IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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S. Ct. No.: **80181**

District Ct. No.: **C333254**

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Appellant Jack Paul Banka herein state, "there is no such corporation" referred to in NRAP 26.1.

ADDITIONAL COMMENTS REGARDING THE ROUTING STATEMENT

Banka's "commingling issue" is not an isolated incident. The District Attorney picks and chooses when to charge its "commingled created offense" and when not to. *See, Neagle v. State*, No. 80670, now before this Court regarding the State's commingling of NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony) as in Banka. The Pariente Law Firm, with John Glenn Watkins, Esq., Of Counsel, represent Neagle. *See also*, the *Vitale, Potts* and *Padilla* Informations where the State chose not to charge its "commingled created offense." AA 110-112; AA 113-114; AA 115-117. The "commingling issue" is of major statewide significance in the litigation of DUI cases and should be heard by this Court.

I

LAW AND ARGUMENT

A.

THE STATE'S CREATION OF A HYBRID OFFENSE BY COMMINGLING STATUTORY "ELEMENTS" FROM TWO (2) SEPARATE CRIMES, NRS 484C.110 (MISDEMEANOR) AND NRS 484C.430 (FELONY), IS NOT A PUBLIC OFFENSE, DOES NOT CHARGE A CRIME AND FAILS TO CONFER SUBJECT MATTER

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JURISDICTION ON THE DISTRICT COURT (OR ANY COURT)[1]

a. There is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense.[2] Without such a statute, there is no crime. NRS 193.050(1).

The law sets parameters for what is required to charge a legal offense in criminal prosecutions. Whim, pleasure or desire play no role in the charging process. Statutory law, case law and constitutional law control. The prosecution must be based on a violation of an existing public offense. NRS 171.010. A public offense must be conduct "prohibited by some statute of this state" and without such a statute, there is no crime. NRS 193.050(1).

The Clark County District Attorney's charging document must contain each and every element of the public offense being charged. *State v. Hancock*[3], 114 Nev at 164[4]. Substitution of the statutory elements is legally impermissible. *State v.*

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1. The State's criticism of Banka's reference to NRS 484C.110 as a misdemeanor statute is unfounded. NRS 484C.110 is a misdemeanor statute with enhanced penalties for prior DUI convictions. However, whatever one calls NRS 484C.110 is irrelevant. The dispositive fact is that NRS 484C.110 and NRS 484C.430 are separate offenses with a number of dissimilar elements.

2. Compare NRS 484C.430 with NRS 484C.410 which incorporates NRS 484C.110 under NRS 484C.410. Unlike NRS 484C.410, there is no incorporation of NRS 484C.110 for a NRS 484C.430 violation. The Legislature has provided NRS 484C.430 with its own elements.

3. 114 Nev. 161, 955 P.2d 183 (1998).

4. Banka has provided a plethora of legal authority is his Opening Brief (ps. 11-12) that the formal accusation must contain each and every element of the offense and will

Cimpritz[5], 110 N.E. 2d at 417-418. Here, the Clark County District Attorney ignored these legal parameters to prosecute Banka.

Instead of charging a NRS 484C.430 violation and alleging the "elements" of that offense in the charging document, the Clark County District Attorney, without legal authority, created his own hybrid DUI offense by commingling two (2) separate statutory offenses, NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), substituting the misdemeanor "location elements" of "on a highway or on premises to which the public has access" for the felony "location element" of "on or off the highways". The substitution of these elements changed the legal definition of a NRS 484C.430 violation. Therefore, the District Attorney's hybrid "commingled created offense" is not a public offense. There is no statute criminalizing conduct by the commingling of NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony).The State recognized that Banka was improperly charged:

> It [the Amended Information] correctly cites the general DUI statute, NRS 484C.110 AND the penalty statute NRS 484C.430. **In doing so the body of the charge incorrectly used the language from NRS 484C.110 of "highway or on a premises to which the public has access" in place of the "on or off a highway" language of NRS 484C.430.**

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not be repeated here for judicial economy. The State has ignored these authorities because they render the State's Answer meritless.

5. 158 Ohio St. 490, 110 N.E. 2d 416 (1953).

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RA 000125. (emphasis added.) *See also*, AA 60, ls. 20-21.

The State does not dispute or repudiate its admission before this Court. The Second Amended Information filed against Banka fails to charge a legal public offense and fails to confer subject matter jurisdiction on the district court (or any court)[6].

B.

BANKA'S RESPONSES TO THE STATE'S SPECIFIC ARGUMENTS

a. The State ignored that there was no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense, the dispositive issue in Banka.

