No. 86694

IN THE NEVADA SUPREME COURT

John Seka,

Petitioner-Appellant,

v.

State of Nevada, et al.

Respondents-Appellees.

Petitioner-Appellant's Appendix
Volume 13 of 15

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Dated October 4, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2023, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

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

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

JOHN JOSEPH SEKA,

Respondent.

CASE NO: 80925

APPELLANT'S OPENING BRIEF

Appeal From Granting of Motion for New Trial
Eighth Judicial District Court, Clark County

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APPELLANT'S OPENING BRIEF

Appeal from Granting of Motion for New Trial
Eighth Judicial District Court, Clark County

JURISDICTIONAL STATEMENT

NRS 177.015(1)(b) provides for an appeal from an order of the district court granting a motion for a new trial.

On March 24, 2020, the district court entered its Order granting Respondent John Joseph Seka's Motion for New Trial in totality. The State filed its Notice of Appeal on March 27, 2020. This appeal is from a final order granting a new trial.

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to a conviction for a Category A felony. NRAP 17(b)(2).

STATEMENT OF THE ISSUE

1. Whether the district court abused its discretion when it granted Respondent's Motion for New Trial.

STATEMENT OF THE CASE

On June 30, 1999, John Joseph Seka (hereinafter "Seka") was charged by way of Information with: Counts 1 & 2 – Murder With Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165); and Counts 3 & 4 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380, 193.165). 1 AA 000001-03.

On July 26, 1999, the State filed its Notice of Intent to Seek the Death Penalty. Id. at 000004-06.

Jury trial commenced on February 12, 2001. Id. at 000007. On March 1, 2001, the jury returned a verdict of guilty of First Degree Murder With Use of a Deadly Weapon as to Count 1, guilty of Second Degree Murder With Use of a Deadly Weapon as to Count 2, and guilty of Robbery as to Counts 3 and 4. 6 AA 001361-62. The penalty hearing commenced on March 2, 2001. Id. at 001370. However, the jury could not return a special verdict. Id. at 001427. On March 13, 2001, the parties filed a Stipulation and Agreement to Waive Sentencing by Three-Judge Panel and stipulated to a sentence of life without the possibility of parole as to Count 1. Id. at 001436-37.

On April 26, 2001, Seka was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – Life without the possibility of parole with an equal and consecutive term of Life without the possibility of parole for use of a

deadly weapon; as to Count 2 – Life with the possibility of parole after ten (10) years with an equal and consecutive term of Life with the possibility of parole after ten (10) years for use of a deadly weapon consecutive to Count 1; as to Count 3 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 2; and as to Count 4 – thirty-five (35) to one hundred fifty-six (156) months consecutive to Count 3. Id. at 001438-52. The Judgment of Conviction was filed on May 9, 2001. Id. at 001453-54.

On May 15, 2001, Seka filed a Notice of Appeal. Id. at 001455-57. On April 8, 2003, the Nevada Supreme Court issued an Order affirming Seka's conviction and remittitur issued on May 9, 2003. Id. at 001458-72.

On February 13, 2004, Seka filed a Petition for Writ of Habeas Corpus. Id. at 001473-500; 7 AA 001501-14. The State filed its Response on April 6, 2004. 7 AA 001534-46. On November 5, 2004, the district court denied Seka's Petition. Id. at 001553-69. On January 31, 2005, the district court filed its Findings of Fact, Conclusions of Law and Order. Id. at 001547-52.

On February 9, 2005, Seka filed a Notice of Appeal. Id. at 001570. On June 8, 2005, the Nevada Supreme Court issued an Order affirming the district court's decision and remittitur issued on July 15, 2005. Id. at 001571-85.

On June 19, 2017, Seka filed a post-conviction Petition Requesting a Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. Id. at 001586-624. The State filed its Response on August 15, 2017. Id. at 001625-40. Seka filed his Reply on September 5, 2017. Id. at 001641-59. On September 13, 2017, the district court granted Seka's Petition. Id. at 001663-64. The district court filed its Order granting Seka's Petition on September 19, 2017. Id. at 001660-62.

On December 14, 2018, the district court held an evidentiary hearing regarding additional testing on the DNA evidence. Id. at 001665-750; 8 AA 001751-814. On December 19, 2018, the district court granted Seka's Petition in part and denied the Petition in part. 8 AA 001815. On July 24, 2019, the district court set a briefing schedule based on the DNA testing. Id. at 001816-21.

On November 19, 2019, Seka filed a Motion for New Trial. Id. at 001822-67. The State filed its Response on January 30, 2020. 10 AA 002487-2500; 11 AA 002501-04. Seka filed his Reply on March 4, 2020. 11 AA 002505-14. On March 11, 2020, the district court granted Seka's Motion. Id. at 002515-16. The district court entered its Order on March 24, 2020. Id. at 002517-19.

On March 27, 2020, the State filed a Notice of Appeal. Id. at 002520-21.

~~On June 15, 2020, Seka filed a Motion for Release Pending Appeal and Retrial Pursuant to NRS 178.488 and 178.484.~~ Id. at 002522-35. ~~The State filed its Response on June 18, 2020.~~ Id. at 002544-65. ~~On June 29, 2020, the district court denied Seka's Motion and noted that "proof is evident or the presumption is great" that Seka committed the crimes charged.~~ Id. at 002579. ~~The district court further noted that the State demonstrated, by clear and convincing evidence, that the detention order was appropriate.~~ Id.

Stricken per 10/22/20 order

STATEMENT OF THE FACTS

The instant case involves the murders of two men, Peter Limanni and Eric Hamilton. On November 16, 1998, Jeffrey Lowery was driving a truck on Las Vegas Boulevard South where he saw a body lying on the left-hand side of the road. 4 AA 000898-99. Lowery testified that he reported the body to the police and that he did not disturb anything at the scene while he waited for the police to arrive. Id. at 000899. Homicide detectives James Buczek and Tom Thowsen, employed with Las Vegas Metropolitan Police Department (LVMPD), responded to the area of Las Vegas Boulevard South where the body was found. 3 AA 000517. Upon arrival, Detective Buczek found a body lying west of Las Vegas Boulevard South covered with a variety of pieces of lumber including cedarwood. Id. at 000518. The body was a black male and was lying face down in the middle of a set of tire tracks leading

to the road. Id. at 000520-21. Detective Buczek testified that a piece of paper with the name "Jack" and a telephone number was found in the body's front pants pocket. Id. at 000521. Randall McPhail, a crime scene analyst with LVMPD, testified that he recovered the green piece of paper with the work "Jack" and a phone number on it from Hamilton's body. 4 AA 000901-02, 000904. The telephone number was checked by Detective Thowsen and came back to Cinergi, a business located at 1933 Western Ave. 3 AA 000522. Vincent Roberts, a crime scene analyst with LVMPD, testified that he made a cast of the tire impressions found at the scene on Las Vegas Blvd. on November 16, 1998. 4 AA 000802-03, 000805. Roberts also impounded pieces of lumber that were found on top of the body of Hamilton. Id. at 000810.

Dr. Giles Sheldon Green, a coroner with the Clark County Medical Examiner Department, testified that he performed an autopsy on the body found on Las Vegas Boulevard South which was later identified as Hamilton. 2 AA 000416, 000420. According to Dr. Green, Hamilton's body had three gunshot wounds: one in the back that exited the chest, one in the left hip that exited the buttock, and one that entered in the back of the leg and exited the right thigh. Id. at 000423-24. Further, Dr. Green testified that Hamilton's body had a laceration on the right wrist which could be consistent with someone tearing a bracelet from the wrist. Id. at 000424. Dr. Green testified that Hamilton was killed within twenty-four hours of his body being

discovered the morning of November 16, 1998 and that the cause of death was three gunshot wounds and the manner of death was homicide. Id. at 000427, 000435-36.

On November 17, 1998, Rick Ferguson, an employee at 1937 Western Ave., called the police to report broken glass with blood on it several buildings down from his work. Id. at 000437-38. Officer Robert Kroll and Officer Robert Nogues, LVMPD, responded to the call regarding broken glass at 1929 Western. 4 AA 000820, 000844. Upon arriving, Officer Kroll saw broken plate glass near the entrance of the property with apparent blood on it. Id. at 000821. Officer Kroll also observed blood inside the business on the carpet, a dark blue jacket and a baseball cap. Id. Expended bullets were also found on the floor inside the business. Id. at 000822.

While the officers were investigating the scene, Officer Kroll testified that Seka drove up to the business in a brown Toyota truck. Id. at 000823-24. When Officer Kroll asked Seka if he knew where Limanni, the owner of the business was, Seka told him that he had not seen Limanni since November 5 and that Limanni was in Reno/Lake Tahoe with his girlfriend. Id. at 000825. Officer Kroll testified that Seka gave his consent for them to search 1933 Western Ave. Id. at 000827. Inside 1933 Western Ave, Officer Kroll observed a humidor under construction and a lot of wood laying around. Id. In addition, Officer Kroll testified that he saw a bullet

standing up on the desk. Id. at 000827-28. Additionally, Michael Cerda, the property manager who was also at the scene, testified that he saw a bullet on top of a desk inside 1933 Western. 2 AA 00365, 000375-76.

Officer Nogues testified that he investigated behind the businesses on Western. 4 AA 000846. Officer Nogues observed a dumpster in an alcove in the rear of the businesses. Id. When he opened the dumpster, Officer Nogues saw a few papers at the bottom of the dumpster, but he could see the bottom of the dumpster. Id. at 000846-47. The owner of the trophy business just down from 1929 and 1933 Western Ave. came out of his store and told Officer Nogues that the dumpster had been emptied that morning or the prior night so nothing would be in it. Id. at 000847.

After noting the broken glass, blood and bullets at 1929 Western, Officers Kroll and Nogues notified their supervisor and then called out a crime scene analyst to document the scene at 1929 Western. Id. at 000822, 000848. David Ruffino, a crime scene analyst with LVMPD, was assigned to process the scene at 1929 Western Ave. on November 17, 1998. 3 AA 000541, 000545. According to CSA Ruffino, when he arrived at 11:31 a. m., there were only two uniform patrol officers on scene and he was told that he was investigating the scene for malicious destruction of private property. Id. at 000546. As Ruffino observed the scene at 1929 Western, he saw glass with blood all over it, blood inside the business and bullets on

the floor. Id. at 000546-47. Ruffino also found a dark jacket with apparent blood and bullet holes on it. Id. at 000547. After finding this evidence, Ruffino contacted the homicide unit because he thought that 1929 Western may be related to a homicide. Id. at 000547-48. After Ruffino arrived and began processing inside 1929 Western, Officers Kroll and Officer Nogues left the area in separate patrol vehicles at 12:08 and 12:09 p.m. 3 AA 000581; 4 AA 000829, 000849, 000862. As the officers were leaving, Ruffino's supervisor Alan Cabrales arrived to assist Ruffino at 12:09 p.m. 3 AA 000581. CSA's Ruffino and Cabrales then went into 1929 Western to process the crime scene and were otherwise left alone inside of that business for approximately thirty minutes until LVMPD Homicide Detectives arrived. 3 AA 000523, 000534-35, 000585-86.

Homicide Detective James Buczek responded to the investigation at 1929 Western Ave and arrived somewhere between 12:33 p.m. and 1:00 p.m. 3 AA 000523, 000534-36. His supervisor Homicide Sargent Ken Hefner arrived on scene at 12:47 p.m. Id. at 000535. Detective Buczek testified that there were three bullets and three fragments of bullets inside the business located at 1929 Western. Id. at 000523. In addition, a dark blue jacket with bullet holes was found. Id. The bullet holes in the jacket were later compared with the bullet holes in Hamilton's body and found to be consistent. Id.

After being gone for about one hour and fifteen minutes, Officer Nogues and Officer Kroll were called back to the scene to speak with homicide detectives. 4 AA 000829-30, 000850. When he returned to the scene, Officer Kroll went into 1933 Western Ave. and testified that the cartridge was missing from the table where he had seen it. Id. at 000830. Officer Kroll questioned the landlord/manager of the building, Michael Cerda and he denied moving the cartridge. Id. at 000831. Officer Nogues testified that upon returning to the scene, he went with homicide detectives to check the dumpster behind the businesses again. Id. at 000850-51. When he looked in the dumpster, Officer Nogues saw papers, burnt clothing and shoes which filled the bottom of the dumpster. Id. at 000851-52. Officer Nogues testified that none of those things had been in the dumpster previously when he had looked inside of it at approximately 11:30 a.m. Id. at 000853, 000867.

Randy McPhail, a crime scene analyst with LVMPD, also responded to the crime scene at 1933 Western on November 17, 1998. Id. at 000907. McPhail found several .357 cartridge cases that had been fired inside 1933. Id. at 000912-13. One was hidden in the false ceiling of the office in the northeast section of the business, another was sitting on a light fixture in front of the doors leading to the humidor and the third was on the ground in the northwest office by the south wall. Id. McPhail also noted a bullet hole was in a couch in the business and that a .32 bullet that

traveled through the couch lodged in the drywall behind it. Id. at 000913; 3 AA 000526. An unfired .32 caliber cartridge was also found lying at the bottom of a toilet bowl in the lone bathroom. 4 AA 000913.

McPhail also testified that in the dumpster there were various items that were partially burned including a green shirt that had the name "Limanni" on it as well as a blue shirt that was also partially burned. Id. at 000914, 000926. Inside the dumpster were numerous items to include photographs of Peter Limanni, personal papers with Limanni's name on them, phone cards and a New Jersey state boat operator's license also in the name of Peter Limanni. Id. at 000913, 000925, 000930. In addition, on the ground near the dumpster at the back of the business there were various player cards from casinos, phone cards and other papers, most of which bore the name of Peter Limanni. Id. at 000914-17. A wallet containing Limanni's driver's license, social security card, birth certificate and a couple credit cards was also found hidden in the false ceiling of Cinergi. Id. at 000914; 3 AA 000526-27. There were numerous blood stains or blood transfers in the business. 4 AA 000915-16. McPhail also recovered some beer bottles located in the trash can of the office at 1933 Western Ave and successfully processed those beer bottles for fingerprints. Id. at 000938-39. In the south central office of business, McPhail documented that the box of mementos that belonged to Limanni was still present. 2 AA 000472; 4 AA 000928.

Gary Reed, crime scene analyst with LVMPD, did a vehicle examination on the brown Toyota truck driven by Seka. 3 AA 000670-71. CSA Reed testified that the exterior of the truck appeared to be clean, but the tires and undercarriage appeared as though the truck had been driven in dirt and rocks. Id. at 000673. Rick Ferguson testified that he remembered noticing that although the brown Toyota truck appeared very clean when Seka was driving it on November 17, the truck normally appeared quite dirty. 2 AA 000440-41. In addition, there were stains in the bed liner which caught Reed's attention. 3 AA 000673-74. These stains were tested with phenylthaline and reflected the presence of blood. Id. at 000674-75. In addition, Reed conducted a luminol test which glows in the dark when it reacts positively with blood and the substance tested positive. Id. at 000675, 000677.

Tom Thowsen, homicide detective with LVMPD, conducted an interview of Seka on November 17, 1998 after responding to the scene at 1933 Western. 5 AA 001069-71. Thowsen testified that Seka had a cellphone on his person and the phone number was the same number found on the piece of paper found in Eric Hamilton's pants pocket when his body was recovered the day before. Id. at 001074. Detective Thowsen mirandized Seka and then took a taped interview of Seka. Id. at 001072-73. During the interview, Seka told Detective Thowsen that Limanni was his friend and that the two of them had been living at Cinergi but Limanni had just disappeared

several weeks before. Id. at 001073. Seka told Thowsen that since Limanni had left, he had been staying at Cinergi and was attempting to run the business without Limanni. Id. When Thowsen asked Seka about Hamilton and his association with Cinergi, Seka claimed to know a person he called "Seymour" that seemed to match Hamilton's description. Id. at 001075; 11 AA 002611-14. Seka said that "Seymour" had done some work at Cinergi back in October but he had not seen the man since around October 10 or two weeks before Seka had traveled back to New Jersey. Id. He also admitted to talking with the black male on his cell phone but had not spoken to him since he left on his trip. Id.

Following the interview, Detective Thowsen told Seka that the information he had given them was inconsistent and that he was a suspect for the murder of Hamilton. 5 AA 001077-78. At that point Seka smiled and said, "You're really starting to scare me now. I think you'd better arrest me or take me home. Do you have enough to arrest me right now?" Id. at 001078. Detective Thowsen told Seka that he would wait until all of the forensic evidence had come back before arresting Seka. Id. Prior to releasing Seka, Detective Thowsen photographed injuries on Seka's hand and took a DNA sample. Id. at 001078-79.

