

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

**JACK BANKA,**

Petitioner/Defendant,

vs.

**THE EIGHTH JUDICIAL DISTRICT  
COURT AND THE HONORABLE  
JASMIN D. LILLY-SPELLS,  
DISTRICT JUDGE**

Respondents.

and

**THE STATE OF NEVADA**

Real Party in Interest

Electronically Filed  
Jan 20 2022 02:28 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

S. Ct. No.: 83381

**BANKA'S MOTION FOR REHEARING PURSUANT TO NRAP RULE 40**

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COMES NOW Petitioner JACK BANKA, through his counsel MICHAEL D. PARIENTE, ESQUIRE and JOHN G. WATKINS, ESQUIRE, OF COUNSEL and moves this Court for rehearing pursuant to NRAP Rule 40 on the grounds that this Court overlooked and/or misapprehended a number of salient points of law in denying and summarily dismissing Banka’s Petition for a Writ of Habeas Corpus, warranting this Court reconsideration.

## NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Petitioner JACK BANKA herein state, “there is no such corporation” referred to in NRAP 26.1.

### RESPECTFULLY, THIS COURT HAS OVERLOOKED AND/OR MISAPPREHENDED A NUMBER OF SALIENT POINTS OF LAW<sup>1</sup>

1. This Court has the authority to hear and decide the merits of an original habeas corpus petition. *See*, Nev. Const., art. 6, sec. 4; *Zobrist*, 96 Nev. at 626; the Editor’s Notes regarding NRAP 22. Banka has a corresponding constitutional right to invoke this Court’s original jurisdiction and file for habeas corpus relief in this Court. *See*, *Pelligrini*, 117 Nev. at 870.
2. A writ of habeas corpus is a plain, speedy and adequate remedy at law. *See*, *Shelby*, 82 Nev. at 207. Unlike extraordinary writs such as mandamus and prohibition, legal remedies are not subject to discretionary review.
3. NRAP 22 is not mandatory and does not prevent or prohibit Banka from filing his habeas corpus petition in this Court. *See*, Editor’s Notes regarding NRAP 22.
4. There is no legal authority for this Court to summarily dismiss Banka’s habeas corpus petition. If this Court declines to entertain a habeas corpus petition for “factual issues”, this Court is required to transfer the petition to a district court. *See*, *Zobrist*, 96 Nev. at 626.
5. This Court is not prohibited from hearing and deciding a habeas corpus petition if it involves a resolution of unresolved or disputed facts. The “question of law alone” limitation in art. 6, sec. 4 of the Nevada Constitution applies to appeals. Habeas corpus petitions are not appeals. The transfer to a district court as required in *Zobrist* is purely discretionary.

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1. Banka addressed these salient points of law in his “REPLY TO THE STATE’S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE A WRIT OF MANDAMUS”, to wit: (1) ps. 7-8, (2) ps. 8-9, (3) p. 10 and (4), p.11.

6. Absent a discretionary transfer to the district court under *Zobrist*, this Court has the legal obligation to review the merits of Banka’s habeas petition and if found to have merit “shall grant the writ without delay. . . .” *See*, NRS 34.390(1).
7. All of Banka’s habeas corpus issues are legal, not factual, thus the reference to “facts” to decline to review Banka’s habeas petition overlooks or misapprehends the record.
8. Banka had no right to seek relief by a mandamus petition because Banka had available a petition for writ of habeas corpus which is a plain, speedy and adequate remedy at law. *Again see, Shelby*.
9. Since this Court believed that mandamus was available to Banka, extraordinary relief should be granted. This Court has exercised its discretion to hear mandamus “. . . when presented with a purely legal question.” *See, Gathrite v. Eighth Judicial Dist. Court*, 135 Nev. at 407. The failure of the State to include the “leaving the scene” charge in the guilty plea agreement is of statewide importance. *See, Burns, infra*, 495 P.3d at 1097-98; *Walker, infra*, 476 P.3d at 1198-1199.

## I

### LAW AND ARGUMENT

#### A.

#### **THE OVERLOOKED AND/OR MISAPREHENDED SALIENT POINTS OF LAW REQUIRE THIS COURT TO ENTERTAIN BANKA’S PETITION FOR A WRIT OF HABEAS CORPUS, OR AT A MINIMUM TRANSFER BANKA’S HABEAS PETITION TO THE DISTRICT COURT**

- a. Banka had the constitutional right to file his NRS 34.360 habeas corpus petition in this Court.<sup>2</sup>

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2. The remedy of habeas corpus is constitutionally rooted and protected. *See, Pelligrini*, 117 Nev. at 870.

