PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

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.: 83381

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

REPLY TO THE STATE'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE A WRIT OF MANDAMUS

COMES NOW Petitioner, JACK BANKA (being in constructive custody and unlawfully restrained by his liberty by Sheriff Joseph Lombardo) , through his counsel, MICHAEL D. PARIENTE, ESQUIRE. with JOHN G. WATKINS, ESQUIRE., (OF COUNSEL), hereby files a Reply pursuant to this Court's "ORDER DIRECTING ANSWER" issued September 10, 2021.

DATED this 20th day of October, 2021.

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469

JOHN G. WATKINS, ESQ., OF COUNSEL
Nevada Bar No. 1574
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Petitioner

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

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

1. Your Declarant is a duly licensed Attorney at Law in the State of Nevada;
2. Your Declarant represents JACK BANKA on his Petition for Writ of Habeas Corpus / Mandamus;
3. Your Declarant verifies that the facts for the Petition and Reply is within the knowledge of your Declarant;
4. Your Declarant believes that Judge Lilly-Spells allowing the State to file a Third Amended Information adding a charge which was not contained in the Second Amended Information sought to be amended is an abuse of discretion as a matter of law. Additionally, it was an abuse of discretion for the district court to allow Banka to be prosecuted for "Leaving the

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Scene" which had been barred by the statute of limitations. Additionally, the "Leaving the Scene" was never lawfully before the district court;

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

FURTHER YOUR DECLARANT SAYETH NAUGHT

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

Executed on this 20th day of October, 2021.

MICHAEL D. PARIENTE, ESQ.

BANKA'S OBJECTION TO THE STATE'S "STATEMENT OF FACTS" AND THE INCLUSION OF THE PRELIMINARY HEARING TRANSCRIPT IN THE STATE'S APPENDIX

The statement of facts must be limited to "**facts relevant to the issues submitted for review**. . . ." NRAP 28(a)(8). (emphasis added.) Banka's issues before this Court are legal, not factual. The State's conduct of submitting irrelevant and emotionally prejudicial facts is a routine practice which should not be condoned by this Court. Therefore, the State's "Statement of Facts" should be stricken.

The attachment of the preliminary hearing transcript is irrelevant to Banka's legal issues and serves nothing more than to prejudice this Court. Therefore, the preliminary hearing transcript should be stricken as well.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

BANKA'S REPLY TO FOOTNOTES 1 AND 7 OF THE STATE'S ANSWER

Footnote 1:

Banka included the Criminal Complaint in his Appendix which was provided to Banka by the State on Banka's request for discovery. Now the State objects to what it provided to Banka – this is nothing more than "the pot calling the kettle black." The State's issue is moot because the State included a file stamped copy of the Criminal Complaint in its Appendix, RA, 1-2. Banka provided a true and correct copy of the Criminal Complaint which is identical to the one provided by the State.

The State's objection to Banka's "First Guilty Plea Agreement" (PA, 14-21) because it "lacks a file stamp and there is no record of this document being filed in the district court" is no valid objection at all. NRAP 30(g)(1) is not limited to filed documents but rather "**true and correct copies of the papers in the district court file**." (emphasis added.) The State's Answer refers to the first GPA, which was obviously before the district court. State's Answer, p. 3-4. The State wants to get rid of Banka's first GPA because Exhibit 1 does not mention the "Leaving the Scene" charge but rather contains only the DUI charge.

Footnote 7:

Banka's failure to provide a copy of the plea transcript was inadvertent. There is no harm to the State because the State has included the plea transcript in its Appendix at ps. 9-20.

STATEMENT OF THE CASE

Petitioner JACK BANKA (Banka) filed a petition for writ of habeas corpus or in the alternative a writ of mandamus on August 17, 2021 challenging the lower court's order allowing the State to amend the Second Amended Information adding the additional and different offense of "Leaving the Scene" (Category B felony – NRS 484E.010). The "Leaving the Scene" had been unconditionally dismissed by the State resulting in the expiration of the statute of limitations. On September 10, 2021, this Court issued an "ORDER DIRECTING ANSWER" to the State "to address the propriety of writ relief, in addition to addressing the merits of the Petition. . . ." Additionally, the Court ordered that "Petitioner shall have 14 days from service of the answer to file and serve a reply." This is Banka's reply.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

ISSUES BEFORE THE COURT

1. **THE APPROPRIATE REMEDY FOR BANKA'S CHALLENGES IS A WRIT OF HABEAS CORPUS.**

2. **THE "LEAVING THE SCENE" CHARGE WAS UNCONDITIONALLY DISMISSED, THEREBY LIFTING THE TOLLING OF THE STATUTE OF LIMITATIONS.**

3. **AT THE TIME THE DISTRICT COURT ALLOWED THE STATE TO FILE ITS THIRD AMENDED INFORMATION TO ADD THE "LEAVING THE SCENE" OFFENSE, THE STATUTE OF LIMITATIONS HAD EXPIRED ON THE "LEAVING THE SCENE" OFFENSE.**

4. **ALLOWING THE AMENDMENT TO ADD THE ADDITIONAL AND DIFFERENT OFFENSE OF "LEAVING THE SCENE" VIOLATES NRS 173.095(1).**

5. **THE AMENDED INFORMATION FILED JULY 10, 2018 WAS IN VIOLATION OF NRS 173.095, THUS BEING NOTHING MORE THAN A "FUGITIVE" DOCUMENT HAVING NO LEGAL FORCE OR EFFECT WHATSOEVER.**

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

I

LAW AND ARGUMENT

A.

