IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK BANKA,

Petitioner,

vs.

CLARK COUNTY, EIGHTH JUDICIAL DISTRICT COURT JUDGE JASMIN LILLY-SPELLS,

Respondents.

STATE OF NEVADA,

Real Party In Interest.

Case No.:

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

PETITIONER'S APPENDIX (PA) FOR PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE A WRIT OF MANDAMUS

MICHAEL D. PARIENTE, ESQ,
COUNSEL FOR APPELLANT
Nevada Bar Number 9469
JOHN GLENN WATKINS, ESQ,
OF COUNSEL
Nevada Bar Number 1574
3960 Howard Hughes Parkway #615
Las Vegas, Nevada 89169
Telephone: (702) 966-5310
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michael@parientelaw.com
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STEVEN WOLFSON,
DISTRICT ATTORNEY
ALEXANDER CHEN
CHIEF DEPUTY DISTRICT ATTORNEY
200 Lewis, Floor 3
Las Vegas, Nevada 89101
Telephone: (702) 671-3847
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"INDEX"

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA #8353273,

Defendant.

CASE NO: 16FH2036X

DEPT NO:

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743), in the manner following, to-wit: That the said Defendant, on or about the 1st day of December, 2016, at and within the County of Clark, State of Nevada,

COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

did then and there willfully and unlawfully drive and/or be in actual physical control of a motor vehicle on a highway or on premises to which the public has access, to wit: 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible under one or more of the following theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to have a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving and/or being in actual physical control of a vehicle, defendant failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or

PH

12/21/17 PLL JCH3

failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately caused the vehicle being driven by defendant to strike and collide with a vehicle being driven by MAXINE LUBER, said collision proximately causing substantial bodily harm to MAXINE LUBER.

COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily injury or death to MAXINE LUBER, fail to immediately stop his vehicle at the scene of the accident, or as close thereto as possible.

COUNT 3 - LEAVING THE SCENE OF AN ACCIDENT

did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily injury or death to MARTIN LUBER, fail to immediately stop his vehicle at the scene of the accident, or as close thereto as possible.

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

01/10/17

16FH2036X/mah
HPD EV# 1621674
(TK)

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

INFORMATION

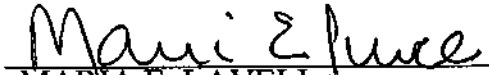
STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crime of **DRIVING UNDER THE INFLUENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430, 484C.105 - NOC 53906),** on or about the 1st day of December, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there willfully and unlawfully drive and/or be in actual physical control of a vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible in one or more of the following ways and/or under one or more of the following theories, to wit: 1) while under the influence of intoxicating liquor

to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a vehicle; 2) while he had a concentration of alcohol of .08 or more in his blood and/or 3) when he was found by measurement within two (2) hours after driving and/or being in actual physical control of a vehicle to have a concentration of alcohol of .08 or more in his blood, Defendant, while driving and/or in actual physical control of a vehicle, failing to pay full time and attention to his driving, failing to exercise due care, and/or failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately caused the vehicle Defendant was driving and/ in actual physical control of, to strike and collide with a vehicle being driven or occupied by MAXINE LUBER and/or MARTIN LUBER, said collision proximately causing substantial bodily harm to MAXINE LUBER and/or MARTIN LUBER.

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

BY 
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

16FH2036X/erg/L-5
HPD EV#1621674
(TK)

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 10 2018

BY, Kristen Brown
KRISTEN BROWN DEPUTY

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

AMENDED
INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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C-18-333254-1
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Amended Information
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COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

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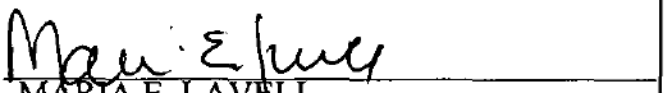
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

These witnesses are in addition to those witnesses endorsed on the Information or Indictment and any other witness for which a separate Notice of Witnesses and/or Expert Witnesses has been filed.

NAME	ADDRESS
BERKOW, KATHLEEN	2149 Silent Echoes Dr., Henderson, NV
CUSTODIAN OF RECORDS	Henderson Detention Center Communications
CUSTODIAN OF RECORDS	Henderson Detention Center Records
CUSTODIAN OF RECORDS	HPD COMMUNICATIONS
CUSTODIAN OF RECORDS	HPD RECORDS
FASSETTE, T.	HPD P# 1618
HAIDEZ, HAMID	C/O St. Rose Dominican Hospital 300 St. Rose Pkwy., Henderson, NV
KAROVIC, E.	HPD P# 1704
KROOK, M.	HPD P# 2231
LARSON, GREGORY	1337 Cadence St., Henderson, NV
LASRY, JASON	UNKNOWN ADDRESS
LILLEGARD, C.	HPD P# 2244

LUBER, MARTIN	2217 Savannah River St., Henderson, NV
LUBER, MAXINE	2217 Savannah River St., Henderson, NV
MAYER, N.	C/O CORIZON, Henderson Detention Center 243 Water St. Henderson, NV
VARGASON, J.	HPD P# 1623
VILLENA, V.	HPD P# 2141
WATTS, J.	C/O CCDA'S OFFICE
YADKO, EDITH	2094 Gunnison Pl., Henderson, NV

16FH2036X/erg/L-5
HPD EV#1621674
(TK)

ORIGINAL

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUN 24 2019
BY Andrea Natali
ANDREA NATALI, DEPUTY

C-18-333254-1
AINF
Amended Information
4844504

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

SECOND AMENDED

INFORMATION

STATE OF NEVADA)
} ss.
COUNTY OF CLARK)

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

BY _____
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

16FH2036X/erg/L-5
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(TK)

GPA
STEVEN B. WOLFSON
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Nevada Bar #001565
MARIA E. LAVELL
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Nevada Bar #010120
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: **DRIVING UNDER THE INFLUENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430, 484C.105 - NOC 53906)**, as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty by way of the Alford decision is based upon the plea agreement in this case which is as follows:

Both parties stipulate to a sentence of two (2) to five (5) years in the Nevada Department of Corrections.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

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I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the offense(s) to which I am pleading guilty was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

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1. The removal from the United States through deportation;

2. An inability to reenter the United States;

3. The inability to gain United States citizenship or legal residency;

4. An inability to renew and/or retain any legal residency status; and/or

5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that P&P will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

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6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

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My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this _____ day of June, 2019.

JACK PAUL BANKA
Defendant

AGREED TO BY:

MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of Alford offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading Alford as provided in this agreement,

   b. Executed this agreement and will enter all Alford pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This _____ day of June, 2019.

THOMAS BOLEY, ESQ.

erg/L-5

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO. C-18-333254-1

DEPT NO. V

SECOND AMENDED

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STATE OF NEVADA)
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EXHIBIT "1"

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

BY _____
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

DA#16FH2036X/erg/L-5
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ORIGINAL

GPA
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MARIA E. LAVELL
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Nevada Bar #010120
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 24 2019

BY Andrea Natali
ANDREA NATALI, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

C-18-333254-1
GPA
Guilty Plea Agreement
4844470

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
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Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: **COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906),** as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty by way of the Alford decision is based upon the plea agreement in this case which is as follows:

Both parties stipulate to a sentence of four (4) to ten (10) years in the Nevada Department of Corrections.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

22

I understand and agree that, if I fail to interview with the Department of Parole and Probation (P&P), fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, Life without the possibility of parole, Life with the possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement.

CONSEQUENCES OF THE PLEA

By pleading guilty pursuant to the Alford decision, it is my desire to avoid the possibility of being convicted of more offenses or of a greater offense if I were to proceed to trial on the original charge(s) and of also receiving a greater penalty. I understand that my decision to plead guilty by way of the Alford decision does not require me to admit guilt, but is based upon my belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses than that to which I am pleading guilty.

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to $5,000.00. I understand that the law requires me to pay an Administrative Assessment Fee.

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I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the offense(s) to which I am pleading guilty was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

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1. The removal from the United States through deportation;

2. An inability to reenter the United States;

3. The inability to gain United States citizenship or legal residency;

4. An inability to renew and/or retain any legal residency status; and/or

5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that P&P will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

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6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

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My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 24th day of June, 2019.

JACK PAUL BANKA
Defendant

AGREED TO BY:

MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of Alford offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading Alford as provided in this agreement,

   b. Executed this agreement and will enter all Alford pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This 24th day of June, 2019.

THOMAS BOLEY, ESQ.

erg/L-5

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

SECOND AMENDED

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crimes of **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906)** ~~**and LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743)**~~, on or about the 1st day of December, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

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EXHIBIT "1"

COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

did then and there willfully and unlawfully drive and/or be in actual physical control of a motor vehicle on a highway or on premises to which the public has access, to wit: 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible under one or more of the following theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to have a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving and/or being in actual physical control of a vehicle, defendant failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately caused the vehicle being driven by defendant to strike and collide with a vehicle being driven by MARTIN LUBER, said collision proximately causing substantial bodily harm to MAXINE LUBER.

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COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily injury or death to MAXINE LUBER and/or MARTIN LUBER, fail to immediately stop his vehicle at the scene of the accident, or as close thereto as possible.

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

BY _____
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

16FH2036X/erg/L-5
HPD EV#1621674
(TK)

District Court

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JACK PAUL BANKA, #8353273 Defendant.	CASE NO: C-18-333254-1 DEPT NO: V

DUI ADMONISHMENT OF RIGHTS

I am the Defendant in this case. At this time, I am charged with willfully and unlawfully driving and/or being in actual physical control of a motor vehicle on a highway or on premises to which the public has access in the County of Clark, State of Nevada, while under the influence of intoxicating liquor; AND/OR a controlled substance; AND/OR a prohibited substance; AND/OR while having a concentration of alcohol of 0.08 or more in my blood or breath; AND/OR while having a concentration of alcohol of 0.08 or more in my blood or breath within two hours after driving or being in actual physical control of a motor vehicle, in violation of NRS 484.379.

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE[S] AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE *MAY HAVE THE FOLLOWING CONSEQUENCES:*

1. I understand the State will use this conviction, and any other conviction from this or any other State which prohibits the same or similar conduct to enhance the penalty for any subsequent offense;
2. I understand that, as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, *in addition to other consequences provided by law, be removed, deported or excluded from entry into* the United States or denied naturalization;
3. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply:

FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 2 days, but not more than 6 months in the Clark County Detention Center or at least 48 hours, but not more than 96 hours of community service; a fine of not less than $400 nor more than $1,000 in addition to certain fees and assessments that are required by statute; required attendance at DUI school with tuition required to be paid by me; required attendance at the Victim Impact Panel. If I was found to have a concentration of alcohol of 0.18 or more in my blood or breath or if I was under 21 years of age when I committed this violation, the Court must, before sentencing, require an alcohol/drug dependency evaluation, and I will be assessed a $100 fee. The Court may order a Breath Interlock Device installed on any vehicle I own or operate for not less than 3 months nor more than 6 months at y own expense, if I was found to have had a concentration of alcohol of less than 0.18 in my blood or breath; the Court may order me, for a period determined by the Court, to install at my own expense Breath Interlock Device in any motor vehicle which I own or operate as a condition of reinstatement of my driving privilege; and, if I was found to have had a concentration of alcohol of 0.18 or more in my blood or breath, the Court must order a Breath Interlock Device installed on any vehicle that I own or operate for a period of not less than 12 months nor more than 36 months. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 90 days and impose a $35 civil penalty. Also, if I was found to have a concentration of alcohol of 0.18 or more in my blood or breath, I will be required to attend a program of treatment for the abused of alcohol or drugs.

SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 10 days, but not more than 6 months in the Clark County Detention Center or in residential confinement; a fine of not less than $750 nor more than $1000, in addition to certain fees and assessments that are required by statute, or an equivalent number of hours of community service; and required attendance at the Victim Impact Panel. In addition, the Court must, before sentencing, require an alcohol/drug dependency evaluation, and I will be assessed a $100 fee. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 1 year, impose a $35 civil penalty, and suspend my registration for at least five days. Additionally, if I was found to have had a concentration of alcohol of less than 0.18 in my blood or breath, the Court may order me, for a period of not less than 3 months nor more than 6 months, to install at my own expense a Breath Interlock Device in any motor vehicle which I own or operate as a condition of reinstatement of my driving privilege; if I was found to have had a concentration of alcohol of 0.18 or more in my blood or breath, the Court must order me to install, for a period of not less than 12 months nor 36 months, a Breath Interlock Device in any motor vehicle which I own or operate as a condition to obtaining a restricted license or as a condition of reinstatement of my diving privilege.

Also, the Court must order me to attend a program of treatment for the abuse of alcohol or drugs.

EXHIBIT "2"

THIRD OFFENSE OR ANY SUBSEQUENT OFFENSE WITHIN 7 YEARS (FELONY):

Incarceration in the Nevada Department of Corrections for a non-probationable sentence of at least 1 year, but not more than 6 years; a fine of not less than $2,000 nor more than $5,000, in addition to certain fees and assessments that are required by statute; and required attendance at the Victim Impact Panel. The Court must order a breath interlock device installed on any vehicle I own or operate for not less than 12 months nor more than 36 months upon my release from prison at my expense. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 3 years, impose a $35 civil penalty, and suspend my registration for at least five days. Before sentencing, the Court must also require me to be evaluated to determine whether I am an abuser of alcohol or drugs and whether I can me treated successfully for that condition.

SPECIAL WARNING

A person who has previously been convicted of: (a) A violation of NRS 484.379 that is punishable as a felony pursuant to paragraph (c) of subsection 1; (b) A violation of NRS 484.3795; (c) A homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or controlled substance or resulting from any other conduct prohibited by NRS 484.379 or 484.3795; or (d) A violation of a law or any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a), (b) Nevada State Prison for a non-probationable sentence of at least 2 years, but not more than 15 years, and shall be further punished by a fine of not less than $200 nor more than $5000 in addition to certain fees and assessments that are required by stature, along with required attendance at the Victim Impact Panel. The Court must order a Breath Interlock Device installed on any vehicle that the person owns or operates for not less than 12 months nor more than 36 months upon release from prison at the person's own expense. Further, the Department of Motor Vehicles will revoke or suspend that person's license for at least 3 years, impose a $35 civil penalty, and if the person is convicted of a second or subsequent violation of NRS 484.39 or 484.3795 within 7 years, the Court must issue an order directing the Department of Motor Vehicles to suspend the registration of that person for at least 5 days. Before sentencing the offender, the Court must also require the person to be evaluation to determine whether he is an abuser of alcohol or drugs and whether he can be treated successfully for his condition.

VEHICULAR HOMICIDE

A person who commits vehicular homicide after three prior DUI offenses is guilty of a category A felony and shall be punished by imprisonment in the state prison: (a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or (b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served. The person may also be subjected to certain fees and assessments that are required by statute. In addition, the person is required to attend the Victim Impact Panel. The Court must also order a Breath Interlock Devise on any vehicle that the person owns or operates for not less than 12 months nor more than 36 months upon the person's release from prison, at the person's own expense. Further, the Department of Motor Vehicles will revoke or suspend that person's driver's license for at least 3 years, the Department of Motor Vehicles may impose a $35.00 civil penalty, and the person's registration will be suspended for at least 5 days. Before sentencing whether he can be treated successfully for his condition.

ALL DEFENDANTS MUST INITIAL EITHER #1 OR #2 BELOW--DO NOT INITIAL BOTH

JBB 1. I am represented by an attorney in this case. My attorney has fully discussed these matters with me and advised me about my legal rights. My attorney is Thomas Boky.