This Court recognized that Banka had the right to seek habeas corpus relief under NRS 34.360, but apparently for some reason[s], not in the Nevada Supreme Court. This Court declined to consider Banka’s petition for a writ of habeas corpus and summarily dismissed it.<sup>3</sup> It is not clear from this Court’s denial Order what legal basis was used to decline consideration of Banka’s habeas corpus petition. Was it because Banka had no right to file his petition for a writ of habeas corpus in this Court? Was it because the standard of review of Banka’s habeas corpus petition is merely discretionary? Was it because NRAP 22 mandatorily required Banka to file his habeas corpus in district court? Was it because habeas corpus petitions involving factual disputes or issues is required to be filed in district court? However, none of these reasons are supported in law.

This Court has the constitutionally mandated original jurisdiction to issue writs of habeas corpus. Nev. Const., art. 6, sec. 4. Not only does this Court have the power to issue habeas writs, it has exercised that power. “. . . we do entertain habeas petitions filed with the clerk of this Court presenting questions of law.” *Zobrist*, 96 Nev. at 626. Equally true, Banka has the constitutional right to file his petition for a writ of habeas corpus in this Court. As a corollary to this Court’s original habeas jurisdiction, Banka has the constitutional right to invoke

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3. Under *Zobrist v. Sheriff*, 96 Nev. 625, 614 P.2d 538 (1980), the proper action was to transfer Banka’s habeas petition to district court, not summarily dismiss it.

this Court’s original jurisdiction. “The right to seek the remedy of habeas corpus is protected by the Nevada Constitution. . . .” *Pelligrini v. State*, 117 Nev. 860, 870, 34 P.3d 519, 526 (2001). There is no restriction in the Nevada Constitution prohibiting Banka from filing his NRS 34.360 petition for a writ of habeas corpus in this Court. *See again*, Nev. Const., art. 6, sec. 4. Likewise, this Court’s original jurisdiction to issue writs of habeas corpus cannot be limited, impaired, or abrogated by legislative action.

This Court has the legal obligation to review Banka’s legal remedy of habeas claims and if found to have merit, the court or judge “. . . shall grant the writ without delay. . . .” or transfer Banka’s habeas corpus petition to the district court. See, NRS 24.390(1); *Zobrist*, 96 Nev. at 626. This Court’s summary dismissal of Banka’s habeas corpus petition is contrary to the holding in *Zobrist*.

This Court’s reliance on NRAP 22 as a reason to decline consideration of Banka’s habeas corpus petition overlooks or misapprehends that NRAP 22 is not mandatory.<sup>4</sup> The Editor’s Notes regarding NRAP 22 explains that the word “should” as opposed to “shall” was intentionally chosen so that the Nevada Supreme Court could hear original petitions for writs of habeas corpus. If “shall” had been used, NRAP 22 would be unconstitutional as negating this Court’s

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4. If NRAP 22 does not apply to pretrial habeas corpus petitions, there is no legal basis to cite or rely on it. Unilaterally choosing part of NRAP 22 (should file petition in district court) and ignoring (right to appeal the district court’s denial of the habeas corpus petition) is specious.

original jurisdiction to issue writs of habeas corpus. The removal of this Court's constitutionally mandated original jurisdiction would be tantamount to suspending the rights to habeas corpus relief in violation of art. 1 sec. 5 of the Nevada Constitution. Therefore, NRAP 22 does not require Banka to have filed his habeas corpus in district court.

This Court has overlooked that all of Banka's issues presented in his habeas corpus petition are purely legal and not factual. All matters pertaining to the issues presented in Banka's habeas petition were fully briefed before the district court and decided accordingly. Even if Banka's habeas corpus petition did contain factual disputes or disagreements (which it does not), there is no legal justification in the Nevada Constitution prohibiting this Court from entertaining Banka's habeas petition. Under controlling law, this Court has two options: (1) hear Banka's habeas writ petition or (2) transfer Banka's habeas corpus petition to district court. *Again see, Zobrist*, 96 Nev. at 626.

An intellectual reading of the "questions of law alone" limitation in Nev. Const. art. 6, sec. 4 shows that the limitation applies to appeals. Habeas corpus proceedings are not appeals. As previously pointed out, this Court can consider factual issues in habeas corpus proceedings or transfer the habeas petition to district court.