A WRIT OF HABEAS CORPUS IS THE APPROPRIATE LEGAL REMEDY TO REVIEW THE ILLEGAL RESTRAINT OF BANKA'S LIBERTY – NOT MANDAMUS

a. Requiring Banka to seek review by Mandamus contradicts *Shelby, infra*, and operates to illegally suspend the writ of habeas corpus.

Extraordinary relief is unavailable when the defendant has a plain, speedy and adequate remedy in law. NRS 31.270; NRS 34.330:

The State readily admits that "a writ of mandamus will only issue when the Petitioner has no plain, speedy and adequate remedy at law." State's Answer, ps. 8-9. The State's assertion that Banka's request for relief in this Court "should be treated as, and the State construes it as, a request for a writ of mandamus" (State's Answer, p.6) ignores that a writ of habeas corpus is a plain, speedy and adequate remedy at law. *See, Shelby v. Sixth Jud. Dist. Ct*., 82 Nev. 204, 207, 414 P.2d 942 (1996) (". . . the availability of habeas relief precludes prohibition.") Since the writ of prohibition "is the counterpart of the writ of mandate," *Shelby* applies to a writ of mandamus under NRS 34.320 as well. Banka, under *Shelby*, is not legally entitled to seek relief by the extraordinary writ of mandamus. The State never addressed *Shelby* which was cited by Banka

in his Petition. Banka's only remedy is through a writ of habeas corpus filed in this Court.[1]

However, if Banka's review was limited to Mandamus he would still be entitled to relief as well. The lower court's decision to allow the State to amend the Second Amended Information which charged a DUI only, to add a "different or additional offense" of "Leaving the Scene" is an abuse of discretion. *See again, Green v. State*, 94 Nev. 176, 177, 576 P.2d 1123 (1978). *Green* also holds that an abuse of discretion occurs if "substantial rights of the defendant are prejudiced" *Id*., 94 Nev. at 177. Allowing an amendment in violation of the statute of limitations prejudices Banka's substantial rights not to be prosecuted on the "Leaving the Scene" charge.

***NRAP 22 is inapplicable*:**

The State's reliance on NRAP 22 is without merit. It would be an act of futility (and potentially sanctionable) to file a writ of habeas corpus in district court challenging a decision of that district court which had already been made. Equally true, this Court lacks jurisdiction to hear an appeal from a lower court's denial of a writ of habeas corpus in criminal cases, except post-conviction habeas

1. *Kussman v. District Court*, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980) should be revisited by this Court in light of *Shelby*.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

writs. *See, White v. Warden*, 96 Nev. 634, 614 P.2d 536 (1980); *Gary v. Sheriff, Clark County*, 96 Nev. 78, 605 P.2d 212 (1980).

***Habeas relief is not limited to probable cause challenges*:**

The State's attempt to limit writs of habeas corpus filed under NRS 34.360 to probable cause challenges ignores the plain language of the statute. NRS 34.360 states,

> Every person unlawfully committed, detained, confined or restrained of his or her liberty, **under any pretense whatever**, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint. NRS 34.360.

(emphasis added.)

Banka's challenge before this Court that his liberty is unlawfully restrained by the unlawful prosecution of the "leaving the scene" offense is cognizable under NRS 34.360.

***Limiting Banka's review in this Court to mandamus operates to unlawfully suspend writs of habeas corpus*:**

This Court has previously relied on *Kussman v. District Court*, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980) as authority for precluding a petitioner from seeking review through an original habeas proceeding in this Court, limiting review to mandamus. In light of *Shelby*, *supra*, it would appear that *Kussman* is misplaced and should be revisited. *Kussman* precluded this Court from reviewing a district court's denial of a habeas corpus petition by appeal. Appeals and writs of habeas corpus are mutually exclusive remedies in the

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

ordinary course of law. *Shelby*, *infra*, 82 Nev. at 207. (". . . the writ of habeas corpus is the plain, speedy and adequate remedy. . . ." in law.)

