

IN THE SUPREME COURT OF NEVADA
STATE OF NEVADA

JESUS NAJERA,

Petitioner,

vs.

THE EIGHTH JUDICIAL
DISTRICT COURT; THE
HONORABLE CRYSTAL
ELLER,

Respondents,

STATE OF NEVADA,

Real Party in Interest.

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S. Ct. No.: 86446

DIST. CT. NO. C-21-356361-1

NAJERA'S PETITION FOR *EN BANC* RECONSIDERATION
PURSUANT TO NRAP RULE 40A

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

JESUS NAJERA,

Petitioner,

vs.

THE HONORABLE CRYSTAL
ELLER, EIGHTH JUDICIAL
DISTRICT COURT JUDGE,
DEPT. NO. 19,

Respondent,

STATE OF NEVADA,

Real Party in Interest.

S. Ct. No.: 86446

DIST. CT. NO. C-21-356361-1

**NAJERA'S PETITION FOR *EN BANC* RECONSIDERATION
PURSUANT TO NRAP RULE 40A**

COMES NOW Petitioner, JESUS NAJERA, through his attorney of
record, MICHAEL D. PARIENTE, ESQ. and JOHN G. WATKINS, ESQ., Of
Counsel, and petitions this Court for *en banc* reconsideration of the Panel's
decision pursuant to NRAP 40A on the grounds that (1) Najera involves a

1 constitutional issue, to wit: the illegal suspension of Najera's right to habeas
2 corpus review, a violation of the Due Process Clause of the Fourteenth
3 Amendment of the United States Constitution.
4

5 DATED this 25th day of May, 2023.

6 Respectfully submitted,
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NRAP 26.1 DISCLOSURE STATEMENTS

The attorneys representing Appellant Jesus Najera herein state, “there is no such corporation” referred to in NRAP 26.1.

GROUND FOR *EN BANC* RECONSIDERATION

This Court will entertain *en banc* reconsideration when “the proceeding involves a substantial precedential, **constitutional** or public policy issue.” Najera’s NRAP 40A petition involves a constitutional issue regarding the Panel’s suspension of Najera’s Fourteenth Amendment Due Process rights to habeas corpus relief.

POINTS AND AUTHORITIES

A.

THE PANEL’S DECISION THAT NAJERA CANNOT SEEK HABEAS CORPUS RELIEF IN THE NEVADA SUPREME COURT IS AN UNLAWFUL SUSPENSION OF HABEAS CORPUS, THEREBY LEAVING NAJERA WITHOUT A VIABLE REMEDY TO CHALLENGE THE LEGALITY OF THE RESTRAINT ON HIS LIBERTY¹

- a. The unlawful suspension of habeas corpus violates the Fourteenth Amendment Due Process Clause of the United States Constitution.

1. The remedy of habeas corpus is constitutionally rooted and protected. *Pelligrini v. State*, 117 Nev. 860, 870, 34 P.3d 519, 526 (2001) (“The right to seek the remedy of habeas corpus is protected by the Nevada Constitution.”)

The Panel’s decision denying Najera the right to challenge the legality of his constructive custody is a violation of the Fourteenth Amendment Due Process Clause, to wit: an illegal suspension of the writ of habeas corpus.² Nev. Const., art. 1, sec. 5.

This Court has original jurisdiction to issue writs of habeas corpus. Nev. Const. art. sec. 4. Habeas corpus is a legal remedy. (“ . . . the writ of habeas corpus is the plain, speedy and adequate remedy” in law.³ *Shelby, infra*, 204 Nev. at 207. As a corollary, Najera has the right to seek habeas corpus relief in this Court. *Again see, Pelligrini*, 117 Nev. at 870.

The Nevada Supreme Court, throughout the history of Nevada as a state, has entertained pretrial writs of habeas corpus. *See, Zobrist v. Sheriff*, 96 Nev. 625, 626, 614 P.2d 538 (1980) (“ . . . we do entertain habeas petitions filed with the clerk of this court presenting questions of law.”)⁴ Najera’s habeas challenge of the legality of the restraint on his liberty is purely a legal issue.

2. The Panel’s decision is more than an unlawful suspension - it is an abrogation of the habeas corpus remedy to all persons who seek the remedy in this Court.

3. Habeas corpus is not a writ of error but rather is a substantive legal remedy to challenge the legality of the restraint of a person’s liberty.