After Detective Thowsen drove him to 1933 Western Ave., Seka asked to leave the scene to go to a dinner appointment. Id. at 001079. Seka was told the brown

Toyota was being impounded. Id. At that point Seka requested that he be allowed to take the white Dodge van with the Cinergi decals. Id. at 001079-80. Detective Thowsen handed Seka the keys to the all-white Dodge van and Seka commented that he wanted to take the van with the decals on it. Id. at 001080-81. Detective Thowsen looked inside the van with the Cinergi decals and saw blood droplets and blood stains. Id. at 001081. A presumptive test was conducted which came back positive for blood. Id. at 001081-82. Seka ended up taking the plain white van and told Detective Thowsen that he would return after his dinner appointment to lock up the business once the police were done. Id. at 001082. Limanni's dog "Jake" was still inside Cinergi when Seka left and Seka was not seen again by law enforcement until April or May 1999 when he was arrested in Pennsylvania. Id. at 001082-83, 001126.

Police began an investigation into 1933 Western and learned that earlier in 1998, Peter Limanni and Takeo Kato entered into a business arrangement to start an air conditioning business in Las Vegas. 3 AA 000725. The business, named Cinergi, opened up on May 6, 1998 and was located at 1933 Western. 2 AA 000365-66. Seka was also an employee at Cinergi and worked for Limanni. Id. at 000367; 2 AA 000439-40. Both Seka and Limanni lived in the same back bedroom of the business at 1933 Western. 2 AA 000451, 000453. Cinergi utilized four different vehicles, three of them were vans and one was a brown Toyota truck. 3 AA 000736.

Jennifer Harrison began dating Peter Limanni in August of 1998. 2 AA 000450. Between August and early November of 1998, Harrison saw Limanni and Seka at Cinergi nearly every day. Id. at 000452. Limanni and Harrison both had cell phones and they talked quite frequently and Limanni was normally easy to get a hold of on his cell phone. Id. Limanni also had a Jack Russell dog named "Jake" that he was very close with. Id. at 000459. Limanni would commonly take Jake with him on job sites and when he ran errands. Id.

Harrison also had frequent interactions with both Limanni and Seka during the late summer and fall of 1998. Id. at 000452-55. She witnessed that Limanni was very controlling of his employee, Seka, and often times exhibited a bad temper with him. Id. at 000455-58. Seka would take orders from Limanni but would never get to tell Limanni what to do. Id. at 000455, 000457-58. Limanni would also control the money and would be disrespectful to Seka often times referring to him as "his nigger." Id. at 000456. On one occasion Harrison witnessed Seka spill paint inside Cinergi and Limanni called him a "dumb ass." Id. When Harrison asked Seka about it, Seka told her Limanni had a bad temper and that the name calling was "just the tip of the iceberg." Id. at 000455-56.

On the evening of November 4, 1998, Harrison saw Limanni for the last time when he came over to her residence for a date. Id. at 000460; 3 AA 000501-02. The

two had a nice evening and planned on having lunch together the next day. Id. at 000460. On the morning of November 5, Harrison called Limanni on his cell phone and Limanni's phone was either turned off or it went straight to his voice mail which was unusual according to Harrison. Id. at 000460-61. She then called Seka looking for him and Seka told her that Limanni got up early that morning and left Cinergi with an unknown person but he did not know where they went. Id. In that same conversation, Seka told Harrison that he had just gotten back to Las Vegas from a trip to New Jersey and that he was depressed. Id. at 000462. Seka said that on his trip he had caught his girlfriend in bed with another man. Id. at 000463.

At around noon that day, Harrison suspected something was not right at Cinergi so she drove over in order to look for Limanni. Id. at 000463-64. She saw Seka passed out on the floor of the business with an unknown female sleeping on the couch. Id. 000463. She also observed several things that were unusual which included the fact that Jake, Limanni's dog, was left at Cinergi without any signs of Limanni and that the bedroom door was locked but it was usually left unlocked. Id. at 000464. She managed to get the bedroom door opened and then inside noted that all of Limanni's shoes (he had three pairs) as well as his clothing appeared to be in their usual places. Id. at 000464-65. She also noticed a bullet on the floor and that

Seka had several hundred dollars in cash laying around which was unusual. Id. at 000465, 000467.

Over the ensuing days, Harrison continued to look for Limanni but never heard or saw him. Id. at 000467-68; 3 AA 000501-02. She spoke to Seka on the phone and wondered if she should file a missing person's report with the police but Seka told her not to because Limanni was "missing because he wants to be missing." Id. at 000467-68. During one conversation with Seka, Harrison asked him if Limanni took a special box that he kept full of personal and family keepsakes. Id. at 000468-69. Limanni had told Harrison that although he tended to "travel light," he would never leave behind his box of mementos. Id. at 000467-68, 000483. Seka told Harrison that Limanni's box of mementos was missing from their bedroom. Id. at 000469.

In November of 1998, Seka met Jennifer Harrison in the parking lot of 24 Hour Fitness and told her that a black guy had been killed, that police were blaming him, and that he had to get out of there. Id. at 000450, 000469-70. Seka also told Harrison that police were going to call her in because they had pictures of her from Lake Tahoe. Id. at 000469. Seka asked Harrison if he could borrow her car because police were following him because he was called in to be prosecuted for murder. Id. at 000471-72. Harrison refused to let Seka take her vehicle. Id. Several weeks later,

Seka called Harrison from Arizona and told her that he was going "underground". Id. at 000470.

On December 23, 1998, Peter Borden was driving on Nipton Road on his way to work at Moycor Mine when he saw a dog chewing on a partially decomposed body on the side of the road. 3 AA 000508-10. Borden called 9-1-1 at a BLM trailer down the road. Id. at 000510-11. Borden testified that he did not disturb anything at the scene where the body was found. Id. at 000511. According to Borden, Nipton Road is about 5 miles from the Nevada state line and it takes roughly 45 minutes to get there via the 1-15 in Las Vegas. Id. at 000511-12.

Kenneth Wolf, a detective with the San Bernadino Sheriff's Department, responded to the location of the body on December 23, 1998. 3 AA 000750; 4 AA 000751. According to Detective Wolf, the body was partially buried from the legs down. 4 AA 000755. There appeared to be tire tracks on one side of the berm where the body was found which drove away from the body in a westerly direction. Id. Further, the body was only wearing boxers. Id. at 000756. Jeff Smink, a forensic specialist with the Sheriff's Department of San Bernadino, testified that he obtained a fingerprint from the body by injecting a syringe full of water into the dehydrated right thumb of the body and using ink to take the fingerprint. 4 AA 000891-92, 000894-95. The body found was later identified as Limanni. 4 AA 000758.

Steven Trenkle, a coroner for San Bernadino County, performed an autopsy on the body of Limanni. 3 AA 000691, 000693-94. The body had a total of at least ten gunshot wounds. Id. at 000695. Two gunshot wounds were in the left lower back, two gunshot wounds to the very back of the head, two gunshot wounds to the left side of the head, two gunshot wounds to the top of the head, a gunshot wound to the right side of the head just above the ear and a gunshot wound to the top of the left shoulder. Id. In addition, the body had a tattoo of a vulture on the right upper arm, a tattoo of an eagle on the left arm and a tattoo of Italy on the right leg and a tattoo of a blue flower on the left leg. Id. at 000695-96. Harrison testified that Limanni had a tattoo of Italy on his calf and a tattoo of an eagle on his arm. 2 AA 000471. Dr. Trenkle testified that the amount of decomposition was consistent with the body being dead for weeks. 3 AA 000694-95, 000698. Dr. Trenkle testified that the amount of decomposition was consistent with the body being dead for weeks and that the cause of death was multiple gunshot wounds to the head and the manner of death was homicide. 3 AA 000694-95, 000698-99. Dr. Trenkle testified that one of the bullets was imbedded in the skull of the body which would be consistent with a defective gun or ammunition. Id. at 000700-01. McPhail recovered bullet fragments from the body of Limanni during the autopsy. 4 AA 000936.

Fred Boyd, a fingerprint analyst employed by LVMPD, testified that he used known prints from Hamilton, Limanni, and Seka to compare with the prints found at the crime scenes. 5 AA 001011, 001015-16. Boyd testified that he found latent prints on the lumber collected where Hamilton's body was found and that numerous pieces of wood contained the prints of Seka and one contained the prints of Limanni. Id. at 001019-22. The latent prints recovered from the Toyota pickup all belonged to Seka. Id. at 001025-28. Further, several beer bottles recovered from the *same* trash can in 1933 Western contained the prints of Seka and Hamilton. Id. at 001028-29; 4 AA 000938. Boyd also testified that the cast made of the tire tracks on Las Vegas Boulevard South matched the tread pattern on the tires on the brown Toyota pickup driven by Seka the day police contacted him on November 17. 5 AA 001030-35, 001040-44.

David Welch, a forensic chemist at LVMPD, testified regarding DNA testing on evidence collected from the two bodies and the crime scenes at 1929 and 1933 Western Ave. 3 AA 000588, 000605. Welch testified that he used samples from Seka, Limanni and Hamilton as standards in his testifying. Id. at 000609. Welch testified that the blood sample collected from inside the Dodge van was human blood and that Limanni could not be excluded as the source of the blood. Id. at 000614. According to Welch, there was only a 1 in 1.8 million chance that another person

aside from Limanni was the source of the blood found in the swab taken from the Dodge van. Id. at 000615. With regard to a glass fragment with blood on it collected from 1929, Welch testified that the sample was human blood and that it matched Hamilton's DNA. Id. at 000616. One would have to sample 2.8 million African Americans to find another DNA match with the blood on the glass. Id. Regarding the blood found in the back of the brown Toyota pickup, Welch testified that Seka and Limanni were excluded as a source. Id. at 000619-20. Further, the blood matched the DNA of Hamilton. Id. at 000619.

Torrey Johnson, employed by LVMPD in the forensic lab as a firearm expert, testified that four cartridge cases found inside 1933 Western were all .357 magnum and all four had been fired from the same weapon. 4 AA 000998-1000. He also testified that the .357 bullet fragments that were discovered at 1929 Western where Hamilton was presumably killed as well as from inside Hamilton's body at autopsy were all consistent to each other and could have been fired from the .357 cartridge cases that were found inside 1933 Western. Id. at 000993, 000997-98. Johnson also testified that .357 magnum ammunition is generally fired from a revolver rather than a semi-automatic weapon. 5 AA 001001.

In addition, Johnson testified that he analyzed a .32 caliber bullet found in a wall at 1933 Western. 4 AA 000998; 5 AA 001008-09. The bullets recovered from

Limanni's body were all .32 caliber and had characteristics consistent with being fired from a revolver that had a misaligned cylinder. 4 AA 000999; 5 AA 001007-08. The .32 caliber bullet recovered from inside the wall at 1933 Western also matched the caliber and the misalignment feature found on the bullets from Limanni's body. 5 AA 001007-09. According to Detective Thowsen, a .32 caliber weapon was used to kill Limanni and a .357 magnum was used to kill Hamilton. Id. at 001121. Neither of the murder weapons were ever recovered.

Thomas Cramer, a friend of Seka's in 1998, testified that when Seka came to Pennsylvania after November 1998, he asked Seka if he had killed Limanni. 4 AA 000768-69, 000772-74. Seka responded, "No. They didn't even find the body." Id. at 000774. Further, Cramer testified that during a fight with Seka on January 23, 1999, Seka said to him, "Do you want me to do to you what I did to Pete Limanni?" Id. at 000775-77. Cramer testified Seka's demeanor and statement scared him so much that he threw Seka down the stairs. Id. at 000778. Cramer further testified that Seka told Cramer that Limanni accused Seka of stealing money, came at him with a gun and so Seka wrestled the gun from Pete and shot him. Id. at 000781-82. Seka told Cramer that Pete was gurgling and blood was coming out of his mouth and so he just kept shooting Pete. Id. at 000782.

Michael Cerda, employed with Nevada Properties as a property manager for 1933 and 1929 Western Avenue in 1998, testified that the last time he saw Limanni was at the beginning of November. 2 AA 000367-68. According to Cerda, Limanni asked him if he could pay his rent on Monday because he was going to a cigar show. Id. at 000369. Cerda testified that Limanni had a large amount of cash with him, approximately 2,000.00 to 3,000.00 dollars. Id. Cerda testified that Limanni never paid the rent. Id. at 000370. However, Seka did contact Cerda and told him that Seka would pay the rent. Id. at 000370-71. Further, Cerda testified that Seka asked him to take care of Limanni's dog. Id. at 000372.

Takeo Kato testified that he entered into a business arrangement with Limanni for an air conditioning business in Las Vegas. 3 AA 000725-26. Kato testified that the business started to fail in the summer of 1998 and that he and Limanni had a bad working relationship because Limanni used company money for personal use. Id. at 000727-28, 000733-34. At some point after November 12, Kato found a written to-do list at 1933 Western Avenue after Limanni disappeared and forwarded it to the police. Id. at 000729-30. Kato sent Detective Thowsen an envelope containing a to-do list dated Thursday November 12, 1998. 5 AA 001084. Further, Kato testified that he had nothing to do with Limanni's disappearance. 3 AA 000731.

Michele Hamilton, Eric Hamilton's sister, testified that her brother moved to Las Vegas in the beginning of November or end of October 1998. Id. at 000705. Ms. Hamilton testified that Eric had about $3,000.00 when he moved to Las Vegas. Id. at 000706. According to Ms. Hamilton, the last time she talked to Eric was on November 13 and Hamilton told her that he was working for a white man who owned a business and that he was building something. Id. at 000710-11.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it granted Seka's motion for new trial. Seka is not entitled to a new trial. Seka's "newly discovered" DNA evidence is not favorable to the defense. Because the newly tested DNA evidence is not favorable to the defense, Seka is not entitled to a new trial under NRS 176.515. Even if this Court were to find the "newly discovered" evidence was sufficient to warrant a new trial as to the Hamilton murder, the district court abused its discretion when it granted Seka's motion as to the Limanni murder. Therefore, this Court should reverse the district court's granting of Seka's Motion for New Trial.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT GRANTED SEKA'S MOTION FOR NEW TRIAL.

Under NRS 176.515(1), a district court may grant a new trial on the basis of newly discovered evidence, and this court reviews the district court's decision for

an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

> To establish a basis for a new trial on this ground, the evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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; and the best evidence the case admits.

Id. at 406, 812 P.2d at 1284-85 (footnote omitted) (*citing* McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978)). The Sanborn factors are conjunctive, and if the purported evidence fails to satisfy a single factor, the district court does not abuse its discretion by denying the motion for a new trial. See id. at 406, 812 P.2d at 1285.

Here, the district court abused its discretion when it granted Seka's Motion for New Trial. The "newly discovered" evidence presented by Seka was previously presented to the jury during Seka's trial and, thus, does not constitute newly discovered evidence. Further, some of the items of evidence were not relevant to the crime scene and therefore are not favorable to defense. As Seka failed to demonstrate that the evidence was newly discovered, material to the defense and non-cumulative, the district court abused its discretion when it granted Seka's Motion for New Trial. In any event, the evidence was not relevant to the Limanni crime scene and, by the

district court's own admission, the district court abused its discretion when it granted Seka's motion as to the Limanni murder.

a. Seka is not entitled to a new trial.

i. Seka's "newly discovered" DNA evidence is not favorable to the defense and is cumulative of the evidence presented at trial.

NRS 176.09187 states in relevant part:

> 1. If the results of a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09183 are favorable to the petitioner:
>
> (a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and
>
> (b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

Here, Seka claims that the newly tested DNA evidence is exculpatory and, therefore, favorable to the defense under 176.09187. 8 AA 001853-67. However, Seka failed to demonstrate that the evidence was newly discovered, material to the defense and non-cumulative, the district court abused its discretion when it granted Seka's Motion for New Trial.

1. Hamilton's Fingernail Clippings

First, some DNA from under one of the victim's, Eric Hamilton's, fingernail clippings were tested. Id. at 001843. Seka was excluded as a contributor to the DNA sample under Hamilton's nails. Id.; see also, 10 AA 002437-41. A second foreign

contributor was found in the DNA sample. Id. Seka based his argument that he is entitled to a new trial on the fact that, although Hamilton was shot twice and there was no evidence of defensive wounds, the killer *may* have dragged Hamilton by his wrists and, thus, DNA *may* have transferred to Hamilton's hands and fingernails. 8 AA 001855-56. Seka's claims are meritless as they are speculative at best.

Forensic scientist Craig King completed the 2018 analysis of certain items of evidence from Seka's trial. King testified that he analyzed Hamilton's fingernail clippings obtained at his autopsy in 1998. 7 AA 001680. This evidence was previously tested in 1999 by another LVMPD forensic scientist. Id. at 001680-81. In 1999, the forensic scientist tested what appeared to be blood on Hamilton's fingernail clippings and included Hamilton as a contributor to the DNA profile and excluded Seka as a possible contributor. Id. at 001681. King retested the clippings and, regarding the right hand clippings, found a mixture DNA profile, which he assumed came from two (2) individuals with one male profile present. Id. at 001682. King concluded that Hamilton's DNA profile was present in the sample and that the profile was 99% Hamilton's DNA and 1% belonged to an unknown individual. Id. at 001685-86. King testified that such a small amount of DNA could come from something as simple as shaking someone's hand. Id. at 001686-87. Seka was

excluded as a contributor. Id. at 001690. King's conclusion was the same as to the left hand fingernail clippings. Id. at 001692-93.