Appeals are statutory remedies; writs of habeas corpus are constitutional remedies. There is no constitutional right to an appeal. *Gary v. Sheriff*, 96 Nev. 78, 79, 605 P.2d 212 (1980); *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133 (1990). Writs of habeas corpus are constitutionally vested. Nev. Const., art. 6, sec. 4. *See also*, Gunderson's and Batjer's dissent in *Kussman*. (". . . I note that our original jurisdiction in habeas corpus, mandamus and prohibition does not derive from statute. . . [i]t is directly vested by the Nevada Constitution, Art. 6, § 4.") *Id*., 94 Nev. at 546-547. The Legislature can limit or abolish appeals but cannot limit or abolish this Court's original jurisdiction, vested in Art. 6, Sec. 4 of the Nevada Constitution, to issue writs of habeas corpus or deny Banka's constitutional right to prosecute a habeas corpus petition under NRS 34.360 in this Court.

A defendant's right to prosecute a writ of habeas corpus in this Court "shall not be suspended unless . . . .," the exclusion is inapplicable in Banka's case. Nev. Const., art. 1, sec. 5. *See also, Grego v. Sheriff*, 94 Nev. 48, 574 P.2d 275 (1978) ("Any attempt by the Legislature to abolish habeas corpus is prohibited by the United States Constitution and the Nevada Constitution.") *Id*., 94 Nev. at 49.. Such an attempt would also run afoul of the constitutional

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

doctrine of the separation of powers. Cf. *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967).

It is uncontroverted that this Court has original jurisdiction to issue writs of habeas corpus. Nev. Const., art. 6, sec. 4. ("The court [supreme court] shall also have power to issue writs of . . . *habeas corpus*. . . .") (italics original.) Thus, *Kussman* is not authority, nor could it be, to remove this Court's original jurisdiction to issue writs of habeas corpus. The Legislature cannot impair the efficacy of the writ of habeas corpus, which removal of this Court's original jurisdiction would surely do. Clearly, removing this Court's original jurisdiction to issue writs of habeas corpus "alters the scope" as well as the efficacy of the habeas writ. *See, Grego, supra,* 94 Nev. at 49. Therefore, this Court's reliance on *Kussman* is misplaced and should be revisited.

Any attempt by the Legislature to remove this Court's original jurisdiction to issue writs of habeas corpus would be nothing short of suspending the rights of a writ of habeas corpus, a violation of Art. 1, Sec. 5 of the Nevada Constitution. ("The privilege of the writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion the public safety may require its suppression.") *See*, Gunderson's, J dissent in *Kussman*. ("Thus, any attempt by the Legislature to restrain our jurisdiction in these matters [original jurisdiction in habeas corpus] would be highly suspect.") *Id*., 86 Nev. at 547.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

This Court in *Grego, supra*, held that the Legislature implementation of reasonable statutory requirements, such as the 21-day rule for filing and the waiver of the 60-day limitation for bringing the accused to trial, "does not constitute a suspension of habeas corpus." *Id*., 94 Nev. at 49. But, *Grego* also noted that the antisuppression clause is not violated "so long as the traditional efficacy of the writ is not impaired." *Id*., 94 Nev. at 49. The reason for the writ of habeas corpus was succinctly stated in *Shelby v. Sixth Jud. Dist. Ct.,* 82 Nev. 204, 414 P.2d 942 (1966).

> It is fundamentally unfair to require one to stand trial unless he is committed upon a criminal charge with a reasonable or probable cause. No one would suggest that an accused person should be tried for a public offense if there exists no reasonable or probable cause for trial. **Our constitution and statute recognize this principle of fairness and provide for its protection by the writ of habeas corpus**. Nev. Const. Art. 1, § 5, commands that the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety may require its suspension; and NRS 34.500(7) explicitly authorizes discharge from custody or restraint if one is not committed upon a criminal charge with reasonable or probable cause.

Id., 82 Nev. at 207-208. (emphasis added.)

The removal of the constitutional right to seek relief from an illegal restraint of liberty is an illegal suspension of habeas corpus.

The removal of this Court's original jurisdiction to issue writs of habeas corpus is not only unconstitutional, but impairs the efficacy of the writ. Absent review of a writ of habeas corpus in this Court operates in most cases to eliminate review of the merits of a lower court's denial of relief. This Court has

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

admitted that mandamus review "is generally disfavored," *citing Kussman*. More telling is the established law which finds any material violations during the case is deemed "harmless" or "cured" by a jury verdict of guilty. *See, Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) ("Finally, that the jury convicted [the defendant] under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings."); *see also, Echavarria v. State*, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) ("Any irregularities which may have occurred in the second grand jury proceeding were cured when [the defendant] was tried and his guilt determined under the higher criminal burden of proof."); *Accord*, *United States v. Mechanik*, 475 U.S. 66, 70 (1986). Unlike the statutory requirements attached to the filing of writs of habeas corpus in *Grego*, a removal of this Court's original jurisdiction to issue writs of habeas corpus impairs the efficacy of the habeas writ by altering the scope of a writ of habeas corpus. *See again*, *Grego*, 94 Nev. at 50. *Kussman* and applicable law here are nothing less than a disguised backdoor suppression of the right to a writ of habeas corpus, a violation of Article 1, Section 5 of the Nevada constitution.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

B.

