

PET

THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
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Attorneys for Defendant

Electronically Filed
Jun 20 2019 03:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK BANKA,

Petitioner,

vs.

Case No.:

EIGHTH JUDICIAL DISTRICT

COURT JUDGE CAROLYN

ELLSWORTH,

District Court Case No.: C-18-
333254-1

Respondents.

Dept. No.: 5

STATE OF NEVADA,

Real Party In

Interest.

PETITION FOR WRIT OF MANDAMUS¹

COMES NOW Petitioner, JACK BANKA, through his counsel,
MICHAEL D. PARIENTE, ESQUIRE. with JOHN G. WATKINS, ESQUIRE.,

¹ Jack Banka is filing an emergency motion under NRAP 27(e) to this Court.

(OF COUNSEL), hereby Petitions this Court to issue a Writ of Mandamus, to
wit: allowing Jack Banka to be represented by Michael D. Pariente, Esquire and
John G. Watkins, Esquire at trial.

DATED this 20th day of June, 2019.



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No. 9469

JOHN G. WATKINS, ESQ., OF

COUNSEL

3960 Howard Hughes Parkway, Suite

615

Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

ROUTING STATEMENT

Matters arising under NRAP 17(a)(14) shall be retained by the Supreme
Court. NRAP 17(a)(14) states in relevant part, “[m]atters raising as a principal
issue a question of statewide public importance” The issue in Jack
Banka’s case involves the interpretation of EDCR 7.40(c), one of first
impression in this Court and fundamental importance.

DECLARATION IN SUPPORT OF PETITION FOR WRIT OF
MANDAMUS AND VERIFICATION

I, MICHAEL D. PARIENTE, ESQUIRE makes the following Declaration
under the penalty of perjury and declares as follows:

1. Your Declarant is a duly licensed Attorney at Law in the State of
Nevada;
2. Your Declarant represents JACK BANKA on his Petition for Writ of
Mandamus;
3. Your Declarant verifies that the facts for the Petition is within the
knowledge of your Declarant;
4. Your Declarant argues that Judge Ellsworth's intreptation of EDCR
7.40(c) conflicts with the Sixth Amendment right to choice of counsel
and Nevada case law;
5. Your Declarant on the authority of Jack Banka requests that this Court
issue a Writ of Mandamus.

FURTHER YOUR DECLARANT SAYETH NAUGHT

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 20th day

of June, 2019.



Michael D. Pariente, Esq.

JURISDICTION

The Supreme Court has the “power to issue writs of mandamus.” Nev. Const., art 6 § 4; NRS 34.160. (A writ of mandamus will issue “. . . to compel the admission of a party to the use and enjoyment of a right . . . to which [she] is entitled and from which [she] is unlawfully precluded by such inferior tribunal” Here, Jack Banka is being denied his Sixth Amendment right to choice of counsel.

ISSUES

- 1. JUDGE ELLSWORTH’S RELIANCE ON EDCR 7.40(c) AS
MANDATORY CONFLICTS WITH THE SIXTH AMENDMENT
RIGHT OF COUNSEL OF CHOICE AND NEVADA CASE LAW.**
- 2. JUDGE ELLSWORTH SHOULD HAVE EXERCISED HER
DISCRETION IN BALANCING THE RIGHT TO COUNSEL OF**

1 **CHOICE AGAINST THE NEEDS OF FAIRNESS AND AGAINST**
2 **THE DEMANDS OF her CALENDAR.**
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8 **RELIEF SOUGHT**

9 Jack Banka requests this Court to stay his trial set for Monday June 24,
10 2019 at 1:00 pm. Whereas Michael D. Pariente, Esquire and John Glenn
11 Watkins, Esquire will be his counsel at trial.
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13 **EXTRAORDINARY RELIEF IS WARRANTED FOR**

14 **MISAPPLICATION OF LAW**
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16 A writ of mandamus is available “. . . to control a manifest abuse or
17 arbitrary or capricious exercise of discretion. . . .” *State v. Dist. Ct.*
18 *(Armstrong)*² (citing *Round Hill Gen. Imp. Dist. v. Newman*³, 97 Nev. at 603-
19 604), 127 Nev. at 931. An exercise of discretion is capricious if it is “**contrary**
20 **to the evidence or established rules of law.**” *State v. Dist. Ct. (Armstrong)*,
21 127 Nev. at 931-932 (quoting definition of Capricious, *Blacks Law Dictionary*
22 119 (9th ed. 2009) (emphasis added). A manifest abuse of discretion is “[a]
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26 _____
27 2. 127 Nev. 927, 267 P.3d 777 (2011).

28 3. 97 Nev. 601, 637 P.2d 534 (1981).