The State's assertion that the Court's jurisdiction is established "when that document [complaint, indictment or information] states the date of the offense, location of the offense giving rise to the court's jurisdiction, and places the

6. A court lacks subject matter jurisdiction if the formal accusation filed against the defendant does not charge an offense. *See*, *Williams v. Municipal Judge*, 85 Nev. 425, 429, 456 P.3d 440 (1969) (" . . . without a formal and sufficient accusation . . . a court acquires no jurisdiction whatever . . . ."). The Court in *State v. Ohio*, 181 Ohio App. 3d 86, 907 N.E. 2d 1238 (2009) noted "[a] valid complaint is a necessary condition precedent for the trial court to obtain jurisdiction in a criminal case." *Id*., 907 N.E. 2d at 1241. The Court in *Application of Alexander*, 80 Nev. 354, 358, 393 P.2d 615 (1964) stated "[w]e are compelled to hold that the failure of the indictment to allege that the crime was committed in the State of Nevada was fatal and that the court never acquired jurisdiction to try the case, and that its judgment was void." *Application of Alexander* further stated, " . . . the failure being fatal to the sufficiency of the information could not be cured by evidence tending to show where the crime was committed." *Id.*, 80 Nev. at 358. *See also, State v. Cimpritz*, supra. (A judgment of conviction based on an indictment which does not charge an offense is void for lack of subject matter jurisdiction.) *Id*., 110 N.E. 2d at 418.

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defendant on notice regarding the charges he will have to defend against" is incorrect. State's Answering Brief (SAB), p.7. These requirements are necessary but not sufficient. **The formal accusation must charge a crime**. *See again*, NRS 193.050(1). The State's cites to *Sheriff, Clark Cty. v. Levison [sic]* and *Watkins v. Sheriff, Clark Cty.* are inapposite. Neither case involves the commingling of separate statutory offenses to charge the defendants.

The State again admits that it was error to charge Banka with the District Attorney's hybrid "commingled created offense" stating ". . . such an error did not cause Appellant not to be placed on notice for the charge he was facing." SAB, p.7. The State's reference to "notice" is misplaced. Banka's claim is not one of notice but rather that the State's Second Amended Information fails to charge a legal public offense.[7]

The State agrees that a legally sufficient complaint, indictment or information is required to confer subject matter jurisdiction on the court, citing *Williams v. Mun. Judge of City of Las Vegas*, 85 Nev. 425, 429, 456 P.2d 440, 442 (1969) and *Application of Alexander*, 80 Nev. 354, 358, 393 P.2d 615, 617 (1964).[8] A legally sufficient formal accusation must charge a public offense. A public offense must be

7. Even under a lack of sufficiency of a notice claim, it cannot be legitimately held that Banka had notice. The State's allegation of the misdemeanor element of "on a highway or on premises to which the public has access" does not provide notice that the correct element is "on or off the highways."

8. Banka also cited *Williams* and *Alexander* in his Opening Brief at p.12, *fn*.21.

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conduct "prohibited by some statute of this state" and without such a statute, there is no crime. NRS 193.050(1). What has been ignored by the State and the district court is that **there is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense**. NRS 484C.110 has absolutely no application to a NRS 484C.430 violation. As a result, the District Attorney's commingling of "elements" fails to charge a legal DUI offense and fails to confer subject matter jurisdiction on the district court (or any court).

The State's argument that "Nevada is a notice pleading state" is misleading. SAB, p.9. "Notice pleading" in generally recognized as applying to "factual allegations" in civil cases. In Nevada, notice in criminal cases comes from NRS 173.075(1), not "notice pleading."[9] *Simpson v. District Court*.[10]

NRS 173.075(1) requires that the charging document must contain **both** the facts and the elements of the offense being charged. *State v. Hancock*, *supra*. ("An indictment, standing alone, must contain: (1) each and every element of the crime charged **and** (2) the facts showing how the defendant allegedly committed each element of the crime charged.") *Id*., 114 Nev. at 164. (emphasis added.) Alleged facts do not establish the elements of the offense, or *vice versa*.

9. Banka has addressed "notice pleading" in more depth in his Opening Brief. *See*, ps.17-19.

10. 88 Nev. 654, 656-657, 503 P.3d 1225 (1972).

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"Notice" is nothing more than being aware of the allegation made by the State, but whether the allegation constitutes an offense at law is a separate matter. "Notice" of the allegation does not make the allegation a crime. Whether or not the State's allegation charges a legal offense is independent from "notice." "Notice" of conduct which is not a crime does not make or render that conduct a crime[11]. Again, the issue in Banka's case is not one of "notice" but rather that the State's Second Amended Information fails to charge a legal offense. The State's "notice pleading" argument and the district court's adoption of it ignores Banka's issue.