THE STATE'S DISMISSAL OF THE "LEAVING THE SCENE" CHARGE WAS UNCONDITIONAL AS A MATTER OF LAW AND LIFTED THE TOLLING OF THE STATUTE OF LIMITATIONS

a. At the time the lower court allowed the State to re-charge Banka with "Leaving the Scene," the statute of limitations had expired on that charge.[2]

The State's assertion that the setting aside of a defendant's guilty plea ALWAYS allows the State to re-charge the defendant with any dismissed charges is legally incorrect and ignores: (1) that the State can unconditionally dismiss an offense, even pursuant to a plea negotiation, (2) that an unconditional dismissal lifts the tolling of the statute of limitations and (3) that both occurred in Banka.

***Unconditional dismissal*:**

The State has the authority to dismiss a charge[s] unconditionally at any time and for any reason,[3] even pursuant to a plea negotiation. There are no statutes that require a dismissal of an offense to be conditional. If the State desires to condition a dismissal on the happenings of future events, the State can

2. The statute of limitations expired on the felony "Leaving the Scene" on December 1, 2019. The re-charging of the "Leaving the Scene" occurred July 23, 2021.

3. There is no legislative prohibition against dismissing a "Leaving the Scene" charge.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

do so but the conditions must be by "contractual" agreement of the parties[4] and the conditions must be set forth in the Guilty Plea Agreement (GPA). *See*, NRS 174.063. (The GPA must "[s]tate the terms of the agreement.")[5] A dismissal of an offense absent conditions in the GPA is an unconditional dismissal.[6] In Banka, there are no attached conditions to the dismissal of the "Leaving the Scene" charge in the record and the GPA never mentions the dismissal, thus the State's dismissal was unconditional. Petitioner's Appendix, 22-33 (GPA); Respondent's Appendix, 9-20 (Plea Transcript). The State's Answer never addresses these salient facts.

As previously pointed out, NRS 174.063 requires that the terms of the plea agreement be set forth in the GPA. Banka's GPA includes a number of conditions regarding Banka's plea to the DUI charge. The GPA states,

> 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

---

4. It is generally held that contract principles apply to criminal plea agreements. *See, State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077 (1994). The terms of the "contract" must be set forth in the "four corners" of the agreement itself. *See also*, NRS 174.063, *infra*. (The GPA must "[s]tate the terms of the agreement.")

5. The State included a number of conditions to Banka's plea which were set forth in the GPA. The State could have easily provided language in the GPA conditioning the dismissal of the "Leaving the Scene" charge as part of the plea agreement itself and providing that any non-compliance of the agreement by Banka would allow the State to re-charge Banka with the dismissed offense – **but they did not do so**. *See also, n.10* in Banka's Petition.

6. It is *ipso facto* that a dismissal of an offense absent expressed conditions, is an unconditional dismissal as a matter of law. Mathematically expressed, A = A.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

> 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.
>
> ***
>
> 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).

GPA at 2-3.

The GPA does not condition the dismissal of the "Leaving the Scene" charge. In fact, the GPA never even mentions the "Leaving the Scene" dismissal! Under these circumstances, it cannot be legally found that the dismissal of the "Leaving the Scene" was part of the plea agreement. *Again see*, NRS 174.063. (The GPA must "[s]tate the terms of the agreement.") The GPA further stated, "Otherwise, I am entitled to receive the benefit of these negotiations **as stated in this plea agreement**." GPA, p.3, ls. 13-14. (emphasis added.) The lack of the GPA to condition the dismissal of the "Leaving the Scene" charge is a benefit to Banka which he is entitled to have enforced by this Court. *Crockett*, states,

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

> While plea agreements are a matter of criminal jurisprudence, most courts have held that they are also subject to contract principles. See, e.g., *United States v. Kinsley*, 851 F.2d 16, 21 (1st Cir. 1988) (using contractual analysis to enforce plea agreement and award "benefit of the bargain"); *United States v Read*, 778 F.2d 1437, 1441 (9th Cir. 1985) ("a plea bargain is contractual in nature and is measured by contract-law standards"), *cert. denied*, 479 U.S. 835 (1986); *United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) ("**plea-bargain's are subject to contract law principles in so far as their application will ensure the defendant what is reasonably do him**"); *United States v Fields*, 766 F.2d 116, 1168 (7th Cir. 1985) ("A plea bargain is a contract.")

Id., 110 Nev. at 842. (emphasis added.)