There is a material difference between extraordinary writs, such as mandamus and prohibition, and writs of habeas corpus. Under the former, relief

can be denied even if the petition is meritorious because review is discretionary. That's not so with habeas corpus petitions. If the habeas petition has merit, it "shall be granted without delay. . . ." See again, NRS 34.390(1). A writ of habeas corpus is a plain, speedy and adequate remedy at law. *Again see, Shelby*, 82 Nev. at 207. Legal remedies are not subject to discretionary review. If this were not true, this Court could decline to entertain a defendant's lawfully pending appeal which we know cannot be done without violating due process.

Mandamus was legally unavailable to Banka. Mandamus will not issue if a person has a plain, speedy and adequate remedy at law. See, NRS 34.170; NRS 34.330; *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) ("[N]either a writ of prohibition nor a writ of mandamus is appropriate if the petitioner has a plain, speedy and adequate remedy in the ordinary course of law. (internal quotation marks omitted.)") Since Banka had the right to challenge his unlawful restraint of his liberty in this Court by a petition for a writ of habeas corpus, Banka was not entitled to mandamus relief. *See again, Shelby*. (*Shelby* denied relief of the extraordinary writ of prohibition because relief through habeas corpus was available.) *Shelby* would apply equally to mandamus, the counterpart of the writ of prohibition. NRS 34.320.

The failure of the State to include the dismissal of the "leaving the scene charge" in the Guilty Plea Agreement (GPA) rendered the dismissal under contract law as not part of the plea agreement. *See, Burns v. State*, 137 Nev. Adv.

Op. 50, 495 P.3d 1091 (2021) (contract principles apply when analyzing a written guilty plea agreement or any other written agreement “bargained-for exchange between a defendant and the state. . . .” *Id.*, 495 P.3d at 1097-98. The State’s failure to include the “leaving the scene” charge in the GPA is an issue of statewide importance and should be addressed for future guidance of the parties to any agreement made in a criminal case. *See, Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1198-1199 (2020) (“This court has alternatively granted mandamus relief where a petitioner presented ‘legal issues of statewide importance requiring clarification, and our decision . . . promote[d] judicial economy and administration by assisting other jurist, parties and lawyers.’”)

## CONCLUSION

It is clear that this Court declined to consider Banka’s NRS 34.360 petition for a writ of habeas corpus. What is not clear however is the legal basis for this Court’s action. In the context of this Court’s treatment of Banka’s habeas petition, this Court cites to NRAP 22 and states that factual matters are best resolved by the district court. If these are the reasons for declining and ordering the outright dismissal of Banka’s habeas corpus petition, Banka has shown that neither supports this Court’s actions. NRAP 22 is not mandatory and Banka’s habeas issues are purely legal. Banka has succinctly pointed out that this Court’s

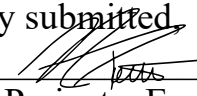
discretionary power regarding habeas corpus petitions is to transfer “factual” habeas petitions to the district court. *See again, Zobrist, supra*. This Court has overlooked that there is no legal authority in the Nevada Constitution that authorizes this Court to summarily dismiss a habeas corpus petition lawfully filed in this Court.

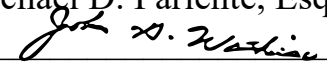
It is without dispute that this Court has original jurisdiction to entertain habeas corpus petitions. It is equally without dispute that Banka has the right to invoke it. Banka’s right is constitutionally mandated and protected. *See again, Pelligrini, supra*. Since a writ of habeas corpus is a plain, speedy and adequate remedy at law, the habeas petition is not subject to discretionary review, unlike the extraordinary writs of mandamus and prohibition. There is no constitutional authority for this Court to decline review of a habeas petition that is purely legal. *See again, NRS 34.390(1)* (If a habeas corpus petition has merit, it **must** be granted without delay.) Assuming *arguendo* that this Court has discretion to decline to review the merits of a habeas corpus petition, there is no authority for an outright dismissal of the habeas petition. This Court must transfer the habeas petition to a district court. *Again see, Zobrist, supra*. If this Court is inclined not to entertain Banka’s petition for a writ of habeas corpus, this Court should grant Banka’s request for a rehearing and transfer Banka’s habeas petition to district court.