As an initial matter, King never verified that there was in fact a second DNA profile under Hamilton's fingernails. King testified that there was a very, very limited amount of DNA in the sample. Id. at 001686. King also testified that there were two locations where there could *possibly* be a second person. Id. King stated that he erred on the side of caution and ran the test under the assumption there was a second DNA profile. Id. at 001687. The district court also confirmed with King that "possibly there wasn't additional DNA, but [he] can't rule it out so [he left] it in there." Id. at 001689. Essentially, King has no idea if there was a second DNA profile contained under Hamilton's fingernails, he is merely assuming so because there was a slight anomaly in his testing. Therefore, Seka cannot even demonstrate that there is in fact another DNA profile under Hamilton's fingernails and his claim fails.

Despite Seka's contention, the fact that there was DNA under Hamilton's fingernails and the fact that Seka was excluded as a source of that DNA was presented to the jury at trial. 3 AA 000655-56. Therefore, this evidence is not newly discovered, is cumulative and, thus, not appropriately raised in a motion for new trial. See NRS 176.515. Further, as this evidence was presented to the jury at trial,

Seka fails to demonstrate a reasonable probability that this evidence would have changed the outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. The jury heard evidence that Seka's DNA was not underneath Hamilton's fingernails. The jury still convicted Seka of the murder of Hamilton based on all the other evidence presented at trial. Additionally, this evidence does not exonerate Seka as he claims. Even if there was an additional contributor to the DNA under Hamilton's fingernails, Seka cannot definitively state when or how this DNA got under Hamilton's fingernails. Instead, he relies on speculation that the killer's DNA may have transferred to Hamilton's hands or nails when his body was being dragged. As Seka provides no evidence that this in fact happened and cannot even demonstrate that the DNA must belong to the killer, he cannot demonstrate that this evidence is favorable to the defense or that there is a reasonable probability this evidence would have rendered a different outcome at trial. Therefore, his claim fails.

2. Hair Under Hamilton's Fingernails

Hairs found under Hamilton's nails were also tested. 8 AA 001843. At the evidentiary hearing, King testified that the hairs under Hamilton's fingernails were tested in 1999 and that Hamilton was included as the source of the blood on the hairs while Seka was excluded. 7 AA 001693-94. King testified that he retested the hairs in 2018 and that Hamilton was the only contributor to the DNA profile from the

hairs. Id. at 001696-97. King also testified that all of the hairs were black and consistent with hair from an African American individual. Id. at 001698. King also testified that it was 3.24 billion times more likely that the hairs came from Hamilton than a random individual. Id.

At trial, it was stated that Hamilton could not be excluded as a source of that hair and that the probability of the hair coming from another African American individual was one in 2.8 million. 3 AA 000623. The hair was identified as coming from an African American individual and Seka is Caucasian. Therefore, Seka was excluded as being a possible source of that hair at trial, although Seka claims this is "newly discovered" evidence. As this evidence was presented to the jury at trial, Seka fails to demonstrate a reasonable probability that this evidence would have changed the outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. It has since been determined that Hamilton was the source of the hair. 10 AA 002442-44. The fact that the victim's own hair was found under his fingernails is not exculpatory evidence, as it does not demonstrate a reasonable probability that the outcome at trial would have been different. Therefore, Seka's claim fails.

3. Cigarette Butts, Skoal container and beer bottle

There were cigarette butts collected from the site where Hamilton's body was found. 8 AA 001843-44. Both Hamilton and Seka were excluded as contributors to

the DNA samples on the cigarettes. Id. at 001844. A Skoal container was also collected from the site where Hamilton's body was found. Id. Both Hamilton and Seka were excluded as possible contributors to the DNA samples on the container. Id. Beer bottles were also collected from the site where Hamilton's body was found. Id. at 001844-45. Seka, Limanni and Hamilton were all excluded as possible sources of the latent prints on the bottle and Hamilton and Seka were excluded as possible sources of the DNA sample on the bottle. Id. Further, the DNA sample was identified as female. Id. at 001844.

King examined the two (2) cigarette butts found in the general area where Hamilton's body was located. 7 AA 001674-75. These items had been previously tested by a different LVMPD forensic scientist in 1999. Id. at 001675. There was no DNA material detected on the items back in 1999 and King confirmed that he found no DNA material on the first cigarette butt. Id. at 001675-76. King testified that he obtained a partial DNA profile from the second cigarette butt and both Hamilton and Seka were excluded as contributors to the DNA profile. Id. at 001678-79.

King also examined the Skoal container as well as the beer bottles. Id. at 001714. King testified that he was concerned with testing those items for DNA because, at the time they were originally tested, the technique for testing for latent prints, known as "huffing" could contaminate any DNA profiles on the item. Id. at

001714-15. Huffing occurs when the latent fingerprint analyst breathes onto the item in order to create condensation to better visualize if a latent print is present. Id. at 001715. Further, testing for touch DNA was not possible at the time of Seka's trial and, therefore, there was not a concern with preserving such evidence or preventing contamination. Id. King testified that there was a possibility that the fingerprint examiner's DNA could have transferred onto the evidence items. Id. King also testified that, based on procedures used prior to touch DNA testing, the examiner may not have worn gloves or may have worn the same gloves while touching multiple items of evidence, thereby contaminating these items. Id. at 001716. King also stated that examiners during that time would use the same fingerprint brush to dust for fingerprints on multiple items of evidence and that would potentially lead to cross-contamination. Id.

Essentially, Seka argues that because LVMPD, out of an abundance of caution, collected certain trash items that *could* have been relevant to the crime scene, the fact that these items did not have Seka's DNA or fingerprints is exculpatory and demonstrates that he should receive a new trial. 8 AA 001856-57. However, just because there were trash items located near the site where Hamilton was found does not make them relevant to the crime scene or even definitively mean that there will be DNA or fingerprint evidence from the individual involved in the

crime. Further, Seka does not even argue that these items were related to the crime or the perpetrator. Instead, he merely states that because police collected the items and these items did not have Seka's DNA on them, this must show that there was an alternate suspect. Seka's claims are meritless.

Seka has failed to demonstrate that these items are related to the crime scene at all or that the 2018 DNA testing was reliable. The validity of the DNA testing of these trash items in 2018 is questionable at best. King testified that, because touch DNA was not testable in 1999, the methods for collecting fingerprints and other types of DNA evidence would compromise touch DNA evidence. 7 AA 001714-16. Therefore, any DNA evidence collected after these techniques were used would be compromised and potentially unreliable. Further, Hamilton's body was dumped on the side of the road. According to the crime scene diagram shown to the jury at trial, most of the trash items collected were not even near the body. One of the cigarette butts, marked 2 on State's Exhibit 79, was located approximately 25-30 feet away from Hamilton's body. 11 AA 002630-31. The Skoal tobacco container, marked 3 on State's 79, was located approximately 20 feet away from the body. Id. Finally, the beer bottles, marked 4 and 5 on State's 79, were located approximately 30-35 feet and 120 feet away from the body respectively. Id. The State never argued at trial that the items were somehow related to the murder or would lead to identifying the

killer of Hamilton. It is laughable to think that these items might be related to the crime scene. As Seka provides no evidence that this evidence was not just unrelated trash discarded on the side of the road and cannot even demonstrate that any DNA must belong to the killer, he cannot demonstrate that this evidence is favorable to the defense or that there is a reasonable probability this evidence would have rendered a different outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Therefore, his claim fails.

4. Baseball Hat

Hamilton's baseball cap was collected from the air conditioning business and not tested for DNA at the time of trial. 8 AA 001845. In the recent testing, Hamilton's DNA was identified as well as two unknown profiles. Id. However, at the evidentiary hearing, King testified that he had not tested the baseball hat. 7 AA 001699. King also testified that the evidence bag containing the hat was not properly sealed and there was no way to tell how many times the package had been opened or closed based on its condition. Id. at 001700. King testified that, based on the condition of the bag, LVMPD's forensic lab would refuse the evidence because there would be concerns as to the integrity of the evidence inside. Id. at 001705. King also testified that he would be concerned because the evidence package was opened at trial and was still in an unsealed condition in 2018 and, therefore, the jurors would

have been able to physically handle and/or talk over the hat and transfer DNA during their deliberations. Id. at 001707-08; 3 AA 000562. King also testified that he did not place the DNA profiles into CODIS because "CODIS will only allow us to enter in profiles that we believe to be attributed to a *suspect*...." Id. at 001710. Thus, because King did not believe the DNA profile belonged to a suspect, he did not enter the profile into CODIS. In fact, Seka's own expert confirmed that there were many ways for DNA mixtures to get onto the baseball hat:

> Q. You have also heard, let's assume that the hat did go back to the jury room and multiple jurors touched the hat. Would that assumption -- would you expect to find jurors' DNA on the hat?
> A. Under your hypothesis of multiple jurors, I would expect some DNA to also be transferred there. I would also -- my experience is even if people don't handle
> a hat after a crime, we often get mixtures on hats. So I think people swap hats -- the hat salesman, hat manufacturer, who knows. So it's not uncommon to have mixtures. Whether the minor components come after a criminal act or before a criminal act really doesn't matter to my work.

7 AA 001735. Further, Seka's expert confirmed that, without other evidence, there is no way to tell when a DNA profile was left on the hat. Id. at 001736.

Seka does not even attempt to argue how other DNA evidence on Hamilton's hat, which consisted of a mixture of at least three individuals and did not exclude Seka, creates a reasonable probability that the outcome at trial would be different.

Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Further, Seka cannot make such a demonstration because there is no way to tell when these DNA samples were transferred to the hat and, thus, any individual Hamilton came into contact with could have contributed to those DNA samples. Therefore, Seka's claim fails.

5. Fingerprints

Seka complains that there were latent fingerprints from the Beck's beer bottle, a piece of lumber at the scene where Hamilton's body was found, a purse found in the ceiling of the business, and various doors and windows in the business were not examined. 8 AA 001845. However, even now Seka cannot show who these fingerprints belonged to our that a latent print comparison would have shown these prints were related to the investigation. The beer bottle and the purse did not belong to either the victims or Seka and so it is to be expected that there could be fingerprints from other sources on these items. Further, Seka's claim that all fingerprints found near the windows and doors of Limanni's air conditioning business is meritless, as any one of their customers, vendors, employees, friends, family, etc., could have accessed the business and left a fingerprint in those areas at any time, as noted by Seka in his motion. See id. at 001860. The fingerprint on the lumber, which came from the business, could also have come from one of these individuals and could have been transferred to the lumber at any time prior to the murders. There is no

indication that any fingerprint comparison would have pointed to an alternate suspect or was in any way favorable to the defense. Therefore, Seka cannot demonstrate that this evidence was favorable to the defense and his claim fails.

As Seka points out, the State did not rely on DNA evidence in proving Seka's guilt. Id. at 001850-51. Instead, witnesses testified as to the relationship between Seka and the victims, other physical evidence and Seka's own inconsistent stories and behavior to attempt to hide evidence demonstrated that he committed the crime. Moreover, Seka admits that the DNA does not implicate anyone else in the commission of the crime. Id. at 001856. Therefore, there is not a reasonable probability that the result at trial would have been different and this evidence is not material to the defense. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Thus, Seka has failed to demonstrate several of the Sanborn factors as to each item of "newly discovered" evidence and the district court abused its discretion when it granted Seka's Motion for New Trial.

Even if this Court were to find that Seka is entitled to a new trial as to the Hamilton murder, Seka is not entitled to a new trial as to the Limanni murder. All of the items of evidence that were retested for the presence of DNA related to items that were either found at the scene of where Hamilton was murdered at 1929 Western or found where Hamilton's body was located on South Las Vegas Boulevard.

Despite this fact, the district court granted a new trial as to all four counts that Seka was convicted of which included two counts where Peter Limanni was the victim (a Second Degree Murder with use of a Deadly Weapon count ((Count 2)) as well as one count of Robbery ((count 4)). ~~In fact on June 29, 2020, some three months after signing an order granting a re-trial in which the district court declared that the new DNA evidence "renders a different result probable upon re-trial", the district court noted that Seka failed to present any evidence which exonerated him of the murder of Peter Limanni and concluded that "proof is evidence and the presumption great" that Seka would be convicted upon re-trial of the Limanni murder and robbery. I I-A-A-002584~~. Therefore, the district court's own contradictory rulings demonstrate that the district court abused its discretion, at the very least, when it granted Seka a new trial as to the Limanni murder/robbery. In the event this Court finds that the district court did not abuse its discretion when it granted the motion as to the Hamilton murder, this Court must find the district court abused its discretion as it relates to the Limanni murder/robbery. However, the State maintains that the district court abused its discretion when it granted Seka's Motion for New Trial as to both murders.

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b. There was sufficient evidence presented at trial to convict Seka without the DNA evidence and, therefore, the district court abused its discretion when it determined Seka was entitled to a new trial.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding that it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (concluding that the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court) (cert. denied by 429 U.S. 895, 97 S. Ct. 257 (1976)). Thus, the fact finder's role and responsibility "[to fairly]

resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts" is preserved. Id. at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, this Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)); see also Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony.").

There was both direct and circumstantial evidence linking Seka to both murders. When police found Hamilton's body, he had a piece of paper in his pocket with the name "Jack" on it and a telephone number which came back to Seka's place of employment. 3 AA 000521-22; 4 AA 000901-02, 000904. Further, Hamilton's body was covered by lumber from the business and Seka's fingerprint was on the lumber covering both Hamilton and Limanni's bodies. 3 AA 000518; 5 AA 001011, 001015-16, 001019-22. Seka was also driving the Toyota pickup truck which had tires matching the tire tracks left at the location where Hamilton's body was dumped. 4 AA 000823-24; 5 AA 001030-35, 001040-44. Hamilton's blood was also located

in the truck. 3 AA 000619. Moreover, after being interviewed by police, Seka tried to leave the business with the company van containing Limanni's blood. 3 AA 000614; 5 AA 001079-82. Seka also admitted to Thomas Cramer that he murdered Limanni. 4 AA 000775-77, 000781-82.

Additionally, Seka lied to police and said that Limanni was out of town with his girlfriend when Seka knew that Jennifer Harrison had been looking for Limanni. 2 AA 000460-61; 4 AA 000825. Limanni's personal documents and credit cards were also recovered from inside the business, where Seka admits only he and Limanni had access to. 3 AA 000526-27; 11 AA 002610-11. Harrison also testified that Limanni's dog, Jake, was always with Limanni and that he would not have left Jake with Seka. 2 AA 000459, 000464. Moreover, after the police left the business after their initial search, Seka was left alone in the business and a bullet from the table disappeared and burnt clothing and other miscellaneous items appeared in the dumpster when police returned to search the business again later that day. 2 AA 000375-76; 3 AA 000523, 000534-35, 000585-86; 4 AA 000827-28, 000846-47, 000850-52. Seka also wrote a to-do list which talked about liquidating the company's assets and finding a new home for Jake. 11 AA 002603. This list was dated prior to Limanni's body being discovered in December of 1998. 3 AA 000508-10; 4 AA 000758.

There was more than sufficient evidence to sustain Seka's convictions for both murders. ~~In fact, the district court itself noted that proof of Seka's guilt was evident and the presumption was great when it denied Seka's Motion for Bail Pending Appeal and Retrial on June 29, 2020. 11 AA 002584. The district court concluded, "[w]e have a very high likelihood of conviction, in light of the history that we have in this case." Id. at 002585~~. Therefore, there is not a reasonable probability that the result at trial would have been different. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Thus, because there was more than sufficient evidence to sustain Seka's conviction without the DNA evidence, and because Seka has failed to demonstrate that the result of trial would have been different, the district court abused its discretion when it granted Seka's Motion for New Trial.

Stricken per 10/22/20 order

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court reverse the district court's granting of Seka's Motion for a New Trial.

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Dated this 3rd day of September, 2020.

Respectfully submitted,

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BY *<u>/s/ Alexander Chen</u>*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,250 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 3rd day of September, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 3, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

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.

The following attorneys have appeared for John Seka in this proceeding or in the proceedings below:

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STATEMENT OF THE ISSUE[1]

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". RA[3] 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 opposed[4] 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.

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[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 dollars[5] 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. Marylin 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.

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[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

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[8] Three boards contained fingerprints from Seka and Limanni.10 AA 002446-56 *A*nother 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.

Cramer[16]

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

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[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.

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[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

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[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.

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[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 fingernails[25] 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

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[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,

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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

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[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.

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[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 inculpates 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]

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[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 02146. 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:

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Steven Wolfson
Aaron Ford

/s/ S. Concepcion
An Employee of Clark Hill PLLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

JOHN JOSEPH SEKA,

Respondent.