The State argues that a charging document need not be artfully pled, *citing Levinson.* SAB, p.9. However, *Levinson* is not legal authority for the State to file a complaint, indictment or information which fails to charge a public offense. *Levinson* did charge a public offense, unlike the Second Amended Information in Banka, but the charging document failed to allege sufficient facts as to how the elements of the offense were violated.

The State's cite to *State v. Jones* regarding trial variance and a reduced standard of review is inapposite. SAB, ps.10-11. Trial variance applies when the

11. Equally true, a plea of guilty does not make a legal offense out of one which is not. "A plea of guilty amounts to nothing more than an acknowledgement of the facts charged in the indictment, but whether such facts **constitute an offense at law** is left open to be decided by the court." *Ex Parte Dickson*, 36 Nev. 94, 101 (1913). (emphasis added.) *Dickson* further stated, "[i]f no crime is charged in the indictment, then none is confessed by pleading guilty." *Id*., 36 Nev. at 102.

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formal allegation charges a crime but the proof varies from the facts alleged as how the element was violated. In *Jones*, the indictment alleged the crime of sale of a controlled substance but factually alleged that the sale was made to the police officer. However, the proof at trial was that the sale was made to a police informant. The *Jones* Court held that the variance did not render the indictment void. Again, there must be a valid charge before the use of a variance arises.

The reduced standard of review in *State v. Jones* does not apply in Banka's case. *See again, State v. Hancock, supra*. ("An indictment, **standing alone**, must contain; (1) each and every element of the crime charged. . . .") *Id*., 114 Nev. at 164. (emphasis added.) Again, Banka's claim is not one of lack of notice but rather that the Second Amended Information fails to charge a legal public offense.

The 9th Circuit cases cited by the State (SAB, ps.11-12) are inapposite for several reasons: (1) crimes were alleged in each case and (2) the State did not error in the statutory cites in Banka. The State intended to charge Banka by using both NRS 484C.110 and NRS 484C.430 as evidenced by the cites to these two statutes and the actual substitution of the location elements in NRS 484C.410 for the location element in NRS 484C.430.

The State admits that Banka was charged under 484C.110 and NRS 484C.430. SAB, p.12. It is uncontroverted that NRS 484C.110 and NRS 484C.430 are separate statutory offenses as admitted by the district court, "I think that they are separate statutes . . . ." AA 63. The State concedes that Banka was charged by

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commingling NRS 484C.110 and NRS 484C.430. The State noted ". . . that the Second Amended Information contained the element 'on a highway or on premises to which the public has access' (the location element imposed pursuant to 484C.110) instead of 'on or off the highways of this state' (the location element imposed pursuant to 484C.430)." SAB, p.30. The State further said, "[s]uch an error did not cause appellant not to be placed on notice of the charge he was facing." SAB, p.13. Again, the State's attempt to make Banka's issue one of notice, which it is not, must be disregarded.

Banka is not challenging the sufficiency of the Second Amended Information for lack of notice. Banka admits that the Second Amended Information, as well as the Complaint, Information and Amended Information, put him on notice that the elements of "on a highway or on premises to which the public has access" were being used to prosecute him. Banka's claim is that the Second Amended Information fails to charge an offense and fails to confer subject matter jurisdiction on the district court (or any court) because of its improper commingling of NRS 484C.110 and NRS 484C.430. Notice of that which is not a crime does not magically make it a crime.

The State's "subset" argument lacks merit. SAB, p.14. The issue in Banka is not that ". . . an individual cannot be on 'a highway or on premises to which the public has access' without also being 'on or off the highways of this State'" but

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rather the commingling of NRS 484C.110 and NRS 484C.430 fails to charge a legal public offense.

The State's argument that Banka's *Alford* plea to the DUI in the Second Amended Information is proof that the Second Amended Information charged a legal offense is meritless. See, *Ex Parte Dickson*[12]. ("A plea of guilty amounts to nothing more than an acknowledgement of the facts charged in the indictment, but whether such facts constitute **an offense at law** is left open to be decided by the court.") Id., 36 Nev. at 101. (emphasis added.) *Dickson* further stated, "[i]f no crime is charged in the indictment then none is confessed by pleading guilty." Id., 36 Nev. at 102.