___ 2. I have declined to have an attorney represent me and I have chosen to represent myself. I have made this decision even though there are dangers and disadvantages in self-representation in a criminal case, including but not limited to, the following:

a. Self-representation is often unwise, and a defendant may conduct a defense to his or her own detriment;
b. a defendant who represents himself is responsible for knowing and complying with the same procedural rules as lawyers, and cannot expect help from the Judge in complying with those procedural rules;
c. a defendant representing himself will not be allowed to complain on appeal about the competency or effectiveness of his or her representation;
d. the state is represented by experienced professional attorneys who have the advantage of skill, training and ability;
e. a defendant unfamiliar with legal procedures may allow the prosecutor an advantage, may not make effective use of legal rights, and may make tactical decisions that produce unintended consequences; and
f. the effectiveness of the defense may well be diminished by a defendant's dual role as attorney and accused.

Jack P. Burden	3/13/98	6/29/19
DEFENDANTS SIGNATURE	DATE OF BIRTH	DATE

I HAVE REVIEWED THIS ADMONISHMENT WITH MY CLIENT AND HE/SHE UNDERSTANDS THE RIGHTS HE/SHE IS WAIVING AND THE CONSEQUENCES OF HIS/HER PLEA OF GUILTY/NOLO CONTENDERE TO THIS DUI CHARGE.

	11061
DEFENDANTS ATTORNEY (if applicable)	BAR NUMBER

136 Nev., Advance Opinion 81

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80181

Appeal from a judgment of conviction, pursuant to an *Alford* plea, of driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Reversed and remanded.

Pariente Law Firm, P.C., and John Glenn Watkins and Michael D. Pariente, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Taleen R. Pandukht, Chief Deputy District Attorney, and Michael G. Giles, Deputy District Attorney, Clark County,
for Respondent.

BEFORE GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

In this appeal, we consider whether a defendant must be informed of the existence of a mandatory minimum fine in order to make a knowing, voluntary decision to enter a plea. Here, the defendant was informed that he faced a mandatory fine of up to $5,000, but not that the fine would be at least $2,000. Because a fine is a form of punishment, we conclude that a defendant must be informed of any mandatory minimum as well as maximum fine in order to be fully informed of the direct consequences of a plea. Therefore, the district court abused its discretion by denying appellant's presentence motion to withdraw his guilty plea. Accordingly, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

BACKGROUND

In December 2016, a car driven by appellant Jack Banka struck another vehicle while on a public road, fracturing the sternum of the other vehicle's passenger. Banka fled the scene until his vehicle stopped working. A blood draw administered within two hours of the original accident revealed Banka's blood-alcohol content to be 0.193. The State charged Banka under NRS 484C.110(1) and NRS 484C.430(1) with driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm.

Banka subsequently entered an *Alford* plea.[1] In the written plea agreement, Banka acknowledged that he understood the consequences of the plea, including that he may be fined up to $5,000. During the district

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[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

court's canvass of Banka, the court clarified that the fine was mandatory and reiterated that it was "up to five thousand," while also saying "because of the language of up to five thousand, I could do something much less than that obviously, but I have to . . . impose a fine."

Banka moved to withdraw his *Alford* plea before sentencing, arguing that he did not understand the consequences of his plea because he did not know the mandatory minimum fine for the offense was $2,000. The district court denied the motion on the ground that, since Banka was informed of a mandatory fine up to a maximum of $5,000, he was on notice for a fine of at least $2,000.

At sentencing, the district court adjudged Banka guilty, and imposed a prison term of 48 to 120 months and a fine of $2,000 (plus other fees). Banka appeals, challenging the denial of the motion to withdraw his plea.

DISCUSSION

A defendant must be informed of any mandatory minimum fine before entering a plea

Banka claims that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Banka argues that he should have been permitted to withdraw his plea since he mistakenly believed the fine could be any amount up to $5,000, including a nominal sum. We agree.

A presentence motion to withdraw a guilty plea may be granted "for any reason where permitting withdrawal would be fair and just." *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). To enter a knowing and voluntary plea, a defendant must have "a full understanding of . . . the *direct consequences* arising from a plea of guilty." *Little v. Warden*, 117 Nev. 845, 849, 34 P.3d 540, 543 (2001). "A consequence is

deemed 'direct' if it has 'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Id.* (quoting *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988) (internal quotation marks omitted)). A mandatory statutory fine is a direct consequence arising from a guilty plea because it is a form of punishment that has an immediate and automatic effect and the range is defined by the statute, and thus, a defendant is required to be informed of the statutory range of the fine. *See Martinez v. State*, 120 Nev. 200, 203, 88 P.3d 825, 827 (2004) (stating that criminal fines are pecuniary forms of punishment); *see also White v. State*, 99 Nev. 760, 761, 670 P.2d 576, 577 (1983) (requiring that a defendant understand "the range of possible punishments that could flow from his plea"). Although a defendant does not necessarily need to be informed during the district court's plea canvass of the consequences of his or her plea, "it must affirmatively appear, somewhere in the record," that he or she was so informed. *Skinner v. State*, 113 Nev. 49, 50, 930 P.2d 748, 749 (1997); *see also Little*, 117 Nev. at 854-55, 34 P.3d at 546 (concluding that the district court's failure to inform the defendant of his ineligibility for parole is harmless error where the totality of the circumstances demonstrate that the defendant knew of his ineligibility). "Absent an abuse of discretion, the district court's decision regarding the validity of a guilty plea will not be reversed on appeal." *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

The required fine for a violation of NRS 484C.430 is "not less than $2,000 nor more than $5,000." NRS 484C.430(1). Banka's guilty plea agreement failed to capture either of these statutory requirements. The agreement erroneously stated that he "may" (as opposed to *must*) be fined up to $5,000, thereby failing to inform Banka that the fine was mandatory,

and the agreement omitted entirely that there was also a statutory minimum fine amount of $2,000. During Banka's plea canvass, the district court clarified that he would be subject to a mandatory fine up to a maximum of $5,000, in addition to restitution. But the district court failed to apprise Banka that the mandatory fine penalty had a statutory minimum of $2,000. This failure to inform Banka of the statutory minimum fine amount was "compounded by the district court further commenting, 'I could[,] . . . because of the language of up to five thousand, I could do something much less than that obviously . . . .'" This comment suggested that while the court had to impose a fine, the fine could be a nominal one.

The State counters that, since Banka was informed of a mandatory fine up to $5,000 and at sentencing received a lesser fine of $2,000, his plea was sufficiently knowing and voluntary. We disagree. The fact that an individual could have anticipated a potential punishment is not enough to ensure that a defendant is fully aware of the actual direct consequences of the plea. Every decision on whether to enter a guilty plea involves a weighing of risks by the defendant, and knowing the range of possible punishments is necessary for a defendant to determine whether he or she should instead proceed to trial. When a defendant believes a nominal fine is possible when, in fact, a substantial fine is required, he or she clearly does not know the actual range of punishment that could be imposed. *See Little*, 117 Nev. at 849, 34 P.3d at 543 (holding that a defendant did not plead with knowledge of the possible punishments when he was not informed that his sentence was not probationable, since "ineligibility for probation means . . . there is not even a remote possibility that the district court will exercise its discretion and suspend the execution of sentence"). Where there is a range of punishments—by fine or by imprisonment—the

defendant must be informed of both the floor and ceiling of that range in order to make a knowing and voluntary decision. Because Banka was not informed of the mandatory minimum statutory fine, we conclude that the district court abused its discretion in denying Banka's presentence motion to withdraw his guilty plea.

CONCLUSION

Having concluded that the district court abused its discretion in denying Banka's presentence motion to withdraw his guilty plea, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.[2]

_____, J.
Stiglich

We concur:

_____, J.
Gibbons

_____, J.
Silver

[2]In light of our reversal, we need not discuss Banka's remaining assignments of error.

MOT
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Nevada Bar #001565
ADAM B. OSMAN
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273,

Defendant.

CASE NO: C-18-333254-1

DEPT NO: XXIII

MOTION TO FILE THIRD AMENDED INFORMATION OR, IN THE ALTERNATIVE, TO STRIKE SECOND AMENDED INFORMATION

DATE OF HEARING: FEBRUARY 17, 2021
TIME OF HEARING: 11:00 A.M.

Comes now, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ADAM B. OSMAN, Deputy District Attorney, and files this Motion to File Third Amended Information or, in the Alternative, to Strike Second Amended Information.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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NOTICE OF HEARING

You, and each of you, will please take notice that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XXIII thereof, on Monday, the 17th day of February, 2021, at the hour of 11:00 o'clock A.M., or as soon thereafter as counsel may be heard.

Dated this 1st day of February, 2021.

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

BY _____
ADAM B. OSMAN
Deputy District Attorney
Nevada Bar #013924

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2016, Defendant Jack Banka failed to yield to oncoming traffic during a left turn and crashed into a vehicle occupied by two 83 year old victims when he failed to yield to oncoming traffic during a left turn. The driver of the car that Defendant hit, Martin Luber, suffered injury to his chest and arm, but the passenger Maxine Luber's sternum snapped in two locations.

After Defendant caused the crash, he stopped only briefly before pushing the victim's vehicle with his own and driving away from the scene. Multiple witnesses at the scene, including an off-duty Henderson Firefighter, observed the crash and saw defendant flee the scene. After leaving, a witness followed the Defendant into a neighborhood where he exited the vehicle, reentered it, and attempted to drive away. His vehicle wouldn't work so he instead fled the area again on foot.

Defendant was eventually found about 1500 feet from his vehicle and brought back to the abandoned car. Defendant exhibited signs of impairment and failed standardized field

sobriety tests. Witnesses identified Defendant as the driver of the at-fault vehicle in the crash. In Defendant's vehicle, officers found a spilled cup of ice with liquid splattered on the interior which had an odor of alcohol. A PBT unit in passive mode detected the presence of alcohol in the liquid. Defendant was arrested for DUI Resulting in Substantial Bodily Harm and Duty to Stop at the Scene of a Crash Resulting in Injury.

On January 24, 2018, the State filed an amended complaint charging the Defendant with Count 1, Driving Under the Influence Resulting in Substantial Bodily Harm (Category B Felony – NRS 484C.110, 484C.430), and Count 2, Leaving the Scene of an Accident with Injury (Category B Felony – NRS 484E.010). On June 28, 2018, Defendant's preliminary hearing proceeded, after which the Justice Court denied the Defendant's motion to dismiss and ordered the Defendant to answer to both charges in the District Court. Subsequently, on July 9, 2018, the State filed a criminal Information charging Defendant with Driving Under the Influence Resulting in Substantial Bodily Harm; the State's notes suggest a plea agreement may have been reached after the preliminary hearing. However, on July 10, 2018, the Defendant plead not guilty and the State filed an Amended Information with both charges upon which the Defendant was bound up.

On June 24, 2019, Defendant appeared with his counsel on the first day of a jury trial and plead guilty pursuant to the *North Carolina v. Alford* decision to one count of Driving Under the Influence Resulting in Substantial Bodily Harm with the parties stipulating to 4-10 years in the Nevada Department of Corrections. A guilty plea agreement and a second amended information were filed the same day; and the guilty plea agreement also included a copy of the second amended information as an exhibit. Defendant later appealed.

On January 6, 2021, the Nevada Supreme Court issued remittitur, after finding that Defendant's guilty plea was not knowing because although he was told at the plea canvas that he would have to be fined, he was not told his plea agreement to 4-10 years in prison specifically carried a minimum fine of $2000. The Supreme Court reversed the judgment of conviction and remanded for further proceedings, effectively directing the District Court to withdraw the Defendant's guilty plea agreement. The State on January 11, 2021, confirmed

with the Court that it should now file an amended information with the original charges and the Court indicated the State should do so. However, the Defense subsequently contacted the Court and State indicating he would object to refiling the original charges, because the three-year statute of limitations had run on Leaving the Scene with Injury, which the State dismissed solely pursuant to the plea agreement Defendant successfully rescinded. The State thus files the instant motion to file the Third Amended Information attached hereto as Exhibit 1.

II. ARGUMENT

A. Nevada Case Law Explicitly Allows Trial Upon the Original Charges

1. The Nevada Supreme Court Specifically Held the State Can Try Original Charges

In ruling that the State cannot appeal the granting of a pre-judgment motion to withdraw guilty plea, the Nevada Supreme Court based its decision on its finding that such a withdrawal does not prejudice the State because "when the district court grants a presentence motion to withdraw a guilty plea . . . *the State may proceed to trial on the original charges* or enter into a new plea bargain with the Defendant." *State v. Lewis*, 124 Nev. 132, 137 (2008) (emphasis added), *overruled on other grounds by State v. Harris*, 131 Nev. 551, 556 (2015). The Court makes no mention of statute of limitations, and thus, limitations periods do not restrict this ability of the State to proceed to trial on original charges.

2. Limitations Periods Do Not Modify Lewis *Regarding Original Charges*

In *State v. Harris*, 131 Nev. 551, 554-555 (2015), the Nevada Supreme Court distinguished *Lewis* on the issue of the State's right to appeal various district court orders. In ruling on that issue, the Court simultaneously further demonstrated that it did not intend the categorical language in *Lewis* – "the State may proceed to trial on the original charges" – to be in any way modified or affected by limitations periods. In *Harris*, the Court held the State *could* appeal a pre-judgment order granting a new trial, unlike a pre-judgment order withdrawing a guilty plea, and specifically based its different decision on the higher likelihood of prejudice to the State. *Id.* at 555-56. In *Harris*, the State argued the same thing regarding new trials, as it did in *Lewis* regarding withdrawal of guilty plea; specifically, that it is denied its right to appellate review without a pre-judgment right to appeal, because the State cannot

appeal an acquittal after an improperly granted new trial. *Id.* at 554. The *Harris* court noted that in *Lewis*, the Court's rationale was based in large part on the "vast discretion" a trial court has in deciding whether to withdraw a guilty plea. *Id.* at 555. However, *Harris* went on to recognize that the district court does not have the same "vast discretion" in granting a new trial. *Id.* at 555. In other words, because there are fewer circumstances in which a district court may properly grant a new trial, it more likely for such an order to be erroneous (the implication being that it poses a greater likelihood that the State would be faced with an inability to appeal an acquittal following an improper ruling). As the Court explained:

> "A prejudgment motion to withdraw a guilty plea [] may be allowed for any reason that is fair and just. While this court suggested it would be a rare circumstances when the State could assert that a district court has exceeded the broad boundaries of judicial discretion in allowing a defendant to withdraw a plea before sentencing, it is significantly more likely that the State can demonstrate that a district court exceeded its discretion in granting a motion for a new trial, particularly given the potential injustice if the defendant obtains an acquittal following an improvidently granted new trial." *Id.* (Internal quotation marks and citations omitted.)

Accordingly, the prejudice to the State the Court has considered in the context of withdrawal of plea has even included the general likelihood of success of challenges to the particular type of order. The Supreme Court also noted that prejudice to the State was "far more substantial" in the case of a motion for new trial, because "the significant time and resources expended to conduct the first trial are wasted." *Id.*

If the State were precluded, following withdrawal of plea, from refiling original charges after a limitations period had elapsed, it would present a extreme likelihood of monumental prejudice to the State. This is especially so given the length of time cases are often open before resolution, and the additional unknown time that may elapse before issuance of an appellate decision in circumstances where an appeal is taken, plus the commonality of guilty plea agreements involving dismissal of charges and reduction to lesser charges. This would be the ultimate possible prejudice of plea withdrawal to the State. If the Court was willing to consider

the general likelihood of an erroneous decision and the time and resources expended when determining the amount of prejudice to the State with respect to withdrawal of plea, then were limitations periods in fact applicable, it would be inconceivable for the Court to not also address them when it had such explicit chances to do so in *Lewis* and *Harris*.

In fact, given the analysis the Supreme Court conducted, if limitations periods did apply, the Court would have no doubt come to a different conclusion as to the State's ability to appeal a pre-judgment motion to withdraw plea. If a wasted trial is sufficient to grant the State pre-judgment appellate rights, surely the prospect of being forced to try a defendant on potentially fewer or lesser charges than before the guilty plea would also be sufficient. But because the Court did not even touch upon the issue, the only reasonable interpretation of the law is that limitations periods do not limit the Court's clear holding that after withdrawal of plea, "the State may proceed to trial on the original charges."

