

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN LEROY GONZALES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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**AMICUS BRIEF OF THE NEVADA ATTORNEY GENERAL'S OFFICE
(SUPPORTS NEITHER PARTY)**

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INTRODUCTION

The Court of Appeals held that under Nevada law, a petitioner who pleads guilty waives the right to challenge counsel’s post-plea performance in state court. *Gonzales v. State*, 136 Nev. ___, 136 Adv. Op. 60 (October 1, 2020). The Court of Appeals explained that petitioners “remain free to seek redress of constitutional deprivations in federal courts in the first instance.” *Id.* at 12, n.3. Because the Nevada Attorney General’s Office is tasked with defending state convictions in federal court, the Attorney General’s Office hereby submits this amicus curiae brief in order to address important implications raised by the Court of Appeals’ interpretation of the statute and its statement that petitioners can raise such claims in federal court. *See* NRAP 29(a).

DISCUSSION

Interpreting NRS 34.810(1)(a), the Court of Appeals held that a petitioner who pleads guilty cannot raise in a post-conviction petition any constitutional violations which took place after he entered the plea. *Gonzales*, 136 Nev. at ___, 136 Adv. Op. 60 at 12 (“Because events occurring after the entry of the plea cannot have affected either counsel's advice regarding entering the guilty plea or the outcome of the plea negotiation process, ineffective-assistance claims relating to post-plea proceedings necessarily fall outside the scope of claims permitted by NRS 34.810(1)(a).”).¹ As a result, the Court of Appeals refused to consider petitioner Melvin Gonzales’ (Gonzales) claims “that trial-level counsel was ineffective for not objecting to the State's breach of the plea agreement at the sentencing hearing and that appellate counsel was ineffective for not raising the breach on appeal” because both claims “alleged deficiencies that occurred *after* Gonzales entered his guilty plea.” *Id.* (emphasis added).

The Court of Appeals effectively held that a petitioner who pleads guilty cannot enforce his right to the effective assistance of post-plea trial and appellate counsel in state court. The Court of Appeals explained, however, that its decision did not “abrogate a defendant’s right to the effective assistance of counsel in post-plea

¹ A post-conviction petition for a writ of habeas corpus under NRS Chapter 34 is the exclusive remedy for petitioners in Nevada who seek to challenge the validity of their judgment or sentence after their direct appeal. NRS 34.724.

proceedings,” because offenders can “seek redress of constitutional deprivations in federal courts in the first instance.” *Gonzales*, 136 Nev. at ___, Adv. Op. 60 at 12, n.3.

This statement raises several important issues involving the interplay between federal and state courts, which do not appear to have been contemplated by the Court of Appeals’ decision. To assist this Court in determining whether to grant review, the Attorney General’s Office hereby provides a brief overview of several of these issues.

I. First Issue – Exhaustion of State Remedies.

The first issue involves the doctrine of exhaustion. The exhaustion doctrine under 28 U.S.C. § 2254(b) requires a petitioner to fairly present every claim for relief to a Nevada appellate court with references to a specific federal constitutional guarantee, as well as a specific statement of the operative facts entitling him to relief. *See, e.g., Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005). The United States Supreme Court has explained that the exhaustion doctrine is a matter of comity and federalism designed to respect the role that state and federal courts both play in protecting citizens’ constitutional rights:

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary “opportunity,” the prisoner must “fairly present” his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.

Baldwin v. Reese, 541 U.S. 27, 29 (2004) (internal citations and quotations omitted); *see also Rose v. Lundy*, 455 U.S. 509, 518 (1982) (“The exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.”).

An exception to the exhaustion requirement exists when a petitioner can demonstrate that he cannot present the claims in state court due to the state’s procedural default rules. *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (“This rule does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.”). However, if a petitioner demonstrates that a state court would deny his claim as procedurally barred, then the federal court is bound by the relevant state law and must treat the claim as defaulted. *Id.* (“In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claim.”); *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014)

(“An unexhausted claim will be procedurally defaulted, if state procedural rules would now bar the petitioner from bringing the claim in state court.”).

II. Second Issue – State Procedural Bars.

This leads to the second issue: the doctrine of procedural default. United States Supreme Court decisions contemplate that states may set out rules requiring a petitioner to follow certain procedures to raise a constitutional claim. *Coleman*, 501 U.S. at 729. If a state rejects a claim based on the petitioner’s failure to follow a state procedural rule, a federal court cannot consider the claim:

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . The doctrine applies to bar federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.