The State's reliance on its claim on lack of prejudice is misplaced. Prejudice is not a factor to be considered when determining whether Banka's Second Amended Information charges a legal offense. A formal accusation which fails to charge an offense will always fail to charge an offense until amended. The absence of prejudice does not magically or legally turn a formal accusation which fails to charge an offense into one that does. Whether or not Banka is prejudiced by the State's Second Amended Information is irrelevant.[13]

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12. 36 Nev. 94, 101 (1913)

13. However, Banka is prejudiced by the State's improper Second Amended Information. An acquittal of the DUI would be null and void, thus denying him constitutional protection against double jeopardy. *See, Application of Alexander*, 80 Nev. at 359. ("An acquittal . . . by a court having no jurisdiction is void . . . . ")

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To "side-step" the uncontroverted fact that the district attorney commingled NRS 484C.110 and NRS 484C.430, two (2) separate statutory offenses, to charge Banka, the State erroneously argues that NRS 484C.430 is not a substantive offense but rather it is nothing more than a penalty enhancement statute for violations of NRS 484C.110. The State's argument lacks merit. There is no case holding that NRS 484C.430 is an enhancement statute. A reading of NRS 484C.430 shows that it is a substantive offense statute. The statute lists the substantive elements of the offense as well as the penalties for its violation. NRS 484C.110 has absolutely nothing to do with NRS 484C.430 except to incorporate the levels of the prohibitive substances listed in NRS 484C.110. The State admits that NRS 484C.110 and NRS 484C.430 are separate offenses, citing *Hudson v. Warden*.[14] The district court disagreed with the State's "enhancement statute" argument and noted that 484C.110 and 484C.430 are separate offenses. AA 63.

The State's reliance on alternative pleading under *State v. Kirkpatrick* that ". . . the listing of multiple statutes does not create 'a commingling of offenses"' is disingenuous. *Kirkpatrick* addresses alternative means of committing the offense, not the commingling of multiple statutes which are separate and distinct to charge a defendant. Conflating alternative means with multiple statutes is flat-out wrong.

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14. 117 Nev. 387, 395-396 (2001)

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The State again admits that NRS 484C.110 (misdemeanor) was used to charge Banka. The District Attorney states, "[t]he Second Amended Information **admittedly** contained language from NRS 484C.110" SAB p.16. But, the State ignores the effect of the improper inclusion. Again, the State attempts to "get around" the commingling by arguing that NRS 484C.430 is merely an enhancement statute. As previously addressed, the State's "enhancement statute" argument is meritless.

The State's argument that "the interchanging [commingling] of these phrases [substituting the elements of "on a highway or on premises to which the public has access" for the element "on or off the highways"] did not create a new offense," lacks merit. The State admits that the interchanging of the elements "narrowed the location for which the State would have had to have proven appellant committed the offense at trial." SAB p.17. Narrowing the definition of a statutory offense does create a "new" offense, unauthorized by the Legislature. The State completely ignores that the District Attorney's hybrid "commingled created offense" amounted to improperly legislating an offense. *See*, Banka's Opening Brief at p.14 (fn.24).

The State's final argument relying on *Blockburger* and NRS 484C.430 being an enhancement statute lacks merit. It has already been established that NRS 484C.430 is not an enhancement statute and, the State never explains how its *Blockburger* analysis "reveals why both NRS 484C.110 and NRS 484C.430 (the felony enhancement portion of the statute) are referenced in the charging

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document." SAB, p.18. Under *Blockburger*, NRS 484C.110 and NRS 484C.430 are separate offenses. *See, fn.32* in Banka's Opening Brief.

Lastly the State is incorrect when it asserts that "[b]oth statutes criminalize 'any act or neglect of duty imposed by law while driving or in actual physical control of any vehicle."' SAB, p.18. Only NRS 484C.430 (felony) has the "act or neglect of duty" element.

Banka challenges the legality of the Clark County District Attorney's "legislating" his own felony DUI offense to charge some defendants, but not all, by commingling NRS 484C.110 (misdemeanor) and NRS 484C.430 (felony), without legal authority, substituting the misdemeanor elements "on a highway or on premises to which the public has access" for the felony element "on or off the highways." There is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense. Without such a statute, there is no crime. NRS 193.050(1). Therefore, the Second Amended Information filed against Banka fails to charge a legal offense and fails to confer subject matter jurisdiction on the district court (or any court).

Therefore, Banka's issue is meritorious and this Court should grant his request for relief.

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C.