CASE NO: 80925

APPELLANT'S REPLY BRIEF

Appeal From Granting of Motion for New Trial
Eighth Judicial District Court, Clark County

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APPELLANT'S REPLY BRIEF

Appeal From Granting of Motion for New Trial
Eighth Judicial District Court, Clark County

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT GRANTED SEKA'S MOTION FOR NEW TRIAL.

Under NRS 176.515(1), a district court may grant a new trial on the basis of newly discovered evidence, and this court reviews the district court's decision for an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

> To establish a basis for a new trial on this ground, the evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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; and the best evidence the case admits.

Id. at 406, 812 P.2d at 1284-85 (footnote omitted) (*citing* McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978)). The Sanborn factors are conjunctive, and if the purported evidence fails to satisfy a single factor, the district court does not abuse its discretion by denying the motion for a new trial. See id. at 406, 812 P.2d at 1285.

Here, the district court abused its discretion when it granted Seka's Motion for New Trial. The "newly discovered" evidence presented by Seka was previously presented to the jury during Seka's trial and, thus, does not constitute newly discovered evidence. Further, some of the items of evidence were not relevant to the crime scene and therefore are not favorable to defense. As Seka failed to demonstrate that the evidence was newly discovered, material to the defense and non-cumulative, the district court abused its discretion when it granted Seka's Motion for New Trial. In any event, the evidence was not relevant to the Limanni crime scene and the district court abused its discretion when it granted Seka's motion as to the Limanni murder.

a. Seka is not entitled to a new trial.

i. Seka's "newly discovered" DNA evidence is not favorable to the defense and is cumulative of the evidence presented at trial.

NRS 176.09187 states in relevant part:

> 1. If the results of a genetic marker analysis performed pursuant to this section and NRS 176.0918 and 176.09183 are favorable to the petitioner:
>
> (a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and
>
> (b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

Here, Seka claims that the newly tested DNA evidence is exculpatory and, therefore, favorable to the defense under 176.09187. 8 AA 001853-67. However, Seka failed to demonstrate that the evidence was newly discovered, material to the defense and non-cumulative, the district court abused its discretion when it granted Seka's Motion for New Trial.

1. **Hamilton's Fingernail Clippings**

First, some DNA from under one of the victim's, Eric Hamilton's, fingernail clippings were tested. Id. at 001843. Seka was excluded as a contributor to the DNA sample under Hamilton's nails. Id.; see also, 10 AA 002437-41. A second foreign contributor was found in the DNA sample. Id. Seka based his argument that he is entitled to a new trial on the fact that, although Hamilton was shot twice and there was no evidence of defensive wounds, the killer *may* have dragged Hamilton by his wrists and, thus, DNA *may* have transferred to Hamilton's hands and fingernails. 8 AA 001855-56. Seka's claims are meritless as they are speculative at best. Seka fails to address the speculative nature of his claim and his silence should be construed as

an admission that his claims are speculative and wholly unproven. Polk v. State, 126 Nev. 180, 185-86, 233 P.3d 357, 360 (2010).

Forensic scientist Craig King completed the 2018 analysis of certain items of evidence from Seka's trial. King testified that he analyzed Hamilton's fingernail clippings obtained at his autopsy in 1998. 7 AA 001680. This evidence was previously tested in 1999 by another LVMPD forensic scientist. Id. at 001680-81. In 1999, the forensic scientist tested what appeared to be blood on Hamilton's fingernail clippings and included Hamilton as a contributor to the DNA profile and excluded Seka as a possible contributor. Id. at 001681. King retested the clippings and, regarding the right hand clippings, found a mixture DNA profile, which he assumed came from two (2) individuals with one male profile present. Id. at 001682. King concluded that Hamilton's DNA profile was present in the sample and that the profile was 99% Hamilton's DNA and 1% belonged to an unknown individual. Id. at 001685-86. King testified that such a small amount of DNA could come from something as simple as shaking someone's hand. Id. at 001686-87. Seka was excluded as a contributor. Id. at 001690. King's conclusion was the same as to the left hand fingernail clippings. Id. at 001692-93.

As an initial matter, King never verified that there was in fact a second DNA profile under Hamilton's fingernails. King testified that there was a very, very limited amount of DNA in the sample. Id. at 001686. King also testified that there

were two locations where there could *possibly* be a second person. Id. King stated that he erred on the side of caution and ran the test under the assumption there was a second DNA profile. Id. at 001687. The district court also confirmed with King that "possibly there wasn't additional DNA, but [he] can't rule it out so [he left] it in there." Id. at 001689. Essentially, King has no idea if there was a second DNA profile contained under Hamilton's fingernails, he is merely assuming so because there was a slight anomaly in his testing. Seka provides no other evidence or argument which demonstrates that a second DNA profile was present. Therefore, Seka cannot even demonstrate that there is in fact another DNA profile under Hamilton's fingernails and his claim fails.

Despite Seka's contention, the fact that there was DNA under Hamilton's fingernails and the fact that Seka was excluded as a source of that DNA was presented to the jury at trial. 3 AA 000655-56. Seka's claims otherwise are wholly false. Further, the fact that this evidence underwent a new type of testing with the same result does not de facto make the results newly discovered evidence. Therefore, this evidence is not newly discovered, is cumulative and, thus, not appropriately raised in a motion for new trial. See NRS 176.515. Further, as this evidence was presented to the jury at trial, Seka fails to demonstrate a reasonable probability that this evidence would have changed the outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. The jury heard evidence that Seka's DNA was not underneath

Hamilton's fingernails. The jury still convicted Seka of the murder of Hamilton based on all the other evidence presented at trial. Additionally, this evidence does not exonerate Seka as he claims. Even if there was an additional contributor to the DNA under Hamilton's fingernails, Seka cannot definitively state when or how this DNA got under Hamilton's fingernails. Instead, he relies on speculation that the killer's DNA may have transferred to Hamilton's hands or nails when his body was being dragged. As Seka provides no evidence that this in fact happened and cannot even demonstrate that the DNA must belong to the killer, he cannot demonstrate that this evidence is favorable to the defense or that there is a reasonable probability this evidence would have rendered a different outcome at trial. Therefore, his claim fails.

2. Hair Under Hamilton's Fingernails

Hairs found under Hamilton's nails were also tested. 8 AA 001843. At the evidentiary hearing, King testified that the hairs under Hamilton's fingernails were tested in 1999 and that Hamilton was included as the source of the blood on the hairs while Seka was excluded. 7 AA 001693-94. King testified that he retested the hairs in 2018 and that Hamilton was the only contributor to the DNA profile from the hairs. Id. at 001696-97. King also testified that all of the hairs were black and consistent with hair from an African American individual. Id. at 001698. King also testified that it was 3.24 billion times more likely that the hairs came from Hamilton than a random individual. Id.

At trial, it was stated that Hamilton could not be excluded as a source of that hair and that the probability of the hair coming from another African American individual was one in 2.8 million. 3 AA 000623. The hair was identified as coming from an African American individual and Seka is Caucasian. Therefore, Seka was excluded as being a possible source of that hair at trial, although Seka claims this is "newly discovered" evidence. The fact that this evidence underwent a new type of testing with the same result does not de facto make the results newly discovered evidence. As this evidence was presented to the jury at trial, Seka fails to demonstrate a reasonable probability that this evidence would have changed the outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. It has since been determined that Hamilton was the source of the hair. 10 AA 002442-44. The fact that the victim's own hair was found under his fingernails is not exculpatory evidence, as it does not demonstrate a reasonable probability that the outcome at trial would have been different. Therefore, Seka's claim fails.

3. Cigarette Butts, Skoal container and beer bottle

There were cigarette butts collected from the site where Hamilton's body was found. 8 AA 001843-44. Both Hamilton and Seka were excluded as contributors to the DNA samples on the cigarettes. Id. at 001844. A Skoal container was also collected from the site where Hamilton's body was found. Id. Both Hamilton and Seka were excluded as possible contributors to the DNA samples on the container.

Id. Beer bottles were also collected from the site where Hamilton's body was found. Id. at 001844-45. Seka, Limanni and Hamilton were all excluded as possible sources of the latent prints on the bottle and Hamilton and Seka were excluded as possible sources of the DNA sample on the bottle. Id. Further, the DNA sample was identified as female. Id. at 001844.

King examined the two (2) cigarette butts found in the general area where Hamilton's body was located. 7 AA 001674-75. These items had been previously tested by a different LVMPD forensic scientist in 1999. Id. at 001675. There was no DNA material detected on the items back in 1999 and King confirmed that he found no DNA material on the first cigarette butt. Id. at 001675-76. King testified that he obtained a partial DNA profile from the second cigarette butt and both Hamilton and Seka were excluded as contributors to the DNA profile. Id. at 001678-79.

King also examined the Skoal container as well as the beer bottles. Id. at 001714. King testified that he was concerned with testing those items for DNA because, at the time they were originally tested, the technique for testing for latent prints, known as "huffing" could contaminate any DNA profiles on the item. Id. at 001714-15. Huffing occurs when the latent fingerprint analyst breathes onto the item in order to create condensation to better visualize if a latent print is present. Id. at 001715. Further, testing for touch DNA was not possible at the time of Seka's trial and, therefore, there was not a concern with preserving such evidence or preventing

contamination. Id. King testified that there was a possibility that the fingerprint examiner's DNA could have transferred onto the evidence items. Id. King also testified that, based on procedures used prior to touch DNA testing, the examiner may not have worn gloves or may have worn the same gloves while touching multiple items of evidence, thereby contaminating these items. Id. at 001716. King also stated that examiners during that time would use the same fingerprint brush to dust for fingerprints on multiple items of evidence and that would potentially lead to cross-contamination. Id.

Essentially, Seka argues that because LVMPD, out of an abundance of caution, collected certain trash items that *could* have been relevant to the crime scene, the fact that these items did not have Seka's DNA or fingerprints is exculpatory and demonstrates that he should receive a new trial. 8 AA 001856-57. However, just because there were trash items located near the site where Hamilton was found does not make them relevant to the crime scene or even definitively mean that there will be DNA or fingerprint evidence from the individual involved in the crime. Further, Seka does not even argue that these items were related to the crime or the perpetrator. Instead, he merely states that because police collected the items and these items did not have Seka's DNA on them, this must show that there was an alternate suspect. Seka's claims are meritless.

Seka has failed to demonstrate that these items are related to the crime scene at all or that the 2018 DNA testing was reliable. The validity of the DNA testing of these trash items in 2018 is questionable at best. King testified that, because touch DNA was not testable in 1999, the methods for collecting fingerprints and other types of DNA evidence would compromise touch DNA evidence. 7 AA 001714-16. Therefore, any DNA evidence collected after these techniques were used would be compromised and potentially unreliable. Further, Hamilton's body was dumped on the side of the road. According to the crime scene diagram shown to the jury at trial, most of the trash items collected were not even near the body. One of the cigarette butts, marked 2 on State's Exhibit 79, was located approximately 25-30 feet away from Hamilton's body. 11 AA 002630-31. The Skoal tobacco container, marked 3 on State's 79, was located approximately 20 feet away from the body. Id. Finally, the beer bottles, marked 4 and 5 on State's 79, were located approximately 30-35 feet and 120 feet away from the body respectively. Id. The State never argued at trial that the items were somehow related to the murder or would lead to identifying the killer of Hamilton. It is laughable to think that these items might be related to the crime scene. As Seka provides no evidence that this evidence was not just unrelated trash discarded on the side of the road and cannot even demonstrate that any DNA must belong to the killer, he cannot demonstrate that this evidence is favorable to the defense or that there is a reasonable probability this evidence would have

rendered a different outcome at trial. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Therefore, his claim fails.

4. Baseball Hat

Hamilton's baseball cap was collected from the air conditioning business and not tested for DNA at the time of trial. 8 AA 001845. In the recent testing, Hamilton's DNA was identified as well as two unknown profiles. Id. However, at the evidentiary hearing, King testified that he had not tested the baseball hat. 7 AA 001699. King also testified that the evidence bag containing the hat was not properly sealed and there was no way to tell how many times the package had been opened or closed based on its condition. Id. at 001700. King testified that, based on the condition of the bag, LVMPD's forensic lab would refuse the evidence because there would be concerns as to the integrity of the evidence inside. Id. at 001705. King also testified that he would be concerned because the evidence package was opened at trial and was still in an unsealed condition in 2018 and, therefore, the jurors would have been able to physically handle and/or talk over the hat and transfer DNA during their deliberations. Id. at 001707-08; 3 AA 000562. King also testified that he did not place the DNA profiles into CODIS because "CODIS will only allow us to enter in profiles that we believe to be attributed to a *suspect*…." Id. at 001710. Thus, because King did not believe the DNA profile belonged to a suspect, he did not enter

the profile into CODIS. In fact, Seka's own expert confirmed that there were many ways for DNA mixtures to get onto the baseball hat:

> Q. You have also heard, let's assume that the hat did go back to the jury room and multiple jurors touched the hat. Would that assumption -- would you expect to find jurors' DNA on the hat?
> A. Under your hypothesis of multiple jurors, I would expect some DNA to also be transferred there. I would also -- my experience is even if people don't handle a hat after a crime, we often get mixtures on hats. So I think people swap hats -- the hat salesman, hat manufacturer, who knows. So it's not uncommon to have mixtures. Whether the minor components come after a criminal act or before a criminal act really doesn't matter to my work.

7 AA 001735. Further, Seka's expert confirmed that, without other evidence, there is no way to tell when a DNA profile was left on the hat. Id. at 001736.

Seka does not even attempt to argue how other DNA evidence on Hamilton's hat, which consisted of a mixture of at least three individuals and did not exclude Seka, creates a reasonable probability that the outcome at trial would be different. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Further, Seka cannot make such a demonstration because there is no way to tell when these DNA samples were transferred to the hat and, thus, any individual Hamilton came into contact with could have contributed to those DNA samples. Therefore, Seka's claim fails.

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5. Fingerprints

Seka complains that there were latent fingerprints from the Beck's beer bottle, a piece of lumber at the scene where Hamilton's body was found, a purse found in the ceiling of the business, and various doors and windows in the business were not examined. 8 AA 001845. However, even now Seka cannot show who these fingerprints belonged to our that a latent print comparison would have shown these prints were related to the investigation. In fact, Seka falsely claims that the evidence includes a single unknown individual, trying to insinuate to this Court that one alternative suspect has appeared. Respondent's Answering Brief ("RAB") at 28. However, there has been no comparison of the fingerprint evidence or the alleged DNA evidence for that matter to determine if they came from one individual. 8 AA 001856. Therefore, this evidence does not exonerate Seka as he claims. Seka's continued attempts to mislead this Court as to the veracity of the evidence fail.

The beer bottle and the purse did not belong to either the victims or Seka and so it is to be expected that there could be fingerprints from other sources on these items. Further, Seka's claim that all fingerprints found near the windows and doors of Limanni's air conditioning business is meritless, as any one of their customers, vendors, employees, friends, family, etc., could have accessed the business and left a fingerprint in those areas at any time, as noted by Seka in his motion. See id. at 001860. The fingerprint on the lumber, which came from the business, could also

have come from one of these individuals and could have been transferred to the lumber at any time prior to the murders. There is no indication that any fingerprint comparison would have pointed to an alternate suspect or was in any way favorable to the defense. Therefore, Seka cannot demonstrate that this evidence was favorable to the defense and his claim fails.

As Seka points out, the State did not rely on DNA evidence in proving Seka's guilt. Id. at 001850-51. Instead, witnesses testified as to the relationship between Seka and the victims, other physical evidence and Seka's own inconsistent stories and behavior to attempt to hide evidence demonstrated that he committed the crime. Moreover, Seka admits that the DNA does not implicate anyone else in the commission of the crime. Id. at 001856. Therefore, there is not a reasonable probability that the result at trial would have been different and this evidence is not material to the defense. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Thus, Seka has failed to demonstrate several of the Sanborn factors as to each item of "newly discovered" evidence and the district court abused its discretion when it granted Seka's Motion for New Trial.

Even if this Court were to find that Seka is entitled to a new trial as to the Hamilton murder, Seka is not entitled to a new trial as to the Limanni murder. All of the items of evidence that were retested for the presence of DNA related to items that were either found at the scene of where Hamilton was murdered at 1929 Western

or found where Hamilton's body was located on South Las Vegas Boulevard. Despite this fact, the district court granted a new trial as to all four counts that Seka was convicted of which included two counts where Peter Limanni was the victim (a Second Degree Murder with use of a Deadly Weapon count ((Count 2)) as well as one count of Robbery ((count 4)). In the event this Court finds that the district court did not abuse its discretion when it granted the motion as to the Hamilton murder, this Court must find the district court abused its discretion as it relates to the Limanni murder/robbery. However, the State maintains that the district court abused its discretion when it granted Seka's Motion for New Trial as to both murders.

b. There was sufficient evidence presented at trial to convict Seka without the DNA evidence and, therefore, the district court abused its discretion when it determined Seka was entitled to a new trial.