1 clearly erroneous interpretation of law or a clearly erroneous application of law
2 or rule.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932. (cites omitted.)
3 Here, Judge Ellsworth interpreted EDCR 7.40(c) as mandatory leaving her with
4 no discretion to allow Michael D. Pariente, Esquire and John Glenn Watkins,
5 Esquire to be substituted as Jack Banka’s counsel. Judge Ellsworth’s
6 interpretation conflicts with the Sixth Amendment right to choice of counsel
7 and Nevada case law.
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10 Generally, an extraordinary writ will not issue if the petitioner has a
11 plain, speedy and/or adequate remedy in the ordinary course of the law.
12 However, there are exceptions to this general rule. In *Williams v. District*
13 *Court*⁴, the Court entertained the writ of mandamus even though there was an
14 adequate remedy at law stating,
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17 Thus, we may consider writ petitions challenging the admission or
18 exclusion of evidence when “an important issue of law needs
19 clarification and public policy is served by this court’s invocation of
20 its original jurisdiction”. *Sonia F. v. Dist. Ct.*, 125 Nev. 38,----, 215
21 P.3d 705, 707 (2009) (quoting *Mineral County*, 117 Nev. at 243, 20
22 P.3d at 805), or when the issue is “one of first impression and
23 fundamental public importance.” *County of Clark v. Upchurch*, 114
24 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may also consider
25 whether resolution of the writ petition will mitigate or resolve related
26 or future litigation. *Id.* Ultimately, however, our analysis turns on the
27 promotion of judicial economy. *Smith v. District Court*, 113 Nev.
28 1343, 1345, 950 P.2d 280, 281 (1997) (“The interests of judicial
economy. . . will remain the primary standard by which this court
exercises its discretion.”)

4. 127 Nev. 518, 262 P.3d 360 (2011).

1 *Id.*, 127 Nev. at 525.

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3 The interpretation of EDCR 7.40(c) is one of first impression and
4 fundamental importance. Also, this issue “will. . . resolve. . . future litigation”
5 and thereby promotes judicial economy. *See, Williams*, 127 Nev. at 931.
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8 **SHORT RESPONSE AS TO WHY WRIT SHOULD ISSUE**
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10 The court in *Ryan v. Dist. Ct.*, 123 Nev. 419, 426, 168 P.3d 703, 708
11 (2007)(“under the Sixth Amendment, criminal defendants who can afford to
12 retain counsel have a qualified right to obtain counsel of their choice.” (internal
13 quotation marks omitted)). Therefore, to interpret EDCR 7.40(c) as mandatory
14 conflicts with the Sixth Amendment of the United States Constitution.
15 However, the right to choose one’s counsel is not absolute, “and a court has
16 wide latitude in balancing the right to counsel of choice against the needs of
17 fairness . . . and against the demands of its calendar” *Patterson v. State*, 129
18 Nev. 168, 175, 298 P.3d 433, 438 (2013) (internal quotation marks omitted).
19 *Patterson* makes clear that the district court must exercise its authority to
20 determine whether or not a substitution of attorneys will be allowed. This,
21 Judge Ellsworth did not do.
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26 Jack Banka’s case had only been continued one time. Judge Ellsworth
27 never inquired of Michael D. Pariente, Esquire or John Glenn Watkins, Esquire
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1 as to how much time they needed to prepare Jack Banka's case for trial. If
2 asked, a two-month delay of the trial would have been sufficient. Further, there
3 was absolutely no prejudice to the State.
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5 Therefore, this Court should grant Jack Banka's Petition for a Writ of
6 Mandamus.
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10 STATEMENT OF RELEVANT FACTS

11 The jury trial is set to commence on June 24, 2019 at 1:00 pm for
12 charges of DUI felony (serious bodily injury) and felony leaving the scene.
13 Both offenses are non-probationable offenses, 2 to 20 years and 2 to 20 years,
14 respectively. A material irreconcilable conflict arose between the Defendant
15 Jack Banka and his counsel, Thomas Boley, Esquire regarding the handling of
16 the defense to the charges. As a result of this conflict, Thomas Boley, Esquire
17 indicated to Jack Banka that he could not effectively represent him which
18 caused Jack Banka to retain Michael D. Pariente, Esquire and John Glenn
19 Watkins, Esquire. A Substitution of Attorneys was filed in the District Court on
20 June 19, 2019. *See Exhibit A* attached hereto. Attorney Boley then represented
21 to Judge Ellsworth that he "cannot effectively represent Jack Banka" *See*
22 *Exhibit B*. Despite Jack Banka's execution of a Substitution of Attorneys, Judge
23 Carolyn Ellsworth refused allow the substitution and ordered the trial to
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1 proceed with Thomas Boley, Esquire as counsel on Monday, June 24, 2019 and
2 1:00 pm.

