

**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.

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S. Ct. No.: 83381

**BANKA'S MOTION FOR *EN BANC* RECONSIDERATION PURSUANT
TO NRAP RULE 40A**

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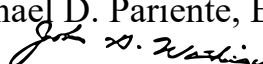
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**BANKA'S MOTION FOR *EN BANC* RECONSIDERATION PURSUANT
TO NRAP RULE 40A**

COMES NOW Petitioner JACK BANKA, through his counsel MICHAEL D. PARIENTE, ESQUIRE and JOHN G. WATKINS, ESQUIRE, OF COUNSEL and moves this Court for *en banc* reconsideration on the grounds that (1) reconsideration by the full court is necessary to secure and maintain uniformity of the decisions of the Supreme Court and (2) the Panel's decision declining to entertain Banka's original petition for a writ of habeas corpus [*ad subjiciendum*] and dismissing it raises substantial precedential, constitutional and public policy issues.

DATED THIS 7th day of February, 2022



Michael D. Pariente, Esquire


John Glenn Watkins, Esquire

NRAP 26.1 DISCLOSURE STATEMENTS

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

I

**REASONS FOR GRANTING
EN BANC RECONSIDERATION**

1. THE PANEL’S DECISION SUBJECTING BANKA’S PETITION FOR A WRIT OF HABEAS CORPUS TO DISCRETIONARY REVIEW AND DISMISSING IT IS CONTRARY TO PUBLISHED OPINIONS BY THIS COURT.
2. THE PANEL’S RELIANCE ON NRAP 22 TO DISMISS BANKA’S PETITION FOR A WRIT OF HABEAS CORPUS IS CONTRARY TO PUBLISHED OPINIONS BY THIS COURT.
3. THE PANEL’S DECISION DENYING BANKA (AND OTHERS SIMILARLY SITUATED) TO SEEK RELIEF FROM AN UNLAWFUL RESTRAINT OF LIBERTY BY A *WRIT OF HABEAS CORPUS AD SUBJICIENDUM* (THE GREAT WRIT) RAISES SUBSTANTIAL PRECEDENTIAL, CONSTITUTIONAL AND PUBLIC POLICY ISSUES.

II

POINTS AND AUTHORITIES

A.

THE PANEL'S DECISION TO DISMISS BANKA'S HABEAS CORPUS PETITION WITHOUT A MERIT REVIEW RAISES SUBSTANTIAL PRECEDENTIAL, CONSTITUTIONAL AND PUBLIC POLICY ISSUES

- a. The Panel's action is nothing short of impairing the function of the Great Writ.

Precedential Issues:

Liberty has been jealously guarded throughout England and has carried over to America. A reading of the United States Constitution confirms the cherished role of liberty and its protection. English common law created the *writ of habeas corpus ad subjiciendum* to quickly resolve any unlawful restraint of a persons liberty.¹

Blackstone stated,

[I]f any person be restrained of his liberty . . . [,] he shall, upon demand of his coun[sel], have a writ of habeas corpus And by . . . the habeas corpus act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer.

1. William Blackstone, the renowned English jurist, stated that the *writ of habeas corpus ad subjiciendum* "a swift and imperative remedy in **all cases** of illegal restraint or confinement." 3 *Blackstone Commentaries*. (emphasis added.)

Blackstone's Commentaries 131.²

This Court long ago stated, “[t]he writ of habeas corpus [ad subjiciendum] is . . . designed for the purpose of giving a **speedy remedy** to one who is unlawfully detained.” *Sullivan*, 65 Nev. at 152; 189 P.2d at 350. (emphasis added.) *See also*, NRS 34.390(1) (“ . . . if it appears that the writ ought to issue, [the judge] shall grant the writ **without delay**. . . .”) (emphasis added.)

This Court, throughout the history of Nevada as a state, has entertained pretrial habeas corpus writs. *See, Eureka Bank Cases*, 35 Nev. 80, 126 P 655 (1912). *See also, Ex Parte Sullivan*, 65 Nev. 128, 189 P.2d 338 (1948) (an unsuccessful habeas petitioner could prosecute an original proceeding in habeas corpus in this Court.) *Id.*, 65 Nev. at 156; 189 P.2d at 351. *But see, Ex Parte Merton*, 80 Nev. 435, 395 P.2d 766 (1964) (availability of appeal from a lower court denial of habeas corpus precluded an original habeas corpus petition in the Supreme Court.)³ Petitioners no longer have the right to appeal a lower court’s denial of a habeas corpus petition. *Gary*, 96 Nev. at 78; 605 P.2d at 213. An appeal

2. Those who wrote America’s Constitution were keenly aware of the long and celebrated role of the *writ of habeas corpus ad subjiciendum*. The importance of this writ of so profound that it is referred to as The Great Writ.