Seka claims that the sufficiency of the evidence in support of Seka's conviction is irrelevant to his claim. RAB at 50-57. However, the sufficiency of the evidence in support of Seka's conviction goes directly to the reasonable probability of a different outcome in the face of the DNA evidence. The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding that it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (concluding that the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court) (cert. denied by 429 U.S. 895, 97 S. Ct. 257 (1976)). Thus, the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts" is preserved. Id. at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, this Court has consistently held that circumstantial evidence alone may sustain a conviction.

Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)); see also Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony.").

There was both direct and circumstantial evidence linking Seka to both murders. When police found Hamilton's body, he had a piece of paper in his pocket with the name "Jack" on it and a telephone number which came back to Seka's place of employment. 3 AA 000521-22; 4 AA 000901-02, 000904. Further, Hamilton's body was covered by lumber from the business and Seka's fingerprint was on the lumber covering both Hamilton and Limanni's bodies. 3 AA 000518; 5 AA 001011, 001015-16, 001019-22. Seka was also driving the Toyota pickup truck which had tires matching the tire tracks left at the location where Hamilton's body was dumped. 4 AA 000823-24; 5 AA 001030-35, 001040-44. Hamilton's blood was also located in the truck. 3 AA 000619. Moreover, after being interviewed by police, Seka tried to leave the business with the company van containing Limanni's blood. 3 AA 000614; 5 AA 001079-82. Seka also admitted to Thomas Cramer that he murdered Limanni. 4 AA 000775-77, 000781-82.

Additionally, Seka lied to police and said that Limanni was out of town with his girlfriend when Seka knew that Jennifer Harrison had been looking for Limanni. 2 AA 000460-61; 4 AA 000825. Limanni's personal documents and credit cards

were also recovered from inside the business, where Seka admits only he and Limanni had access to. 3 AA 000526-27; 11 AA 002610-11. Harrison also testified that Limanni's dog, Jake, was always with Limanni and that he would not have left Jake with Seka. 2 AA 000459, 000464. Moreover, after the police left the business after their initial search, Seka was left alone in the business and a bullet from the table disappeared and burnt clothing and other miscellaneous items appeared in the dumpster when police returned to search the business again later that day. 2 AA 000375-76; 3 AA 000523, 000534-35, 000585-86; 4 AA 000827-28, 000846-47, 000850-52. Seka also wrote a to-do list which talked about liquidating the company's assets and finding a new home for Jake. 11 AA 002603. This list was dated prior to Limanni's body being discovered in December of 1998. 3 AA 000508-10; 4 AA 000758.

There was more than sufficient evidence to sustain Seka's convictions for both murders. Therefore, there is not a reasonable probability that the result at trial would have been different. Sanborn, 107 Nev. at 406, 812 P.2d at 1284-85. Thus, because there was more than sufficient evidence to sustain Seka's conviction without the DNA evidence, and because Seka has failed to demonstrate that the result of trial would have been different, the district court abused its discretion when it granted Seka's Motion for New Trial.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court reverse the district court's granting of Seka's Motion for a New Trial.

Dated this 3rd day of December, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 4,557 words and 373 lines of text.
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 3rd day of December, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 3, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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137 Nev., Advance Opinion 30

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

No. 80925

FILED

JUL 08 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order granting a motion for a new trial in a criminal matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen and John T. Fattig, Chief Deputy District Attorneys, Clark County,
for Appellant.

Clark Hill PLLC and Paola M. Armeni, Las Vegas; Jennifer Springer, Salt Lake City, Utah,
for Respondent.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

John "Jack" Seka was convicted in 2001 of two counts of murder and two counts of robbery related to the 1998 killings of his boss Peter

Limanni and contract worker Eric Hamilton. Both bodies were transported in work vehicles and dumped in remote desert areas. Although substantial circumstantial and physical evidence pointed to Seka as the killer, no physical evidence, aside from fingerprints on a board covering Hamilton's body, connected Seka to the desert locations where the bodies were found. Genetic marker analysis (DNA) testing at the time of trial could only exclude Seka from DNA collected from a few pieces of evidence. But DNA testing performed in 2018 and 2019 both excluded Seka from DNA on several pieces of evidence and discovered other DNA profiles on some of that evidence. In 2020, based on these new DNA test results, the district court granted a new trial.

NRS 176.515(1) allows a court to grant a new trial within two years after the original trial "on the ground of newly discovered evidence." But NRS 176.09187(1) allows a defendant to move for a new trial at any time where DNA test results are "favorable" to the defendant. We have never addressed what constitutes "favorable" results under that statute. We now clarify that, consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. We conclude that the new evidence here fails to meet this requirement, and we reverse the district court's order granting a new trial.

I.

Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived

together at Cinergi.[1] Limanni typically drove the business's brown Toyota truck, while Seka drove one of the company vans.

The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.

Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.

The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.

On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the

[1]According to Seka, no one else lived with them at the business.

I-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

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

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

contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

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

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

drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

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

Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going

underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.

Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border. Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.

Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

II.

The State charged Seka with two counts of murder with use of a deadly weapon (open murder) and two counts of robbery with use of a deadly weapon, and filed notice of its intent to seek the death penalty. The case went to trial from February 12 to March 1, 2001. The State's theory of the case was that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee.

Some of Seka's friends testified Limanni treated Seka well, but Jennifer Harrison recalled Limanni treating Seka poorly and testified that Limanni always referred to Seka as "his nigger." Harrison also explained Limanni controlled Seka's access to money and often ordered Seka to run menial errands. Seka once told Harrison that Limanni's anger and name-calling was "just the tip of the iceberg." Harrison further testified that she called Seka the morning Limanni disappeared, and Seka reported Limanni had left early that morning. Harrison thought Seka seemed "really down,"

and Seka told Harrison that he had just discovered his girlfriend was cheating on him. But Seka's girlfriend testified that nothing had happened between them during Seka's visit and that Seka had not been upset with her.

Notably, Seka's friend of 12 years, Thomas Cramer, testified to once overhearing Limanni treat Seka poorly during a phone call. Then, during the time that Seka was hiding from being apprehended by the police for murder, Cramer asked Seka about the rumor that he killed Limanni. Seka responded saying, "They didn't even find the body." On another occasion, Seka threatened Cramer by saying, "Do you want me to do to you what I did to Pete Limanni?" Finally, Cramer testified Seka told him that Limanni had come at Seka with a gun, and Seka had wrested the gun from Limanni and shot him in self-defense. During cross-examination by Seka's attorneys, Cramer was impeached by acknowledging to the jury that he had been treated for alcohol addiction and depression, had been diagnosed with major depressive disorder and PTSD, was on medication, and admitted that he had previously been treated at mental hospitals. He also admitted to being upset with Seka, who was friends with Cramer's girlfriend and helped her secure a restraining order against Cramer. Seka was also instrumental in having Cramer put into a mental institution.

During trial, the evidence established that a .32 caliber firearm was used to kill Limanni, while a .357 caliber firearm was used to kill Hamilton. Both types of ammunition were found at Cinergi, where Seka had been living and working. The evidence further suggested that only one gun had been used at each shooting. The evidence also showed Limanni's body had been transported in the decaled company van, while Hamilton's body had been transported in the bed of the brown Toyota pickup truck.

The tires on the Toyota truck made impressions similar to the tire tracks near Hamilton's body. DNA from a glass shard further established that Hamilton was the victim killed at 1929 Western, the business next to Cinergi. Of the wood covering Hamilton's body, two pieces bore Seka's prints, and one bore Limanni's. Beer bottles in Cinergi's trash yielded both Seka's and Hamilton's prints. But prints on the beer bottle found in the desert area near Hamilton's body did not match Seka, and DNA evidence from Hamilton's fingernails excluded Seka as a contributor. The State did not argue that Seka dropped the trash found near Hamilton's body.

During closing arguments, the State theorized that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee. But defense counsel theorized that Cinergi's investors, who had lost a substantial sum on Cinergi and disliked Limanni, came to the business after Seka had moved out, took Limanni out into the desert and killed him, and also shot Hamilton, an innocent bystander. Defense counsel argued that no evidence implicated Seka in the murders, that Seka had no motive to kill the victims, and that the State's case against Seka was not believable. Defense counsel contended Limanni was a con man and highlighted discrepancies and weaknesses in the circumstantial evidence to undermine the State's case and suggest alternative theories.[2] Relevant here, defense

[2]For example, defense counsel argued that Cinergi investors lied to detectives; Cramer's testimony of Limanni gurgling blood was inconsistent with the lack of blood at Cinergi; Cramer suffered from mental illness and developed the story to get Seka away from Cramer's girlfriend; Cramer

counsel pointed out, through photographs in evidence showing Seka smoking, that the cigarette butts found near Hamilton's body were a different kind than those Seka smoked and therefore did not tie Seka to the crime.

The jury found Seka guilty of first-degree murder with use of a deadly weapon and robbery in regard to Hamilton, and of second-degree murder with use of a deadly weapon and robbery as to Limanni, but the jury deadlocked at the penalty phase. Seka thereafter stipulated to life imprisonment without the possibility of parole to avoid the death penalty.

III.

Seka filed a direct appeal in May 2001, and we affirmed the conviction. Seka thereafter petitioned for a writ of habeas corpus, which the district court denied, and we affirmed the denial.

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

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA

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changed his story between the preliminary hearing and trial; testimony suggested other people had access to and frequented Cinergi; Seka was too small to have singlehandedly put Limanni's 200-pound corpse in the vehicle, drive him to the state line, and bury him; Seka would not have left his own phone number in Hamilton's pocket had he killed Hamilton; etc.

from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.[3]

(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA[4] that it could have been transferred from something as benign as a handshake or DNA may not have actually existed.

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.[5]

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

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[3]The State put the results from the second cigarette butt into the CODIS system, a database of DNA profiles and other samples from various arrestees and offenders, but did not find any matches.

[4]The forensic scientist explained that the test results showed 99 percent of the DNA coming from Hamilton as the DNA contributor and 1 percent of the DNA coming from an unknown contributor.

[5]Statistically, it was 3.24 billion times more likely that the DNA was Hamilton's than that of a different, unknown contributor.

crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

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

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

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion.

Arguing the new DNA evidence does not warrant a new trial, the State appeals.

IV.

NRS 176.515(1) allows a court to grant a new trial "on the ground of newly discovered evidence." That statute generally requires a

defendant to move for a new trial within two years of the verdict.[6] NRS 176.515(3). An exception applies where the newly discovered evidence comes from DNA testing, in which case the defendant may move for a new trial at any time if the evidence is "favorable" to the defendant. NRS 176.09187(1). But NRS 176.09187 does not define the term "favorable." We review the district court's decision to grant a new trial for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). But we review issues involving statutory interpretation de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

We have never addressed what makes DNA evidence "favorable" under NRS 176.09187(1) or the circumstances under which new DNA evidence warrants a new trial. At the outset, we note "courts have uniformly held that the moving party bears a heavy burden" on a motion for a new trial on newly discovered evidence. *INS v. Abudu*, 485 U.S. 94, 110 (1988). And over a century ago we set forth elements for determining whether newly discovered evidence in general warrants a new trial. *See Sanborn*, 107 Nev. at 406, 812 P.2d at 1284-85 (citing *McLemore v. State*, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978)); *see also Oliver v. State*, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969); *Whise v. Whise*, 36 Nev. 16, 24, 131 P. 967, 969 (1913). In *Sanborn* we explained

> the evidence must be: newly discovered; material to the defense; such that even with the exercise of

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[6]We note that generally the district court judge who presided at trial should be the judge who hears and determines the motion for a new trial whenever possible, as the trial judge is in the best position to determine whether new evidence is "favorable" to the defendant, *see* NRS 176.09187. We encourage the district courts to be exceptionally mindful of this and be very familiar with the trial record if the trial judge is unavailable to preside over a motion for a new trial.

> reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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; and the best evidence the case admits.

107 Nev. at 406, 812 P.2d at 1284-85. As these factors are conjunctive, *id.*, a new trial must be denied where the movant fails to satisfy any factor.

We interpret NRS 176.09187's mandate that new evidence be "favorable" in concert with this long-honored caselaw.[7] *Cf. First Fin. Bank N.A. v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("This court will not read a statute to abrogate the common law without clear legislative instruction to do so."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318-19 (2012) (addressing the presumption that a statute will not be read to alter the common law absent the statute's clear intent to do so). We conclude that to warrant a new trial, the "favorable" DNA evidence must do more than merely support the defendant's position or possibly alter the outcome of trial. *See Whise*, 36 Nev. at 24, 131 P. at 969 ("[I]t is not sufficient that the new evidence, had it been offered at trial, *might* have changed the judgment." (emphasis added)). The new DNA evidence must be material to a key part of the prosecution or defense, or so significant to the trial overall, such that had it been introduced at trial, a different result would have been reasonably probable. *See id.* ("Newly discovered evidence, to have any weight in the consideration

[7]Seka acknowledges the term "favorable" in NRS 176.09187 is synonymous with *Sanborn*'s standard.

of a trial court, must be material or important to the moving party . . . such as to render a different result reasonably certain.").

The weight of the new DNA evidence will ultimately depend on the facts and circumstances of each individual case, including the sufficiency of the evidence adduced at trial. *Cf. State v. Parmar*, 808 N.W.2d 623, 631-34 (Neb. 2012) (comparing and contrasting cases where the new DNA evidence "probably would [or would not] have produced a substantially different result if the evidence had been offered and admitted at . . . trial"); *see also Walker v. State*, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (concluding evidence would support the defendant's argument but ultimately was not of a caliber that would likely lead to a different result). But we stress that newly discovered DNA evidence cannot be considered favorable where it does not undermine the jury's verdict and is cumulative under the facts of the case.[8] *Cf. Cutler v. State*, 95 Nev. 427, 429, 596 P.2d 216, 217 (1979) (concluding cumulative evidence did not warrant a new trial); *Bramlette v. Titus*, 70 Nev. 305, 312, 267 P.2d 620, 623-24 (1954) (same). Newly discovered evidence is also not favorable where it has no relevance to the circumstances of the crime. *Cf. Mortensen v. State*, 115 Nev. 273, 287, 986 P.2d 1105, 1114 (1999) (explaining the new evidence did not relate to the circumstances of the murder and did not inculpate a new

[8]Although *LaPena v. State*, Docket No. 73826 (Order of Affirmance, October 11, 2018), is unpublished, it is also instructive here. There, we considered newly discovered DNA evidence that impeached a key witness's testimony of the murder but concluded the DNA evidence did not warrant a new trial where the witness's testimony had been impeached at trial by the medical examiner. *Id.* Moreover, an additional, unknown DNA profile on the cord used to strangle the victim did not warrant a new trial where it merely showed that an unknown person had handled the cord at some unknown time. *Id.*

suspect or exculpate the defendant). Nor is newly discovered evidence favorable where it impeaches a witness without contradicting or refuting any of the trial testimony supporting the verdict. *Cf. id.* at 288, 986 P.2d at 1114 (concluding introducing the evidence "would simply be an attempt to discredit" the witness where that evidence did not contradict or refute the witness's trial testimony). Likewise, the newly discovered evidence will not be favorable if it merely goes to an issue that was fully explored at trial and is not sufficiently material to make a different verdict probable. *Cf. D'Agostino v. State*, 112 Nev. 417, 423-24, 915 P.2d 264, 267-68 (1996) (concluding newly discovered evidence about benefits offered to a witness did not warrant a new trial where the witness's criminal background and cooperation with police had been explored at trial); *see also Simmons v. State*, 112 Nev. 91, 103, 912 P.2d 217, 224 (1996) (concluding newly discovered evidence that was relevant to the question of where the victim was killed did not warrant a new trial where substantial evidence already pointed to the murder scene).

With the exception of Seka's fingerprints on the wood stacked on Hamilton's body in the desert, the State at the 2001 trial presented no other physical evidence from where the body was found to tie Seka to the murders, instead relying on the circumstantial evidence. The DNA testing in 2018 and 2019 produced six new pieces of DNA evidence,[9] taken from Hamilton's fingernail clippings and hair under his fingernails; from a tobacco container, beer bottle, and cigarette butt found in the vicinity of his

[9]Although the State argues the evidence is not "new" because similar evidence was presented at trial, we note the DNA tests performed in 2018 and 2019 were not available at the time of trial and the new DNA tests were able to find additional profiles, making those test results newly discovered evidence that could not have been discovered at the time of trial.

body; and from a hat found at Hamilton's murder scene. As set forth in detail below, although some of the evidence newly tested yielded other, unknown profiles, none of it exculpated Seka of the murders, necessarily implicated another suspect in the crimes, or otherwise materially supported his defense. Critically, too, the new DNA evidence from the scene where Hamilton's body was dumped was cumulative of the evidence adduced at trial as no DNA evidence inculpated Seka to that scene in 2001 and the new DNA results likewise do not inculpate Seka to that crime scene. Moreover, the new DNA evidence did not contradict or refute the totality of the evidence supporting the verdict. Thus, for the following reasons, the new DNA evidence was not favorable to the defense within the meaning of NRS 176.09187.[10]

First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails.[11] Moreover, the fingernail clippings provided so little

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[10]Seka also argues that a number of fingerprints taken from items at Cinergi and evidence around Hamilton's body were not tested and contends those fingerprints may have implicated another perpetrator. Because the narrow question before us is whether the new DNA evidence supports the granting of a new trial, we do not address the untested fingerprints.