Therefore, because the Defendant's guilty plea agreement was withdrawn in this case, the State may proceed to trial on the original charges that were lawfully bound up after a preliminary hearing – which included felony Leaving the Scene with Injury.

3. Laches Also Demonstrates Limitations Periods are Irrelevant to Plea Withdrawal

The law surrounding post-conviction plea withdrawal, specifically that regarding the well-established doctrine of laches, also illustrates how limitations periods are inapplicable to refiling original charges. The exclusive procedural vehicle by which a defendant can seek post-conviction withdrawal of a guilty plea is a petition for writ of habeas corpus. *Harris v. State*, 130 Nev. 435, 448 (2014) (exclusive remedy language of NRS 34.724 applies to post-conviction motions for withdrawal of plea). If a defendant were to file such a petition and it were granted, then he would be allowed to withdraw his plea as in the instant case (although after appeal). However, given that post-conviction withdrawal of guilty plea is relegated to post-conviction petitions for habeas corpus, NRS 34.800[1] would apply, and thus such a petition could be dismissed if the delay prejudices the State in its ability to conduct a retrial of the

[1] Commonly referred to by caselaw as the doctrine of Laches, *see e.g. Rippo v. State*, 134 Nev 411, fn7 (2018).

defendant. Moreover, subsection (2) creates a rebuttable presumption of prejudice to the State when a delay of five years has elapsed since judgment of conviction.

These statutes further demonstrate that statutes of limitations do not apply here, because they reveal no correlation between actual limitations periods and any consideration regarding the State being prejudiced by a plea withdrawal. If the legislature, and the Nevada Supreme Court, had intended for a defendant to escape trial on original charges after a plea is withdrawn outside of a limitations period, then the time chosen by the legislature for the rebuttable presumption provision of NRS 38.800(2) would be nonsensical. More precisely, it would be inexplicable why it would require five years to elapse *from date of the judgment* in order to presume prejudice, when no crimes other than a select few carry a base limitations period of longer than *four* years *from date of the offense. NRS 171.080 et. seq.* As explained above, if the limitations period barred refiling of original charges after withdrawal of plea, surely prejudice should be presumed at that time, which will take place well before the five years from judgment in every case other than a few select felonies. There would be little point for the five-year-from-judgment rule if extreme and predictable prejudice typically attached several years beforehand.

Ultimately, if either statute or caselaw had been intended to limit the State's held ability to refile original charges after plea withdrawal, there have been several opportunities for the legislature or Nevada Supreme Court to so indicate. They have not. The only reasonable understanding of the Court's holdings is that the Court meant what it said and the State's ability to refile charges following plea withdrawal is not restricted by limitations periods.

4. This Result is Harmonious With Other Statutory Schemes and Caselaw

NRS 173.035 provides that "an information may be filed against any person for any offense when the person: (a) Has had a preliminary examination as provided by law before a justice of the peace . . . and has been bound over to appear at the court having jurisdiction." Subsection 3 provides that if a Defendant waives his preliminary hearing pursuant to an plea agreement, then "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." Further, NRS 178.610 (part of Title 14) provides that "if no procedure is specifically prescribed by this title, the court may proceed in any lawful manner not inconsistent with this title or with any other applicable statute." In *Moultrie v. State*, 131 Nev. 924, 933-34 (2015), for example, the Nevada Court of Appeals in part utilized NRS 178.610 in holding that the State can amend a criminal complaint to conform to evidence that had been presented at a preliminary hearing.

In *Hill v. Sheriff of Clark County*, 85 Nev. 234, 235 (1969), the Court was presented with the question of whether a justice court continuance of a preliminary hearing was proper. The Court held that the reasons underlying District Court Rule 21 (now renumbered DCR 14) are equally applicable to justice court proceedings, even though there was at that time no rule specifying a procedure to be followed to continue a preliminary hearing in justice court.

Similarly, the reasons underlying NRS 173.035 are equally applicable to withdrawal of plea in any other context. There is no substantive difference to be found between withdrawal of plea that had been entered after waiving up from district court; versus withdrawal of plea entered at any other procedural point. There is also no reason that the State should be always allowed to refile original charges, regardless of limitations periods, when a defendant has waived up from justice court; but not where the guilty plea agreement was reached in district court. As stated, NRS 178.610 provides that where no procedure is specifically prescribed, the court may proceed in any lawful manner.

B. Even Double Jeopardy Does Not Bar Reinstating Charges After Withdrawal

In *Sweat v. Eighth Judicial District Court*, Defendant was originally charged with Battery Constituting Domestic Violence Resulting in Substantial Bodily Harm, a non-probationable felony. 133 Nev. 602, 602 (2017). Pursuant to negotiations, the defendant agreed to plead guilty to one misdemeanor count of Battery Constituting Domestic Violence and one (probationable) felony count of Battery Resulting in Substantial Bodily Harm. *Id.* at 602-603. The Defendant plead guilty to the misdemeanor in Justice Court, receiving credit for time served, but refused to plead guilty to the felony in District Court. *Id.* at 603. The State

resultingly filed an amended information reinstating the original felony battery constituting domestic violence charge. *Id.* The Nevada Supreme Court held that although Battery Domestic Violence is a lesser-included offense which would ordinarily trigger double jeopardy and bar prosecution for Battery Constituting Domestic Violence Resulting in Substantial Bodily Harm, because the felony domestic violence charge was only dismissed pursuant to the guilty plea agreement, the State was permitted to reinstate the original charge because the agreement was not fulfilled. *Id.* at 604-05. Thus, where Defendant does not comply with his end of the deal, the State can reinstate charges despite what would otherwise be a bar to doing so. If the constitutional issue of Double Jeopardy is not construed to impede the State's ability per caselaw and statute as explained above to reinstate charges where Defendant does not hold up his end of the deal, then statutory limitations periods should not be construed to do so either.

C. Contract Principles Require the Parties be Returned to Their Position Pre-Plea

Criminal guilty plea agreements are subject to contract principles. *State v. Crockett*, 110 Nev. 838, 842 (1994). "Rescission 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." *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577 (1993). When one party to a contract rescinds it, "he must immediately return whatever of value he has received under it." *Id.* Further, "a rescinded contract is void ab initio," and when a contract is rescinded the parties should be "returned to [their] status quo." *Id.* at 577-78. When a defendant fails to fulfill a guilty plea agreement, the State may rescind the plea agreement. *Sweat v. Eighth Judicial District Court*, 133 Nev. 602, 606 (2017). The *Sweat* Court, in rendering its decision, relied in part upon *Dutton v. State*, 970 P.2d 925, 935 (Alaska Ct. App. 1999), which held that the State could rescind a guilty plea agreement where the defendant was supposed to have plead guilty and been sentenced upon a federal charge, but later withdrew his federal plea agreement.

Here, the plea agreement between the State and the Defense was an exchange whereby the State would both drop the Leaving the Scene charge, and agree to recommend four to ten years in the Nevada Department of Corrections, and the Defendant would plead guilty to the remaining charge and recommend the same sentence. The Supreme Court's reversal entitled

the Defendant to withdraw his plea of guilt. When he chose to do so and proceed to trial, he was no longer in compliance with the terms of the plea agreement because one of the benefits of the State's bargain was that the Defendant would plead guilty to the charge and be sentenced. It would strain logic and reason to believe that the State only bargained for the Defendant to plead guilty and be sentenced without also for that guilty plea (and resulting sentence) to remain standing.

Because the Defendant was allowed to back out of his half of the deal, the Court should allow the State to rescind the plea agreement entirely, as held in *Sweat* and *Dutton*, and thereby the parties should be returned to their positions pre-plea. Accordingly, the State should be allowed to proceed on the original charges which it would have proceeded upon, had the Defendant not entered a plea of guilt.

D. Allowing Defendant to Escape Trial on Count 2 Would Lead to Absurdity and Run Contrary to Public Policy Regarding Lack of Delay

"A statute's language should not be read to produce absurd or unreasonable results." *Leven v. Frey*, 123 Nev. 399, 405 (2007). "When interpreting a statute, this court will look to the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result." *City Plan Development, Inc. v. Office of Labor Com'r*, 121 Nev. 419, 435 (2005). The policies underlying statutes of limitations are to limit exposure to criminal prosecution to a fixed period of time following criminal acts; protect against the need to defend oneself regarding facts obscured by the passage of time; and minimize the danger of being punished due to acts in the far-distant past; as well as encouraging promptness on the part of law enforcement. *Toussie v. U.S.*, 397 U.S. 112, 114-15 (1970). Further, Nevada law consistently evinces a public policy of avoiding unreasonable delay in disposition of matters. *See, e.g.* EDCR 1.90 (setting forth aspirational standards for 100% of criminal cases to be resolved within 2 years of filing); NRS 34.726 (limiting filing of post-conviction petitions for writs of habeas corpus to one year after judgment or appeal); *Rippo v. State*, 134 Nev 411, 419 (2018) (time bars to post-conviction habeas reflect the necessity for a workable criminal justice system of a time when criminal convictions become final).

Applying statutes of limitations any time a charge is dropped pursuant to a plea agreement would lead to absurd results, and unreasonable delays. First, the claim raised by the defense in their communication with the State and the Department would not be limited to situations in which a plea was entered and later withdrawn; Defendants would be encouraged to strategically communicate an intent to enter into a plea agreement with the State, only to back out once the State has filed the amended information conforming to the plea agreement, and then move to dismiss based on the amended information containing new charges past the statute of limitations. Further, Defendants would be encouraged to wait longer periods of time before pleading guilty, as that would increase the chances that, should they be allowed to withdraw their plea agreement down the line, it would be beyond the period of limitations for charges that were dropped or amended. Defendants who do go through with their plea agreements will also be encouraged to wait longer periods of time before moving to withdraw a guilty plea agreement for the same reason. Finally, the State would be less inclined to negotiate older cases, or any case, to a different or lesser charge, given the potential that even if a defendant does not delay his motion, petition, or appeal concerning plea withdrawal, such proceedings could take an unknown amount of time beyond sentencing, and accordingly could still put the case outside the limitations period.

Further, none of the policies underlying statutes of limitations would be served by applying them to the instant situation. The Defendant chose to accept an offer made by the State after prosecution had been underway almost two and a half years and after Defendant had the opportunity to hear the State's evidence and cross examine the State's witnesses at the preliminary hearing. Although the Defendant was later found not to have been sufficiently canvassed during entry of plea, and was allowed to withdraw his guilty plea, the Defendant's own indicated desire to accept an offer made by the State was the only reason the case did not proceed to trial that very day. His counsel had announced ready for trial at calendar call. Given that Defendant was ready for trial (along with the State) – and thus clearly was not prejudiced by any delay at that time, plus the *only* time having been lost by Defendant being the approximately year and a half from entry of guilty plea to remittitur from the appeals court, it

cannot reasonably be said that Defendant has been unreasonably prejudiced in any way by a delay in prosecution of the case. The State is merely attempting to reinstate the case upon which the Defendant would have been tried had there been no guilty plea. The Defendant should not be allowed to engage in an attempted "gotcha."

All of these results are clearly absurd and unintended, and contrary to the public policies concerning speedy resolution of cases and those underlying limitations periods. When Defendant withdraws a guilty plea pursuant to an agreement with the State, the State is and should be permitted to reinstate the original charges and proceed to trial thereupon. Any other conclusion is both unsupported and contradicted by case law, statute, and public policy. Therefore, the State should be allowed to file a third amended information also including the second charge upon which the Defendant was held to answer after preliminary hearing.

E. Solely in the Event the Court Disagrees, the Court Should Simply Strike the Second Amended Information, and Proceed Upon the Amended Information

The only reason the State filed a second amended information dropping Count 2 for the Leaving the Scene was in consideration of the Defendant's guilty plea agreement. Pursuant to contract principles regarding rescission, the State should be allowed to rescind all benefits it conferred upon the Defendant pursuant to that agreement. If the Court takes issue with the State's attempt to file a new information to effectuate this, as is contemplated by statute and case law, then surely the State should be allowed to request the Court strike the second amended information that was also an exhibit to the very plea agreement now unwound.

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III. CONCLUSION

For each of the foregoing reasons, the State requests the Court grant its motion and allow the State to file the Third Amended Information. Solely in the alternative, the State requests the Court allow it to move to strike the second amended information as part of a rescinded plea agreement.

Dated this 1st day of February, 2021.

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

BY _____
ADAM B. OSMAN
Deputy District Attorney
Nevada Bar #013924

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing Motion to File Third Amended Information or, in the Alternative, to Strike Second Amended Information was made this 2nd day of February, 2021, by electronic transmission to:

MICHAEL PARIENTE, ESQ.
EMAIL: michael@parientelaw.com

JOHN WATKINS, ESQ.
EMAIL: johngwatkins@hotmail.com

BY: _____
Theresa Dodson
Secretary for the District Attorney's Office

16FH2036X/AO/td/VCU

EXHIBIT 1

AINF
STEVEN B. WOLFSON
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273,

Defendant.

CASE NO: C-18-333254-1

DEPT NO: XXIII

THIRD AMENDED
INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crimes of **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743),** on or about the 1st day of December, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

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COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

did then and there willfully and unlawfully drive and/or be in actual physical control of a motor vehicle on a highway or on premises to which the public has access, to wit: 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible under one or more of the following theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to have a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving and/or being in actual physical control of a vehicle, defendant failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately caused the vehicle being driven by defendant to strike and collide with a vehicle being driven by MAXINE LUBER, said collision proximately causing substantial bodily harm to MAXINE LUBER and/or MARTIN LUBER.

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COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily injury or death to MAXINE LUBER and/or MARTIN LUBER, fail to immediately stop his vehicle at the scene of the accident, or as close thereto as possible.

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

BY _____
ADAM OSMAN
Chief Deputy District Attorney
Nevada Bar #013924

16FH2036X/td/vcu
HPD EV#1621674
(TK)

MOT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

Defendant

Case No: **C-18-333254-1**

Dept No: **XXIII**

ANSWER TO THE STATE'S MOTION TO FILE THIRD AMENDED INFORMATION OR, IN THE ALTERNATIVE, TO STRIKE SECOND AMENDED INFORMATION

COMES NOW Defendant, JACK BANKA, through his attorneys, MICHAEL D. PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and Answers the State's Motion.

DATED this 18th day of February, 2021.

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STATEMENT OF THE CASE

Defendant JACK BANKA ("Banka") was charged by complaint in Justice Court alleging: (1) DUI (NRS 484C.430) and (2) "Leaving the Scene" (NRS 484E.010). After a preliminary hearing, the State filed an Information in district court alleging the DUI offense only. The next day, without legal authority to do so, the State filed an Amended Information adding the "Leaving the Scene" charge. The State's justification for filing the Amended Information in its Motion to the Court lack merit. *See, fn.3, infra.*

After Banka's request to hire new counsel, Michael D. Pariente, Esq. and John G. Watkins, Esq. did not happen[1], Banka entered into a plea agreement (contract) with the State to plead *Alford* to the DUI charge. The State agreed to dismiss the "leaving the scene" charge (and did so before Banka actually pled) and Banka entered his plea to the DUI charge. Banka fulfilled his part of the contract as he waived his constitutional rights, waived all appeals to issues occurring before his plea, and entered his *Alford* plea. The State never conditioned its dismissal of "Leaving the Scene" in the plea agreement. Banka's plea was entered on the State's Second Amended Information which was to contain only the DUI charge.[2]

Now, the State attempts to re-charge Banka with "Leaving the Scene" by filing a Third Amended Information.

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1. The district court 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.

2. The State inadvertently included the "Leaving the Scene" charge in the Second Amended Information and on the State's own request had the charge removed by interlineation. *See,* Plea Transcript, p.4, ls.1-6.

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SUMMARY OF ARGUMENT

The State's entire Motion is nothing but an attempt to re-charge Banka with "Leaving the Scene" even though that charge was dismissed by the State, the statute of limitation period has run on that charge, and Banka fulfilled his obligation under the plea agreement. None of the State's attempts are supported by legal precedent and must be denied.