Coleman, 501 U.S. at 729-30.

There is an exception to this general rule. Under the doctrine of procedural default, a federal court can consider a procedurally barred claim if the petitioner demonstrates “cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice.” *Vansickel v. White*, 166 F.3d 953, 958 (9th Cir. 1999).

A habeas petitioner seeking to demonstrate good cause must show that some “objective factor external to the defense” impeded his attempts to comply with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). If he can establish cause, a petitioner must then show “prejudice,” *i.e.*, that there was actual prejudice amounting to a substantial disadvantage, which resulted in a trial infected with constitutional error. *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989). To show a miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the charged offenses. *See, e.g., Bousley v. United States*, 523 U.S. 614, 623 (1998).

To summarize, according to the Court of Appeals, NRS 34.810(1)(a) precludes a petitioner who pleads guilty from challenging his attorney’s performance after the plea was entered in state court. This means the claim will be deemed procedurally defaulted in federal court pursuant to NRS 34.810(1)(a). To overcome the state default, the petitioner will have to demonstrate good cause and actual prejudice or actual innocence. The Court of Appeals’ statement, which suggested that a petitioner could simply raise a constitutional claim barred by NRS 34.810(1)(a) in federal court with no constraints, was incomplete.

III. Additional Considerations In Granting Review.

In determining whether to grant review of the Court of Appeals’ decision, this Court should also consider the following.

First, the Court of Appeals held that the Nevada Legislature intentionally blocked criminal defendants from enforcing certain constitutional rights in Nevada courts. However, the duty to protect a petitioner's constitutional rights does not rest solely on the shoulders of federal courts. Nevada courts are equally tasked with enforcing the rights provided by the United States Constitution. *Rose*, 455 U.S. at 518 (“Under our federal system, the federal and state courts are *equally bound* to guard and protect rights secured by the Constitution.” (emphasis added) (quotation marks and alterations omitted)).

Second, the type of claims that the Court of Appeals concluded were barred by NRS 34.810(1)(a)—ineffective-assistance of trial and appellate counsel claims—are the precise type of claims that should be reviewed by a state court in the first instance. A petitioner's constitutional right to the effective assistance of counsel can be violated if his attorney fails to follow state law. This means a federal court reviewing a claim barred by NRS 34.810(1)(a), assuming a petitioner could overcome the procedural default, would be tasked with deciding in the first instance whether an attorney properly complied with Nevada law with the limited record that exists in guilty plea matters and without affording any deference to a state court's decision. *But see Rose*, 455 U.S. at 519 (“Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.”).

Third, while a federal court must generally decline to consider claims that are defaulted in state court, it will only do so if the state rules are adequate and independent, either overall or as applied in a given case. *See Walker v. Martin*, 562 U.S. 307, 320 (2011) (explaining that a procedural bar “may be found inadequate when discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law.” (internal quotation marks omitted)). The Court of Appeals’ novel decision runs the risk of undermining the adequacy of NRS 34.810(1)(a) as a procedural bar, meaning a federal court could decline to enforce it in all Nevada cases, including cases where it was properly applied.²

² Because the Nevada Attorney General’s Office is primarily responsible for enforcing state procedural bars in federal court, this Court could consider directing the Attorney General’s Office to provide amicus briefing in cases involving the procedural bars when it makes similar requests of other criminal justice organizations.

Finally, the Court of Appeals' statement that petitioners can enforce their right to the effective assistance of counsel in federal courts misses a fundamental point: petitioners also have the right to the effective assistance of counsel under the *Nevada Constitution* in addition to the United States Constitution. A petitioner cannot enforce a right afforded by the Nevada Constitution in federal court, leaving it unclear how a petitioner who pleads guilty could enforce his rights under the Nevada Constitution based on the Court of Appeals' interpretation of the statute.

RESPECTFULLY SUBMITTED this 25th day of November, 2020.

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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 2010 in 14 point, Times New Roman.

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

This brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,795 words.

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 is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 25th day of November, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 25th day of November, 2020, I served a copy of the foregoing **AMICUS BRIEF OF THE NEVADA ATTORNEY GENERAL'S OFFICE** by CM/ECF electronic filing to:

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