[11]Although Seka distinguishes between the blood tested at trial and the epithelial cells tested in 2018, this distinction is not materially relevant

DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time.[12] Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

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

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not

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under the facts here, where Seka was excluded as a contributor on both types of evidence.

[12]Notably, too, the beer bottle produced a female profile, and Seka has never argued that the killer was a woman.

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

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

Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and

Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.

Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.

Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling, and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working

at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer.[13] All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

Whether newly discovered DNA evidence will warrant a new trial in a murder case is a fact-intensive inquiry. Under different facts, DNA evidence such as that discovered here could warrant a new trial. But the newly discovered DNA evidence was cumulative in this case, and the unknown DNA profiles on miscellaneous desert debris cannot, under these facts, be considered favorable. And although Seka points to discrepancies and weaknesses in the evidence adduced at trial and to speculative evidence that disgruntled investors were more likely suspects than himself, the

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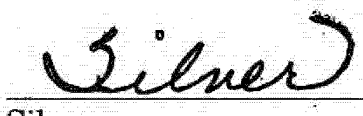
[13]Seka argues on appeal that Cramer's testimony was not credible. However, the defense attacked Cramer's credibility at trial and the jury nevertheless convicted Seka, and we do not reweigh the evidence on appeal. *Clancy v. State*, 129 Nev. 840, 848, 313 P.3d 226, 231 (2013).

totality of all of the physical and circumstantial evidence adduced at trial nevertheless pointed to Seka and supports the jury's verdict.

Accordingly, the new DNA evidence does not make a different outcome reasonably probable here and is not "favorable" to the defense as necessary to warrant a new trial.[14] We therefore conclude the district court abused its discretion by granting Seka a new trial based on the newly discovered DNA evidence, and we reverse the district court's decision.

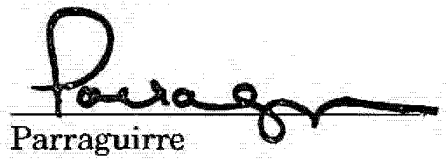
V.

Under NRS 176.09187(1), a party may move for a new trial at any time where DNA test results are "favorable" to the moving party. Consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), we hold that new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. Because the new evidence here fails to meet this standard, we reverse the district court's order granting a new trial.

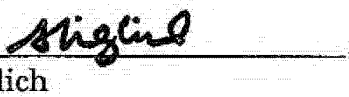


_____, J.
Silver

We concur:



_____ J.
Parraguirre



_____, J.
Stiglich

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[14]Notably, too, Seka was *also* convicted of robbing the victims, and the jury therefore believed beyond a reasonable doubt that Seka not only murdered Limanni and Hamilton, but robbed them as well.

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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STATE OF NEVADA

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

[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:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

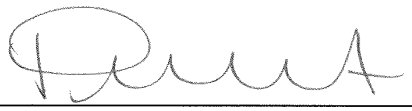
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 3952 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed 10 pages.

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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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

No. 80925

FILED

AUG 09 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Kathleen E. Delaney, District Judge
Attorney General/Carson City
Clark County District Attorney
Jennifer Springer
Clark Hill PLC
Eighth District Court Clerk

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 EN BANC RECONSIDERATION

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RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

Respondent John Joseph 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 Honorable Court for en banc reconsideration of the published decision issued in the above-captioned case on July 8, 2021 (attached as Exhibit A) because the panel reversed the district court's decision to grant Mr. Seka a new trial using the wrong standard of review and placed a burden on Defendants contrary to the intent of the Nevada DNA Testing Statute and adverse to new trial precedent and public policy.

This Petition for En Banc Reconsideration is based on the following Memorandum of Points and Authorities and all papers and pleadings on file in this case.

TIMELINESS OF THE PETITION

A petition for en banc reconsideration is timely filed within fourteen (14) days after written entry of a Supreme Court panel decision denying rehearing. NRAP 40A(b). The panel filed its Order Denying Rehearing on August 9, 2021. Thus, Mr. Seka has timely filed the instant petition.

STANDARD FOR EN BANC RECONSIDERATION OF THE PANEL'S SUMMARY DENIAL OF THE PETITION FOR REHEARING

Nevada R. App. P. 40A(a) permits en banc reconsideration of a decision of a panel of the Supreme Court under the following circumstances:

> (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.

To warrant en banc reconsideration based on maintaining uniformity of decisions, "the petition shall demonstrate that the Panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases." NRAP 40A(c). Reconsideration based on matters of precedent and public policy requires the petition to "concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." *Id.*

As set forth below, en banc reconsideration is necessary in this case to "secure or maintain uniformity of decisions" and because the issue is a matter of precedential and "substantial public policy." NRAP 40A(a). Specifically, en banc reconsideration of Mr. Seka's case is necessary because the panel reversed the district court's order granting Mr. Seka a new trial using the incorrect standard of review. This error flies in the face of the uniformity of this court's prior decisions, both published and unpublished. Further, the panel analyzed the case by placing an impossibly high burden on the defendant to prove his or her innocence, contrary to the intent of the Nevada DNA Testing Statute and adverse to new trial precedent and public policy recognizing the need to provide a defendant a mechanism to present newly discovered DNA evidence to a jury.

ARGUMENT

I. En Banc Reconsideration of Mr. Seka's Case is Necessary to Maintain Uniformity of Decisions Because the Panel Analyzed the Case Using the Incorrect Standard of Review Contrary to this Court's Prior Published Opinions.

The panel's decision in Mr. Seka's case is patently contrary to well-established Nevada case law. In short, the panel disregarded the appropriate standard of review. As a result, "reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court [and] the Court of Appeals." Nevada R. App. P. 40A(a).[1]

As outlined in Mr. Seka's Answering Brief,[2] as both the State[3] and the panel acknowledged,[4] and as this Court has repeatedly and uniformly held, a lower court's

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[1] The panel also inappropriately relied on an unpreserved issue to support the reversal of Mr. Seka's order for a new trial. As Mr. Seka provided in his answering brief, this Court's uniform and 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); *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. 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. The panel not only accepted the State's unpreserved arguments but also relied on those arguments to reverse the district court.

[2] *See* Respondent's Answering Brief, p. 24-26.

[3] *See* Appellant's Opening Brief, p. 27-28.

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

decision on a new trial motion is reviewed for abuse of discretion.[5] *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991); *Flowers v. State*, 136 Nev. Adv. Rep. 1, 18, 456 P.3d 1037, 1052 (2020) (citing *Funches v. State*, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997)). Reversal is only appropriate "when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Although the panel may have 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, 930, 937-38, 267 P.3d 777, 779 (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.3d 798, 800 (2017) (citing *Dist. Ct. (Armstrong)*, 267 P.3d at 780). 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.

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[5] This standard appears in Nevada Supreme Court precedent as early as 1876 in *Margaroli v. Milligan*, 11 Nev. 96, 96 which held that the district court's decision to grant a new trial will "not be disturbed except where there is a gross abuse of discretion." No case since that time, either civil or criminal, has used a different standard of review in assessing a district court's decision to grant or deny a new trial motion.

However, the panel rejected the abuse of discretion standard of review and conducted a de novo review asserting that this case involved only issues of statutory interpretation.[6] This was not only clear error, but also runs contrary to this Court's precedent on the standard of review applied to new trial motions on appeal.[7]

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.[8] 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*. 812 P.2d 1279.[9] Using the *Sanborn* standard to

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

[7] It is all but impossible to marshal every case that this Court has decided in the last 157 years using the abuse of discretion standard to review a district court's grant or denial of a new trial motion. In addition to those cited in the body of this argument, additional published cases indicating that the appropriate standard to review a district court's grant or denial of a new trial motion include *Servin v. State*, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001); *Domingues v. State*, 112 Nev. 683, 695 917 P.2d 1364, 1372-73 (1996) (citing *Pappas v. State, Dep't Transp.*, 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

[8] In *LaPena v. State*, this Court upheld the denial of a new trial motion based on DNA evidence even though the district court misconstrued the Post-conviction DNA Testing Statute by obscuring the term "'favorable" in reviewing the materiality of the new evidence." 134 Nev. 970, *6, 429 P.3d 292 (2018) (unpublished) (emphasis added). This Court did not reverse because of the district court's error but instead upheld the district court's decision emphasizing that the standard of review is abuse of discretion on a new trial motion. *Id.*

[9] 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,

analyze the district court's order granting Mr. Seka's new trial motion should have logically led the panel to apply the *Sanborn* abuse of discretion standard of review. *Sanborn*, 812 P.2d at 1284 (citing *McCabe v. State*, 98 Nev. 604, 655 P.2d 536 (1982)). Nothing in the DNA Testing Statute suggests otherwise. 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 176.515 is not applicable" in a new trial motion involving DNA. NRS 176.0918(10)(b). Notably, 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).

Although the Supreme Court twice referenced the abuse of discretion standard in its Opinion,[10] the Court did not actually *analyze* the district court's decision under that standard. Instead, the Court announced a new rule regarding the favorability of

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> 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, 812 P.2d at 1284-85.

[10] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), pp. 13 & 23.

DNA evidence and applied that rule de novo when reviewing the district court's new trial ruling. In doing so, the Court failed to maintain uniformity of its decisions on the standard of review for new trial motions.

Had the Court applied the proper standard of review, it would have found that the district court did not abuse its discretion when it granted Mr. Seka's new trial motion. Nothing in the record indicates 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.[11] 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[12] testified on December 14, 2018. The district court ordered DNA testing of evidence two separate times.[13] 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.[14] Put plainly, an en banc

[11] 7 AA 001586-624.
[12] 7 AA 001666-1750; 8 AA 001751-1764.
[13] 7 AA 001660-62; 8 AA 001816-21.
[14] 11 AA 002517-19.

reconsideration is necessary to apply the abuse of discretion standard of review and uphold the uniformity of this Court's prior decisions.

Mr. Seka's case creates significant precedent that will be relied on in future post-conviction DNA testing cases and conflicts with published decisions of the Nevada Supreme Court on the appropriate standard of review. *See, e.g.*, *Sanborn*, 812 P.2d at 1284. Additionally, considering an unpreserved issue runs contrary to all this Court's jurisprudence. *See, e.g.*, *Old Aztec Mine*, 623 P.2d at 983. The panel's decision in Mr. Seka's case is completely contrary to well-established case law and will cause significant confusion in future cases. Accordingly, the panel's use of the wrong standard of review and its consideration of an unpreserved argument requires en banc reconsideration to reverse the panel's decision and permit the district court's order to stand.

II. En Banc Reconsideration of Mr. Seka's Case is Necessary as a Matter of Substantial Public Policy Because the Panel's Reversal Essentially Negates the Intent of the Post-Conviction DNA Testing Statute and Adversely Affects Wrongfully Convicted Individuals.

Mr. Seka's case provides the first published opinion analyzing the post-conviction DNA testing statute and provides significant precedent that will be relied on in future cases. It is an important opinion that will have a substantial impact on the efficacy of the Nevada Post-conviction DNA Testing Statute and on public policy affecting the wrongfully convicted. 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.[15] *See* NRS 176.918; *see also* NRS 176.515; *Sanborn*, 812 P.2d 1279. In short, when new DNA testing results are presented, along with other evidence, the Nevada Post-conviction DNA 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 evidence.[16] *Id.* 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.[17] Inexplicably, the panel also held that to deserve a new trial, Mr. Seka was required to "contradict or refute

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[15] *See also Schlup v. Delo*, 513 U.S. 298 (1995).
[16] *See* Respondent's Answering Brief, p. 35-37.
[17] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.

the totality of the evidence supporting the verdict."[18] These heavy burdens do not comport with "long-honored caselaw" as the panel claims to rely on in its decision.[19] 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 outcome, and instead require the petitioner to prove beyond a reasonable doubt that he or she did not commit the crime.[20] This certainly cannot be what was intended in the Post-conviction DNA Testing Statute.

Second, allowing a de novo review in these types of matters undermines the district court judge that spent years analyzing the case, hearing arguments, and taking testimony in turn undermining a defendant's relief in DNA cases. The panel reversed the decision of the court that presided over this matter for almost 3 years before ultimately granting a new trial. In doing so, the panel, in its short time reviewing the matter, failed to give the district court deference and misinterpreted the evidence previously analyzed thoroughly by the district court.

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[18] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.
[19] *Id.* at 14.
[20] These burdens also exceed the "reasonable possibility" standard in the Nevada Post-Conviction DNA Testing Statute. NRS 176.918(3)(b).

Specifically, 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.[21] The panel also 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.[22] The panel is simply wrong on both counts as demonstrated by the facts presented in Mr. Seka's answering brief and in the appendix documents supporting that brief. In addition, the panel readily accepts the State's argument which was rejected by the district court that the beer bottle, cigarette butt, and Skoal container were merely "trash" and any connection to the crime, now that Mr. Seka is excluded from all three, is either cumulative or speculative. However, as they did when they collected these items, the police continue to believe that both the cigarette butt and the beer bottle were from the "putative perpetrator," a fact minimized by the panel.[23]

Finally, the panel recited the prosecution's trial case in reversing the district court's grant of a new trial. The panel, however, ignored exculpatory evidence the jury never heard, and when combined with the DNA evidence exonerating Mr. Seka,

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[21] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17-18; *See* Respondent's Answering Brief, p. 19, 39, 3 AA 000620; 10 AA 002437; 10 AA 002443-44.
[22] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17; *see* Respondent's Answering Brief, p. 19, 39, 10 AA 002437-41, 10 AA 002443-44.
[23] *See* Respondent's Answering Brief, p. 20-21, 2446-48. 2482-83; 9 AA 002084; 10 AA 002437-41; 10 AA 002446-48; 10 AA 002446-47.

points to his innocence. Importantly, that evidence includes a new witness who has provided a declaration that the state's key witness wholly fabricated the story in which he claimed Mr. Seka confessed.[24] The panel also ignored exculpatory evidence that was not provided to defense counsel showing that Mr. Seka was excluded as the contributor of fingerprints on a stolen purse found at the purported scene of the crimes.[25] And, the panel ignored the fact that for every piece of circumstantial evidence the prosecution relied upon, there is other evidence favoring Mr. Seka – all of which is outlined in Mr. Seka's Answering Brief. Mr. Seka's case at trial was wholly circumstantial and new DNA evidence excludes him and includes other unknown profiles that may belong to the perpetrator(s).

In short, the district court carefully reviewed the entire record and ordered a new trial simply allowing Mr. Seka an opportunity to present this newly discovered exculpatory evidence to a jury of his peers and the panel incorrectly reversed that order – creating dangerous precedent that will impact all defendants who file for post-conviction DNA testing of physical evidence and motion for a new trial based on the results. This precedent will direct the district court to improperly require defendants to meet an unattainable burden and solve the crime, identify the actual

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[24] *See* Respondent's Answering Brief, p. 56; 10 AA 002425-27; *See e.g., Hennie v. State*, 114 Nev. 1285, 1291, 968 P.2d 761, 764-65 (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).

[25] *See* Respondent's Answering Brief, p. 54; 10 AA 002282.

perpetrator, and "contradict or refute the totality of the evidence supporting the verdict"[26] without regard to new DNA testing results or other exculpatory evidence before they are entitled to a new trial. Not only is this inconsistent with *Sanborn* precedent, but it is against public policy and the legislative intent of the Post-conviction DNA Testing Statute. The panel's decision will, in essence, negate the efficacy of the Post-conviction DNA Testing Statue. Thus, the en banc Court should reconsider the panel's decision in Mr. Seka's case.

CONCLUSION

Based on the foregoing, this Court should grant an en banc reconsideration on the panel's reversal of the district court's grant of a new trial.

Dated this 23rd day of August, 2021.

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[26] *State v. Seka*, 137 Nev. Adv. Op. 30 (filed July 8, 2021), p. 17.

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:

[**X**] It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 font size and Times New Roman; or

[ ] It has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 3,414 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains __ words or ___ lines of text; or

[ ] Does not exceed 10 pages.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF SERVICE

I, hereby certify and affirm that the foregoing **RESPONDENT JOHN SEKA'S PETITION FOR EN BANC RECONSIDERATION** was filed electronically with the Nevada Supreme Court on the 23rd day of August, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT A

137 Nev., Advance Opinion 30

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

No. 80925

FILED

JUL 08 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order granting a motion for a new trial in a criminal matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen and John T. Fattig, Chief Deputy District Attorneys, Clark County,
for Appellant.