Even assuming *arguendo* that the dismissal of "Leaving the Scene" was part of the plea negotiation, the State fares no better. There is no language conditioning the dismissal on the future event of Banka being successful on appeal. The State's reliance on Banka's prior counsel's statement "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" is inapposite for two reasons: (1) the statement says nothing about any conditions being placed on the dismissed charge, and (2) the statement cannot be used to usurp and ignore NRS 174.063's requirement that the GPA set forth the terms of the agreement. The State could have easily provided language in the GPA, as it had done with other conditions, conditioning the dismissal of the 'Leaving the Scene" charge as part of the plea agreement and providing that any non-compliance of the agreement would allow the State to re-charge with the dismissed "Leaving the

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

Scene" charge – **but did not do so**. Therefore, the State was legally precluded from re-charging Banka with "Leaving the Scene."

***Statute of Limitations*:**

Statutes of limitations ordinarily begin to run when a crime has been completed. *Campbell v. District Court*, 101 Nev. 718, 722, 710 P.2d 70 (1985), citing *Pendergast v. United States*, 317 U.S. 412, 418 (1943). The filing of a formal accusation tolls the statute of limitations period so long as that charge remains in the charging document.[7] A charge that has been unconditionally dismissed by the State no longer tolls the statute of limitations. Since the dismissal of the "Leaving the Scene" charge in Banka was unconditionally dismissed, the tolling ended upon dismissal. At the time the lower court allowed the State to re-charge Banka with the "Leaving the Scene" charge (April 28, 2021), the statute of limitations had expired by 514 days.

***State's Arguments*:**

The State's assertion that Banka "blatantly misrepresents the record" in regards to the State's unconditional dismissal of the "Leaving the Scene" charge thereby reinstating the statute of limitation, is meritless. Banka has shown this Court that the State's dismissal of the "Leaving the Scene" was unconditional. There were no conditions attached to the dismissal and more

7. Tolling does not extend the statute of limitations time period but rather avoids dismissal of the charge when the limitations period has expired.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

telling, Banka's GPA never mentioned the dismissal of the "Leaving the Scene" charge. It is *ipso facto* that a dismissal of an offense absent expressed conditions, is an unconditional dismissal as a matter of law. If there had been conditions, which there were not, the conditions are legally required to be set forth in the plea agreement. *See again*, NRS 174.063. (The GPA must "[s]tate the terms of the agreement.") It is the State who "blatantly misrepresents the record", not Banka.

If the State wanted to be in a position to re-charge Banka with the dismissal of the "Leaving the Scene" charge if Banka was successful on an appeal, the State could have conditioned the dismissal on those terms. But, the State did not do so. Now, the State in essence wants this Court to "rewrite" Banka's GPA adding the condition which should have been added by the State. Obviously, any "rewrite" would be improper.

C.

THE DISTRICT COURT'S DECISION ALLOWING THE STATE TO FILE A THIRD AMENDED INFORMATION ADDING AN "ADDITIONAL OR DIFFERENT OFFENSE" OF "LEAVING THE SCENE" 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*, 94 Nev. at 177, entitling Banka to relief.

***NRS 173.095(1)*:**

Banka has cogently set forth the law which controls amendments of

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

indictments and informations in his Petition. *See*, ps. 12-16. Summarizing however,[8] amendments of indictments and informations are controlled by NRS 173.095(1) which only allows such amendments "if no additional or different offense is charged." *See also, Jennings v. State*, 116 Nev at 490. The language of NRS 173.095(1) is plain and unambiguous, thus a court cannot go beyond the statute plain meaning. *State v. Lucero*, 127 Nev. at 95; *State, Dep't of Motor Vehicles v. Terracin*, 125 Nev. at 34*; Nat'l Bank v. Germain*, 503 U.S. at 253-254. The legal maxim *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* (the expression of one thing is the exclusion of the other) applies to NRS 173.095(1). *Valenti v. Dep't of Motor Vehicles*, 131 Nev. at 880; *Cramer v. State*, 126 Nev. at 394. The filing of an amended information must comply with NRS 173.095(1), unless Section 3 of NRS 173.095 applies which is does not in Banka.

A valid amendment supersedes the prior information, whether the prior information is an original or amended information, and controls the criminal prosecution. *Randono v. Ballow*, 100 Nev. at 143. The Second Amended Information which Banka pled to only contained the DUI offense. The State admitted, "[a]s Petitioner acknowledges, the Second Amended Information inadvertently included the Leaving the Scene charge, and was removed in open

8. Banka will dispense with full cites of controlling law which were provided in his Petition for reasons of judicial economy.

court via interlineation." Respondent's Answer (RA) at p. 15. The "Leaving the Scene" charge had been unconditionally dismissed, thereby lifting the tolling of the statute of limitations. *See* Banka's Argument B, *supra*. Therefore, since the State's Third Amended Information added an "additional or different offense" (actually, in this case, both) its filing violated NRS 173.095(1). The State's filing also violated the statute of limitations. The lower court's decision allowing the amendment was an abuse of discretion entitling Banka to relief. *Green v. State*, 94 Nev. at 177.