THE DISTRICT COURT'S REFUSAL TO ALLOW APPELLANT BANKA TO WITHDRAW HIS PLEA OF GUILTY (*ALFORD*) WAS CONTRARY TO LAW AND AN ABUSE OF DISCRETION FOR THE FOLLOWING REASONS: (1) APPELLANT BANKA DID NOT UNDERSTAND THE ELEMENTS OF THE DUI OFFENSE, (2) APPELLANT BANKA DID NOT UNDERSTAND THE CONSEQUENCES OF THE PLEA, (3) APPELLANT BANKA'S PRIOR COUNSEL WAS INEFFECTIVE AND (4) APPELLANT BANKA HAD LEGAL DEFENSES TO THE DUI CHARGE

b. Banka should have been allowed to proceed to trial.

A plea of guilty must be entered knowingly, voluntarily and intelligently.[15] *Boykin v. Alabama*[16]; *Higby v. Sheriff*[17]. A failure to comply with this requirement is not only a "fair and just" reason to allow a defendant to withdraw his/her plea, the withdrawal is constitutionally mandated.

The record[18] (totality of the circumstances) must show that the defendant, at the time he entered his/her plea, understands the nature of the charge, i.e. the

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15. The dissent in *State v. Freeze*, 116 Nev. 1097, 13 P.3d 442 (2000). At *fn.1*, noted that the United States Supreme Court has used slightly different language in its cases when describing the voluntary, knowing and intelligent requirement.

16. 395 U.S. 238 (1969).

17. 86 Nev. 774, 476 P.2d 959 (1970).

18. Banka agrees with the State's assertion that the plea canvass and the GPA are the most significant factors for the "totality of the circumstances" review. SAB, p.21. However, neither supports the State.

elements of the offense and the consequences of the plea. The record in Banka shows that neither constitutional requirement was met.

Banka did not understand the elements of a NRS 484C.430 offense:

The location "elements" alleged in the Second Amended Information i.e. "on a highway or premises to which the public has access" are not the "elements" of a NRS 484C.430 violation. *See again*, Banka's commingling challenge in his Opening and Reply Briefs. The correct element should have been "on or off the highways." Banka had no knowledge of the correct location "element."

Banka cold not have knowingly, voluntarily and intelligently entered his plea when the Second Amended Information substituted misdemeanor elements for the felony element. It is indisputable that Banka was never aware of each and every element of a NRS 484C.430 offense.[19] **The State's illegal commingling of NRS 484C.110 and NRS 484C.430 not only fails to charge a legal offense, but also fails to inform Banka of the correct elements of NRS 484C.430.** Without such knowledge, Banka's plea is constitutionally infirm.

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19. An indictment, information or complaint **must** allege every element of the offense. *See*, *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment **must** set forth each element of the crime that it charges." (emphasis added.); *United States v. Cook*, 17 Wall. 168, 174 (1872) (" . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.")[19] *See also*, *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763 (1962). The Court in *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183 (1998) recognized, "[a]n indictment, standing alone, **must contain**: (1) each and every element of the crime charged . . . ." (emphasis added.)

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There is no evidence that Banka understood any of the elements alleged in the Second Amended Information. The District Judge never canvassed Banka on any of the elements.

The use of the "however slight" language in the Second Amended Information was improper and misleading. Banka believed that the "however slight" language meant that the prosecution need show only slight impairment. The trial Judge never addressed the "however slight" language.

The Admonishment of Rights, attached to the GPA as Exhibit 2, indicated that Banka was being charged under NRS 484.379 [now NRS 484C.110], a misdemeanor statute with enhance penalties for prior DUI convictions. There is no mention of NRS 484C.430 in the Admonishment of Rights. This misleading conflict was never addressed by the court below, contrary to *Hudson v. Warden*, 117 Nev. at 400.

Banka's ineffective assistance claim was ignored by the district court. Banka's prior counsel, Thomas Boley, Esq. never filed any motions on behalf on Banka. Also, attorney Boley never requested discovery of the State's alcohol testing, a must in a felony DUI case. *See*, NRS 484C.240(3). In short, Boley did nothing to defend Banka.

Banka did not understand the consequences of his plea:

Banka was given erroneous information regarding the amount of the fine which the district court could impose. Banka was led to believe that the fine could

be as low as $1.00 and up to $5,000. Yet, the law requires the imposition of at least a minimum fine of $2,000. Therefore, it cannot be legitimately held that Banka understood the consequences of his plea.

Based on Banka's lack of understanding of the nature of the charge, i.e. the elements of the offense and the consequences of the plea, Banka's plea is constitutionally infirm. The plea was not entered knowingly, voluntarily and intelligently.

D.

BANKA'S RESPONSES TO THE STATE'S SPECIFIC ARGUMENTS REGARDING BANKA'S PLEA

a. None of the State's arguments refute Banka's withdrawal claim.

The presumptive validity of a plea of guilty is extinguished when the defendant shows that his/her plea was not entered knowingly, voluntarily and intelligently. *See again, Boykin v. Alabama*, *supra* and *Higby v. Sheriff, supra*. Banka, contrary to the State's assertion, has made the requisite showing to be allowed to withdraw his plea.[20]

The State's reference to the facts and issues in *Stevenson* are irrelevant. SAB, ps. 22-23. Banka's issues are entirely different.

20. Banka's plea should also be set aside on the grounds that it is null and void because the Second Amended Information fails to charge a legal public offense, leaving the district court without subject matter jurisdiction. *See again, fn.6, supra*.

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The State admits that the Second Amended Information "interchanged" the misdemeanor location "elements" in NRS 484C.110 for the felony "element" in NRS 484C.430. But, it erroneously concludes that the State's commingling "did not change the elements of the offense sufficient [sic] to change Appellant's level of culpability." SAB, p.24. The "level of culpability" has nothing to do with the State's improper allegation of the incorrect misdemeanor element. The issue is whether Banka understood the elements of NRS 484C.430. Two prosecutors, prior defense counsel and the district court did not know that "on or off the highways" was the element of a 484C.430 violation, not "on a highway or on premises to which the public has access." Why is it disingenuous that Banka did not know? It's not.

The State's argument that Banka "waived any defects in the pleadings" is belied by the record. Attorney Boley's waiver of "any" defects went solely to this Court's striking Court 2, Leaving the Scene. The Plea Transcript (June 24, 2019) exposes the State's false statement.

> MS. LAVELL: And, Judge, the State amended the amended information by interlineation.
>
> THE COURT: Okay. The leaving the scene?
>
> MS. LAVELL: Yes, Your Honor.
>
> MR. BOLEY: And that's struck by interlineation?
>
> MS. LAVELL: Yes.

MR. BOLEY: **We'll waive any defects assuming the plea goes through today.**

THE COURT: Okay. All right. Thank you.

MS. LAVELL: Thank you.

THE COURT: And so do you want me to conform the attachment Exhibit 1 by striking—

MS. LAVELL: Yes, please.

THE COURT: -- the language—

MS. LAVELL: If you would.

THE COURT: -- on the first page, line 24 of the amended? Or actually it starts on line 23.

AA 39. (emphasis added.)

AA 40.

There was no waiver as to Count 1!

The State's "boiler plate" language in the GPA stating that Banka discussed the elements of the charge and understood them (SAB, p.24), only means, if this is a true statement, that Banka understood the allegations made in the Second Amended Information, not that Banka understood the correct elements of NRS 484C.430 which were not part of the charging document attached as Exhibit 1 in the GPA.

The GPA's "boiler plate" language that Thomas Boley, Esq. explained the elements only means, if this really happened, that Boley explained the elements that

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were alleged in the Second Amended Information. Attorney Boley never explained that the location element was "on or off the highways".

The State's conclusion that Banka understood the elements of the offense lacks merit. Banka did not understand the elements of the offense because the State's improper commingling of NRS 484C.110 and 484C.430 failed to allege the correct elements of "on or off the highway." Banka cannot be legitimately held or said to have understood that which he had no knowledge of.

The State's argument that the Admonishment of Rights, Exhibit 2 in the GPA, merely informed Banka that the DUI conviction could be used for enhancement of penalties for a subsequent DUI conviction lacks merit. The form itself refutes the State's argument: "I am the Defendant in this case. I am charged with . . . [a] violation of NRS 484.379 [now NRS 484C.110]." AA 35.

The State's argument that "even if this error [charging a NRS 484C.110 violation] had occurred", that it is only an error in the citation, lacks merit. SAB p.26. A reading of the Admonishment of Rights shows that it applies only to violations of NRS 484.379 [now NRS 484C.110].

The State's argument regarding the "however slight" language is totally meritless. The State postures Banka's case as having only one theory to defend, i.e. "while he had a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving . . . ." SAB ps. 26-27. However, Banka was charged with two other DUI theories, impairment and *per se,* which he was

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required to defend. *See Kirkpatrick, supra*. (A defendant is required to defend alternative means of committing an offense alleged in the charging document). The "however slight" language applies to the impairment theory. [21]

The Legislature in 2015 defined "under the influence" without any "however slight" or similar language. *See*, NRS 484C.105. The State knows that there is no legal authority to use the "however slight" language by the State's willingness to remove the "however slight" language if requested by defense counsel. AA 78.