Clark Hill PLLC and Paola M. Armeni, Las Vegas; Jennifer Springer, Salt Lake City, Utah,
for Respondent.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

John "Jack" Seka was convicted in 2001 of two counts of murder and two counts of robbery related to the 1998 killings of his boss Peter

Limanni and contract worker Eric Hamilton. Both bodies were transported in work vehicles and dumped in remote desert areas. Although substantial circumstantial and physical evidence pointed to Seka as the killer, no physical evidence, aside from fingerprints on a board covering Hamilton's body, connected Seka to the desert locations where the bodies were found. Genetic marker analysis (DNA) testing at the time of trial could only exclude Seka from DNA collected from a few pieces of evidence. But DNA testing performed in 2018 and 2019 both excluded Seka from DNA on several pieces of evidence and discovered other DNA profiles on some of that evidence. In 2020, based on these new DNA test results, the district court granted a new trial.

NRS 176.515(1) allows a court to grant a new trial within two years after the original trial "on the ground of newly discovered evidence." But NRS 176.09187(1) allows a defendant to move for a new trial at any time where DNA test results are "favorable" to the defendant. We have never addressed what constitutes "favorable" results under that statute. We now clarify that, consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. We conclude that the new evidence here fails to meet this requirement, and we reverse the district court's order granting a new trial.

I.

Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived

together at Cinergi.[1] Limanni typically drove the business's brown Toyota truck, while Seka drove one of the company vans.

The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.

Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.

The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.

On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the

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[1]According to Seka, no one else lived with them at the business.

I-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

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

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

contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

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

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

drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

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

Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going

underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.

Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border. Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.

Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

II.

The State charged Seka with two counts of murder with use of a deadly weapon (open murder) and two counts of robbery with use of a deadly weapon, and filed notice of its intent to seek the death penalty. The case went to trial from February 12 to March 1, 2001. The State's theory of the case was that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee.

Some of Seka's friends testified Limanni treated Seka well, but Jennifer Harrison recalled Limanni treating Seka poorly and testified that Limanni always referred to Seka as "his nigger." Harrison also explained Limanni controlled Seka's access to money and often ordered Seka to run menial errands. Seka once told Harrison that Limanni's anger and name-calling was "just the tip of the iceberg." Harrison further testified that she called Seka the morning Limanni disappeared, and Seka reported Limanni had left early that morning. Harrison thought Seka seemed "really down,"

and Seka told Harrison that he had just discovered his girlfriend was cheating on him. But Seka's girlfriend testified that nothing had happened between them during Seka's visit and that Seka had not been upset with her.

Notably, Seka's friend of 12 years, Thomas Cramer, testified to once overhearing Limanni treat Seka poorly during a phone call. Then, during the time that Seka was hiding from being apprehended by the police for murder, Cramer asked Seka about the rumor that he killed Limanni. Seka responded saying, "They didn't even find the body." On another occasion, Seka threatened Cramer by saying, "Do you want me to do to you what I did to Pete Limanni?" Finally, Cramer testified Seka told him that Limanni had come at Seka with a gun, and Seka had wrested the gun from Limanni and shot him in self-defense. During cross-examination by Seka's attorneys, Cramer was impeached by acknowledging to the jury that he had been treated for alcohol addiction and depression, had been diagnosed with major depressive disorder and PTSD, was on medication, and admitted that he had previously been treated at mental hospitals. He also admitted to being upset with Seka, who was friends with Cramer's girlfriend and helped her secure a restraining order against Cramer. Seka was also instrumental in having Cramer put into a mental institution.

During trial, the evidence established that a .32 caliber firearm was used to kill Limanni, while a .357 caliber firearm was used to kill Hamilton. Both types of ammunition were found at Cinergi, where Seka had been living and working. The evidence further suggested that only one gun had been used at each shooting. The evidence also showed Limanni's body had been transported in the decaled company van, while Hamilton's body had been transported in the bed of the brown Toyota pickup truck.

The tires on the Toyota truck made impressions similar to the tire tracks near Hamilton's body. DNA from a glass shard further established that Hamilton was the victim killed at 1929 Western, the business next to Cinergi. Of the wood covering Hamilton's body, two pieces bore Seka's prints, and one bore Limanni's. Beer bottles in Cinergi's trash yielded both Seka's and Hamilton's prints. But prints on the beer bottle found in the desert area near Hamilton's body did not match Seka, and DNA evidence from Hamilton's fingernails excluded Seka as a contributor. The State did not argue that Seka dropped the trash found near Hamilton's body.

During closing arguments, the State theorized that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee. But defense counsel theorized that Cinergi's investors, who had lost a substantial sum on Cinergi and disliked Limanni, came to the business after Seka had moved out, took Limanni out into the desert and killed him, and also shot Hamilton, an innocent bystander. Defense counsel argued that no evidence implicated Seka in the murders, that Seka had no motive to kill the victims, and that the State's case against Seka was not believable. Defense counsel contended Limanni was a con man and highlighted discrepancies and weaknesses in the circumstantial evidence to undermine the State's case and suggest alternative theories.[2] Relevant here, defense

[2]For example, defense counsel argued that Cinergi investors lied to detectives; Cramer's testimony of Limanni gurgling blood was inconsistent with the lack of blood at Cinergi; Cramer suffered from mental illness and developed the story to get Seka away from Cramer's girlfriend; Cramer

counsel pointed out, through photographs in evidence showing Seka smoking, that the cigarette butts found near Hamilton's body were a different kind than those Seka smoked and therefore did not tie Seka to the crime.

The jury found Seka guilty of first-degree murder with use of a deadly weapon and robbery in regard to Hamilton, and of second-degree murder with use of a deadly weapon and robbery as to Limanni, but the jury deadlocked at the penalty phase. Seka thereafter stipulated to life imprisonment without the possibility of parole to avoid the death penalty.

III.

Seka filed a direct appeal in May 2001, and we affirmed the conviction. Seka thereafter petitioned for a writ of habeas corpus, which the district court denied, and we affirmed the denial.

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

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA

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changed his story between the preliminary hearing and trial; testimony suggested other people had access to and frequented Cinergi; Seka was too small to have singlehandedly put Limanni's 200-pound corpse in the vehicle, drive him to the state line, and bury him; Seka would not have left his own phone number in Hamilton's pocket had he killed Hamilton; etc.

from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.[3]

(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA[4] that it could have been transferred from something as benign as a handshake or DNA may not have actually existed.

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.[5]

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

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[3]The State put the results from the second cigarette butt into the CODIS system, a database of DNA profiles and other samples from various arrestees and offenders, but did not find any matches.

[4]The forensic scientist explained that the test results showed 99 percent of the DNA coming from Hamilton as the DNA contributor and 1 percent of the DNA coming from an unknown contributor.

[5]Statistically, it was 3.24 billion times more likely that the DNA was Hamilton's than that of a different, unknown contributor.

crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

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

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

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion.

Arguing the new DNA evidence does not warrant a new trial, the State appeals.

IV.

NRS 176.515(1) allows a court to grant a new trial "on the ground of newly discovered evidence." That statute generally requires a

defendant to move for a new trial within two years of the verdict.[6] NRS 176.515(3). An exception applies where the newly discovered evidence comes from DNA testing, in which case the defendant may move for a new trial at any time if the evidence is "favorable" to the defendant. NRS 176.09187(1). But NRS 176.09187 does not define the term "favorable." We review the district court's decision to grant a new trial for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). But we review issues involving statutory interpretation de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

We have never addressed what makes DNA evidence "favorable" under NRS 176.09187(1) or the circumstances under which new DNA evidence warrants a new trial. At the outset, we note "courts have uniformly held that the moving party bears a heavy burden" on a motion for a new trial on newly discovered evidence. *INS v. Abudu*, 485 U.S. 94, 110 (1988). And over a century ago we set forth elements for determining whether newly discovered evidence in general warrants a new trial. *See Sanborn*, 107 Nev. at 406, 812 P.2d at 1284-85 (citing *McLemore v. State*, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978)); *see also Oliver v. State*, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969); *Whise v. Whise*, 36 Nev. 16, 24, 131 P. 967, 969 (1913). In *Sanborn* we explained

> the evidence must be: newly discovered; material to the defense; such that even with the exercise of

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[6]We note that generally the district court judge who presided at trial should be the judge who hears and determines the motion for a new trial whenever possible, as the trial judge is in the best position to determine whether new evidence is "favorable" to the defendant, *see* NRS 176.09187. We encourage the district courts to be exceptionally mindful of this and be very familiar with the trial record if the trial judge is unavailable to preside over a motion for a new trial.

> reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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; and the best evidence the case admits.

107 Nev. at 406, 812 P.2d at 1284-85. As these factors are conjunctive, *id.*, a new trial must be denied where the movant fails to satisfy any factor.

We interpret NRS 176.09187's mandate that new evidence be "favorable" in concert with this long-honored caselaw.[7] *Cf. First Fin. Bank N.A. v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("This court will not read a statute to abrogate the common law without clear legislative instruction to do so."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318-19 (2012) (addressing the presumption that a statute will not be read to alter the common law absent the statute's clear intent to do so). We conclude that to warrant a new trial, the "favorable" DNA evidence must do more than merely support the defendant's position or possibly alter the outcome of trial. *See Whise*, 36 Nev. at 24, 131 P. at 969 ("[I]t is not sufficient that the new evidence, had it been offered at trial, *might* have changed the judgment." (emphasis added)). The new DNA evidence must be material to a key part of the prosecution or defense, or so significant to the trial overall, such that had it been introduced at trial, a different result would have been reasonably probable. *See id.* ("Newly discovered evidence, to have any weight in the consideration

[7]Seka acknowledges the term "favorable" in NRS 176.09187 is synonymous with *Sanborn*'s standard.

of a trial court, must be material or important to the moving party . . . such as to render a different result reasonably certain.").

The weight of the new DNA evidence will ultimately depend on the facts and circumstances of each individual case, including the sufficiency of the evidence adduced at trial. *Cf. State v. Parmar*, 808 N.W.2d 623, 631-34 (Neb. 2012) (comparing and contrasting cases where the new DNA evidence "probably would [or would not] have produced a substantially different result if the evidence had been offered and admitted at . . . trial"); *see also Walker v. State*, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (concluding evidence would support the defendant's argument but ultimately was not of a caliber that would likely lead to a different result). But we stress that newly discovered DNA evidence cannot be considered favorable where it does not undermine the jury's verdict and is cumulative under the facts of the case.[8] *Cf. Cutler v. State*, 95 Nev. 427, 429, 596 P.2d 216, 217 (1979) (concluding cumulative evidence did not warrant a new trial); *Bramlette v. Titus*, 70 Nev. 305, 312, 267 P.2d 620, 623-24 (1954) (same). Newly discovered evidence is also not favorable where it has no relevance to the circumstances of the crime. *Cf. Mortensen v. State*, 115 Nev. 273, 287, 986 P.2d 1105, 1114 (1999) (explaining the new evidence did not relate to the circumstances of the murder and did not inculpate a new

[8]Although *LaPena v. State*, Docket No. 73826 (Order of Affirmance, October 11, 2018), is unpublished, it is also instructive here. There, we considered newly discovered DNA evidence that impeached a key witness's testimony of the murder but concluded the DNA evidence did not warrant a new trial where the witness's testimony had been impeached at trial by the medical examiner. *Id.* Moreover, an additional, unknown DNA profile on the cord used to strangle the victim did not warrant a new trial where it merely showed that an unknown person had handled the cord at some unknown time. *Id.*

suspect or exculpate the defendant). Nor is newly discovered evidence favorable where it impeaches a witness without contradicting or refuting any of the trial testimony supporting the verdict. *Cf. id.* at 288, 986 P.2d at 1114 (concluding introducing the evidence "would simply be an attempt to discredit" the witness where that evidence did not contradict or refute the witness's trial testimony). Likewise, the newly discovered evidence will not be favorable if it merely goes to an issue that was fully explored at trial and is not sufficiently material to make a different verdict probable. *Cf. D'Agostino v. State*, 112 Nev. 417, 423-24, 915 P.2d 264, 267-68 (1996) (concluding newly discovered evidence about benefits offered to a witness did not warrant a new trial where the witness's criminal background and cooperation with police had been explored at trial); *see also Simmons v. State*, 112 Nev. 91, 103, 912 P.2d 217, 224 (1996) (concluding newly discovered evidence that was relevant to the question of where the victim was killed did not warrant a new trial where substantial evidence already pointed to the murder scene).

With the exception of Seka's fingerprints on the wood stacked on Hamilton's body in the desert, the State at the 2001 trial presented no other physical evidence from where the body was found to tie Seka to the murders, instead relying on the circumstantial evidence. The DNA testing in 2018 and 2019 produced six new pieces of DNA evidence,[9] taken from Hamilton's fingernail clippings and hair under his fingernails; from a tobacco container, beer bottle, and cigarette butt found in the vicinity of his

[9]Although the State argues the evidence is not "new" because similar evidence was presented at trial, we note the DNA tests performed in 2018 and 2019 were not available at the time of trial and the new DNA tests were able to find additional profiles, making those test results newly discovered evidence that could not have been discovered at the time of trial.

body; and from a hat found at Hamilton's murder scene. As set forth in detail below, although some of the evidence newly tested yielded other, unknown profiles, none of it exculpated Seka of the murders, necessarily implicated another suspect in the crimes, or otherwise materially supported his defense. Critically, too, the new DNA evidence from the scene where Hamilton's body was dumped was cumulative of the evidence adduced at trial as no DNA evidence inculpated Seka to that scene in 2001 and the new DNA results likewise do not inculpate Seka to that crime scene. Moreover, the new DNA evidence did not contradict or refute the totality of the evidence supporting the verdict. Thus, for the following reasons, the new DNA evidence was not favorable to the defense within the meaning of NRS 176.09187.[10]

First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails.[11] Moreover, the fingernail clippings provided so little

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[10]Seka also argues that a number of fingerprints taken from items at Cinergi and evidence around Hamilton's body were not tested and contends those fingerprints may have implicated another perpetrator. Because the narrow question before us is whether the new DNA evidence supports the granting of a new trial, we do not address the untested fingerprints.

[11]Although Seka distinguishes between the blood tested at trial and the epithelial cells tested in 2018, this distinction is not materially relevant

DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time.[12] Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

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

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not

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under the facts here, where Seka was excluded as a contributor on both types of evidence.

[12]Notably, too, the beer bottle produced a female profile, and Seka has never argued that the killer was a woman.

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

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

Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and

Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.

Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.

Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling, and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working

at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer.[13] All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

Whether newly discovered DNA evidence will warrant a new trial in a murder case is a fact-intensive inquiry. Under different facts, DNA evidence such as that discovered here could warrant a new trial. But the newly discovered DNA evidence was cumulative in this case, and the unknown DNA profiles on miscellaneous desert debris cannot, under these facts, be considered favorable. And although Seka points to discrepancies and weaknesses in the evidence adduced at trial and to speculative evidence that disgruntled investors were more likely suspects than himself, the

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[13]Seka argues on appeal that Cramer's testimony was not credible. However, the defense attacked Cramer's credibility at trial and the jury nevertheless convicted Seka, and we do not reweigh the evidence on appeal. *Clancy v. State*, 129 Nev. 840, 848, 313 P.3d 226, 231 (2013).

totality of all of the physical and circumstantial evidence adduced at trial nevertheless pointed to Seka and supports the jury's verdict.

Accordingly, the new DNA evidence does not make a different outcome reasonably probable here and is not "favorable" to the defense as necessary to warrant a new trial.[14] We therefore conclude the district court abused its discretion by granting Seka a new trial based on the newly discovered DNA evidence, and we reverse the district court's decision.

V.

Under NRS 176.09187(1), a party may move for a new trial at any time where DNA test results are "favorable" to the moving party. Consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), we hold that new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. Because the new evidence here fails to meet this standard, we reverse the district court's order granting a new trial.

Silver, J.
Silver

We concur:

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

[14]Notably, too, Seka was *also* convicted of robbing the victims, and the jury therefore believed beyond a reasonable doubt that Seka not only murdered Limanni and Hamilton, but robbed them as well.

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
v.
JOHN JOSEPH SEKA
Respondent.

CASE NO: 80925

APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and answers to Respondent's Petition for En Banc Reconsideration in obedience to this Court's Order filed September 9, 2021, in the above-captioned appeal. This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 21st day of September, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

BRIEF STATEMENT OF THE CASE RELEVANT TO THIS PETITION

The following synopsis is not meant to be a comprehensive review of the facts, but it hopefully will be helpful in explaining why en banc reconsideration is not warranted in this case. The underlying facts and evidence presented in this case are generally not in dispute. What Appellant and Respondent do dispute is whether the newly discovered DNA evidence, as it relates to the facts that were presented at Respondent's trial, was sufficient as to the legal question of whether the district court should have granted him a new trial.