3. The appeal after the lower court’s denial was a quick and swift remedy keeping in line with the function of the Great Writ.

after conviction runs afoul of the purpose behind the Great Writ of *habeas corpus ad subjiciendum*.⁴ The following quote tells it all,

It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and **there is no higher duty than to maintain it unimpaired.**

Bowen v. Johnston, 306 U.S. 19, 27 (1939) (emphasis added.)

The Panel's decision to decline Banka's habeas petition is contrary to the long and cherished history to the Great Writ as well as Nevada's precedents. The Panel's actions here raises substantial precedential issues, thus Banka's NRAP 40A reconsideration is appropriate and should be granted.

Constitutional Issues:

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. 625, 626, 614 P.2d 538 (1980). Equally true, Banka has the constitutional right to file his petition for a writ of habeas corpus in this

4. This Court should adhere to Justice Gunderson's position in *Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 549, 612 P.2d 679, 682 (1980) wherein Justice Gunderson stated that an appeal after conviction is not an adequate remedy to challenge an unlawful restraint of a persons liberty. A merit review of a habeas petition is judicious and quick for only one justice is required for the review.

Court. As a corollary to this Court’s original habeas jurisdiction, Banka has the constitutional right to invoke 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. The Panel’s decision to decline entertaining Banka and others similarly situated, raises constitutional issues, thus NRAP 40A reconsideration is appropriate.

Public Policy Issues:

Taking away the constitutional right to seek relief from an unlawful restraint of a person’s liberty in this Court is a concern (or should be) of every citizen of the State of Nevada, another reason why Banka’s NRAP 40A request for reconsideration should be granted.

B.

RECONSIDERATION BY THE FULL COURT IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY OF DECISIONS OF THE SUPREME COURT AND COURT OF APPEALS

- a. The Panel’s reliance on NRAP 22 and discretionary review regarding Banka’s original habeas petition finds no support in law.

NRAP 22:⁵

This Court in *Gary v Sheriff*, 96 Nev. 78, 605 P.2d 212 (1980) held that NRAP 22 no longer applies to constitutionally authorize writs of habeas corpus. *Gary* stated, “NRAP 22 * * * became inoperative when the statute giving the right was nullified.” *Id.*, 96 Nev. at 80; 605 P.2d at 214. *See also, White v. Warden*, 96 Nev. 634, 614 P.2d 536 (1980) (“We consider NRAP 22 as applied to post-conviction habeas corpus appeals”) *Id.*, 96 Nev. at 637; 605 P.2d at 538. *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014) makes clear that post-conviction habeas corpus is a statutory remedy only. “Post-conviction relief is a statutory remedy and it is up to the legislature define its contours.” *Id.*, 130 Nev. at 576; 331 P.3d at 875. However, overlooking *Gary*, *White* and *Brown*, this Court repeatedly cites NRAP 22 to deny constitutionally mandated habeas corpus, as opposed to the statutory remedy of post-conviction habeas corpus cases⁶. This Court respectfully is urged to correct its improper use of

5. NRAP 22 states, “An application for an original writ of habeas corpus should be made to the appropriate district court. If an application is made to the district court and denied, the proper remedy is by appeal from the district court’s order denying the writ.”

[As amended; effective January 20, 2015.]

6. Unpublished Nevada Supreme Court Opinions: (1) *Dehoyos-Maldonado v. State*, 442 P.3d 153, 2019 WL 2504833 (June 14, 2019); (2) *Mullet v. Warden*, 435 P.3d 669, 219 WL 1096537 (March 6, 2019); (3) *Braunstein v. Eighth Judicial District Court*, 435 P.3d 659, 2019 WL 972854 (February 25, 2019); (4) *Chin v. Sheriff*, 134 Nev. 923, WL 5096374 (October 17, 2018); (5) *Gonzales v. Eighth Judicial District Court*, 133 Nev. 1015, WL 11489255 (May 16, 2017).

NRAP 22 to deny such cases as Banka and to those other petitioners similarly situated.

Imposing Discretionary Review of Legal Remedies is Unlawful:

It should be obvious that there is absolutely no support in law for discretionary review of legal remedies unlike the extraordinary writs of mandamus and prohibition. This Court is *Shelby v. Eighth Judicial Dist. Court*, 82 Nev. 204, 414 P.2d 942 (1980) made it absolutely clear that habeas corpus relief is a legal remedy. “Since 1912, this court has recognized that the writ of habeas corpus is a plain, speedy and adequate remedy. . . .”⁷ *Id.*, 82 Nev. at 207; 414 P.2d at 943. *Shelby* dismissed the petitioner’s request for relief through a writ of prohibition because he had the availability of the legal remedy of habeas corpus. Any attempt by a court to decline to consider a legal remedy runs afoul of both federal and state due process.