The State's request to file a Third Amended Information ignores and violates NRS 173.095, the law controlling amendments of informations. The Third Amended Information broadens the charge set forth in the Second Amended Information (only contained the DUI charge) by adding the "Leaving the Scene" charge. Therefore, the State's request to amend must be denied on the ground that the amendment violates NRS 173.095(1). **It should be noted that the State never mentioned NRS 173.095 in its Motion**.

None of the reasons offered by the State allows the amendment. NRS 173.095 is the only law controlling when amendments of indictments or informations are allowed. Again, the filing of the Third Amended Information is a clear violation of NRS 173.095.

Contrary to the State's belief, an amendment of an information can trigger a statute of limitations violation. *See, Benitez, infra.* It is uncontroverted that the statute of limitations period has run on the "Leaving the Scene" charge.

There is no authority presented by the State allowing its request to strike the Second Amended Information. Without legal support and cogent argument, this Court, as does the Nevada Supreme Court, should ignore the State's request. *See, Maresca, infra.*

Lastly, if the Amended Information was allowed to be resurrected (with no authority for this however), Banka is moving to strike the Second Amended Information as a fugitive document filed in violation of NRS 173.035(4) and NRS 173.095(3).

Therefore, this Court must deny the State's request to file a Third Amended Information and its alternative request to strike the Second Amended Information.

I

LAW AND ARGUMENT

A.

THE STATE'S REQUEST TO FILE A THIRD AMENDED INFORMATION MUST BE DENIED BECAUSE IT 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):

The only legal authority for filing the Amended Information in Banka (or any other case) is NRS 173.095(1). The State conveniently ignored (never mentioned) NRS 173.095 in its request to file the Third Amended Information. 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 legal maxim *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* ("the expression of one thing is the exclusion of another, repeatedly confirmed in this State") applies in Banka. *See, 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

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information must comply with NRS 173.095(1) to the exclusion of all other attempts. 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 State's request to file the Third Amended Information must be denied because its filing violates NRS 173.095(1). The 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. At the time Banka entered his plea, the Second Amended Information was in effect. The Second Information was only to contain the DUI charge. The Guilty Plea Agreement (GPA) confirms this fact.

Prior to the filing of the Second Amended Information, the State agreed to dismiss the "Leaving the Scene" charge and Banka was to plead to the DUI charge. The State inadvertently included the "Leaving the Scene" in the Second Amended Information and requested that reference to that charge be removed by interlineation. The Plea Transcript (June 24, 2019) states,

> 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.

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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

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 would violate 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." 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

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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, it is an abuse of discretion under *Green* to allow the amendment.

Statute of Limitations:

The State's argument that the statute of limitations do not apply to the filing of an amended information is simply not true. *See*, *Benitez v. State*, 111 Nev. 1363, 904 P.2d 1036 (1995) (The court held that an amended information or indictment can violate the statute of limitations.) A charge that has been dismissed and the statute of limitations has run on that offense cannot be resurrected by the filing of an amended information. *Cf.*, *Stogner v. California*, 539 U.S. 607 (2003) (A law resurrecting an expired statute of limitations period is unconstitutional.) *Id.*, 539 U.S. at 632-633. Allowing the State to resurrect the expired statute of limitations period on the "Leaving the Scene" offense is substantially the same as the resurrection condemned in *Stogner*.

The only information legally before this Court is the State's Second Amended Information which does not contain the "Leaving the Scene" charge as it had been dismissed by the State before Banka entered his *Alford* plea. *Benitez* stated, "[a] superseding indictment filed while the original indictment in validly pending is not barred by the statute of limitations if the new indictment does not broaden or substantially amend the original charges." *Id.*, 111 Nev. at 1364. *Benitez* further stated, "[t]he same would be true of a superseding information." *Id.*, 111 Nev. at 1364.

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Adding the new charge of "Leaving the Scene" does "broaden or substantially amend the original charge" contained in the Second Amended Information. Therefore, the Third Amended Information violates the statute of limitations as well as NRS 173.095(1).

B.

THE STATE'S AMENDED INFORMATION (FILED JULY 10, 2018) WAS NOT AUTHORIZED UNDER NRS 173.095(3) AND VIOLATED NRS 173.095; THEREFORE, IT CANNOT BE USED TO LEGALLY CHARGE BANKA THEN OR NOW WITH ANY OFFENSE

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

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> 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. The State admits that 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.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(1) was violated.[3] The Amended Information was illegally filed and could not legally charge Banka then and cannot be used to charge him now.

The State's request to resurrect and proceed under its Amended Information (filed July 10, 2018) ignores that the Amended Information is unlawful under NRS 173.095 and cannot be used as the charging document to prosecute Banka. Banka now moves to strike the Amended Information.

3. The State attempts to justify the July 9, 2018 and July 10, 2018 informations by stating "the States 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).

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C.

THE STATE OFFERS A NUMBER OF REASONS IN ITS ATTEMPT TO PERSUADE THIS COURT TO ALLOW THE FILING OF THE THIRD AMENDED INFORMATION. HOWEVER, NONE HAS LEGAL SUPPORT IN LAW.

a. As previously pointed out, the filing of the amendment violates NRS 173.095 and the statute of limitations.

The State's reliance on *State v. Lewis*, 124 Nev. 132, 178 P.3d 146 (2008) is both inapposite and meritless. *Lewis's* holding is limited to pre-sentence withdrawals of a guilty plea. *Id.*, 124 Nev. at 137. Banka's withdrawal was post-sentence on appeal, and as acknowledged by the State, "effectively direct[ed] the District Court to withdraw guilty plea agreement." States Motion, p.3, ls. 27-28. There is a material difference between pre-sentence and post-sentence of guilty pleas. In pre-sentence withdrawals, the State's and the defendant's legal and factual situation before and after the withdrawal remains the same. This is not so in the post-sentence withdrawal context. Banka clearly illustrates the difference. The Nevada Supreme Court's directed withdrawal of Banka's guilty plea does not erase the fact that Banka went to prison, serving approximately 14 months. Banka's position, unlike those pre-sentence defendants, is not in the same situation he was before the plea. Thus, *Lewis* being limited to pre-sentence withdrawals of pleas is not legal precedent for the State in Banka's case.

The State neglects to point out that it had the opportunity to take advantage of *Lewis* by not opposing Banka's pre-sentence request to withdraw his plea through his new counsel. The State wants to "have its cake and eat it to" - not a palatable position in law. The State's argument that since *Lewis* did not mention the statute of

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limitations, then the expiration of the statute of limitations does not apply in Banka is not only meritless but nonsense. Legal precedent is based on the Court's holding, not what it did not hold. It would be more reasonable to conclude that there was no statute of limitations issue in *Lewis* because, if there was, the Court would have addressed it. Again, silence is not legal authority. Therefore, *Lewis* is not legal precedent to recharge Banka on the "Leaving the Scene" offense.

The State's reliance on *State v. Harris*, 131 Nev. 551, 355 P.3d 791 (2015) is equally unavailing. *Harris* has absolutely nothing to do with " . . . proceed[ing] to trial on the original charges". In fact, if the State's appeal was successful, there would be no trial, and the original conviction would be reinstated.

The State's argument that the running of the statute of limitations period on the "Leaving the Scene" is to be ignored under *Harris* lacks merit and is nothing more than a "red herring." *Harris* never addressed, discussed or considered the statute of limitations because it is irrelevant to an appeal of the trial court's decision granting a new trial. Again, there would be no new trial if the State was successful on appeal - the conviction would be reinstated. *Harris* is just not legal authority for the State to re-charge Banka with "Leaving the Scene" when that charge was dismissed, and the statute of limitations period has run.

The State's reliance on NRS 34.800 is misguided. NRS 34.800 deals with allowing the dismissal of a post-conviction habeas corpus petition for untimeliness, not the re-charging of an offense, here "Leaving the Scene", which was dismissed by the State and the statute of limitations period has run. Banka's post-conviction request for relief was timely.

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The State never moved for dismissal of Banka's post-conviction habeas corpus petition because there was no basis to do so. Everything Banka's new counsel did was extremely timely. Banka's Petition was not dismissed but rather denied. Thus, reliance on NRS 34.800 lacks merit.

NRS 34.800 does not state, hold or direct the refiling of a charge which was dismissed, and the statute of limitations period expired. The State's attempt to read more into NRS 34.800 than it states is unavailing.

The State argues that there is no rule preventing the filing of the Third Amended Information and since NRS 173.035(2) allows an Amended Information to reinstate the bindover charges, the amendment should be allowed in Banka. The State's argument is without merit and ignores controlling law.

NRS 173.035 applies only to the filing of an information after a bindover to district court following a premilimary hearing or a waiver of the right to that hearing. Further, the statute requires "[t]he information must be filed within 15 days after the holding or waiver of the preliminary examination." *See*, NRS 173.035(3). Therefore, the State's reliance on NRS 173.035 as authority to file the Third Amended Information is erroneous.

Equally unavailing is Section (4) of NRS 173.035. As previously pointed out to this Court, that section applies only when a defendant has waived his right to a preliminary hearing "in accordance with an agreement by the defendant to plead guilty." Banka had a preliminary hearing, thus NRS 173.035(4) is inapplicable to his case.

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The State's reliance on NRS 178.610 and *Moultrie v. State*, 131 Nev. 924, 933-34, 364 P.3d 606 (2015), referring to NRS 178.610 are inapposite as applied to Banka. NRS 178.610 applies only when ". . . no procedure is specifically prescribed . . . ." There is a law which applies to the filing of amended informations, i.e. NRS 173.095(1). Unless an amendment complies with NRS 173.095, the filing of it is unlawful. Banka has previously addressed NRS 173.095 in regard to the State's request to file a Third Amended Information, which violates NRS 173.095(1) and is not authorized under Section (3) of NRS 173.095.

The reliance on *Hill v. Sheriff of Clark County*, 85 Nev. 234, 452 P.2d 918 (1969) is irrelevant for the same reason that NRS 178.610 does not apply. The law that applies is NRS 173.095. In fact, it is the sole controlling law on the subject. *See again*, the legal maxim *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* ("The expression of one thing is the exclusion of another . . . ." *Valenti, supra*, 131 Nev. at 880; *Cramer, supra*, 126 Nev. at 394.

The State's conclusion that "[t]here is no substantive difference to be found between the withdrawal of the plea that had been entered after waiving up from district court versus withdrawal of the plea entered at any other procedural point" (State's Motion, p.8, ls. 14-16) misses one crucial point - the law allows one and prohibits the other!

The State's attempt to compare a waiver of the constitutional double jeopardy question with the filing of the Third Amended Information lacks merit for several reasons. First, there is no double jeopardy issue in Banka. Secondly, the reliance on *Sweat v. Eighth Jud. Dist. Ct.*, 133 Nev. 602, 403 P.3d 353 (2017) is inapposite. *Sweat's*

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holding is based upon Sweat's failure to comply with his obligations to comply under the plea agreement. This is not the case in Banka. Banka complied with his obligations. Banka waived his constitutional rights, waived his appellant right to all issues, statutory and constitutional, occurring prior to his plea and pled guilty pursuant to *Alford*. Banka did not contract to go to prison. Sentencing is not part of the contract and this fact was made clear by the trial judge. " . . . this guilty plea agreement is a contract between you and the State of Nevada and I'm **not a party to the contract**." HT, p.4, ls. 8-9. (emphasis added.)

Since Banka fulfilled his part of the contract, he is constitutionally entitled to the "benefit of the bargain." *Santobello v. New York*, 404 U.S. 257 (1971). A plea agreement between the accused and the prosecutor,

> . . . must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances. Those circumstances will vary, **but a constant factor is when a plea rests in any significant degree on a promise or agreement of the prosecutor, so it can be said to be part of the inducement or consideration, such promise must be fulfilled**.

Santobello, 404 U.S. at 262. (emphasis added.)

Therefore, the State cannot file the Third Amended Information to re-charge Banka of "Leaving the Scene" because it was part of the inducement to have Banka plead guilty to the DUI charge.

It is also important to note that *Sweat* relied on *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). Referring to *Ricketts*, *Sweat* stated, "[t]he plea agreement provided that '[s]hould the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and **the original charges will be automatically reinstated**.'" Sweat, 133 Nev. at 605. (emphasis added.) There is no

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"reinstatement of the original charge" language in Banka's GPA if his plea were withdrawn on appeal.

Lastly, the prosecutor in *Sweat* filed the Amended Information pursuant to NRS 173.035. "Despite his agreement with the State, Sweat refused to plead guilty in the district court. As a result, the State filed an amended information pursuant to NRS 173.035, reinstating the original felony battery constituting domestic violence charge that it had dropped pursuant to the terms of the plea agreement." Sweat, 133 Nev. at 603. The Third Amended Information in Banka does not meet the legal requirements under NRS 173.035 for filing.

The State's "contract principles" reliance can be summarized as follows: the bargain between Banka and the State was "that [the] guilty plea (and resulting sentence) to remain standing." State's Motion, p.10, ls. 5-6. However, the "remain standing" was not part of the bargain. Under contract law, the contractual terms must be in the contract i.e. the "four corners" of the document. There is no language in the GPA reinstating the dismissal of the "Leaving the Scene" charge or that the dismissal was conditional on any basis. The State could have but did not add such language in the GPA. The Court in *Statz v. State*, 113 Nev. 987, 944 P.2d 813 (1997) stated, "[i]f the government agrees only to refrain from recommending a specific sentence and intends to retain the right to present facts and argument pertaining to sentencing, **such a limited commitment should be explicit**." *Id.*, 113 Nev. at 993 (emphasis added.)

If the State intends to condition its dismissal of the "Leaving the Scene" charge in Banka, the State "should be specific" and list the terms of the condition. *See, Gilman v. Gilman*, 114 Nev. 416, 956 P.2d 701 (1998).

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> Under well settled rules of contract construction, a court has no power to create a new contract for the parties which they have not created or intended themselves . . . Parties are presumed to contract with reference to existing statutes . . . Applicable statutes will generally be incorporated into the contract: however, other legal principles may govern the legal relationship where they are expressly set forth in the contract . . . Indeed, '**when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition**, the presumption is that the parties intended the prescribed remedy as the sole remedy for that condition. . . .

Id., 114 Nev. at 426. (emphasis added.) (cites omitted.)

Absent explicit language in the plea contract conditioning the dismissal on future conditions, the State cannot resurrect the "Leaving the Scene" charge by filing the Third Amended Information. Note, the State could (and should have) anticipated that Banka would appeal the District Court's denial of his pre-sentence Motion to Withdraw the Plea. Again, the State could have provided explicit conditions in the plea agreement for the resurrection of the "Leaving the Scene" charge but did not do so.

Another "contractual principle" is that the parties are presumed to contract with reference to existing statute and will be deemed incorporated into the contract unless explicitly eliminated. *See, All Star Bail Bonds, Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 419, 423-424, 326 P.2d 1107 (2014), *citing Gilman, supra,* 114 Nev. at 426. Therefore, NRS 173.095 is deemed to have been incorporated in the Banka contract plea. The State has no legal right to file the Third Amended Information under NRS 173.095 as previously discussed.

The State's "public policy" argument lacks merit. The State paints a picture of gloom for the State and rainbows for the defendants. This picture is never painted if the State explicitly conditions any dismissal on being reinstated if a defendant's plea is

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held to be unconstitutional or if the defendant "backs out" of the plea. The GPA contains a number of other conditions, however.

None of the reasons offered by the State authorizes the filing of the Third Amended Information.

There is no legal authority presented by the State to allow the striking of the Second Amended Information. Absence of relevant authority and cogent argument, the State's request need not be addressed by this Court. *See, Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3 (1987). Likewise, Banka cannot address that which has not been presented.