3 The basis of Judge Ellsworth's refusal to allow the substitution of
4 counsel was her opinion that EDCR 7.40(c)⁵ was mandatory, thus eliminating
5 any discretion for her decision. Interpreting EDCR 7.40(c) as mandatory "runs"
6 afoul of the Sixth Amendment right to counsel of choice and Nevada case law.
7 Court rules do not serve as a basis to deny or violate one's Sixth Amendment
8 right to counsel but serves to "promote and facilitate the administration of
9 justice." *See*, EDCR 1.10.
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13 CONCLUSION

14 A Defendant has a qualified right under the Sixth Amendment to choice
15 of counsel. Judge Ellsworth's interpretation of EDCR 7.40(c) conflicts with this
16 Sixth Amendment requirement. A court must exercise its discretion to
17 determine whether substitution of attorneys is warranted. This, Judge Ellsworth
18 did not do. Therefore, Jack Banka's Petition for Writ of Mandamus should be
19 granted.
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24 Respectfully Submitted,
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27 5. EDCR 7.40(c) states, "[n]o application for withdrawal or substitution [of counsel]
28 may be granted if a delay of the trial or of the hearing of any other matter in the case
would result."



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No. 9469

JOHN G. WATKINS, ESQ., OF

COUNSEL

3960 Howard Hughes Parkway, Suite

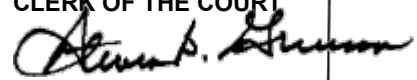
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Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

EXHIBIT A



SUBT
PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ. OF COUNSEL
Nevada Bar No. 9469
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorney for Defendant

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

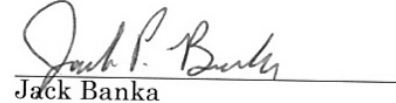
Defendant

Case No: C-18-333254-1
Dept No: 5

SUBSTITUTION OF ATTORNEY

I hereby appoint MICHAEL D. PARIENTE, ESQ., with JOHN G. WATKINS, ESQ., (Of Counsel) of the PARIENTE LAW FIRM, P.C. to represent Defendant JACK BANKA in connection with the above-entitled action, in place and instead of THOMAS BOLEY, ESQ.

DATED this 19th day of June, 2019.


Jack Banka


I hereby consent to the substitution of MICHAEL D. PARIENTE, ESQ., with JOHN G. WATKINS, ESQ., (Of Counsel) of the PARIENTE LAW FIRM, P.C. to represent Defendant Jack Banka in connection with the above-entitled action, in my place and stead.

DATED this 19th day of June, 2019.


Thomas Boley, Esq.

I, hereby accept the substitution to represent Defendant Jack Banka in connection with the above-entitled action.

DATED this 19th day of June, 2019.


Michael D. Pariente, Esq.

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EXHIBIT B

AFFIDAVIT

Date 6/19/19 Case No.: C-18-333254-1

Thomas Boley, Esq.

THOMAS BOLEY came and appeared before me, the undersigned Notary, the within named THOMAS BOLEY, who is a resident of CLARK County, State of Nevada, and makes this his statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct:

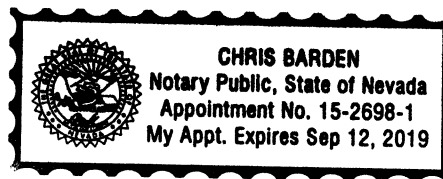
1. That I, Thomas Boley was the attorney of record for Jack Banka regarding a felony substantial bodily injury DUI in the above-entitled case.
2. That an irrevocable material conflict has occurred between Jack Banka and myself regarding how to defend against the allegation of proximate cause. Based upon the irreconcilable conflict, Jack Banka told me that he did not want my representation.
3. That Jack Banka hired the law firm of Michael D. Pariente, Esq., with John Glenn Watkins, Esquire, (Of Counsel) on June 18, 2019.
4. That the jury trial in Jack Banka's case is set for Monday, June 24, 2019 at 1:00 pm.
5. That I represented to Judge Carolyn Ellsworth that there was an irreconcilable conflict between myself and Jack Banka.
6. That Judge Ellsworth refused to allow Mr. Pariente and Mr. Watkins to substitute as Jack Banka's counsel.
7. That based on the irrevocable conflict, I cannot effectively represent Jack Banka.
8. That Judge Ellsworth denied my request to be removed and have Mr. Pariente and Mr. Watkins represent Jack Banka.

DATED this 19th day of June, 2019

THOMAS BOLEY, ESQ.

SUBSCRIBED and SWORN to before me

this 19th day of June, 2019.



NOTARY PUBLIC in and for said CLARK County and State of NEVADA

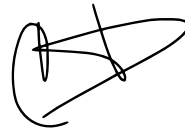
CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing, was made this
20th day of June, 2019, by email transmission to:

JUDGE CAROLYN ELLSWORTH
dept05lc@clarkcountycourts.us
200 Lewis Street
District Court Department 5
Las Vegas, Nevada 89101

and

Maria Lavell – District Attorney
maria.lavell@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



Chris Barden,
an employee of
Michael D. Pariente, Esquire