4. Any assertion that the Nevada Supreme Court has discretion whether or not to entertain petitions for writ of habeas corpus destroys the purpose and efficacy of habeas relief.

The writ of habeas corpus has a long history, beginning in England as of 1166 A.D.⁵ The importance attached by this Court to the availability of the habeas writ applies to probable cause challenges. The *Court in Shelby v. District Court*, 82 Nev. 204, 414 P.2d 942 (1966) stated,

It is fundamentally unfair to require one to stand trial unless he is committed upon a criminal charge with 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

Id., 82 Nev. at 207.

Najera’s habeas challenge was filed in this Court based on the lack of probable cause as to Count 8 of the Indictment.

The panel declined to provide Najera habeas relief stating, “[a]n original petition for a writ of habeas corpus in this court is not a proper method to challenge the district court’s decision to deny a pretrial petition of habeas

5. The habeas writ originated from the *Assize of Clarendon of 1166*, predating the Magna Carta (1215). The purpose of the writ, then and now, is for the court of chief official to determine whether a person’s detention is unlawful. William Blackstone characterized the writ of habeas corpus as a “great and efficacious writ in all manner of illegal confinement.” Blackstone, William (1979) [1768]. *Commentaries on the Laws of England: A facsimile of the first edition of 1765–1769*. Vol. 3. Chicago: University of Chicago Press. pp. 129–137. The writ is a legal remedy as a matter of right.

corpus. *ORDER DENYING PETITION*, p.1.⁶ Najera’s request had nothing to do with the district court’s denial but rather was a request that this Court itself determine the legality of the restraint on his liberty.

The Panel’s refusal to entertain Najera’s habeas petition rendered his probable cause challenge without a viable remedy – moot.

Renders Mandamus Meaningless:

This Panel has made it clear, *citing Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 545, 612 P.2d 679, 679-80 (1980), that it will most often not entertain mandamus to review pretrial probable cause challenges. Furthermore, mandamus and prohibition are not available because the right to habeas corpus is a substantive legal remedy. *See again, Shelby*, 204 Nev. at 212.

No Remedy on Appeal:

The established law finds any material violations during the proceeding establishing probable cause, the lack of probable cause, 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

6. Najera explained why reliance on NRAP 22 was misplaced in his Rule 40 request for reconsideration. However, the issue here is that Najera’s habeas corpus remedy was suspended (eliminated) - a Fourteenth Amendment Due Process violation.

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). *Grego*, 94 Nev. at 50. The applicable law here is 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.

CONCLUSION

It is without dispute that this Court has constitutionally mandated original jurisdiction to entertain habeas corpus petitions. Equally undisputed, Najera has the constitutional right to invoke this Court’s original jurisdiction. *See again*, *Pelligrini, supra*, 117 Nev. at 870 (“the right to seek the remedy of habeas corpus is protected by the Nevada Constitution.”)

The “. . . writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion . . . requires its suspension.” The “unless” clause does not apply in Najera’s case.

The suspension of habeas corpus absent “rebellion or invasion” violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

1 The Panel's ORDER DENYING PETITION (filed on May 24, 2023)
2 leaves Najera with no viable legal remedy to challenge the legality of the
3 restraint on his liberty. This effectually operates as a suspension of Najera's
4 right to seek habeas relief. The Panel's decision affects not only Najera but
5 all persons who seek habeas relief in this Court – a matter of statewide
6 importance.
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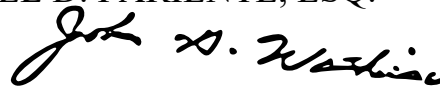
9 Najera's NRAP 40A petition should be granted.

10 DATED this 25th day of May, 2023.

11 Respectfully submitted,



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VERIFICATION

Under penalty of perjury, the undersigned declares that in the foregoing Petition and knows the contents thereof; that Petition 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.

DATED this 25th day of May, 2023.

Respectfully submitted,



MICHAEL D. PARIENTE, ESQ.

Attorney for Petitioner

JOHN G. WATKINS, ESQ.

Of Counsel

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 1,997 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 matters in the record to be supported by a reference to the page 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 25th day of May, 2023.



Michael D. Pariente, Esquire

CERTIFICATE OF SERVICE

I, Christopher Barden, hereby certify and affirm that this document was filed electronically with the Supreme Court on May 25th, 2023. 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 19,
DISTRICT COURT JUDGE ,

DATED this 25th day of May, 2023.



Chris Barden, Paralegal