CONCLUSION

There is no legal authority to file the Third Amended Information in Banka. Amendments to an information are controlled solely by NRS 173.095(1). Under that statute, an amendment to the information cannot add a charge not contained in the information to be amended. The State's Third Amended Information adds the charge of "Leaving the Scene" which is not contained in the State's Second Amended Information. Therefore, this Court must deny the State's request to file the Third Amended Information. Again, the State never mentioned NRS 173.095!

None of the State's reasons set forth in its Motion are legal precedent authorizing the filing of the Third Amended Information. The reasons are nothing more than innuendo's and inferences and not the law.

The State's request to file the Third Amended Information, or in the alternative to strike the Second Amended Information, is an unauthorized attempt to "get around" a plea negotiation that did not conclude as the State desired. However, this is not a

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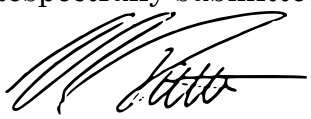
legal basis to re-charge Banka with the previously dismissed and beyond the statute of limitations period "Leaving the Scene" charge. The re-charging of this offense is also a breach of the agreement by the State. Banka fulfilled his part of the plea contract. Again, Banka waived his constitutional rights, waived his appeal, both on statutory and constitutional issues occurring before his plea and did enter his *Alford* plea. The serving of the court sentence is not part of the contract. Since Banka complied with his part of the agreement, he is entitled to receive the "benefit of the bargain" i.e. dismissal of the "Leaving the Scene" charge. *See again*, *Santobello*, 404 U.S. at 272. Therefore, the State's request must be denied.

The State's alternative request to strike the Second Amended Information and prosecute Banka under the Amended Information is not supported by any legal authority provided by the State and should accordingly be ignored. *See again, Marescea, supra.*

DATED this 18th day of February, 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of February, 2021, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Adam Osman – Chief Deputy District Attorney
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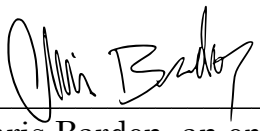

Chris Barden, an employee
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273,

Defendant.

CASE NO: C-18-333254-1

DEPT NO: XXIII

STATE'S REPLY TO DEFENDANT'S ANSWER TO THE STATE'S MOTION TO FILE THIRD AMENDED INFORMATION OR, IN THE ALTERNATIVE, TO STRIKE SECOND AMENDED INFORMATION

DATE OF HEARING: APRIL 19, 2021
TIME OF HEARING: 12:30 P.M.

Comes now, the State of Nevada, by Steven B. Wolfson, Clark County District Attorney, through Adam B. Osman, Deputy District Attorney, and files this Reply To Defendant's Answer To The State's Motion to File Third Amended Information Or, In The Alternative, To Strike Second Amended Information.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant's response to the State's motion boils down to just two major points, both incorrect and misleading. First, Defendant claims that the sole basis by which the State can file an information is NRS 173.095; and second, Defendant claims that he satisfied the entire substance of his agreement with the State. Further, Defendant's response consistently contradicts and doubles back upon itself. For the reasons that follow, the State's motion should be granted and the State should be allowed to file the Third Amended Information and proceed to trial upon the original charges.

II. ARGUMENT

A. NRS 173.095 Is Not the "Only legal Authority" For an Amended Information

Throughout his opposition, Defendant repeatedly claims that the "only legal authority" (and variations of that phrase) to file an amended information is NRS 173.095, and because "the State conveniently ignored (never mentioned)" that statute, there can be no justification to file the amended information. But this argument is demonstrably incorrect, even from the plain language of the statute itself.

Defendant would have this Court read the language of NRS 173.095 as exclusive. But the Defendant would thereby have this Court gloss over the actual wording of that statute, which provides as follows: "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." This language is enabling, not disabling.[1] By its very wording, the statute *gives* the court the ability to allow the State to file an amended information where certain conditions are met – *but nowhere does it state that this is the exclusive manner by which the State can file an "amended" information.*

Defendant attempts to sidestep this problem with his interpretation by placing all the interpretation's weight onto the maxim of "*Expressio Unius Est Exclusio Alterius.*" But this

[1] Black's Law Dictionary defines "enabling statute" as one "that permits what was previously prohibited or that creates new powers," and a "disabling statute" as one "that limits or curbs certain rights."

canon of interpretation as applied in this situation simply indicates that the State does not have unfettered power to file charges via information on any basis, at any time, for any reason. It does not mean the Court is bound to interpret the State's ability to file an "amended" information as being limited to the four corners of that one statute.

This is further illustrated by another principle of statutory construction – that whenever possible, "the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results." *We People Nevada v. Miller*, 124 Nev. 874, 881 (2008); *see also e.g. Orion Portfolio Services 2 LLC v. County of Clark*, 126 Nev. 397, 403 (2010) (courts have "a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized"); *Verdi Lumber Co. v. Bartlett*, 161 P. 933, 934 (1916) (courts favor harmonizing different acts which touch upon the same subject "as to enable them all to stand").

If Defendant's interpretation of NRS 173.095 were accepted, it would, for example, render meaningless NRS 173.115 which provides for joinder of offenses. Surely joinder, which involves amending an information to add multiple offenses not previously charged in that document, would thereby run afoul of NRS 173.095(1) which only allows amending an information to add "additional or different offense[s]." But if NRS 173.095 were the *exclusive* manner by which the State could file an amended information, NRS 173.115 would be useless, because the State could then only join offenses where it would require no additional or different offenses be charged. Of course, this is not the case and NRS 173.095 establishes only one set of ways by which the State is permitted to file an "amended" information. NRS 173.035 contains additional ways, as do NRS 173.115 and NRS 173.135 (for joinder of defendants), and as does caselaw in the ways described both in the State's original motion and again below.

Defendant further relies on two cases, *Jennings v. State*, and *Green v. State*, for his argument that NRS 173.095 is the exclusive manner by which an "amended" information may be filed. However, this reliance is misguided. Defendant relies on *Jennings* for the language of "the 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." However, before that

language, the Court explicitly recognizes that "amendement of a criminal information at any time before verdict is *authorized* by NRS 173.095(1)." *Jennings v. State*, 116 Nev. 488, 490 (2000). The case then goes on to explain, using the language quoted by defense, the requirements for amendment under that particular statute i.e. NRS 173.095. The Nevada Supreme Court never states that this is the *only* manner by which an "amended" information can can be authorized, only that it is in fact authorized in that scenario.

Defendant cites *Green v. State*, 94 Nev 176, for the language, "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'." However, again, the Defendant completely omits the relevant context of this language. In *Green*, the state had initially charged the defendant therein with lewdness by fondling the "private parts" of the victim – but after evidence in the state's case in chief only established that the defendant, at most, rolled up the victim's shirt two inches from the breast area, the trial court allowed the state to amend the information to match its theory to that testimony. *Green v. State*, 94 Nev. 176, 177 (1978). The Nevada Supreme Court held that the amendment should not have been allowed because it substantially prejudiced the defendant's rights and thus ran afoul of NRS 173.095(1). *Id.* Of course, this was the only provision in law that the particular amendment in *Green* could have reasonably been based on. It certainly was not made e.g. for purposes of joinder, or based on charges that had been bound over after preliminary hearing, or pursuant to an agreement rescinded at the Defendant's request. Further, as in *Jennings*, nowhere in the case does the Court hold that NRS 173.095 is the sole manner by which an "amended" information may ever be filed. Nor could it reasonably do so, given all the other ways in which an information can be amended, as explained above.

Nevertheless, Defendant's opposition is pervaded by this faulty claim that NRS 173.095 is exclusive of all other possible manners of amendment, as well as the argument that the State's motion must be denied because it failed to address that statute. The mistaken nature of the argument is therefore significant because without this foundation, most of the opposition immediately crumbles, as explained more fully below.

B. The July 10, 2018 "Amended" Information Should Not Be Stricken

In a fairly short section of his motion, Defendant claims the "Amended" Information, filed on July 10, 2018, should be striken for not complying with NRS 173.095. However, as explained above, NRS 173.095 is not the sole manner in which the State may file charges via information. NRS 173.035(1) provides that "an information may be filed against any person for any offense when the person: (a) Has had a preliminary examination as provided by law before a justice of the peace . . . and has been bound over to appear at the court having jurisdiction. . . . The information must be filed within 15 days after the holding . . . of the preliminary examination." In other words, the State may *charge* the Defendant by way of an information when said charges comply with NRS 173.035(1); and it may later amend that document after the 15 days if the proposed amendment complies with Nevada law, such as NRS 173.095. In this case, as Defendant admits, a preliminary hearing was held on June 28, 2018, and Defendant was bound over and held to answer on both felony counts as charged in the amended criminal complaint in Justice Court (i.e., DUI and Leaving the Scene).

Because the information filed on July 10 contained only charges upon which the Defendant was validly bound over after preliminary hearing, and because it was filed within 15 days of the preliminary hearing, it was allowed under NRS 173.035. Defendant does not dispute this, but solely analyzes the July 10 information under NRS 173.095. Defendant appears to assume that because NRS 173.095 handles "amended informations," then NRS 173.035 must be limited to informations that are not "amended." But nothing in either statute supports this conclusion, and Defendant cites no other legal authority in support of it, other than his incorrect claim that NRS 173.095 is the exclusive vehicle by which an "amended" information may be filed. It is true that NRS 173.095(1) specifically applies to an "amendment" scenario, but this is only because the language of that statute presupposes a previously-filed information to which a proposed new information can be compared. Nothing in that statute in any way even purports to limit the applicability of NRS 173.035 to the first information filed in a case. Thus, while NRS 173.095 can *only* ever be relevant where a prior information has been filed, NRS 173.035 applies whenever its general conditions are met.

Indeed, by its own language, NRS 173.035 allows the filing of "an information," and even an "amended information" is still "an information." Finally, NRS 173.035(3) discusses requirements for "each" information, further suggesting the statute applies to more than just the filing of a single initial charging document.

Here, on July 10, 2018, the State solely charged Defendant, by way of information, with counts that it was entitled to charge under NRS 173.035(1) and (3), and neither that statute nor NRS 173.095 remove that entitlement simply based on what the document is labeled or what came before it. Because the State was enabled under NRS 173.035 to charge the Defendant by way of information with both counts (and timely did so), this claim is meritless.

C. Because NRS 173.095 Is Not Exclusive, Defendant Failed to Refute the State's Case Law Establishing its Ability to Reinstate Charges

1. Lewis *Controls and the State May File the Third Amended Information*

As explained, nothing within or about NRS 173.095 establishes that those subsections are the sole manner by which the State may file an "amended" information. However, this is the Defendant's only argument against the clear language of *Lewis* allowing the State to do exactly what it requesting via the instant motion: "when the district court grants a presentence motion to withdraw a guilty plea . . . *the State may proceed to trial on the original charges* or enter into a new plea bargain with the Defendant." *State v. Lewis*, 124 Nev. 132, 137 (2008) (emphasis added), *overruled on other grounds by State v. Harris*, 131 Nev. 551, 556 (2015). As noted previously, Defendant's motion to withdraw guilty-plea was pre-sentence, having been filed on November 15 and amended on November 19, and Defendant having been sentenced on December 4 after the motion was denied. The Nevada Supreme Court's order further establishes that it was reversing the decision on the pre-sentence motion to withdraw guilty plea: "Having concluded that the district court abused its discretion in denying Banka's *presentence* motion to withdraw his guilty plea, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion." (Emphasis added.)

Accordingly, the plain language of the *Lewis* opinion controls. The Nevada Supreme Court reversed the judgment, and directed the District Court to grant the Defendant's

presentence motion to withdraw plea. Pursuant to *Lewis*, where the District Court grants a presentence motion to withdraw guilty plea, "**the State may proceed to trial on the original charges.**" There is no limiting or qualifying language. Further, the use of the word "original" recognizes the charges may have changed when the guilty plea agreement was entered. Therefore, the *only* way proceeding to trial on "original charges" can be accomplished is through the filing of an amended information, which is exactly what the State seeks to do, and *Lewis* explicitly gives the State the authority to do so.

2. Lewis *Is Not Distinguishable Based on Whether Sentencing Has Once Occurred*

The Defendant's attempt to distinguish *Lewis* from the instant case because "Banka's withdrawal was post-sentence on appeal" is disingenuous in light of his continuous insinuation that he is the only party following the strict and plain language of the law. To begin with, it is noteworthy that the Defendant through this argument is conceding that the language of *Lewis* itself does allow the State to refile original charges, regardless of NRS 173.095, which it had elsewhere in its brief claimed was the sole manner in which the State could amend an information. However, the Defendant's new argument that *Lewis* simply does not apply because his motion wasn't granted until after remand from an appeal ignores the plain language in *Lewis* allowing the State to proceed upon the original charges when "the district court grants a *presentence motion to withdraw a guilty plea.*" There is no dispute that Defendant *solely* filed a presentence motion to withdraw his plea, and the Nevada Supreme Court even referenced the motion as a "presentence" motion. The Court could have stated "when the district court grants a presentence motion to withdraw a guilty plea prior to the Defendant ever being sentenced pursuant to the withdrawn plea," but did not. The motion that was granted was a presentence motion, *Lewis* plainly applies, and the State is entitled to proceed upon the original charges.

In rebuttal to the above, Defendant claims that the admittedly presentence motion should be reinterpreted as being "post-sentence" because he had to spend time in custody pending appeal. Had the State stipulated to the withdrawal, the parties would have then been in the same position as before the plea. It is true that Defendant spent the time during the

pendency of the appeal in custody, but nothing in *Lewis* suggests this has any applicability to its procedural holding, or that the existence of an appeal converts and otherwise presentence motion into a post-sentence one. *Lewis* references when the motion is filed, not when it is ultimately ordered to be granted. The precise phrase "presentence motion to withdraw guilty plea" also has a procedural relevance, because such a motion if legitimately filed post-conviction must be filed in the form of a post-conviction petition for writ of habeas corpus pursuant to *Harris v. State*, 130 Nev. 435, 448 (2014). The motion was undeniably not in that form. *Lewis* also simply mentions nothing about whether a defendant filed an appeal or how much time a defendant may have spent in custody prior to the motion being granted. If it did, presumably it would not be limited to discussing time in custody awaiting appeal. But once again, the *Lewis* court could have mentioned this consideration, if it were actually going to have an effect on its procedural holding, but it did not. Therefore, it is not relevant.

3. Even If Lewis Were Distinguishable Based on Whether a Sentencing Occurred, the Plea Withdrawal in This Case Was Still Pre-Sentence

Even were the State's plain language reading of the *Lewis* opinion incorrect, and the case required the motion to have not only been filed but also granted "pre-sentence," the motion was still granted "pre-sentence." Again, the Defendant did not file a post-conviction petition for habeas corpus (the exclusive remedy by which a defendant may request post-conviction plea withdrawal). As mentioned, Defendant solely filed a presentence motion to withdraw guilty plea, and the granting of said motion came only after the Supreme Court reversed the judgement, remanded the case, and directed the district court to grant the motion upon remand. Surely Defendant would agree that the reversal vacated the imposed sentence. But when the sentence has already been vacated, the withdrawal cannot be procedurally "post-sentence," because no sentence existed at the time the plea in this case was withdrawn. If this were not the case, then everything that now occurs in the case would be "post-sentence." A jury trial would be post-sentence, a guilty plea would be post-sentence, motions in limine would be post-sentence, etc. Of course, it would not be post-sentence in the manner with which Defendant claims *Lewis* is concerned (i.e., procedurally post-sentence). Accordingly, even

taking into account the fact that a sentencing has at one time occurred in the case, and even accepting Defendant's incorrect interpretation of *Lewis*, the withdrawal was still presentence and the operative language still applies: "the State may proceed to trial upon the original charges."[2]

D. Defendant Completely Misses the Point of the State's Legal Authority Allowing It To Reinstate Original Charges Without Regard to Statute of Limitations

Outside of Defendant's back and forth argument that the State cannot file an amended information outside of NRS 173.095, and then that the State could have done so had it simply conceded the withdrawal in the first place, Defendant's entire response to the State's legal authority boils down to missing the forest for the trees. Defendant claims that each of the State's arguments showing that statutes of limitations do not apply are "inapposite" because the cases and statutes cited do not explicitly use the words "statute of limitations." But this merely takes an overly-simplistic and fractured view of the State's argument, and burns a strawman. For example, obviously the State is not arguing that solely because *Harris* allows the State to appeal a pre-conviction motion for new trial, or because NRS 34.800 establishes a time limit for post-conviction habeas petitions, therefore the State may reinstate original charges. The State is similarly not arguing based on silence (such as Defendant does when claiming that NRS 173.095 is exclusive); it is arguing based on the explicit language of the caselaw alongside the necessary and reasonable implications of its language. When considered together (as principles of legal interpretation demand), the authority presented in the State's motion establishes a meaning for the words contained within each of those citations and shows why neither the legislature nor the Nevada Supreme Court could possibly have intended statutes of limitation to modify *Lewis* to restrict the State's ability to reinstate charges after a defendant rescinds a plea agreement.