This case involves the homicide and robbery of two different victims: Eric Hamilton (hereinafter "Hamilton") and Peter Limanni (hereinafter "Lamanni"). Hamilton's body was discovered on November 16, 1998 near the side of the road on Las Vegas Boulevard South, south of what is now St. Rose Parkway. At the time, the area was vacant and devoid of buildings or businesses. Hamilton's body was covered with wood. This wood would later be tied to wood that was being used at Respondent John Seka's (hereinafter "Seka") place of business. Seka's fingerprints were found on the wood covering Hamilton's body.

On December 23, 1998, Lamanni's partially decomposed body was found near the Nipton Road, near the Nevada and California state border. Upon further investigation, it was determined that Lamanni's blood was found at the scene of 1929

Western Avenue, which is located next to Seka's place of business. The incident that was investigated at 1929 Western Avue was on November 17, 1998, just one day after Hamilton's body had been discovered.

In 2001, Respondent John Seka (hereinafter "Seka") was tried by a jury of his peers and convicted on the four separate counts to which he was charged. He was convicted of Counts 1 and 3, which related to the First Degree Murder with Use of a Deadly Weapon and Robbery charge of Hamilton. He was also convicted on Counts 2 and 4, which related to the same exact charges for Seka's other victim, Limanni. A Judgment of Conviction was filed on May 9, 2001.

Seka filed a timely direct appeal to the Nevada Supreme Court. On April 8, 2003, this Court affirmed Seka's convictions on the following grounds:

1.) Seka's evidence of flight from Nevada to Pennsylvania was admissible.

2.) Sufficient evidence was produced to charge Seka for Limanni's murder in Nevada.

3.) Joinder of the Hamilton and Limanni charges was not in error.

4.) Seka was not prejudiced because the State had exhausted blood samples that had belonged to Limanni and Hamilton.

5.) There was sufficient evidence to convict Seka of all the charges.

Following the denial of his appeal, Seka filed a timely petition for a writ of habeas corpus (post-conviction). Among the issues that he raised in arguing that his trial counsel was ineffective was that no DNA experts or experts in forensic

pathology. This Court again rejected all arguments because counsel had consulted with a forensic pathologist that aided them in cross-examination of the witnesses. Remittitur was issued on July 12, 2005.

Then on June 19, 2017, roughly twelve years following remittitur from the denial of his post-conviction petition for writ of habeas corpus, Seka filed a new post-conviction petition requesting genetic marker testing pursuant to NRS 176.0918. Among the items that Seka requested for DNA testing by motion were (i) hairs collected from under Hamilton's fingernails; (ii) fingernail clippings from Hamilton; (iii) a black baseball cap belonging to Hamilton; (iv) lumber found covering the body of Hamilton which contained Seka's fingerprints; (v) hair and debris found on Hamilton's jeans; (vi) white cotton type material collected from the body of Lamanni; (vii) Marlboro brand cigarette butts found at the Hamilton scene; (vii) a Skoal brand tobacco container found at the Hamilton scene; (viii) two empty Beck's brand beer bottles found at the Hamilton scene; and finally (ix) bullet fragments found at the crime scene at 1929 Western Ave. Of all the items that Seka requested genetic marker testing on, only the white cotton type material pertaining to evidence related to Lamanni. The rest of the evidence that testing was requested on related to Hamilton only.

As litigation commenced on the petition for genetic marker testing, Seka modified and eliminated some of his initial requests for testing, based in large part

upon the testimony of his own expert witness. Seka later removed the request for testing of the lumber with his fingerprints covering Hamilton's body as well as the request for testing of the bullet fragments. Genetic marker testing was not performed on the white cotton type material related to Lamanni.

The State objected to the items being tested because the items would not yield any different result and would not contradict the evidence that was introduced at trial. The State argued that most of these items were simply trash that was discovered in the vacant lot around Hamilton's body, but that none of this evidence was used to convict Seka at trial. Over the State's objection, the district court, in an order filed January 24, 2019, ordered testing for DNA for nearly all of the items that Seka wanted tested. In short this consisted of testing on the hair and nail samples found on Hamilton, cigarette butts, a Skoal container, and two beer bottles located at the scene where Hamilton's body was discovered.

The findings of the DNA testing produced the following results. Of the two Marlboro cigarette butts tested, one did not have a DNA profile and the other had the contribution of 1 male, but Hamilton and Seka were excluded. The fingernail clippings of Hamilton yielded DNA that was likely Hamilton's own DNA. There was possibly another foreign contributor but Seka was excluded. The hair sample under Hamilton's nails was 3.24 billion times more likely to belong to Hamilton than an unknown contributor. The Skoal container excluded Hamilton and Seka as

possible contributors. One of the empty Becks beer bottles yielded the DNA of a female, the other beer bottle did not have any DNA suitable for interpretation. From the beer bottle with the female's DNA, both Hamilton and Seka were excluded as possible contributors. Finally, the black hat had Hamilton's DNA as well as two unknown profiles, but the result was inclusive as to whether Seka's DNA was found on the hat.

On November 19, 2019, Seka then filed a Motion for New Trial based upon the results of the genetic marker testing, specifically citing NRS 176.515(3) and NRS 176.0918(a). Seka argued that his DNA was not found on any of the new items tested. The State countered that the items, which consisted largely of trash found near the road of where Hamilton's body was found, did not reasonably change the likelihood of a different outcome at trial. Yet, the district court granted Seka's Motion for New Trial. In its March 24, 2020 order, the district court held that five of the 6 items tested had DNA of unknown origins and also excluded Seka as a contributor. Based upon this holding, the district court held that the evidence was "non-cumulative, renders a different result probable upon retrial, and is not only an attempt to discredit a witness."

The State then appealed the district court's granting Seka a new trial. Oral argument was held by a panel of this Court on April 15, 2021. Following oral argument, a panel of this Court issued its written order on July 8, 2021. In its written

order, the panel found that the district court had abused its discretion in granting a new trial because the DNA evidence was not favorable to Seka and would not have rendered a different result probable upon retrial. Seka now seeks en banc reconsideration from the granting of the State's appeal.

LAW AND ARGUMENT

I. The Panel Correctly Applied an Abuse of Discretion Standard when it Overturned the District Court's Decision to Grant Respondent a New Trial

This Court should not grant en banc reconsideration on this matter because the panel that decided it did not deviate from prior decisions of this court, and the facts as applied to the law here do not involve a substantial precedential, constitutional, or public policy issue. NRAP 40A(a). The panel's decision ultimately held that the district court's granting of a new trial was an abuse of discretion because the genetic marker analysis, or DNA testing, that was performed did not yield favorable results. The panel went into detail with each item of newly tested evidence to describe why the district court incorrectly granted a new trial.

At first, Respondent correctly argues that the issue on appeal was whether the district court abused its discretion in granting him a new trial. The grant or denial of a new trial is within the trial court's discretion and will not be reversed on appeal absent its abuse. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). An abuse of discretion occurs if the district court's decision is arbitrary or capricious

or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' or 'contrary to the evidence or established rules of law.'" State v. Dist. Ct. (Armstrong), 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011). The panel correctly acknowledged that it reviews the district court's decision to grant a new trial under an abuse of discretion standard.

As a preliminary matter, Respondent argues that the district court did not act arbitrarily, capriciously or with prejudice or preference because the district court did not make the decision lightly. However, the time or effort a court takes to decide is not the legal standard for what is arbitrary or capricious. As stated above, the decision is one founded on prejudice or preference rather than reason, or that the decision is contrary to the evidence or established rules of law. Id. As the panel opinion pointed out, the district court's ruling in this case ran afoul of the long-standing standard that should be applied when granting a new trial (referring to Sanborn). The new evidence that Respondent used to support his petition, when applied to the facts that were adduced at trial, were inadequate to warrant a new trial.

The factors for a district court's decision on granting a new trial is found in Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991). In order for a district court to grant a new trial, the evidence must be: "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could have been

discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; 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; and the best evidence the case admits." Sanborn v. State, 107 Nev. at 406, 812 P.2d at 1284-1285 (1991) *citing* McLemore v. State, 94 Nev. 237, 577 P.2d 871 (1978).

Even though Respondent filed his motion for a new trial pursuant to NRS 176.515 and NRS 176.09187, he now argues that the panel erred in interpreting the very language of the statute that he relied on. NRS 176.515 is the statute that enables a court to grant a new trial "as a matter of law or on the ground of newly discovered evidence." NRS 176.515(3) explains that a motion for a new trial based on newly discovered evidence must be made within two years after the verdict or finding of guilt.

NRS 176.09187, upon which Respondent cited and relied, works in conjunction with NRS 176.515. According to NRS 176.09187, when genetic marker analysis is favorable to the petitioner, then the petitioner may bring a motion for a new trial pursuant to NRS 176.515 and the two- year statute of limitation is also waived.

Thus, NRS 176.09187 only allows for a person outside of the two-year time limitation to bring a motion for a new trial pursuant to NRS 176.515 when the

genetic marker analysis is actually favorable. If the genetic marker analysis is not favorable, then the motion for a new trial outside of the two-year requirement should be denied.

In his prior briefing to this court, Respondent agreed that that term "favorable" was synonymous with the Sanborn standard. In a footnote, the panel's opinion cites to this relevant point as well. Opinion, p.14. Yet because the panel ruled against him, Respondent now argues that the term "favorable" should have an altogether different meaning.

Here, panel of this Court to determine was correct to explain what "favorable" means pursuant to NRS 176.09187 because it was part of the district court's decision to entertain and grant Respondent's motion seeking a new trial. The district court's order granting a new trial specifically held that "the multiple unknown DNA profiles are favorable evidence to Mr. Seka," and "since there is favorable evidence, the two-year statute of limitations of NRS 176.515 is inapplicable." The determination of the word "favorable" was clearly part of the district court's ruling. Therefore, the panel correctly applied the standard that statutory interpretation is subject to de novo review. If the district court was wrong to consider the motion, then it certainly was an abuse of discretion for the district court to even go further in granting the same motion that should have been barred.

However, this Court also need not interfere with the panel's opinion because

in addition to the panel's analysis of the word "favorable," the panel recognized that the district court abused its discretion when it granted a new trial. The panel properly considered the DNA evidence within the framework of the existing case law that permits the granting of a new trial. Ultimately, the panel correctly held that the new genetic marker testing was not favorable, was cumulative, and would not have rendered a different result probable upon retrial. Even Respondent agrees that this standard, as set forth by Sanborn, is the correct standard that should be used. Respondent's Petition, p.11. Thus, the panel applied the correct standard, it is only the application of the standard that Respondent finds problematic even though the panel explained exactly why the newly discovered evidence was insufficient to warrant granting a new trial.

Even Respondent's request for en banc reconsideration does not identify any mistake of fact upon which the panel relied. The panel provided specific analysis for each piece of DNA evidence and explained why that evidence was not favorable, and why the evidence would not have made a different result probable. The panel's application of the facts and law was entirely consistent with pre-existing case law of this Court.

II. Reversal of the District Court's Decision in this Particular Case does not Negate the Intent of the DNA Testing Statute

Respondent then argues that en banc reconsideration is necessary because the panel negated the intent of the genetic marker analysis statute. This assertion is

incorrect. The panel acknowledged that the consideration for a court when presented with new DNA evidence is a fact-intensive inquiry. The fact-intensive inquiry that the panel applied in this case was whether the DNA evidence would meet the test that this Court has continuously used in Sanborn. Even Respondent agrees that Sanborn contains the factors to be considered when granting a new trial. The DNA elements discussed by the panel simply affirm that DNA evidence must meet the same requirements as any other type of new evidence that is presented for review. Under this specific scenario, the panel went through great lengths to explain exactly why the DNA evidence as it relates to this case is insufficient.

This was not a case where the State presented DNA evidence to obtain a conviction. Items like the cigarette butts, Skoal container, and beer bottles were never presented as proof or evidence that Respondent had committed the murder of Hamilton. Hamilton was shot, and there was never an argument presented that a physical struggle had ensued prior to his death. Hamilton's hat, which ultimately had Hamilton's DNA, was never argued to be something that the killer wore or touched. Moreover, all of the newly discovered DNA related to Hamilton, and none of it pertained to the murder of Limanni.

Despite repeatedly arguing that the panel should have applied the Sanborn factors, Respondent ultimately wants this court to impose a different standard when the newly discovered evidence pertains to DNA. For instance, Respondent writes

that the panel "inexplicitly" held that he was required to "contradict or refute the totality of the evidence supporting the verdict." Respondent's Petition, p. 10-11. However, this Court has always required that new evidence, no matter whether DNA is involved or not, must have a likelihood of making a different result probable.

The panel was not persuaded by the new DNA evidence that Respondent presented because his conviction was not one based on forensic evidence. The items that Respondent ultimately tested do nothing to exculpate him of the murders. The panel did not err by holding that DNA must actually be favorable to grant a new trial. Otherwise, a defendant would simply attempt to get any random item tested and argue that the DNA somehow proves his or her innocence despite the evidence of guilt that was presented.

The Nevada Attorneys for Criminal Justice (NACJ) also submitted a brief in support of en banc consideration. Their amicus brief does not take issue with the panel interpreting the word "favorable" as used in the statute, but it has an issue with the interpretation that the panel gives. In summary, NACJ argues that when a defendant has convinced a district court to grant genetic marker testing under the language that a reasonable probability exists that a different result would have occurred, then the results of that testing absent inculpating the defendant are in fact favorable.

This interpretation would set an incredibly low bar. Even though the standard

for granting a new trial has consistently used the Sanborn factors, DNA evidence would have a much lower standard than other types of evidence if this Court adopted NACJ's proposal. An individual that convinces a district court to order DNA testing on random pieces of evidence that have no nexus to the case would then be able to satisfy the favorable requirement when the defendant's DNA unsurprisingly is not found on the items tested. NACJ's interpretation would make the prior trial irrelevant because there would be no needed comparison between the evidence that the jury considered when it rendered its verdict, and the defendant's new theory. For these reasons, the panel's opinion was appropriate and consistent with this court's long-standing history and precedent that favorable evidence must make a new outcome probable, not merely possible.

The panel recognized that this inquiry is a fact-intensive one, and when it considered the facts here, it was apparent that the district court had no legal basis to grant a new trial. However, despite ruling against Respondent, nothing about the ruling is contrary to the statutes regarding genetic marker analysis or the laws regarding the granting or denying of a new trial. The panel's decision leaves open the possibility that DNA evidence will come to light in a case that raises the likelihood of a different outcome; however, this is not that case.

WHEREFORE, the State respectfully requests that Appellant's Petition for En Banc Reconsideration be DENIED.

Dated this 21st day of September, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*
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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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points contains 3,257 words and 269 lines of text.

Dated this 21st day of September, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 21, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

PAOLA M. ARMENI, ESQ.
JENNIFER SPRINGER, ESQ.
Counsels for Respondent

ALEXANDER CHEN
Chief Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

AC//ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

No. 80925

FILED

OCT 07 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.[1]

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Silver

_____, J.
Herndon

[1]The motion for leave to file an amicus curiae brief in support of respondent's petition for en banc reconsideration filed by Nevada Attorneys for Criminal Justice is denied.

HARDESTY, C.J., CADISH, AND PICKERING, JJ., dissenting:

We dissent. The parties here both agreed that the standard set forth in *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) applies to the motion for new trial herein, and the court's opinion appropriately applies that standard. However, further analysis of the statutory scheme at NRS 176.0918 through NRS 176.09187 and NRS 176.515 as well as the issues raised in the amicus brief is warranted to determine the correct legal standard for a motion for new trial based on DNA evidence. Therefore, we would grant the petition for en banc reconsideration and the motion for leave to file an amicus brief in support of the petition.

/ Hardesty, C. J.
Hardesty

Cadish, J.
Cadish

Pickering, J.
Pickering

cc: Hon. Kathleen E. Delaney, District Judge
Attorney General/Carson City
Clark County District Attorney
Jennifer Springer
Clark Hill PLC
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

Supreme Court No. 80925
District Court Case No. C159915

FILED
NOV 19 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 02, 2021

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
Hon. Kathleen E. Delaney, District Judge
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney
Clark County District Attorney \ John T. Fattig, Deputy District Attorney
Clark Hill PLC \ Paola M. Armeni
Jennifer Springer

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on NOV - 3 2021.

Deputy District Court Clerk

NOV 0 9 2021

RECEIVED
APPEALS
NOV - 3 2021
CLERK OF THE COURT

21-31438

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOHN JOSEPH SEKA,
Respondent.

Supreme Court No. 80925
District Court Case No. C159915

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Reversed."

Judgment, as quoted above, entered this 8th day of July, 2021.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing denied."

Judgment, as quoted above, entered this 9th day of August, 2021.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the petition DENIED."

Judgment, as quoted above, entered this 7th day of October, 2021.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this November 02, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk