

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 JACK BANKA,

4 Petitioner,

5 vs.

6 CLARK COUNTY, EIGHTH
7 JUDICIAL DISTRICT COURT
8 JUDGE JASMIN LILLY-SPELLS,
9 Respondents.

10 STATE OF NEVADA,

11 Real Party In
12 Interest.

Electronically Filed
Aug 17 2021 03:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No.:

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

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15 **PETITION FOR WRIT OF HABEAS CORPUS OR IN THE**
16 **ALTERNATIVE A WRIT OF MANDAMUS**

17 COMES NOW Petitioner, JACK BANKA (being in constructive custody
18 and unlawfully restrained by his liberty by Sheriff Joseph Lombardo) , through
19 his counsel, MICHAEL D. PARIENTE, ESQUIRE. with JOHN G. WATKINS,
20 ESQUIRE., (OF COUNSEL), petitions this Honorable Court for an Order
21 granting the Writ of Habeas¹ Corpus on the ground that the “Leaving the
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26 1. NRS 34.500(3) & (4) state in pertinent part: “. . . the petitioner may be
27 discharged in any one of the following cases:

28 3. When the process is defective in some matter of substance
required by law, rendering it void.

Scene” charge is an illegal restraint of Banka’s liberty, to wit: (1) the “Leaving the Scene” charge was added by an illegal amendment, (2) the statute of limitations had expired on the “Leaving the Scene” and (3) the “Leaving the Scene” charge was never legally before the district court at any time, or in the alternative petitions this Court to issue a Writ of Mandamus, on the grounds that: (1) The district court’s decision permitting the State to amend by adding an additional charge of “Leaving the Scene” is an abuse of discretion as a matter of law. *Green, infra*, 94 Nev. at 177, (2) the statute of limitations had run on the “Leaving the Scene” charge and (3) the “Leaving the Scene” charge was never legally before the district court.

DATED this 17th day of August, 2021.



MICHAEL D. PARIENTE, ESQ.
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4. When the process, though proper in form, has been issued in a case not allowed by law.”

ROUTING STATEMENT

This Court shall hear and decide a Writ such as Banka’s under NRAP(13) & (14). Banka’s issue that the State’s unconditional dismissal of the “Leaving the Scene” charge (NRS 484E.010) by failing to make the dismissal part of the Guilty Plea Agreement (GPA), thereby restarting the statute of limitations period on the dismissed charge, is an issue of first impression. Additionally, Banka’s challenge raises a principle issue of statewide importance.

DECLARATION OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS / WRIT OF MANDAMUS

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 Habeas Corpus / Mandamus;
3. Your Declarant verifies that the facts for the Petition is within the knowledge of your Declarant;
4. Your Declarant believes that Judge Lilly-Spells allowing the State to file a Third Amended Information adding a charge which was not contained

in the Second Amended Information sought to be amended is an abuse of discretion as a matter of law. Additionally, it was an abuse of discretion for the district court to allow Banka to be prosecuted for “Leaving the Scene” which had been barred by the statute of limitations. Additionally, the “Leaving the Scene” was never lawfully before the district court;

5. Your Declarant on the authority of Mr. Banka requests that this Court issue a Writ of Habeas Corpus / Mandamus.

FURTHER YOUR DECLARANT SAYETH NAUGHT

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

Executed on this 17th day of August, 2021.



MICHAEL D. PARIENTE, ESQ.

JURISDICTION

This Court has jurisdiction to grant a writ of habeas corpus. Nevada Constitution, Article 6 § 4; NRS 34.360 *et. seq.*

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 he is

entitled and from which he is unlawfully precluded by such inferior tribunal . . .
.”

ISSUES PRESENTED

1. **ALLOWING AN AMENDMENT OF AN INDICTMENT OR INFORMATION ADDING AN ADDITIONAL OR DIFFERENT OFFENSE VIOLATES NRS 173.095(1).**
2. **THE STATE’S UNCONDITIONAL DISMISSAL OF THE “LEAVING THE SCENE” OFFENSE “STARTS OR RESTARTS THE CLOCK” ON THE STATUTE OF LIMITATIONS PERIOD.**
3. **AN OFFENSE WHICH HAS BEEN UNCONDITIONALLY DISMISSED BY THE STATE WHEREBY THE STATUTE OF LIMITATIONS HAS EXPIRED CANNOT BE RESURRECTED TO CHARGE AND PROSECUTE THE DEFENDANT ON THAT CHARGE.**
4. **A DOCUMENT FILED IN VIOLATION OF THE LAW IS A “FUGITIVE” DOCUMENT HAVING NO FORCE OR EFFECT WHATSOEVER.**

RELIEF SOUGHT

Banka requests that this Court reverse the district court’s decision allowing the State to file a Third Amended Information to add the charge of “Leaving the Scene”, contrary to NRS 173.095(1)², which was not contained in the State’s Second Amended Information.

2. NRS 173.095(1) states, “[t]he court may permit an indictment or information to be amended at any time before verdict or finding **if no additional or different offense is charged** and if substantial rights of the defendant are not prejudice.” (emphasis added.) The conjunction “and” requires both requirements to be met before any amendment is legally allowed. The first requirement is at issue here.

THE LEGAL REMEDY OF HABEAS CORPUS IS WARRANTED TO CHALLENGE THE ILLEGAL RESTRAINT OF BANKA’S LIBERTY

Writs of habeas corpus are legal remedies in the ordinary course of law. *Shelby v. Sixth Jud. Dist. Ct.*, 82 Nev. 204, 414 P.2d 942 (1996) (“ . . . The writ of habeas corpus is the plain, speedy and adequate remedy. . . .”) in law. *Id.*, 82 Nev. at 207. A defendant’s right to prosecute a writ of Habeas Corpus in this Court “shall not be suspended unless. . . .,” The “unless” exclusion is inapplicable in Banka’s case. Since Mandamus is an extraordinary remedy, relief is most often denied procedurally if the person had a legal remedy. Banka felt it was necessary to seek relief through habeas corpus as well as mandamus out of an abundance of caution.

EXTRAORDINARY RELIEF BY MANDAMUS IS WARRANTED FOR MISAPPLICATION OF LAW

A writ of mandamus is available “ . . . to control a manifest abuse or arbitrary or capricious exercise of discretion. . . .” *State v. Dist. Ct. (Armstrong)*³ (citing *Round Hill Gen. Imp. Dist. v. Newman*⁴, 97 Nev. at 603-604), 127 Nev. at 931. An exercise of discretion is considered arbitrary if it is “founded on prejudice or preference rather than on reason” and capricious if it

3. 127 Nev. 927, 267 P.3d 777 (2011).

4. 97 Nev. 601, 637 P.2d 534 (1981).

is “**contrary to the evidence or established rules of law.**” *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932 (quoting definitions of Arbitrary and Capricious, *Blacks Law Dictionary* 119 (9th ed. 2009) (emphasis added). A manifest abuse of discretion is “[a] clearly erroneous interpretation of law or a clearly erroneous application of law or rule.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. at 931-932. (cites omitted.)

SHORT RESPONSE AS TO WHY WRIT SHOULD ISSUE

The district court’s decision allowing the State to file a Third Amended Information adding the charge of “Leaving the Scene” which was not contained in the Second Amended Information is an abuse of discretion as a matter of law. *Green, infra*, 94 Nev. at 177. (A trial court’s discretion to allow an amendment of an information “. . . is abused if an ‘additional or different offense is charged. . . .’”) The trial court also ignored that the statute of limitations had run on the “Leaving the Scene” charge as well as the fact that “Leaving the Scene” charge was never legally before the district court. For each and every reason stated, Banka’s writ request has merit and should be granted.

STATEMENT OF THE CASE

This Court granted Banka’s appeal and remanded for further proceedings. Thereafter, the State filed a motion to file a Third Amended Information to add the charge of “Leaving the Scene” which had been

1 unconditionally dismissed causing the statute of limitations period to expire. In
2 the alternative, the State requested the district court to strike the Second
3 Amended Information which contained only the DUI charge. Banka opposed
4 both requests. The district court granted the State's request to file the Third
5 Amended Information. Banka now challenges the district court's decision
6 allowing the Third Amended Information.
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9 STATEMENT OF RELEVANT FACTS

10 On November 1, 2016, Petitioner Banka ("Banka") was arrested for DUI
11 substantial bodily injury (NRS 484C.110 and NRS 484C.430)⁵ and "Leaving
12 the Scene" (NRS 484E.010). A criminal complaint was filed January 11, 2017
13 charging the DUI and two (2) Counts of "Leaving the Scene". Petitioner's
14 Appendix (PA), 3-4. Subsequently, the State filed an amended complaint
15 removing one of the "Leaving the Scene" Counts.
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18 On June 28, 2018, Banka's preliminary hearing commenced wherein the
19 Justice Court found probable cause and ordered Banka to proceed in district
20 court. The State filed an Information in district court on July 9, 2018 alleging
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24 5. The criminal complaint did not charge felony substantial bodily injury under
25 NRS 484C.430 but instead erroneously commingled NRS 484C.110
26 (misdemeanor) and NRS 484C.430 (felony), two (2) separate and distinct
27 offenses, to charge Banka. The commingling issue was raised on Banka's appeal
28 to this Court but remained unresolved because the Court granted Banka's appeal
on a different ground.

the DUI offense only. PA, 5-6. The next day, **without any legal authority to do so**, the State file an Amended Information adding the “Leaving the Scene” charge. PA, 7-10.

Banka was offered a plea to the DUI felony with a recommended sentence of two (2) to five (5) years mandatory incarceration. PA, 14-21. The GPA attached the Second Amended Information as Exhibit 1. PA, 20-21. The Second Amended Information contained only the DUI felony charge. The GPA never conditioned the dismissal of the “Leaving the Scene” on a plea to the felony DUI. In fact, the GPA never mentioned the “Leaving the Scene” charge at all.

Banka decided to reject the plea offer and hire new counsel. However, after Banka’s request to hire new counsel, Michael D. Pariente, Esq. and John G. Watkins, Esq. did not happen⁶, Banka entered into a second plea agreement with the State to plead to the DUI charge. PA, 22-33. The State penalized Banka for not accepting its offer by increasing its offer to four (4) to ten (10) years incarceration. The State removed the “Leaving the Scene” charge (and did so before Banka pled) and Banka entered his plea to the DUI charge. *See*,

6. The previous district court judge conditioned Banka’s request to have new counsel on counsel being ready to proceed to trial in four (4) days. The district court’s condition could not be accomplished by new counsel. New counsel could not adequately and constitutionally defend Banka with only four (4) days preparation. Only after Banka pled to the DUI charge, did the district court allow new counsel.

ps. 14-15, *infra*. Again, the State never conditioned the dismissal of “Leaving the Scene” in the plea agreement. Again, the GPA never mentioned the “Leaving the Scene” charge at all. At the time Banka entered his plea, the Second Amended Information contained only the DUI charge.

After this Court’s reversal in Banka (PA, 34-39) , the State on February 2, 2021 filed a “Motion To File Amended Information Or, In The Alternative, To Strike The Second Amended Information” to reinstate the “Leaving the Scene” charge. PA, 40-56. The “Leaving the Scene” had been unconditionally dismissed and the statute of limitations had expired prior to the State’s Motion To Amend. The Guilty Plea Agreement (GPA) never conditioned the dismissal of the “Leaving the Scene” on Banka’s plea to the felony DUI. PA, 22-33. In fact, the GPA never mentioned the “Leaving the Scene”. There is nothing in the GPA to toll the statute of limitations on the “Leaving the Scene” charge.

Banka filed an Opposition. PA, 57-75. The State submitted a Reply. PA, 76-101. Banka filed a Surrebuttal to address new points raised in the State’s Reply. PA, 102-105. The district court heard arguments April 28, 2021. PA, 106-111. Subsequently, the district court “grant[ed]” the state’s request to file a Third Amended Information.” PA, 113, l. 25. (bracket added.) Banka now files his Petitions for relief.

SUMMARY OF ARGUMENT

Banka’s case comes to this Court as a result of the district court’s abuse of discretion in allowing the State to file a Third Amended Information to add the “Leaving the Scene” charge which had been unconditionally dismissed by the State and the statute of limitations had expired. The Guilty Plea Agreement (GPA) never conditioned the State’s dismissal of “Leaving the Scene” on Banka’s Alford plea to the felony DUI. The GPA never even mentioned the “Leaving the Scene” charge.

The district court also abused her discretion by allowing the Third Amended Information in violation of NRS 173.095(1). The “Leaving the Scene” was not part of the Second Amended Information at the time Banka entered his Alford plea to the felony DUI. The amendment added an “additional or different offense” to the Second Amended Information, in violation of NRS 173.095(1).

I

LAW AND ARGUMENT

A.

THE DISTRICT COURT’S DECISION ALLOWING THE STATE TO FILE A THIRD AMENDED INFORMATION ADDING AN “ADDITIONAL OR DIFFERENT OFFENSE” VIOLATES NRS 173.095(1) AND THE STATUTE OF LIMITATIONS

a. Allowing an amendment which violates NRS 173.095(1) is an abuse of discretion under *Green v. State, infra*.

NRS 173.095(1):

An amendment of an indictment or information is controlled by NRS 173.095(1) NRS 173.095(1), “[t]he court may permit an indictment or information to be amended at any time before verdict or finding **if no additional or different offense is charged** and if substantial rights of the defendant are not prejudiced.” (emphasis added.) The language of NRS 173.095(1) is plain and unambiguous, thus a court cannot go beyond the statute’s plain meaning. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (“If a statute is unambiguous, this court does not look beyond its plain language in interpreting it.”) *See also, State, Dep’t of Motor Vehicles v. Terracin*, 125 Nev. 31, 34, 199 P.3d 835 (2009) (“When the language of a statute is plain and unambiguous, its intention must be deduced from such language, and the court has no right to go beyond it.”) The United States Supreme Court in *Nat’l Bank v. Germain*, 503 U.S. 249 (1992) stated,

. . . in interpreting a statute a court should always turn first to one, cardinal cannon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

When the words of a statute are unambiguous, then, the first cannon is also the last: “judicial inquiry is complete”.

Id., 503 U.S. at 253-254. (cites omitted.)

The legal maxim *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* (“the expression of one thing is the exclusion of another, repeatedly confirmed in this State” applies to NRS 173.095(1). *Valenti v. Department of Motor Vehicles*, 131 Nev. 875, 880, 362 P.3d 83, 86 (2015); *Cramer v. State*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010). The filing of an amended information must comply with NRS 173.095(1) ⁷.

The Court in *Jennings v. State*, 116 Nev. 488, 998 P.2d 557 (2000) addressed NRS 173.095(1) stating, “[t]he first requirement under the statute for amendment of the criminal information at any time before verdict **is that no additional or different offense is charged.**” *Id.*, 116 Nev. at 490. (emphasis added.) The filing of the Third Amended Information must be denied because its filing violates NRS 173.095(1). The State’s amendment adds an “additional and different offense” of “Leaving the Scene”, which is not contained in the State’s Second Amended Information.

An amended information supersedes the prior information, whether an original or amended information, and controls in criminal cases. *See, Randono v. Ballow*, 100 Nev. 142, 143, 676 P.2d 807, 808 (1984) (explaining that an

7. Section 3 of NRS 173.095 provides an exception to NRS 173.095(1). The exception does not authorize the State’s Third Amended Information. Equally true, as will be discussed *infra*, the exception did not apply to the State’s Amended Information filed July 10, 2018, rendering the Amended Information a “fugitive” document and without any force and effect whatsoever. The “Leaving the Scene” was never lawfully before the district court.

1 amended complaint is a distinct pleading that supersedes the original complaint.)

2 At the time Banka entered his plea, the Second Amended Information was in
3 effect and only contained the DUI charge.
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5 Prior to the filing of the Second Amended Information, the State dismissed⁸
6 the “Leaving the Scene” charge, and then Banka then plead to the DUI charge.
7 The State inadvertently included the “Leaving the Scene” in the Second
8 Amended Information and requested that reference to that charge be removed by
9 interlineation. The Plea Transcript (June 24, 2019) states,
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11 MS. LAVELL: And, Judge, the State amended the amended
12 information by interlineation.
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14 THE COURT: Okay. The leaving the scene?
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16 MS. LAVELL: Yes, Your Honor.
17

18 MR. BOLEY: And that’s struck by interlineation?
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20 MS. LAVELL: Yes.
21

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

24 THE COURT: Okay. All right. Thank you.
25

26 MS. LAVELL: Thank you.
27

28 THE COURT: And so do you want me to conform the

8. The dismissal was unconditional and not part of the GPA.

H.T., p.3, ls. 14-25. (emphasis added.)

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.

H.T., p.4, ls. 1-6.

The Second Amended Information at the time Banka entered his plea only contained the DUI offense. Since the Third Amended Information adds an “additional or different offense” of “Leaving the Scene,” its filing violates NRS 173.095(1).

The Court’s discretion to allow an amendment of the information to be filed is not unlimited. Under NRS 173.095, a court’s discretion applies only “if no additional or different offense is charged” **and** “if substantial rights of the defendant are not prejudiced.” Both requirements must be met; however, only the first requirement is at issue in Banka. Allowing an amendment contrary to these mandatory requirements is an abuse of discretion. The Court in *Green v. State*, 94 Nev. 176, 576 P.2d 1123 (1978) held, “[o]f course, although amendment of an information is usually within the trial court’s discretion, that discretion is abused if an ‘additional or different offense is charged’ or

‘substantial rights of the defendant are prejudiced.’” *Id.*, 94 Nev. at 177. Since the State’s Third Amended Information contains the “additional or different offense” of “Leaving the Scene”, which is not contained in the State’s Second Amended Information attached to the plea agreement, it was an abuse of discretion under *Green* to allow the amendment.

Statute of Limitations:

A defendant cannot be lawfully charged with an offense when the statute of limitations for that offense has expired⁹. The filing of a formal accusation tolls the statute of limitations period so long as that charge remains in the charging document. A charge that has been unconditionally dismissed by the State no longer tolls the statute of limitations.¹⁰ In *State v. Merolla*, 100 Nev. 461, 686 P.2d 244 (1984), the Court stated, “[m]oreover, criminal statutes of limitations

9. The Court in *Hubbard v. State*, 112 Nev. 946, 920 P.2d 991 (1996) stated, “. . . we conclude that the best reasoned approach is to treat criminal statutes of limitation as non-jurisdictional, affirmative defenses. The failure to raise the statute of limitation in the trial court waives the defense.” *Id.*, 112 Nev. at 948. Waiver does not apply in Banka as he has asserted his affirmative defense.

10. The State could have easily provided language in the GPA conditioning the dismissal of the charge as part of the plea agreement itself and any non-compliance of the agreement by the defendant would allow the State to re-charge the defendant with the dismissed offense. *See, Ricketts, infra*, cited in *Sweat, infra*. The inclusion of such language in the GPA would toll the statute of limitations during the time it was dismissed. However, the State failed to include such language, allowing the limitation period to charge Banka to have run. The district court’s denial of Banka’s statute of limitations claim was contrary to law.

1 are to be liberally construed in favor of the accused,” citing *Toussie v. United*
2 *States*, 397 U.S. 112, 114-15 (1970).

3 The statute of limitations applies to the filing of an amended information.
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5 See, *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036 (1995) (The court held that
6 an amended information or indictment can violate the statute of limitations.)
7 *Benitez* stated, “[a] superseding indictment filed while the original indictment is
8 validly pending is not barred by the statute of limitations if the new indictment
9 does not broaden or substantially amend the original charges.” *Id.*, 111 Nev. at
10 1364. *Benitez* further stated, “[t]he same would be true of a superseding
11 information.” *Id.*, 111 Nev. at 1364. Adding the additional charge of “Leaving
12 the Scene” does “broaden or substantially amend the original charge” contained
13 in the Second Amended Information. The only information legally before the
14 district court is the State’s Second Amended Information which does not contain
15 the “Leaving the Scene” charge as it had been dismissed by the State before
16 Banka entered his *Alford* plea. Therefore, the Third Amended Information
17 violates the statute of limitations as well as NRS 173.095(1).
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23 **Ex Post Facto:**

24 A charge that has been unconditionally dismissed and the statute of
25 limitations has run on that offense, that offense cannot be resurrected by filing
26 an Amended Information. *Stogner v. California*, 539 U.S. 607, 632-633 (2003)
27 (Resurrecting an expired statute of limitations period to prosecute a person
28

violates the prohibition of the *ex post facto* clause.) Allowing the State to resurrect the expired statute of limitations period on the “Leaving the Scene” offense is condemned by *Stogner* and violates the *ex post facto* clause. U.S. Const., Art. 1 § 10.

B.

THE STATE’S AMENDED INFORMATION (FILED JULY 10, 2018) WAS NOT AUTHORIZED UNDER NRS 173.095(3) AND VIOLATED NRS 173.095; THEREFORE, THE AMENDED INFORMATION IS A “FUGITIVE” DOCUMENT AND CANNOT BE USED TO LEGALLY CHARGE BANKA WITH “LEAVING THE SCENE” THEN OR NOW

a. NRS 173.035(4) did not apply in Banka’s case.

An amendment of an indictment or information which fails to comply with NRS 173.095 is a fugitive document and without legal effect whatsoever. An amended information filed in violation of NRS 173.095 cannot legally charge a defendant with any crime. NRS 173.095 states in pertinent part,

(1) The court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(3) The court shall permit an information to be amended pursuant to subsection (4) of NRS 173.035.

Subsection (3) is the only exception to NRS 173.095(1).

NRS 173.035(4) states in relevant part,

If, with the consent of the prosecuting attorney, a defendant waives the right to a preliminary examination in accordance with an agreement by the defendant to plead guilty . . . to a

lesser charge or at least one, but not all, of the original charges, the information filed against the defendant pursuant to this section may contain only the offense or offenses to which the defendant has agreed to enter a plea of guilty If, for any reason, the agreement is rejected by the district court or withdrawn by the defendant, the prosecuting attorney may file an amended information charging all of the offenses which were in the criminal complaint upon which the preliminary examination was waived. The defendant must be arraigned in accordance with the amended information.

This section applies only if the defendant waives the right to a preliminary hearing. **However, Banka had a preliminary examination and was bound over to district court as a result of that hearing.**

As a result of Banka's bindover, the State filed an Information in district court on July 9, 2018, charging only the DUI offense (NRS 484C.110 and NRS 484C.430). On July 10, 2018 the State filed an Amended Information charging the DUI and the additional charge of "Leaving the Scene" (NRS 484E.010). It is uncontroverted that the exception in NRS 173.095(3) did not apply, and as a result NRS 173.095 was violated.¹¹ The Amended Information was illegally filed and could not legally charge Banka then and cannot be used to charge him now.

11. The State attempts to justify the July 9, 2018 and July 10, 2018 informations by stating "the State's notes suggest a plea agreement may have been reached after the preliminary hearing" (even if this was true) ignores both NRS 173.095(1) & (3) and NRS 173.035(4).

C.

**THE CASES RELIED UPON BY THE DISTRICT COURT ARE
INAPPOSITE OR MISPLACED**

a. The district court never addressed NRS 173.095(1).

Lewis:

State v. Lewis, 124 Nev. 132, 178 P.3d 146 (2008), overruled on other grounds by *State v. Harris*, 131 Nev. 551, 355 P.3d 791 (2015) is inapposite.

The issue in *Lewis* “is whether an order granting a presentence motion to withdraw a guilty plea is independently appealable.” *Lewis*, 124 Nev. at 133.

This issue has nothing to do with Banka’s “amending information” and “statute of limitations” issues.

Lewis’s statement, “[t]he state may proceed to trial on the original charges or enter into a new plea bargain with the defendant” is dicta. *Lewis*, 124 Nev. at 137. Legal precedent is based on a court’s holding, not what it did not hold. Again, *Lewis* is simply inapposite.

Sweat:

The district court’s reliance on *Sweat v. Eighth Jud. Dist. Ct.*, 133 Nev. 602, 403 P.3d 353 (2017) is misplaced for several reasons. The facts in *Sweat* and Banka are materially different. *Sweat* involved a double jeopardy claim arising from the defendants refusal to plead to the greater felony offense after he entered a plea of guilty to the lesser included offense. Banka involves the

1 illegality of allowing the State to file an amendment in violation of NRS
2 173.095(1) as well as charging him with an offense when the statute of
3 limitations has run on that offense.
4

5 The district court overlooked that *Sweat* relied on *Ricketts v. Adamson*,
6 483 U.S. 1, 8 (1987). Referring to *Ricketts*, *Sweat* stated, “[t]he plea agreement
7 provided that ‘[s]hould the defendant refuse to testify or should he at any time
8 testify untruthfully. . . then the entire agreement is null and void and the
9 original charges will be automatically reinstated.’” *Sweat*, 133 Nev. at 605.
10 There is no “reinstatement of the original charge” language in Banka’s GPA.
11 The GPA never mentioned the dismissal of the “Leaving the Scene” charge or
12 conditioned the dismissal on Banka’s plea to the felony DUI. In fact, the GPA
13 never mentioned “Leaving the Scene” at all.
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17 *Sweat* supports Banka on his challenge of the district court allowing the
18 State’s amendment to add a charge not present in the Second Amended
19 Information. The Amended Information filed in *Sweat* was not under NRS
20 173.095(1) but rather the exception listed in Section 3 of NRS 173.095. *Sweat*
21 stated, “. . . the State filed an amended information pursuant to NRS 173.035,
22 reinstating the original felony battery constituting domestic violence charge that
23 it dropped pursuant to the terms of the plea agreement.” *Sweat*, 133 Nev. at
24 603. *Sweat* waived his preliminary hearing unlike Banka who had a preliminary
25 hearing. The Third Amended Information in Banka does not meet the legal
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requirements under NRS 173.035 for filing.¹²

Crockett:

The district court’s reliance on *State v. Crockett*, 110 Nev. 838, 877 P.2d 1077 (1994) is misplaced. *Crockett* involved the State withdrawing its offer before it was legally accepted by the court. *Crockett* held that there was no contract under this situation between the parties. Therefore, the district court’s reliance on “contract principles require the parties to be returned the pre-plea position” does not apply in Banka.

Bergstrom:

Bergstrom v. Estate of DeVoe, 109 Nev. 575, 854 P.2d 860 (1993) is inapposite for Banka’s issues. *Bergstrom* says nothing about the filing of amended informations or prosecuting a defendant on an offense which is outside the statute of limitations. However, any reliance on *Bergstrom* would favor Banka. *Bergstrom* noted, “[r]escission is an equitable remedy which totally abrogates a contract and which **seeks to place the parties in the position they occupied prior to executing the contract.**” *Id.*, 109 Nev. at 577.

12. As previously pointed out, the State’s filing of the Amended information on July 10, 2018 in violation of NRS 173.035 is a “fugitive” document, thus the “Leaving the Scene” charge was never lawfully before the district court. This being the case, it cannot be said that the district court made the correct decision reinstating the “Leaving the Scene” albeit the wrong reason. *See, Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason.)

(emphasis added.) Prior to Banka executing the “contract,” the State had unconditionally dismissed the “Leaving the Scene” charge. The Second Amended Information at the time Banka executed his plea contained only the DUI charge. Therefore, under *Bergstrom*, any rescission would go back to the Second Amended Information. *Bergstrom* is simply not authority to reinstate “Leaving the Scene” or that an amendment to add the “Leaving the Scene” is allowed.

Benitez:

Whether or not a defendant is prejudiced under *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036 (1995) is irrelevant. Prejudice plays no role in where the State amends an information which violates the statute of limitations.

CONCLUSION

Amendments to an information are controlled by NRS 173.095(1). The language of that statute is clear and unambiguous. Under NRS 173.095(1), an amendment to an information cannot add a charge not contained in the information to be amended. NRS 173.095(1) states, “. . . if no additional or different is charged. . . .” The State’s Third Amended Information adds the charge of “Leaving the Scene” which is not contained in the Second Amended Information. Therefore, the district court’s decision allowing the state to file a Third Amended Information adding the “Leaving the Scene” charge is an abuse

1 of discretion. *Green, supra*.

2 The State's unconditional dismissal of the "Leaving the Scene" charge
3 resulted in the statute of limitations period to expire. At the time the State filed
4 its motion to file a Third Amended Information, the statute of limitations on
5 "Leaving the Scene" had already run. The district court's decision to allow the
6 Third Amended Information violates the statute of limitations period. *Benitez,*
7
8 *supra*. Also, allowing Banka to be prosecuted by the State's resurrection of the
9 "Leaving the Scene" offense when the statute of limitation has expired on that
10 offense violated the *Ex Post Facto* Clause of the United States Constitution.
11
12 *Stogner, supra*.

13 The State's Amended Information (filed July 10, 2018,) was not
14 authorized under NRS 173.095(3) and violated NRS 173.095; therefore, the
15 Amended Information is a "fugitive document" and cannot be used to legally
16 prosecute Banka then or now. The only lawful information before the district
17 court was the one filed July 9, 2018 which contained only the DUI charge. All
18 other superseding accusations were built on the illegal "fugitive" document
19 filed July 10, 2018.
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24 The district court's decision allowing the State to file a Third Amended
25 Information adding an offense not contained in the Second Amended
26 Information is an abuse of discretion as a matter of law. *Again see, Green,*
27
28 *supra*. Therefore, Banka's request for the issuance of a Writ of Habeas Corpus /

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Writ of Mandamus must be granted on this issue alone.

Respectfully submitted,



MICHAEL D. PARIENTE, ESQ.

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this petition complies with the formatting requirements
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7 is not in conformity with the requirements of the Nevada Rule
8
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11 Dated this 17th day of August, 2021.

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Attorney for Appellant Banka
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