[2] It should be noted that the State *does not* concede any ability to reinstate charges after the granting of a legitimately post-sentence petition to withdraw guilty plea. Indeed, there is no relevant difference in *Lewis*'s procedural rationale between a pre- and post-sentence motion to withdraw guilty plea; the only difference is the required form of the Defendant's request (i.e., a petition for writ of habeas corpus, *see Harris v. State*, 130 Nev. 435, 448 (2014)) and the basis upon which such request may be granted (*see* NRS 176.165). However, as explained, that is not the circumstance here. Because Defendant only filed a pre-sentence motion to withdraw plea, reinstatement of charges after a post-sentence petition is granted need not be addressed or argued any further at this time.

1. Defendant Contradicts Himself Again

Initially, Defendant once again contradicts himself when he claims that the State may not refile original charges, even in light of *Lewis*, where it is past the statute of limitations. In one section of his opposition, as noted above, Defendant writes, "the State neglects to point out that it had the opportunity to take advantage of *Lewis* by not opposing Banka's pre-sentence request to withdraw his plea through his new counsel." However, the motion to withdraw plea was heard on December 4, 2018, having not been filed until November 15 and then amended on November 19. A hearing took place on the judicial day between those dates, i.e. on November 18. On December 4, the first date the State could have stipulated to defendant's motion, the three-year statute of limitations on the Leaving the Scene charge had already run, because the Defendant committed the crime on December 1, 2016.[3]

Thus, the Defendant argues both that the State cannot refile original charges after the statute of limitations, but also suggests that the State could have refiled the original charges had it only been magnanimous. Defendant claims the State wants to "have its cake and eat it to [sic]," but the Defendant is speaking out of both sides of his mouth throughout his opposition. He is essentially attempting to imply that the State should not now be fairly accommodated because it cut off its nose to spite its face by not agreeing to plea withdrawal, but then turns around and claims the State couldn't have reinstated the charges after the statute of limitations ran anyway.

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[3] And, had the State simply filed an amended information in the meantime, prior to the December 4 hearing, Defendant would no doubt have then claimed that the State filed the information prematurely and/or in violation of NRS 173.095.

2. The Decisions in Lewis *and* Harris*, along with NRS 34.800 Show That Statutes of Limitations Are Not Factored Into the State's Ability to Reinstate Original Charges*

The Defendant separately considers each of the State's discussions of *Lewis*, *Harris*, and NRS 34.800, and erroneously disregards each authority as irrelevant and based on silence rather than law. However, again doubling back on his own argument, despite accusing the State of arguing based on silence, the Defendant claims that what the silence really means is that the statute of limitations simply was not at issue in that particular case. Because the State is relying on the express, unqualified language of *Lewis*, it is the Defendant, not the State, who is attempting to use silence to conjure and incorporate baseless restrictions into the holding.

The State incorporates its extensive discussion of and citations to the above cases and statute as included in its original motion as if fully set forth herein. Boiled down, the holdings in *Lewis* and *Harris* establish that whether the State is allowed to appeal a pre-judgment motion is based on the likely prejudice faced by the State when the particular motion is granted. The cases explain that because the State can simply "proceed to trial on the original charges" in the case of a pre-judgment motion for withdrawal of plea, but would have to potentially restart an entire trial in the case of a pre-judgment motion for new trial, the State faces sufficient likelihood of prejudice in the latter scenario to entitle it to appeal that ruling before the judgment in the new trial. The Court further discussed "the potential injustice if the defendant obtains an acquittal following an improvidently granted new trial."

If these factors – the potential for a needless retrial and the potential for the State to not be able to retry the Defendant on certain charges (due to a possible acquittal after an improper granting of a new trial) – were sufficient to change the entire analysis with respect to whether the State may appeal, then surely it should have also been sufficient potential prejudice for the State to not be able to try the Defendant on original charges whenever their limitations periods had expired. Again, Defendant is the party who is attempting to alter the plain language of *Lewis* to be limited by statutes of limitations. But if the Court had intended its holding to have that restriction, there is no reasonable scenario in which the Court would not have mentioned it. Indeed, were it the case, there would be no use for any discussion as to any other potential

prejudice at all. The immense and consistent prejudice of a defendant being able to game his way out of being tried on charges upon which the State chose not to proceed solely due to a guilty plea would always be present, and the entire distinction the Court made across both cases would be meaningless. Both the express language and its strong implications are not ambiguous, and Defendant fails to establish why baseless restrictions should be read into it.

With respect to Laches and NRS 34.800, again, the Defendant's rebuttal is so overly literal and dismissive that it fails to even attempt to rebut the State's argument. As previously explained, whenever possible, "the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results." *We People Nevada v. Miller*, 124 Nev. 874, 881 (2008). NRS 34.800 provides that a post-conviction habeas petition could be dismissed if the delay prejudices the State in its ability to conduct a retrial of the defendant. Moreover, subsection (2) creates a rebuttable presumption of prejudice to the State when a delay of five years has elapsed since judgment of conviction. If statutes setting forth limitations periods were meant to apply to reinstatement following plea withdrawal, other statutes should reflect this. Yet as the statutes are written, such interpretation would lead to the absurd result where the five year period before presuming prejudice to the State becomes totally meaningless and random. No other form of prejudice (such as absence of witnesses or fading memories) would matter if by the five year mark the State could no longer reinstate and try a defendant for any crimes except Murder and Sexual Assault anyway.

Once again, ultimately, if either statute or caselaw had been intended to limit the State's ability to reinstate charges after plea withdrawal, the law could have and would have made this clear. Instead, the law both states outright (in *Lewis*) that the State can reinstate charges, and otherwise makes clear (in *Lewis* and the rest of the law cited above) that the State's ability to to do so is, in fact, not restricted by limitations periods.

In further support of Defendant's unfounded argument to the contrary, he again cites two cases, and misleadingly quotes language from them without providing the Court with any context. First, Defendant cites to *Benitez v. State*, 111 Nev. 1363 (1995) for the proposition that an amended information "can violate the statute of limitations." The State obviously does

not dispute that a scenario could exist wherein an amended information violates a statute of limitations, but the instant case is not one of those scenarios. Further, *Benitez* describes a wholly different amendment situation (at entry of guilty plea), and in fact held the State did *not* violate the statute of limitations in that case. *Id.* at 1365. It has nothing to do with whether the State can amend an information to reinstate charges after withdrawal of guilty plea.

Defendant next cites to *Stogner v. California*, 539 U.S. 607, for the claims that "a law resurrecting an expired statute of limitations is unconstitutional." However, what *Stogner* held was that California violated the Ex Post Facto clause of the Constitution when it enacted new provisions which resurrected charges that had previously expired their statutes of limitations. *Id.* at 609 ("In 1993, California enacted a new criminal statute of limitations governing sex-related child abuse crimes. . . . The statute thus authorizes prosecution for criminal acts committed many years beforehand—and where the original limitations period has expired—as long as prosecution begins within a year of a victim's first complaint to the police."). Of course, nothing about the instant case involves the enactment of an ex post facto law; all of the statutes the State has cited in support of its motion were in existence at the time Defendant committed the instant crimes (and *a fortiori*, when he entered and later withdrew his guilty plea). The *Stogner* case is completely irrelevant. Defendant astonishingly claims that it somehow supports or provides an example of (using the "cf" signal) the proposition that "a charge that has been dismissed and the statute of limitations has run on that offense cannot be resurrected by the filing of an amended information," but there is no possible reading of the case that supports this or at all goes beyond the subject of newly-enacted ex post facto laws. Defendant can cite no cogent authority contradicting the holding of *Lewis*; the State's ability to refile charges following plea withdrawal is not restricted by limitations periods.

E. Banka's Responses to The State's Other Statutory Arguments are Unavailing

1. Defendant Failed to Actually Respond to the State's NRS 178.610 Argument

Defendant does not actually contend with the State's argument that no procedure is specifically set forth when a Defendant withdraws his guilty plea, and that there is no compelling basis to not also follow the procedure in NRS 173.035(4) in such situations.

NRS 178.610 provides, "if no procedure is specifically prescribed by this title, the court may proceed in any lawful manner not inconsistent with this title or with any other applicable statute," which would authorize the Court to proceed in that manner. However, Defendant's only reason to distinguish the use of the procedure from NRS 173.035(4) in one situation from its use in the other, is a strenuous declaration that "the law allows one and prohibits the other!"

But this, once again, burns a strawman. Defendant essentially argues that the reason the Court should not follow the procedure in the analogous situation is because NRS 173.035(4) only describes a situation where the Defendant has waived his right to a preliminary hearing. Yet the State's argument in reality is that because no procedure is specifically provided for by statute for when a defendant has withdrawn his guilty plea, the Court should proceed in the same manner as set forth in NRS 173.035(4) for a highly analogous situation – the point being to reinstate charges that were removed from an information pursuant to what the State had believed was an agreement between the parties. Again, and significantly, Defendant fails to provide *any* substantive basis for why the situations should be distinguished.

Defendant does claim that NRS 178.610 does not apply because NRS 173.095 provides the procedure for amending an information – but this claim fails for reasons already set forth above. Once again, NRS 173.095 is not the exclusive means by which an information may be amended, and contrary to his argument, does not actively prohibit application of its rationale in other situations. Withdrawal of plea is governed by NRS 176.165 instead. NRS 173.095 does not even purport to touch on the procedure for this issue; as an enabling statute, it only controls situations in which the State intends to amend an information pursuant to that statute.

But NRS 176.165 also does not set forth a procedure for what the Court should do once a plea of guilty is withdrawn. If taken in an overly strict sense, as Defendant seems to be asking this Court to do when it suits him, when a defendant withdraws a plea, the case would simply go back to pre-plea status. But that statute doesn't explicitly allow the Court to then rearraign Defendant and reset trial, so the case could end up languishing in the system for eternity. Yet the Court may validly reset trial, because the Court may proceed in any lawful manner, and proceeding to trial is clearly the appropriate procedure to follow based upon the typical

procedural flow of a criminal case as otherwise set forth. Another extremely appropriate procedure to follow, based in large part on the rationale of NRS 173.035(4), is to allow the State to file an amended information reinstating the original charges due to no significant difference existing between the situation described by NRS 173.035(4), and the situation in the instant case.[4] Again, Defendant did not even attempt to contradict this logic, nor could he reasonably have done so. The Court should follow the procedure of NRS 173.035(4) and allow the State to file an amended information with the original charges.

F. Defendant Fails to Distinguish *Sweat* From the Instant Case

1. The Rationale of Sweat *is Not Limited to Double Jeopardy Scenarios*

The Defendant's logic with respect to *Sweat v. Eighth Judicial Dist Ct.*, 133 Nev. 602, 602 (2017), ultimately begins the same as its flawed logic with respect to *Harris* and NRS 34.800. Specifically, Defendant claims the case is irrelevant because there is no Double Jeopardy issue here, and because the original charges in *Sweat* were reinstated under NRS 173.035(4). The State agrees no Double Jeopardy issue plagues the instant case, but Defendant is simply refusing to dig past the most surface-level premise of *Sweat*. The State reincorporates the actual argument from its motion, which was that if the *constitutional* guarantee against Double Jeopardy does not bar the reinstatement of the original charges in *Sweat* due to the failure to fulfill his end of the plea agreement, then the *statutory* matter of statutes of limitation surely cannot overcome that principle. Defendant fails to respond to this precise argument.

2. Sweat *Was Not Limited to Agreements With Explicit Reinstatement Provisions*

Instead of responding to the State's argument above, Defendant makes two failing claims to distinguish *Sweat*. First, Defendant claims that *Sweat* is different than the instant case because it relies on *Ricketts v. Adamson*, 483 U.S. 1 (1987), which involved a plea agreement that specifically included language allowing the State to proceed to trial upon the original charges. In addition to this being a technically dissimilar situation from the instant

[4] The State reincorporates the citations in its motion to *Moultrie v. State*, 131 Nev. 924, 933-34 (2015) and *Hill v. Sheriff of Clark County*, 85 Nev. 234, 235 (1969) as examples of the Supreme Court approving use of NRS 178.610 where a procedure is not prescribed (allowing the State to amend a complaint to conform to testimony); and use of an analogous but technically-inapplicable rule to fill a procedural gap (applying a District Court rule to continuances in Justice Court).

case, due to touching upon breach rather than rescission, as explained more fully in the next section – the *Adamson* case does not change the fact that the State was allowed to reinstate original charges in *Sweat* despite that nothing in *Sweat* discussed any such language. The holding in *Sweat* was therefore not based on the specific language of the plea agreement in *Ricketts*, but rather on a defendant generally failing to comply with his explicit obligations under the agreement. Moreover, after citing *Adamson*, the *Sweat* Court went on to discuss two other cases where a defendant was held to have waived his double jeopardy rights simply by withdrawing of or the failing to comply with obligations under a plea agreement, despite that "*the terms of the agreement do not explicitly address double jeopardy*" (such as via the reinstatement clause in *Adamson*, which the United States Supreme Court had interpreted as "an explicit waiver of the defendant's double jeopardy rights in the event he breached the agreement"). *Sweat*, 133 Nev. at 606 (citing *Adamson*, 483 U.S. at 10).

One of those cases heavily relied upon in *Sweat*, which supports the State's position and which was cited by the State in its original motion *but never addressed or mentioned by Defendant*, was *Dutton v. State*, 970 P.2d 925 (Alaska Ct. App., 1999). In *Dutton*, the Alaska Court of Appeals discussed *Adamson* but analyzed a plea agreement which contained no such "reinstatement" language. *Id.* at 932.[5] The defendant in *Dutton* entered into an agreement whereby the state would reduce a felony to a misdemeanor in exchange for the defendant also pleading guilty to a felony in a separate federal case; however, he later withdrew the federal guilty plea and the state prosecutor reinstated his original felony charge. *Id.* at 927-28. The defendant first claimed he had not materially breached the plea agreement, which the *Dutton* court rejected. *Id.* at 930-31. (The defendant also made an argument virtually identical to the Defendant's argument herein, as will be discussed in more detail in the following section.)

The *Dutton* court further rejected, however, the defendant's claim that an explicit reinstatement clause is required for rescission to be a valid remedy. *Id.* The defendant's argument was based on Double Jeopardy, *Id.* at 931-32, having apparently not even bothered to claim the State would not otherwise be entitled under contract principles to reinstate the

[5] Further, *Dutton* never mentions statute as a basis to reinstate. Yet, as discussed below, it found reinstatement appropriate.

original charges. But the *Dutton* court did not in fact limit its holding to the issue of double jeopardy, instead setting forth the general recognition that "even though a plea agreement may not explicitly list reinstatement of the original charges as one of the consequences of a material breach, courts nevertheless conclude that the government can normally seek rescission—a return to the *status quo ante*—if the defendant commits a material breach." *Dutton*, 970 P.2d at 933. The *Dutton* court then analogized the situation of the defendant therein to several other cases in which the terms of plea agreement were violated or not actualized, including an Ohio Court of Appeals case called *Katelanos*, involving a defendant who successfully challenged a guilty plea on appeal (as in the instant case). *Id.* at 935; *Village of Chagrin Falls v. Katelanos*, 54 Ohio App.3d 157 (Ohio App.1988). The defendant in *Katelanos* pleaded guilty to only one of multiple charges, but was allowed to withdraw the plea due to the trial court's failure to conduct a proper plea canvas. *Katelanos*, 54 Ohio App.3d at 157, 159. However, after sustaining the associated assignments of error, the Ohio appeals court went on to hold that "since the improper conviction resulted from a defective plea, the defendant has not performed his part of the ... plea bargain. Hence, we must vacate the [trial] court's action and reinstate all the original charges." *Id.* at 159 (citing *Adamson*, 483 U.S. at 9-10, using the *cf* signal).[6]

Following these comparisons, the *Dutton* court determined that the reinstatement clause in *Adamson* was not decisive of the State's ability to reinstate original charges, and concluded its contractual analysis with the following very broad holding:

> When, following his sentencing in state court, Dutton withdrew his federal plea, he put himself in a legal position analogous to the defendants in *District Court*, *Siebert*, *Peterson*, and *Katelanos*. That is, *Dutton received the anticipated benefit of his bargain with the State, and then he voluntarily took action that defeated the State's expected benefit*. Even though Dutton's plea agreement with the State did not contain an explicit provision outlining the State's remedies if Dutton withdrew his federal plea, we nevertheless conclude that the State was entitled to rescission of the plea agreement—return of the parties to the status quo ante, and reinstatement of the original charge.
>
> *Dutton*, 970 P.2d at 935 (emphasis added).

[6] The other cases referenced by the holding in *Dutton* cited below this footnote were *People ex rel. VanMeveren v. District Court*, 195 Colo. 34 (Colo.1978); *People v. Siebert*, 201 Mich.App. 402 (Mich.App.1993); and *Peterson v. Commonwealth*, 5 Va.App. 389 (Va.App.1987);

Because *Sweat* heavily relies on *Dutton*, because *Dutton* is even more precisely on point than *Sweat*, and because *Dutton* does not limit its holding to Double Jeopardy or a particular statute regarding amendment, and cites to the materially-identical *Katelanos*, this Court should similarly follow its explicit common-sense holding. Defendant's argument should be rejected and the lack of a reinstatement clause in the plea agreement should be irrelevant to the State's ability herein to reinstate the original charges upon the agreement's withdrawal.[7]

3. Defendant Fails to Dispute that Rescission Requires Returning to Status Quo Ante

Defendant's primary argument against the applicability of *Sweat*, however, is the puzzling claim that he has not failed to abide by the plea agreement; although this is incorrect, as described in the following section, it is also irrelevant because the plea agreement has been rescinded. In fact, in responding to the State's authority regarding rescission of the plea agreement, the Defendant focuses exclusively on whether or not he complied with the terms, which amounts to whether he *breached* the plea agreement. Defendant never actually rebuts the State's argument regarding the required effects of the *rescission* of the plea agreement, which is different than breach. For example, Defendant could have breached the plea agreement if he recommended a sentence other than four to ten years in prison at sentencing.

Instead, Defendant has withdrawn his guilty plea and rescinded the plea agreement that negotiated for that guilty plea. It is true that the State's motion referenced the Defendant no longer abiding by the terms of the plea agreement, but only in the context of illustrating that

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[7] Defendant makes three other nonsensical arguments regarding the supposed necessity of a reinstatement clause. First, he cites *Statz v. State*, 113 Nev. 987 (1997) to claim "the State should be specific." But the case is about the State not going beyond the clear meaning of an agreement it made regarding its position at sentencing. Further, it is limited by *Sullivan v. State*, 115 Nev. 383, 388 (1999), which held that a stipulated sentence does *not* preclude the State from arguing facts and circumstances (in support of the stiuplation), even where there had been no explicit language reserving that right.

Defendant also cites *Gilman v. Gilman*, 114 Nev. 416, 426 (1998) apparently (based on bolding) primarily for the language "when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy for that condition." Defendant claims this requires "explicit language in the plea contract conditioning the dismissal on future conditions," but even disregarding the State's cited authority to the contrary, the quoted language does not even state as much.

Last, he argues that the State "could (and should have) anticipated that Banka would appeal the District Court's denial of his pre-sentence Motion to Withdraw the Plea," and thus should have included a reinstatement clause. However, even if the clause were required, the State does not have a time machine. By the date the motion was filed, the plea agreement had long been signed, filed, and entered. After all, a Defendant cannot withdraw a plea agreement that is still being drafted.

the State had, effectively, "returned" the benefits for which it had bargained. In other words, rescission must have occurred because Defendant was allowed to regain e.g. the constitutional rights that he gave up when he entered the agreement. He was similarly allowed to regain a record free from the felony conviction he negotiated to accept. Along those same lines, and according to the authority presented in the State's original motion, the Defendant should similarly be required to "return" the benefits he received, one of which being the dismissal of the Leaving the Scene count.[8]

Defendant claims that there is no language in the agreement providing that "dismissal [of the Leaving the Scene count] was conditional on any basis." Apparently, the Defendant would have this Court believe that his understanding of the agreement was that the dismissal of count two was completely separate from the parties' agreement, had nothing to do with the plea, and was done for no reason. But there is of course absolutely no reasonable basis for this.

Before even considering the general ridiculousness of this supposed belief, however, the claim can be easily rejected because Defendant's opposition itself claims the opposite, ten pages earlier. Indeed, in mentioning that the Second Amended Information contained only the DUI charge (as part of his incorrect argument that NRS 173.095 is exclusive), Defendant explicitly states, "at the time Banka entered his plea, the Second Amended Information was in effect. The Second Information [sic] was only to contain the DUI charge. *The Guilty Plea Agreement (GPA) confirms this fact.*" (Emphasis added.) There is only one way to interpret this statement, made explicitly by Defendant through his counsel: the terms of the plea agreement required the Second Amended Information, filed pursuant to that agreement, to only contain the DUI charge. Nothing else referred to by the Defendant would have any such effect on what the Second Amended Information was allowed to contain – only the plea agreement. In fact, according to the Defendant, in absence of a plea agreement, the only valid restriction on the contents of the Second Amended Information would have been been

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[8] Defendant cites *All Star Bail Bonds, Inc., v. Eighth Judicial District Court*, 130 Nev. 419 (2014) for the proposition that parties are presumed to contract with reference to existing statute and therefore, the parties contracted with reference to NRS 173.095. As explained above, this argument is irrelevant because NRS 173.095 is not exclusive.

NRS 173.095; but that statute certainly did not force the State to *dismiss* a count that had already been validly filed.

Therefore, Defendant has already conceded that the Second Amended Information was filed as a term of the plea agreement, and that the agreement required it to only contain the DUI (as opposed to the dismissal of count 2 being unconditional and for no reason). Having again spoken out of both sides of his mouth, Defendant defeats his own argument. This concession is also consistent with page 1 of the plea agreement, which provides that Defendant was to plead guilty "as more fully alleged in the charging document attached hereto as Exhibit '1'." That exhibit was the second amended information. No reasonable person would read this language and believe the State was striking count two for absolutely no reason.

Perhaps even more compellingly, however, the transcript itself of the plea hearing establishes that the Defense was explicitly aware that the dismissal was part of the exchange. Page three of that transcript provides that it was Defense counsel, not even the State or the Court, who stated, "This is going to be a guilty plea by way of the *Alford* decision . . . to Count 1, DUI with substantial bodily harm. *Dismiss remaining counts.* We're going to stipulate to a sentence of four to ten years in the Department of Corrections." Immediately after that statement, also on page three of the transcript, and after counsel for the State agreed with defense counsel's statement of the negotiations, the Court asked, "is that your understanding of the negotiations, Mr. Banka?" *and the Defendant replies, "Yes."* (Emphasis added.)[9] There is no possible way to interpret these statements by both the Defendant and his counsel without a recognition that the Defendant knew that the dismissal of count two was part of the bargain between the parties. In fact, not only was it part of the bagain, but it was the first and arguably most obvious and most up front portion of the bargain. Defendant knew exactly why Count 2 was being dismissed, and he should not be able to game the system by now feigning ignorance.

Because dismissal of count two was, in fact, a term of the contract, the Defendant knew it was part of the contract, and rescission of the contract entitles the State to undo the portions

[9] Defendant even cites to the portions of the transcript immediately after these statements (and which appear on the same page, at least when viewing the transcript formatted as filed in Odyssey on August 1, 2019), when discussing contents of the Second Amended Information, but conveniently leaves this part out.

it had already performed, the State is entitled to reinstate the original charges, which requires filing of the Third Amended Information.

4. Defendant in No Way Complied With His End of the Bargain

Even analyzing the issue as whether the Defendant materially breached the agreement by withdrawing his guilty plea, a material breach absolutely occurred. Despite now having unraveled the agreement, having had his sentence and conviction vacated, and having been allowed to (at some point) proceed to trial more than four years after the crime was committed, Defendant claims he has still fulfilled everything he contracted to do. Thus, he later claims, it is the State which will breach the (rescinded) plea agreement by resintating the Leaving the Scene charge. Defendant's belief is apparently that all he contracted to do under the agreement was to "plead guilty" (apparently meaning to singularly engage in the act of undergoing a plea canvas and filing a plea agreement) and to waive various constitutional and appellate rights. Sentencing, the Defendant proclaims, was never part of the bargain.

Even if Defendant were correct that the only requirement was for him to waive his rights (other than going through the motions of pleading guilty one time), he has undeniably breached that term. Based on the rest of his argument, Defendant is presumably claiming that he only needed to waive his rights the one time. However, this is in clear disagreement with the words on page 4 which read, "by entering my plea of guilty, I understand that I am waiving and *forever giving up*" the rights that follow. (Emphasis added.) Surely the Defendant will agree that as a result of the withdrawal, he is re-entitled to remain silent, to force the State to prove the charge(s) beyond a reasonable doubt, and to cross-examine witnesses. Yet there is no way to reconcile this with the contract which by its plain language required the Defendant to "*forever*" give up those rights with respect to this case. Where the language of a contract is clear and unambiguous, "the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739 (2015). There is no reasonable way to interpret the word "forever" than to mean that Defendant must not regain these constitutional rights with respect to the case in which he was pleading guilty. The language is not ambiguous. Further, this must be considered a material breach because there is no reason for the State to take actions like

limiting its available positions at sentencing, or dismissing or amending charges, if the Defendant could force the State to prove the charge(s) at trial anyway.

Even putting the waiver of rights aside, however, Defendant also agreed to plead guilty and has no longer done so. "The objective of interpreting contracts is to discern the intent of the contracting parties." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739 (2015) (internal quotation marks omitted). "When interpreting a contract, this court look[s] to the language of the agreement and the surrounding circumstances in order to discern the intent of the contracting parties." *Washoe County School District v. White*, 133 Nev. 301, 303-04 (2017). *See also Mizrachi v. Mizrachi*, 132 Nev. 666, 677 (2016) ("[A]s in contract interpretation cases," a court interpreting an agreement-based child custody decree "must consider the intent of the parties in entering into the agreement"); *Davis v. Beling*, 128 Nev. 301, 321 (2012) ("The objective in interpreting an attorney fees provision, as with all contracts, is to discern the intent of the contracting parties"; internal quotation marks omitted). Despite this standard, Defendant appears to claim that all he had to do to comply with the agreement was to singularly plead guilty, at some point in the case, and he further claims that he "did not contract to go to prison" (i.e., that ultimately serving a sentence also was not part of the deal).

Initially, the *Dutton* case, which the Nevada Supreme Court cited in *Sweat*, and which the Defendant completely ignored in his opposition, explains why this position is unreasonable and mere gamesmanship. The defendant in *Dutton*, in claiming he had not committed a material breach, argued that "he never expressly promised that he would not withdraw his federal plea." *Dutton*, 970 P.2d at 928. This is functionally identical to the Defendant's argument herein that he "did not contract to go to prison." The *Dutton* court defined a "material breach" as one that defeats "the reasonable expctations of the parties," and found that Defendant had materially breached his agreement. *Id.* at 929. The *Dutton* court recognized that Defendant's claim "simply does not make sense," because it "fails to suggest what benefit the State might gain from [Defendant's] entry of a federal plea unless [Defendant] was actually convicted and sentenced in federal court. That is, there appears to be no reason why the State would agree to reduce its charge against [Defendant] in exchange for [Defendant's] entry of a

guilty plea . . . if the State believed that [Defendant] was then free to withdraw the federal plea." *Id.* Despite the precise context in *Dutton* being the entering and then withdrawal of a separate federal plea, the logic equally applies to the entry of any plea agreement: The State has no reason to bargain for procedural formalities (e.g., entering a guilty plea) without simultaneously bargaining for the naturally-expected results of those formalities (i.e., sustaining a criminal conviction and serving a sentence).

It is also unreasonable for Defendant to claim that he did not believe sentencing was part of the deal simply because the court issues the sentence without itself being a party to the contract. The plea agreement may not guarantee a *particular sentence*, but it does guarantee that the Defendant will *be sentenced.* Page 3 of the plea agreement in the instant case even provides that "I know that my sentence is to be determined by the Court within the limits prescribed by statute." Therefore, the Court has discretion, but only within the limits prescribed by law. The Defendant must still be sentenced, to some sentence, as the parties must have known and expected. And, in fact, in this case the Defendant *did* "contract to go to prison," because in addition to generally discussing a sentence being imposed, page 2 of the plea agreement specifically provided that "I understand that *as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me to imprisonment* in the Nevada Department of Corrections for a minimum term of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years." (Emphasis added.)

Therefore, as with the waiver of rights, undoing the conviction and the imposition of sentence in this case defeated the State's expectations and the State's main reasons for entering into the plea agreement. Further, the Defendant surely understood this, both based on the logic in *Dutton* as well as based on the express language in the plea agreement. Defendant contracted to be convicted and sentenced, and any claim that the Defendant only agreed to "plead guilty" one, at some point in the proceedings, would be similar to arguing that a buyer has still "paid" a seller for merchandise after reaching into the seller's pocket and taking the money back. No reasonable defendant would have interpreted the plea agreement in this way. Defendant is in breach and the State must be allowed to return to its position pre-plea.

G. Defendant Has No Response to the State's Policy Argument

In its motion, the State lays out a number of policy considerations and why they would be violated if the Defendant were allowed to play the system as he is attempting to do, by precluding the State from reinstating the original charges upon withdrawal of guilty plea and rescission of the plea agreement. Specifically, Defendants would be encouraged to play games of "gotcha" with plea agreements and the filing of amended informations based thereupon. Defendants who intend to plead guilty (or who have already plead guilty) would be encouraged to drag cases out until they are past the statute of limitations, and then try to withdraw their plea to place themselves in a better position than pre-plea – possibly years after the fact. And the State would be less inclined to negotiate cases given the high potential for unfair prejudice, even if the Defendant withdraws his plea presentencing (because an amended information potentially charging fewer or less serious offenses will still have been filed by that point). These results would occur despite failing to serve the policies underlying the existence of statutes of limitation, particularly in the instant case in light of the Defendant's choice to plead guilty coming on the first day of what would have been his trial.

Defendant's rebuttal to this argument consists of a single paragraph with five lines that amount to, "all the State has to do is include a reinstatement clause." But although the State's position stands with respect to reinstatement clauses, the question remains as to how the State is to enforce such a clause where the contract is rescinded by Defendant, as occurs in plea withdrawal, rather than breached (and potentially rescinded by the State or the Court). If the State somehow cannot reinstate original charges simply based on the law of rescission, it could arguably be left without a reinstatement clause to enforce once defense rescission has occurred. Yet in the wake of his flawed argument, Defendant never actually disputes that his position will lead to absurd consequences that are against public policy. The Court should not follow his novel and dangerous position regarding procedure following plea withdrawal.

For all of the foregoing reasons, the State should be allowed to reinstate the original charges, and should be allowed to file the amended information to accomplish this, pursuant to *Lewis*, *Dutton*, contract principles, and all the rest of the State's cited legal authority.

H. In the Alternative, The Court Can Strike the Second Amended Information

If the Court still is not convinced, for any reason, that it should allow the State to file a Third Amended Information, then contract principles would make striking (or perhaps, "withdrawing") the Second Amended Information appropriate. The Defendant claims the State failed to support this section of its original motion, but the only way he could claim this is if he did not read that section.[10] Defendant thereby failed to respond to this argument.

As the State's motion explained, if Defendant rescinds his plea agreement, he must return the benefits gained from it. As Defendant concedes (see above), one of those benefits was the filing of the Second Amended Information. The only way to accomplish the "return" of this benefit, other than by filing a Third Amended Information undoing the changes made by the Second Amended Information, is to simply strike the information that had been filed with the rescinded plea agreement. This would thereby return to the charges as set out in the most recent charging document before the plea agreement – the first amended information. Also, because the first amended information was filed on July 10, 2018, it was thus well within both the limitations periods as well as the 15 days provided for by NRS 173.035. Simply striking the Second Amended Information would therefore also resolve any concerns with respect to those issues – if, that is, the Court were not already persuaded by the State's extensive argument above and in its original motion that they are not issues to begin with.

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[10] "The only reason the State filed a second amended information dropping Count 2 for the Leaving the Scene was in consideration of the Defendant's guilty plea agreement. Pursuant to contract principles regarding rescission, the State should be allowed to rescind all benefits it conferred upon the Defendant pursuant to that agreement. . . ." *Motion* at 12.

III. CONCLUSION

For each of the foregoing reasons, the State requests the Court reject the arguments in the Defendant's opposition, grant its motion, and allow the State to file the Third Amended Information. Solely in the alternative, the State requests the Court allow it to move to strike the second amended information as having been part of a now-rescinded plea agreement.

Dated this 1st day of April, 2021.

Steven B. Wolfson
Clark County District Attorney
Nevada Bar #001565

By _____
ADAM B. OSMAN
Deputy District Attorney
Nevada Bar #013924

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing State's Reply To Defendant's Answer To The State's Motion to File Third Amended Information Or, In The Alternative, To Strike Second Amended Information was made this _____ day of April, 2021, by electronic transmission to:

MICHAEL PARIENTE, ESQ.
EMAIL: michael@parientelaw.com

JOHN WATKINS, ESQ.
EMAIL: johngwatkins@hotmail.com

By: _____
Theresa Dodson
Secretary for the District Attorney's Office

16FH2036X/AO/td/VCU

REP
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. JACK BANKA, Defendant	Case No: **C-18-333254-1** Dept No: **XXIII**

DEFENDANT'S SURREBUTTAL TO THE STATE'S DISENGENUOUS READING OF NRS 173.035 TO JUSTIFY ITS ILLEGAL FILING OF THE JULY 10, 2018 AMENDED INFORMATION AND THE STATE'S ERRONEOUS RELIANCE ON "JOINDER" UNDER NRS 173.115 AND NRS 173.135 TO ILLEGALLY EXPAND NRS 173.095

COMES NOW Defendant, JACK BANKA, through his attorneys, MICHAEL D. PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and files the instant surrebuttal to the State's Reply.

DATED this 7th day of April, 2021.

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I

LAW AND ARGUMENT

A.

THE STATE'S READING OF NRS 173.035 TO JUSTIFY ITS ILLEGAL FILING OF THE JULY 10, 2018 AMENDED INFORMATION IS DISENGENUOUS AND THE STATE'S RELIANCE ON "JOINDER" UNDER NRS 173.115 AND NRS 173.135 TO EXPAND NRS 173.095 IS ERRONEOUS

The State's assertion to this Court that NRS 173.035(1) allows the prosecutor to file an Amended Information in Banka's case is not only erroneous, it is disingenuous. The only amendment allowed to be filed by the State under NRS 173.035(1) is section 4 of that statute. As clearly pointed out in Banka's Answer, section 4 does not apply to his case.

The State conveniently ignores that NRS 173.035(4) is the only exception to NRS 173.095. ("The court shall permit an information **to be amended** pursuant to subsection 4 of NRS 173.035.") (emphasis added.) Equally true, the State has not provided this Court with any statute, other than NRS 173.095 and NRS 173.035(4), expressly allowing amendments of informations. Why? Because there is none!

The prosecutor's assertion that there is no legal difference between an original information and an amended information is not only erroneous, it is again disingenuous. *See*, State's Reply, (SR), p.6, ls.1-2. ("Indeed, by its own language, NRS 173.035 allows the filing of 'an information,' **and even an 'amended information' is still 'an information**.'") (emphasis added.) It should be obvious that an amended information supersedes the original information, thus each are legally different.

Section 1 of NRS 173.035 is limited to the filing of an original information; section 4 of NRS 173.035 is limited to the filing of an amended information. NRS 173.035 does not conflate the two.

The prosecutor's statement ". . . NRS 173.035(3) discusses requirements for 'each' information, further suggesting the statute applies to more than just the filing of a single initial charging document." SR, p.6, ls.2-4. **SECTION 3 OF NRS 173.035 DOES NOT APPLY TO AMENDED INFORMATION - ONLY ORIGINAL INFORMATIONS FILED PURSUANT TO NRS 173.035(1)!** Only section 4 of NRS 173.035 applies to the filing of amended informations.

The State's reliance on "joinder" in NRS 173.115 and NRS 173.135 to expand NRS 173.095 beyond its plain and unambiguous language is erroneous. There is absolutely no mention of amendments in either "joinder" statute.

CONCLUSION

There is absolutely no authority to allow the state to file a third amended information in Banka's case. Equally true, NRS 173.035(4) does not allow the State to file its previously labeled second amended information. As a result the second amended information must be dismissed as a fugitive document.

DATED this 7th day of April, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2021, that I electronically filed the foregoing Surrebuttal with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Adam Osman – Chief Deputy District Attorney
adam.osman@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101

Chris Barden, an employee
of Pariente Law Firm, P.C.

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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. JACK PAUL BANKA, Defendant.	CASE#: C-18-333254-1 DEPT. XXIII

BEFORE THE HONORABLE JASMIN LILLY-SPELLS,

DISTRICT COURT JUDGE

WEDNESDAY, APRIL 28, 2021

RECORDER'S TRANSCRIPT OF HEARING: DECISION

APPEARANCES:

For the State: ADAM OSMAN, ESQ.
Deputy District Attorney

For the Defendant: MICHAEL D. PARIENTE, ESQ.
JOHN WATKINS, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

Las Vegas, Nevada, Wednesday, April 28, 2021

[Case called at 1:58 p.m.]

MR. PARIENTE: Good afternoon, Your Honor, Michael Pariente and John Watkins for Mr. Banka.

THE COURT: Good afternoon, Mr. Pariente.

MR. OSMAN: Adam Osman for the State, Judge.

THE COURT: Good afternoon, Mr. Osman.

Thank you all. This matter is on for a decision with regards to the motion to file Third Amended Information or in the alternative to strike Second Amended Information. The State's motion to file Third Amended Information or in the alternative to strike Second Amended Information is going to be granted. The State is given lead to file the Third Amended Information. The Court finds under *State versus Lewis*, *125 Nevada 132*, 2008 case, that the State may proceed on the original charges.

Additionally, the Court finds that *Sweat versus Eighth Judicial District Court, 133 Nevada 602*, a 2017 case, is instructive. That is the case that the State was allowed to reinstate the original charges even in the face of double jeopardy. Additionally, the Court believes that contract principles require the parties to be returned to the plea, the pre-plea position under *State versus Crockett*, *117 Nevada 838*, as well as under *Bergstrom versus Estate of DeVoe*, *109 Nevada 575.*

I did review the *Benitez* case as well, as stated in the opposition. I don't find here that the Defendant is prejudiced by the original charges here. I think that the contract principles weigh in the fact

of the fact that here the State did not receive their benefit of the bargain by the plea being withdrawn and so the parties must be returned to that pre-plea position.

I'm going to ask that Mr. Osman prepare the order inclusive of findings of fact and conclusions of law. Please run it by Mr. Pariente as to approve as to form in contents.

MR. OSMAN: I'll do so, Your Honor. Just [indiscernible] clarification. If you can just repeat mentions the *Crockett* case. And then, did you have a cite for that?

THE COURT: 1-1-10, Nevada 8-3-8. And then, did you get the *Bergstrom* case?

MR. OSMAN: No, I did not.

THE COURT: *Bergstrom versus Estate of DeVoe, 109 Nevada 575*, a 1993 case. Thank you.

Any additional requests --

MR. PARIENTE: Thank you.

THE COURT: -- from either counsel?

MR. PARIENTE: Your Honor, at some point, what we -- I'm sure that a trial date will need to be set; however, Mr. Watkins and I intend to appeal the Court's ruling today probably by a Writ of Mandamus. So what I'd like to do is perhaps if we could have -- could we have 30 days to file our brief? Or -- cause I know the State is going to need time to do the order. What's the Court's preference?

THE COURT: Are you requesting a stay, or to do the writ?

MR. PARIENTE: Yes. Yeah, I think that would be -- that

would be appropriate if we could request a stay because we will definitely have a writ filed forthwith.

THE COURT: State, do you wish to be heard on the request for a stay?

MR. OSMAN: Your Honor, I mean this is an out of custody waived case, it's probably not going to be heard for a little while anyway. Eventually, you know, obviously the State needs to now file the Amended Information, and then my hope was that we were going to be able to get an arraignment completed and get a trial date set at least potentially knock this case out, you know, for two of them. But it's up to the Court eventually.

THE COURT: Okay, the motion for stay will be granted.

MR. PARIENTE: Thank you, Your Honor.

THE COURT: So we do need the order. I guess we'll need a status check, I guess, so we kind of see where we're at with the stay. Parties agree?

MR. PARIENTE: Yes, Your Honor.

THE COURT: Okay, so let's go -- do you think 60 days is sufficient, or what are your thoughts?

MR. PARIENTE: I'm sure 60 days would be fine, Your Honor, for both parties.

THE COURT: We'll do that.

THE CLERK: June 30th at 12:30.

THE COURT: Thank you.

MR. PARIENTE: All right. Thank you, Your Honor. I

appreciate your time.

THE COURT: Mr. Osman, when you guys submit the order, please do it in both Word and PDF versions, okay?

MR. OSMAN: Okay, understood. Do you want to just -- I guess I never -- well, never mind, I'll find out. I was going to ask about the filing system and the email inbox, but my staff should probably know about that.

THE COURT: It's dc 23 inbox with the same ending hook.

MR. OSMAN: Got it.

THE CLERK: Judge, and is the stay 60 days, or is the stay 30 days and then the 60 days status check?

THE COURT: I think the stay is ongoing.

THE CLERK: Okay.

THE COURT: And so otherwise it's a status check.

Thank you.

Did you already give them the date?

THE CLERK: Yeah, June 30th at 12:30.

THE COURT: Thank you. We'll see you that day.

MR. PARIENTE: Thank you, Your Honor.

MR. OSMAN: Thank you.

MR. PARIENTE: I appreciate it. Thank you. Bye-bye.

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THE COURT: Bye.

[Hearing concluded at 2:04 p.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Maria L. Garibay

MARIA L. GARIBAY
Court Recorder/Transcriber

Electronically Filed
07/23/2021 6:32 PM
CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,	)	
	)	Case No. C-18-333254-1
PLAINTIFFS,	)	Dept No. XXIII
-vs-	)	
	)	
JACK PAUL BANKA, #8353273	)	
	)	
DEFENDANTS.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: APRIL 28, 2021
TIME OF HEARING: 12:30 PM

THIS CAUSE having come on for hearing before the Honorable JASMIN LILLY-SPELLS, District Judge, on the 28 day of April, 2021, the Petitioner being present, represented by Michael Pariente, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ADAM B. OSMAN, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

I. FINDINGS OF FACT

On December 1, 2016, Defendant was arrested for DUI Resulting in Substantial Bodily Harm and Leaving the Scene of an Accident with Injury. On January 24, 2018, the State filed an amended complaint charging the Defendant with Count 1, Driving Under the Influence Resulting in Substantial Bodily Harm (Category B Felony – NRS 484C.110,

Jasmin Lilly-Spells
DISTRICT JUDGE

DEPARTMENT XXIII

484C.430), and Count 2, Leaving the Scene of an Accident with Injury (Category B Felony – NRS 484E.010). On June 28, 2018, Defendant's preliminary hearing proceeded. The Justice of the Peace found probable cause and ordered the Defendant to answer to both charges in the District Court. On July 9, 2018, the State filed a criminal Information only charging Defendant with Driving Under the Influence Resulting in Substantial Bodily Harm. On July 10, 2018, the State filed an Amended Information in open court charging both DUI Resulting in Substantial Bodily Harm and Leaving the Scene of an Accident with Injury.

On June 24, 2019, Defendant appeared with his counsel on the first day of jury trial and plead guilty pursuant to the *North Carolina v. Alford* decision to one count of Driving Under the Influence Resulting in Substantial Bodily Harm and the State agreed to dismiss the Leaving the Scene of an Accident with Injury charge. A guilty plea agreement and a Second Amended Information (interlineated to remove Count 2) were filed the same day.

On November 15, 2019, Banka filed a presentence Motion to Withdraw Guilty Plea requesting that he be allowed to withdraw his Alford plea of guilty. On December 4, 2019, the District Court denied the motion and proceeded to sentencing. Banka appealed the court's denial to the Nevada Supreme Court. The Supreme Court granted the appeal and found that Defendant's guilty plea was not knowingly entered into because he was not told his plea agreement carried a minimum fine of $2000. The Supreme Court reversed the judgment of conviction and remanded for further proceedings. Remittitur issued on January 6, 2021.

Thereafter, the State filed a Motion to File Third Amended Information Or, In the Alternative, To Strike Second Amended Information, seeking leave to reinstate the charge that had been dismissed pursuant to the guilty plea agreement. The Court heard oral argument on April 18, 2021, and on April 28, 2021. For reasons hereinafter stated, this Court grants the State's request to file a Third Amended Information.

II. CONCLUSIONS OF LAW

Good cause appearing,

Jasmin Lilly-Spells
DISTRICT JUDGE

DEPARTMENT XXIII

THIS COURT FINDS that once the motion to withdraw was granted, the original agreement was not fulfilled and therefore the plea was vacated. *See 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) and *Sweat v. Eighth Judicial District Ct.*, 133 Nev. 602, 403 P.3d 353 (2017) (concluding that the State may proceed on the original charges when a district court grants a presentence motion to withdraw plea).

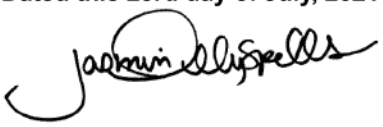
THIS COURT FURTHER FINDS that contract principles require the parties to be returned to the pre-plea position, that the State did not receive their benefit of the bargain by the plea being withdrawn and, therefore, the parties must be returned to their pre-plea positions. *See State v. Crockett*, 110 Nev. 838, 877 P.2d 1077 (1994) and *Bergstrom v. Estate of DeVoe,* 109 Nev. 575, 854 P.2d 860 (1993).

THIS COURT FURTHER FINDS that Banka was not prejudiced, thus *Benitez v. State,* 111 Nev. 1363, 904 P.2d 1036 (1995) is inapposite.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the State's Motion to File Third Amended Information Or, In the Alternative, To Strike Second Amended Information is hereby GRANTED. The State is given leave to file the Third Amended Information.

Dated this 23rd day of July, 2021



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Jasmin Lilly-Spells
District Court Judge

Jasmin Lilly-Spells
DISTRICT JUDGE
DEPARTMENT XXIII

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DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-18-333254-1
vs	DEPT. NO. Department 23
Jack Banka	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/23/2021

District Attorney's Office	motions@clarkcountyda.com
Chris Barden	legal@parientelaw.com