There was nothing in the GPA that informed Banka that he must be fined a minimum of $2,000. The GPA used the word "may" be fined up to $5,000. The "may" indicates that Banka need not be fined at all. However, the district court corrected the erroneous "may" language, but in doing so led Banka to believe he could be fined anywhere from $1.00 to $5,000. The district court never told Banka that he had to be fined at least a minimum of $2,000. Therefore, it is uncontroverted that Banka did not understand the consequences of his plea.

The State's reference to restitution is irrelevant. Restitution was not an issue in Banka's case.

21. It appears that the State's argument here is a concession that it could only prove the "two (2) hour theory" . If so, Banka's prior counsel, Thomas Boley, Esq. should have "stopped" the plea, moved to suppress the reported alcohol reading and proceed to trial.

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Ineffective assistance of counsel is a legal basis to have a plea of guilty withdrawn. *See, Molina v. State*[22], *Nollette v. State*[23], *Hill v. Lockhart*[24]. There is nothing in the record to show that Banka's prior counsel, Thomas Boley, did **anything** to defend Banka. Doing nothing is not effective assistance of counsel under the seminal case of *Strickland v. Washington*[25].

The State's argument that Banka's reference to Motions that could have or should have been filed by attorney Boley are "frivolous or inconsequential" is meritless. SAB p. 34

The *Armstrong* Motion:

Armstrong recognized that a jury could very well convict on emotion rather than a meaningful evaluation of the evidence when jurors hear a high BAC even though the alcohol reading is not "tethered" to the offense. *Id.*, 127 Nev. at 934. To minimize the possibility of an emotional verdict, *Armstrong* found it reasonable to require the State to present a scientifically valid retrograde extrapolation calculation. Retrograde extrapolation is a "mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working

22. 120 Nev. 185, 190, 97 P.3d 533 (2004).

23. 118 Nev. 341, 348-349, 46 P.3d 87 (2002).

24. 474 U.S. 52 (1985).

25. 466 U.S. 668 (1993).

backward from the time the blood [sample] was taken."[26] *Armstrong*, 127 Nev. at 932. Absent a scientifically reliable retrograde calculation, *Armstrong* upheld the district court's exclusion of the blood alcohol readings. However, any attempt by the State's expert to use retrograde extrapolation must satisfy NRS 50.275. *See, Higgs v. State*[27] ; *Hallmark v. Eldridge*[28].

Critical factors which must be known for an expert to use retrograde extrapolation include but are not limited to, (1) the type and amount of food in the stomach, (2) when the last alcoholic drink was consumed, (3) drinking pattern at the relevant time, (4) elapsed time between the first and last drink consumed, and (5) time elapsed between the last drink consumed and the blood draw. *See again, Armstrong*, 127 Nev. at 936. **None of these critical factors are known in Banka's case!**

Without knowledge of the times of the first and last alcoholic drink, retrograde extrapolation cannot be scientifically reliable. In *Com. v. Senior*, cited

---

26. The physiology of alcohol consumption consists of three phases or stages commonly referred to as the "alcohol curve": (1) Absorption, (2) Equilibrium (peak) and (3) Elimination. The "alcohol curve", based on individual data, is a representation of a persons BAC levels over time. Absorption is a non-linear dynamic process rendering its data points and shape on the "alcohol curve" as unknown. Equilibrium (peak) is when all the alcohol in the stomach (and no more added) has been uniformly absorbed throughout the body. Elimination occurs when the "peak" has been reached. (A decreasing BAC does not guarantee that absorption has ended – it may be that elimination is just greater than the absorption.) The elimination stage is linear (i.e. straight line regression) unlike the non-linearity of absorption.

27. 126 Nev. 1, 222 P.3d 648 (2010).

28. 124 Nev. 492, 189 P.3d 646 (2008).

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in *Armstrong*, 127 Nev. at 932, the state's expert conceded that without knowledge of the times of the first and last alcoholic drink, ". . . he would be unable to conduct his analysis [retrograde extrapolation]. 433 Mass. at 460. **Again, this critical information is unknown in Banka's case!** Additionally, there was only one (1) blood draw taken over an hour after the accident. Banka has less factors for a retrograde extrapolation calculation than *Armstrong*, clearly negating the State's assertion that an *Armstrong* motion in Banka's case would be frivolous.

Contrary to the State's assertion, *Armstrong's* holding is not limited to cases where the evidentiary test[s] (breath/blood) was obtained outside of two (2) hours after driving. The dispositive issue in *Armstrong* is whether there are sufficient factors known to calculate a scientifically valid retrograde extrapolation. Again, these necessary factors are absent in Banka's case.