***Statute of limitations*:**

The statute of limitations is a bar to a criminal prosecution when the limitations period has run.[9] The limitations bar is not jurisdictional but rather an affirmative defense. *Hubbard v. State*, 112 Nev. 946, 948, 920 P.2d 991, 993 (1996). However, a person who timely objects cannot lawfully be charged with an offense when the statute of limitations for that offense has expired. *Hubbard*, 112 Nev. at 947. (The statute of limitations affirmative defense "must be asserted in the district court or they are waived.") Banka has

9. Some offenses are an exception to the statute of limitations bar such as sexual assault "committed in a secret manner." *Dozier v. State*, 124 Nev. 125, 128, 178 P.3d 149, 152 (2008). However, even exceptions have limitations periods. *Hautz v. State*, 111 Nev. 457, 462, 893 P.2d 355, 358 (1995). The "Leaving the Scene" offense in Banka is not subject to an exception to the statute of limitations and applies to a three (3) year limitations period. *See*, NRS 171.085(2).

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

challenged the State's re-charging of the "Leaving the Scene" offense on the grounds that the statute of limitations had expired. This Court in *State v. Merolla*, 100 Nev. 461, 464, 686 P.2d 244, 246 (1984) stated, "[m]oreover, criminal statutes of limitations are to be liberally construed in favor of the accused," *citing Toussie v. United States*, 397 U.S. 112, 114-115 (1970).

Statutes of limitations ordinarily begin to run when a crime has been completed. *Campbell v. District Court*, 101 Nev. 718, 722, 710 P.2d 70 (1985), citing *Pendergast v. United States*, 317 U.S. 412, 418 (1943). The filing of a formal accusation tolls the statute of limitations period so long as that charge remains in the charging document.[10] A charge that has been unconditionally dismissed by the State no longer tolls the statute of limitations. Since the dismissal of the "Leaving the Scene" charge in Banka was unconditionally dismissed, the tolling ended upon dismissal.

The criminal charges filed against Banka arose from the driving incident on December 1, 2016, commencing the start of the statute of limitations time period. PA, 3-4; RA, 1-4. The statute of limitations for "Leaving the Scene" is three (3) years from the date of the incident. *See*, NRS 171.085(2). The statute of limitations expired on December 1, 2019. The tolling of the statute of limitations occurred on January 11, 2017, the filing of the Complaint. The

10. Tolling does not extend the statute of limitations time period but rather avoids dismissal of the charge when the limitations period has expired.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

unconditional dismissal of the "Leaving the Scene" charge lifted the tolling of the limitations period. At the time the lower court allowed the State to re-charge Banka with the "Leaving the Scene" charge (April 28, 2021), the statute of limitations had expired by 514 days. Under these circumstances, the re-charging of the unconditional dismissal of the "Leaving the Scene" was unlawful.

***State's Arguments*:**

The State either ignores or fails to understand that a criminal charge can be unconditionally dismissed and in order to avoid an unconditional dismissal, the State must expressly add conditions to its dismissals. There are no conditions attached to the dismissal of the "Leaving the Scene" offense.

The State ignores that the language of NRS 173.095(1) is plain and unambiguous. The statute's language "if no additional or different offense is charged" means what it says. *Nat'l Bank v. Germain, supra*, 503 U.S. at 253-254. (". . . court's must presume that a legislature says in a statute what it means and means in a statute what it says there.") An amendment of an indictment or information which adds an "additional or different offense" is simply not allowed under NRS 173.095(1). The State's reference to "enabling, not disabling" is merely a red herring to divert this Court's focus away from the statute's plain and unambiguous language. Even if "enabling, not disabling" had merit, the definition cited to from *Black's Law Dictionary* shows that NRS

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

173.095(1) is disabling because it "limits or curbs certain rights," namely limits the right to amend indictments and informations without exceptions.

The State has provided no statute that allows an amendment to add the unconditionally dismissed "Leaving the Scene" offense in Banka. Why, there is none.

The State addresses the legal maxim *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* stating ". . . this cannon 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." RA, p.11. Banka agrees. NRS 173.095(1) only allows the State to file an amendment of an indictment or information if the amendment does not add an "additional or different offense." However, the State's Third Amended Information violates NRS 173.095(1). The "Leaving the Scene" is both an additional offense because it is in addition to the DUI in Count 1 and the DUI and the "Leaving the Scene" are different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932).

The State's reference to joinder as being out of harmony with the language of NRS 173.095(1) stating, "[s]urely 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). . . ." is meritless. There are two statutes dealing with joinder of offenses, NRS 173.115 and NRS

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

174.155, neither of which authorize or involve amendments. NRS 173.115(1) states,

> 1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged whether, Felonies or gross misdemeanors or both are:
>
> (a) Based on the same act or transaction; or
>
> (b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The statute involves only one indictment or information. There is absolutely no mention of an amendment to add "two or more offenses."

NRS 174.155 states,

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such a single indictment or information.

Again, there is no authority to amend under NRS 174.155. The procedure is to try both offenses listed in separate informations together. The State's assertion to this Court that joinder involves amending the information to add multiple offenses is not only meritless, it borders on the disingenuous.