Zobrist v. Sheriff, 96 Nev. 625, 614 P.2d 538 (1980) allows this Court to transfer a habeas corpus case to a district court for resolution of unresolved questions of fact. *Zobrist* does not state that this Court can dismiss a constitutionally mandated original habeas corpus petition outright. There is a material difference between this Court’s refusal to consider the merits of a

7. A number of unpublished opinions denying habeas corpus relief characterized the writ of habeas corpus as an extraordinary remedy. Such characterizations are contrary to the specific holding in *Shelby*.

1 habeas petition and dismissing it as opposed to transferring the petition to a
2 district court for a merit review. The Panel’s decision in Banka is tantamount to
3 an unlawful suspension of the constitutional right to seek relief through habeas
4 corpus. *See, Thuraissigiam, infra.*

6 **Under Current Law, Extraordinary Relief Is Unavailable To Banka And**
7 **Those Petitioners Similarly Situated:**

8 Mandamus was unavailable to Banka and those petitioners similarly
9 situated. Mandamus (as well as prohibition) are extraordinary writs subject to
10 the no legal remedy in law rule. *See*, NRS 34.170. (“Writ [mandamus] to issue
11 when no plain, speedy and adequate remedy in law.”); NRS 34.330. (“The writ
12 [prohibition] may issue . . . where there is no plain, speedy and adequate
13 remedy in the ordinary course of law. . . .”) As previously set forth, *Shelby*
14 recognized Nevada’s long standing determination that habeas corpus is a “plain,
15 speedy and adequate remedy” in the ordinary course of law. *Id.*, 82 Nev. 207;
16 414 P.2d at 943. *Shelby* denied the prohibition writ because *Shelby* had the
17 legal remedy of habeas corpus available to him. *Shelby*, 82 Nev. at 211; 414
18 P.2d at 946.

23 Banka and other petitioners similarly situated have, under current law,
24 the habeas corpus remedy available to them. Nevada case law makes the
25 availability of habeas corpus relief dependent on whether the right of appeal of
26 a lower court’s denial of the habeas corpus petition. *See, Merton*, 80 Nev. 435,
27
28

395 P.2d 766 (1964) (availability of appeal from a habeas corpus denial precludes an original habeas petition in this Court.) In 1979, the Nevada Legislature renewed the right to appeal habeas corpus denials. 1979 Nev. Stats. ch. 216 § 1, at 312. *See also, Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 546, 612 P.2d 679, 680 (1980). Absent the right to appeal, petitioners can prosecute an original proceeding in habeas corpus in this Court. *Sullivan*, supra succinctly stated,

. . . a prisoner, denied appeal, is not deprived, however, of the right to continue to seek his liberty by a succession of original applications before other courts, justices or judges, until, as many jurist have said, he has “exhausted the judicial power of the state. . . .”

Id., 65 Nev. at 156; 189 P.2d at 351.

Sullivan establishes that Banka and other similarly situated petitioners have the availability of habeas corpus relief in this Court. Therefore, mandamus and/or prohibition is legally unavailable to challenge the unlawful restraint of petitioner’s liberty.

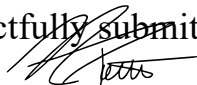
A dismissal of a constitutionally mandated petition for a writ of habeas corpus without a merits review or transfer to a district court under *Zobrist*, is tantamount to an unconstitutional suppression of the right to request habeas corpus relief and a violation of Due Process under Fourteenth Amendment of the United States Constitution. *See, Department of Homeland Security v. Thuraissigiam*, __ U.S.__, 141 S. Ct. 1959, 1968-71 (2020) (a failure to provide

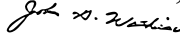
1 the remedy of habeas corpus in situations traditionally within the scope of the
2 writ is an unlawful suspension of the writ of habeas corpus.) Nevada's
3 suspension clause is identical to the federal suspension clause.
4

5 6 CONCLUSION

7
8 Based on the foregoing, Banka's request for *en banc* reconsideration
9 pursuant to NRAP 40A should be granted.

10
11 Respectfully submitted,


12 
Michael D. Pariente, Esquire

13 
John Glenn Watkins, Esquire

14 15 16 VERIFICATION

17
18 Under penalty of perjury, the undersigned declares that in the foregoing
19 Motion and knows the contents thereof; that the Motion is
20 true of the undersigned's own knowledge, except as to those matters stated on
21 information and belief, and as to such matters the undersigned believes them to be
22 true.
23
24

25
26 Respectfully submitted,

27 
Michael D. Pariente, Esquire
28

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 2,760 words; 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

1 matters in the record to be supported by a reference to the page
2
3 and volume number, if any, of the transcript or appendix where
4
5 the matter relied on it to be found. I understand that I may be
6
7 subject to sanctions in the event that the accompanying brief
8
9 is not in conformity with the requirements of the Nevada Rule
10
11 of Appellant Procedure.

12 Dated this 7th day of February, 2022.



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 February 7, 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



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