1 If this Court believes that Banka was entitled to seek relief by mandamus,  
2 it should be granted. The States failure to include the “leaving the scene” charge  
3 in the GPA is of statewide importance. *See again, Walker, supra*, 476 P.3d at  
4 1198-1199.  
5

6 This Court should take the opportunity to resolve the overwhelming  
7 confusion regarding pretrial petitions for writs of habeas corpus. The effort in  
8 doing so benefits all.  
9

10 Respectfully submitted

11   
12 Michael D. Pariente, Esquire

13   
14 John Glenn Watkins, Esquire

15 **THIS COURT SHOULD TAKE THE OPPORTUNITY IN BANKA (THE**  
16 **ISSUES ARE ALL LEGAL NOT FACTUAL) TO RESOLVE THE**  
17 **OVERWHELMING CONFUSION REGARDING THE LAW ON PRETRIAL**  
18 **WRITS OF HABEAS CORPUS**

19 A reading of the relevant constitutional sections, legislative statutes and  
20 this Court’s caselaw (published and unpublished) shows there is much confusion  
21 regarding the filing of pretrial petitions for writs of habeas corpus under NRS  
22 34.360. The relevant statutes governing NRS 34.360 are silent as to which court  
23 the habeas petition must be filed with. Since the Nevada Supreme Court, the  
24 Court of Appeals and District Courts have original jurisdiction to issue writs of  
25 habeas corpus, can petitioner file his habeas petition in any of these courts?  
26 However, NRAP 22 states that original petitions for writs of habeas corpus  
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1 should be filed in district court. Yet, the Editor's Notes to NRAP 22 explain that  
2 the word "should" as opposed to "shall" was intentionally used so the Supreme  
3 Court could hear original pretrial habeas corpus petitions. Which procedure is  
4 correct?  
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6 There is further confusion regarding the remedy when a district court  
7 denies a pretrial petition for a writ of habeas corpus. NRAP 22, codified in 2015,  
8 expressly states that the remedy is to appeal the district court's denial to the  
9 Nevada Supreme Court. There are numerous cases by the Nevada Supreme Court  
10 decided by Orders, even though many are unpublished, holding that the appeal is  
11 the remedy. *But see, Gary v. Sheriff, Clark County*, 96 Nev. 78, 605 P.2d 212  
12 (1980) stating that NRAP 22 no longer applied to pretrial habeas denials.  
13 However, the Legislature codification of NRAP 22 in 2015 indicates that it does  
14 apply. Which is correct?  
15  
16  
17

18 There is no authority in the Nevada Constitution for the Nevada Supreme  
19 Court to impose a discretionary standard of review on original habeas corpus  
20 petitions filed in its Court. **There is no legal authority anywhere which allows**  
21 **a discretionary standard of review for legal remedies at law.** A reasonable  
22 argument can be made, even though rejected by this Court in *Banka*, that  
23 discretionary review operates as an illegal suspension of the right to habeas  
24 corpus relief. *See, Nev. Const., art. 1, sec. 5.*  
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The “questions of law alone” limitation in art. 6, sec. 4 of the Nevada Constitution is not authority to decline a meritorious review of a habeas corpus petition as that limitation applies to appeals. Habeas corpus petitions are not appeals. In those habeas corpus petitions which involve disputed facts, case law holds that a petition for a writ of habeas corpus can be transferred to a district court - not issue a denial and dismissal of the habeas petition. *See, Zobrist v. Sheriff*, 96 Nev. 625, 614 P.2d 538 (1980).

Based on the overwhelming of foresaid confusion, it would be prudent, helpful and judicious to grant Banka’s Rule 40 request for rehearing and resolve the confusion.

### VERIFICATION

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

Respectfully submitted,



Michael D. Pariente, Esquire

## **CERTIFICATE OF COMPLIANCE**

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

6 ☐ This brief has been prepared in a proportionally spaced typeface  
7 using Microsoft Word 2016 with Times Roman 14 font style  
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9 2. I further certify that this brief complies with the page – or type  
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14 contains 3,298 words; or  
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17 ----- words or ----- lines of text, or  
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1 and volume number, if any, of the transcript or appendix where  
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3 the matter relied on it to be found. I understand that I may be  
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7 is not in conformity with the requirements of the Nevada Rule  
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11 Dated this 19<sup>th</sup> day of January, 2022.  
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Michael D. Pariente, Esquire

**CERTIFICATE OF SERVICE**

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Court of Appeals on January 19, 2022. Electronic Service of the foregoing Petition for rehearing shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON,  
DISTRICT ATTORNEY,

DEPARTMENT 23,  
DISTRICT COURT JUDGE ,

SHERIFF JOSEPH LOMBARDO



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Christopher Barden,  
Sr. Paralegal for,  
Michael D. Pariente