that Mr. Seka was excluded from the blood on the left-hand clippings, the jury received no further information. Now, a jury would learn that not only were both the blood and epithelial

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[18] These burdens also exceed the "reasonable possibility" standard in the Nevada Post-Conviction DNA Testing Statute. NRS 176.918(7)(a).
[19] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17 -18.
[20] *See* Respondent's Answering Brief, p. 19, 39, 3 AA 000620; 10 AA 002437.

cells under the fingernail clippings on both of Hamilton's hands tested, but that Mr. Seka was excluded from both, and a second foreign contributor was detected on both of Hamilton's hands.[21] The perpetrator removed Hamilton's jacket and drug his body from the business into the parking lot, likely by his wrists and hands because his gold bracelet was broken and left at the scene.[22] Further, the presence of epithelial DNA under Hamilton's fingernails could itself be evidence of a struggle and therefore, the journey into reasonable doubt begins.

Hair: The panel argues that the exclusion of Mr. Seka from the bloody hairs found under Hamilton's fingernails is cumulative because Mr. Seka was excluded from them at the time of trial.[23] Again, the panel is incorrect. Although the blood on those hairs was tested at the time of trial and excluded Mr. Seka, the hairs themselves were not tested at that time.[24] The new testing shows that those hairs belonged to Hamilton so any speculation that they belonged to Mr. Seka is destroyed.[25] The 2001 jury was told the blood on the hairs belonged to Hamilton, but they were not told that the hairs themselves also belonged to Hamilton. Thus, this evidence is neither cumulative nor irrelevant and thus the journey into reasonable doubt continues.

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[21] *See* Respondent's Answering Brief, p. 19, 39, 10 AA 002443-44.
[22] *Id.* at 9, 3 AA 000546-47, 9 AA 002242, 002248-49; 4 AA 000821; 2 AA000345.
[23] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.
[24] *See* Respondent's Answering Brief, p. 19, 39, 10 AA 002437-41.
[25] *Id.* at 19, 10 AA 002443-44.

The beer bottle, cigarette butt and Skoal container: The panel readily accepts the State's argument which was rejected by the district court that these three pieces of evidence were merely "trash" and any connection to the crime, now that Mr. Seka is excluded from all three, is either cumulative or speculative. Clearly, the police did not believe these items to be "trash." They were near Hamilton's body which was transported by truck, then removed from the truck and left over 2 miles from Highway 146.[26] These items could have easily fallen out of the truck upon arrival at the site in which Hamilton was found. As such, police not only collected these items[27] but they requested that they be tested in hopes they would implicate Mr. Seka.[28] At the time of trial, testing of the Skoal container for fingerprints yielded no results,[29] but the new DNA testing identifies two unknown profiles, neither of which is Mr. Seka.[30] The beer bottle was also examined for prints at the time of trial and Mr. Seka was excluded.[31] However, now testing shows an unknown female DNA profile on that bottle.[32] Lastly, although the cigarette butts were of a different type

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[26] *See* Respondent's Answering Brief, p. 20; 9 AA 002084.
[27] *See* Respondent's Answering Brief, p. 20-21; 9 AA 002084.
[28] *Id.*; 10 AA 002437-41; 10 AA 002446-48; 10 AA 002446-47.
[29] *See* Respondent's Answering Brief, p. 20; 10 AA 002446-48.
[30] *See* Respondent's Answering Brief, p. 20; 10 AA 002482-83.
[31] *See* Respondent's Answering Brief, p. 21; 10 AA 002446-47.
[32] *See* Respondent's Answering Brief, p. 21; 10 AA 002482-83. The panel asserts that because Mr. Seka has never argued that the killer was female, this evidence has little value. *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 18. This assertion, however, is an example of where the panel expects the petitioner to meet an impossible burden. Mr. Seka does not know who killed Hamilton or Limanni and he

than those Mr. Seka regularly smoked, the police tested them in hopes of implicating Mr. Seka. The butts produced no identifiable DNA profiles at the time of trial.[33] Now, one of those butts has produced a full DNA profile that excludes Mr. Seka.[34] The LVMPD believed, at the time of the post-conviction DNA testing, that both the cigarette butt and the beer bottle were from the "putative perpetrator" and uploaded the identified DNA profiles into the Local and National DNA Index Systems for comparison.[35] Were a jury allowed to learn the DNA results of these items, reasonable doubt would continue to build.[36]

Other Exculpatory Evidence: The panel recites the prosecution's trial case in its support of reversal of the district court's grant of a new trial. The panel, however, ignores additional evidence the jury never heard, and when combined with the DNA evidence exonerating Mr. Seka, points to his innocence.

First, at trial, the State called Thomas Cramer to testify that Mr. Seka has "confessed" to killing Limanni. Although the defense attacked Mr. Cramer's

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is not obligated to point the finger at someone else, like Jennifer Harrison. He is simply obligated, on a motion for a new trial, to show that there is a reasonable probability, based upon the record, that the jury would have reached a different result when presented with all the available evidence.

[33] *See* Respondent's Answering Brief, p. 20; 10 AA 002437-41; 3 AA 000664.

[34] *See* Respondent's Answering Brief, p. 20; 10 AA 002443-44.

[35] *See* Respondent's Answering Brief, p. 20.

[36] Nothing would prevent the State from trying to convince the jury that these pieces of evidence were just trash and that anyone could have touched them at any time. However, that is an argument to be made at a new trial, not at an appeal of the grant of a motion for a new trial.

credibility by pointing to his diagnosed mental illness and his hatred of Mr. Seka, there was no direct evidence that Mr. Cramer was lying. Now, a new witness, Margaret McConnell, who was present when Mr. Seka purportedly confessed to Mr. Cramer, has provided a declaration that Mr. Cramer's story was wholly fabricated.[37] A jury has never heard this direct evidence and it is hard to imagine that, when combined with the new DNA evidence, it would not create reasonable doubt. *See Hennie v. State*, 11 Nev. 1285, 968 P.2d 761, 764 (1998) (holding that new evidence, which the jury never heard, supported the grant of a new trial when it severely undermined the credibility of the State's key witnesses).

Second, the panel points to the presence of Limanni's wallet, his identification, and a stolen purse in the ceiling of the place where Mr. Seka and Limanni lived as circumstantial evidence of Mr. Seka's guilt. What the panel ignores, however, is that when the stolen purse was tested for fingerprints before trial, Mr. Seka was excluded and that exculpatory evidence was not provided to Mr. Seka or his trial counsel, and so the jury was never told about it.[38]

Finally, for every piece of circumstantial evidence the prosecution (and the panel) relied upon, there is other evidence favoring Mr. Seka – all of which is outlined in Mr. Seka's Answering Brief. When a case is wholly circumstantial, it is hard to

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[37] *See* Respondent's Answering Brief, p. 56; 10 AA 002425-27.
[38] *See* Respondent's Answering Brief, p. 54; 10 AA 002282.

envision that a district court abuses its discretion when it orders a new trial based upon determinative and exculpatory DNA testing.

CONCLUSION

Based on the foregoing, this Court should grant rehearing on its reversal of the district court's grant of a new trial.

Dated this 26th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing/reconsideration or answer 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:

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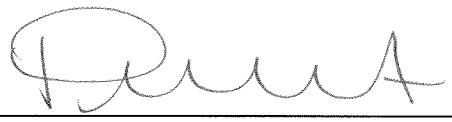
Dated this 26th day of July, 2021.



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CERTIFICATE OF SERVICE

I, hereby certify and affirm that the foregoing **RESPONDENT'S PETITION FOR REHEARING**, was filed electronically with the Nevada Supreme Court on the 26 day of July, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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