The *State v. Sample*[29] PBT Motion:

The purpose of the officer administering a PBT is to establish probable cause. *See*, NRS 484C.150. If the officer has probable cause before administering a PBT, the PBT should not be given and the person "shall" be arrested. *See*, NRS 171.1231. ("At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for arrest appears.") *See*

29. 134 Nev. 169, 414 P.3d 814 (2018).

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also, *Dixon v. State*[30]. ("We do not condone intentional violations of the [NRS 171.1231] statute.") Id., 103 Nev. at 274, *fn.1*. Eliminating the PBT creates a legitimate challenge to the officer's probable cause, contrary to the State's assertion. The Motion is far from frivolous.

The Motion to Suppress the Blood Test for a violation of the Implied Consent Law:

The "two hour" theory is equally defensible. A motion to suppress the evidentiary BAC reading is appropriate because the officer did not give Banka the choice of submitting to a breath test in lieu of blood. See, NRS 484C.160(5)(a) (". . . the person may refuse to submit to a blood test if means are reasonably available to perform a breath test."); NRS 484C.240(2) (unless the officer substantially complies with the implied consent law, which he did not do, the evidentiary test reading is inadmissible.) A motion to suppress should have been filed.

The State's cite to *Kinkade* in inapposite. *Kinkade*, unlike Banka, was given the choice of breath or blood. *Kinkade*, 107 Nev. at 259.

CONCLUSION

Arguments A and B, *supra*, challenge the legality of the Clark County District Attorney's "legislating" his own felony DUI offense to charge some defendants but not all, by commingling NRS 484C.110 (misdemeanor) and NRS

30. 103 Nev. 272, 737 P.2d 1162 (1987).

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484C.430 (felony), without legal authority, substituting the misdemeanor elements "on a highway or on premises to which the public has access" for the felony element "on or off the highways" There is no statute making the commingling of NRS 484C.110 and NRS 484C.430 a public offense. Without such a statute, there is no crime. NRS 193.050(1). Therefore, the Second Amended Information filed against Banka fails to charge a legal offense and fails to confer subject matter jurisdiction on the district court.

Arguments C and D, *supra*, challenge the district court's denial of his request to withdraw the guilty (*Alford*) plea. The plea was constitutionally infirm. The location "elements" alleged in the Second Amended Information are not part of a NRS 484C.430 violation. The correct element should have been "on or off the highways." Banka had no knowledge of the correct location "element," thus he could not have understood the correct elements of a 484C.430 offense.

There is no evidence that Banka understood any of the elements. The District Judge never canvassed Banka on any element.

Banka believed that the language "however slight" alleged in the charging document meant that all the State had to prove was slight impairment. The trial judge never addressed the "however slight" language.

The Admonishment of Rights indicated that Banka was charged under NRS 484.379 [now NRS 484C.110]. There is no mention of NRS 484C.430 in the

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Admonishment of Rights. This misleading conflict was never addressed by the court below.

Banka was given erroneous information regarding the amount of the fine which the court could impose. Banka was led to believe that the fine could be as low as $1.00 and up to $5,000. Yet, the law required at least a minimum fine of at least $2,000. Therefore, it cannot be held that Banka understood the consequences of his plea.

Banka made a claim of ineffective assistance of counsel against Thomas Boley, Esq. However, the district court ignored the claim.

Banka had arguable issues which would have merited the filing of several motions which never happened. The court below ignored this issue as well.

Banka had presented numerous "fair and just" reasons to be allowed to withdraw his plea. Banka's request to withdraw his plea was made before sentencing, thus the district court was required to use a relaxed standard to review Banka's request. The relaxed requirement standard was ignored by the lower court.

For each of the aforementioned reasons, the district court abused her discretion in denying Banka's request to withdraw his previously entered guilty (*Alford*) plea.

Therefore, for each and every reason set forth herein, Banka's request for relief should be granted.

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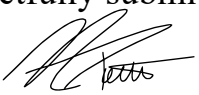
Respectfully submitted,

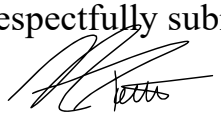


Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire
(On the Brief)

VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Reply Brief and knows the contents thereof; that Reply Brief is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on it 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 Rule of Appellant Procedure.

Dated this 20th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 20th, 2020. Electronic Service of the foregoing Appellant's Reply Brief and shall be made in accordance with the Master Service

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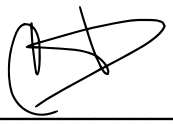

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