The State's attempt to avoid *Jennings, supra*, and *Green, supra*, by asserting that NRS 173.095(1) does not apply "to reinstate[ing] the original charges following a guilty plea" lacks merit for several reasons. The State ignores that the dismissal of "Leaving the Scene" was unconditional and not

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

part of (never mentioned) in Banka's GPA. There is no exception in NRS 173.095 of guilty pleas. The only exception to NRS 173.095(1) is Section 3 of NRS 173.095 which does not apply in Banka.

The State's assertion that NRS 173.095 is not the exclusive vehicle for amendment of an information "but [only] one way by which the state can amend a criminal information" is without any legal authority to support its assertion. If there were other statutes allowing amendments, the State would surely have provided them. However, there are none. NRS 173.095(1) is exclusive.

The State's argument that "[t]he statute is silent as to the meaning of 'additional or different offense'" is totally without merit. An additional offense is an addition to any other charges filed in the information. A different offense is determined by *Blockburger, supra*, (Two offenses are separate offenses if each offense contains an element that the other does not.) *See also, Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114 (2006), citing *Blockburger v. United States*. Under *Blockburger*, and common sense, the felony DUI and "Leaving the Scene" are separate offenses. The State surely must be aware of *Blockburger* in its ordinary dealings with criminal cases. Further, the State cited *Gov't of V.I. v. Bedford*, 671 F.2d 758, 765 (3rd Cir. 1982) where the court relied on the *Blockburger* analysis. *Id.,* 671 F.2D at 765.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

The State's reliance on *Simon v. Gov't of Virgin Islands*, 929 F.3d 118 . . . (3rd Cir. 2019) (citing *Gov't of V.I. v. Bedford*, *supra*.) are inapposite. First, they are not controlling authority. Secondly, since the language of NRS 173.095(1) is plain and unambiguous, a court cannot go beyond the statute's plain meaning. *See again, State v. Lucero*, 127 Nev. at 95. ("If a statute is unambiguous, this court does not look beyond its plain language in interpreting it."); *State, Dep't of Motor Vehicles v. Terracin*, 125 Nev. at 34. ("When the language of a state is plain and unambiguous, its intention must be deduced from such language, and the court has no right to go beyond it."

D.

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

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

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

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

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

(emphasis added.)

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

NRS 173.035(4) states in relevant part,

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

(emphasis added.)

This section applies only if the defendant waives the right to a preliminary hearing. **However, Banka had a preliminary examination and was bound over to district court as a result of that hearing, thus NRS 173.035(4) does not apply in Banka.**

As a result of Banka's bindover, the State filed an Information in district court on July 9, 2018, charging only the DUI offense (NRS 484C.110 and NRS 484C.430). On July 10, 2018 the State filed an Amended Information charging the DUI and the additional charge of "Leaving the Scene" (NRS 484E.010). It is

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

uncontroverted that the exception in NRS 173.095(3) did not apply because Banka did not waive his preliminary hearing and as a result NRS 173.095 was violated. The Amended Information was illegally filed and could not legally charge Banka then and cannot be used to charge him now.

***State's Arguments*:**

The State wants this Court to ignore the difference between an information and an amended information. An amended information necessarily requires that there exist an information to be amended. No such requirement exists for the filing of an information itself. NRS 173.035(1) refers to an information, not an amended information[s]. The 15-day requirement in Section 3 of NRS 173.035 applies to an information, not an amended information[s]. The only authority under NRS 173.035 to file an amended information is Section 4 which states in relevant part,

> 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**.

(emphasis added.)

The legal authority to file an amended information under NRS 173.035(4) is conditioned on the defendant having waived a preliminary examination. Banka had a preliminary hearing. Therefore, the State had no legal authority to file its Amended Information dated July 10, 2018. The Amended Information is a

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

fugitive document having no force or effect whatsoever.

The State's argument that Banka solely analyzes the July 10th filing under NRS 173.095 is meritless. Banka's legal analysis is based on Section 3 of NRS 173.095 and NRS 173.035. NRS 173.095(3) provides the only exception to NRS 173.095(1) which states, "[t]he court shall permit an information to be amended pursuant to Subsection 4 of NRS 173.035." Section 3 of NRS 173.095 does not apply in Banka, thus, the Third Amended Information must have complied with NRS 173.095(1) which it does not.

The State's attempt to distinguish NRS 173.095(1) and NRS 173.035 on the grounds that NRS 173.095(1) "presupposes a previously-filed information" and NRS 173.035 does not, lacks merit. Section 4 of NRS 173.035 presupposes the filing of a previously filed information when it refers to the filing of an Amended Information, the bindover information.

It is interesting that the State attempts to justify the July 9, 2018 and July 10, 2018 informations by stating "the State's notes suggest a plea agreement may have been reached after the preliminary hearing," (PA, 42) but now claims the reason to have been "[i]t is unclear from the record whether the information filed on July 9, 2018 contained only one of the Counts due to a clerical error or due to there being a plea agreement that may have been reached following the preliminary hearing". PA 42. Surely, the clerical "justification" is an afterthought in hopes to avoid the unlawful filing in the July 10, 2018 amended

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

information. Even if any of these justifications are really true, NRS 173.095(1) & (3) and NRS 173.035(4) have been violated. Banka never waived his preliminary hearing, a necessary condition under NRS 173.095(3) and NRS 173.035(4) which have been violated. The State's July 10, 2018 filing of its amended information is a fugitive document with no force or effect whatsoever.

***State v. Crockett*:**

The State's argument that Banka's response to *Crockett* is *ipse dixit* is without merit. The reference to *ipse dixit* really applies to the lower court and not Banka. *Crockett* never held that under contract principles all plea negotiations require reinstatement of all charges when the plea is withdrawn. *Crockett* never explained what contract principles apply under particular case scenarios, such as in Banka. *Crockett* never addressed the effect of the State's unconditional dismissal of a charge or the expiration of the statute of limitations. These are the reasons that Banka stated the lower court's reliance on *Crockett* was misplaced. The lower court's finding that *Crockett* commands ". . . the parties must be returned to their pre-plea position" is *ipse dixit*.

CONCLUSION

Based on this Court's original jurisdiction to issue writs of habeas corpus under the Nevada Constitution, Article 6 Section 4, and in light of *Shelby's, supra*, recognition that habeas corpus is a plain, speedy and adequate remedy at law, Banka is entitled to have his issues reviewed by a writ of habeas corpus.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

However, even if review was limited to mandamus, Banka is still entitled to relief.

Amendments to an information are controlled by NRS 173.095(1). The language of that statute is clear and unambiguous. Under NRS 173.095(1), an amendment to an information cannot add a charge not contained in the information to be amended. NRS 173.095(1) states, ". . . if no additional or different offense is charged. . . ." The State's Third Amended Information adds the charge of "Leaving the Scene" which is not contained in the Second Amended Information and is a different offense than the DUI charge in Count 1. *See again, Blockburger, supra*. Therefore, the district court's decision allowing the state to file a Third Amended Information adding the "Leaving the Scene" charge is an abuse of discretion. *Green, supra*.

The State's unconditional dismissal of the "Leaving the Scene" charge resulted in the statute of limitations period to expire. At the time the State filed its motion to file a Third Amended Information, the statute of limitations on "Leaving the Scene" had already run by 514 days. The district court's decision to allow the Third Amended Information violates the statute of limitations period.

There is nothing in the State's Answer that refutes the unconditional dismissal of the "Leaving the Scene" charge. There are no conditions attached to the dismissal. Further, Banka's GPA does not even mention the dismissal of

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

"Leaving the Scene," a violation of NRS 174.063.

The State's Amended Information (filed July 10, 2018,) was not authorized under NRS 173.095(3) and violated NRS 173.095; therefore, the Amended Information is a "fugitive document" and cannot be used to legally prosecute Banka then or now. The only lawful information before the district court was the information filed July 9, 2018 which contained only the DUI charge. All other superseding accusations were built on the illegal "fugitive" document filed July 10, 2018.

The district court's decision allowing the State to file a Third Amended Information adding an offense not contained in the Second Amended Information is an abuse of discretion as a matter of law. *Again see, Green, supra*. Further, it was an abuse of discretion for the lower court to allow the State to amend when the statute of limitations had expired. Therefore, Banka's request for the issuance of a Writ of Habeas Corpus / Writ of Mandamus must be granted.

Respectfully submitted,

MICHAEL D. PARIENTE, ESQ.

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with Times Roman 14 font style

2. I further certify that this brief complies with the page – or type - volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[] Proportionally spaced, has a typeface of 14 points or more, and contains 6,942words; or

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

[] Does not exceed 51 pages.

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

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

and volume number, if any, of the transcript or appendix where the matter relied on it to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rule of Appellant Procedure.

Dated this 20th day of October, 2021.

Michael D. Pariente, Esquire
Attorney for Appellant Banka
John Glenn Watkins, Esquire

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

PARIENTE LAW FIRM. P.C.
3960 Howard Hughes Pkwy, Suite 615
Las Vegas, NV 89169
PHONE: (702) 966-5310 | FAX: (702) 953-7055
WWW.PARIENTELAW.COM

CERTIFICATE OF ELECTRONIC TRANSMISSION

I HEREBY CERTIFY that on the 20th day of October, 2021, that I electronically filed the foregoing Petition for review by the Supreme Court 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:

JUDGE JASMIN LILLY-SPELLS
200 Lewis Street
District Court Department 3
Las Vegas, Nevada 89101

and

STEVEN WOLFSON
DISTRICT ATTORNEY
200 LEWIS STREET
Las Vegas, Nevada 89101

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