

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MELVIN GONZALES,

SUPREME COURT No. 78152
Dist Ct. Case. CV 20,547

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

APPEAL FROM JUDGMENT OF THE HONORABLE
MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S CORRECTED REPLY BRIEF

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STATEMENT OF FACTS

The State by way of its Answering Brief relied heavily on the facts that were determined by the District Court in its Order dated February 1, 2019. The short facts cited by the District Court are inadequate for review of the legal issues raised herein. 2AA 283-296. All remaining factual allegations found in the Opening Brief remain strong in support of the arguments of Appellant, Melvin Leroy Gonzales.

Respondent argued that Mr. Cochran (trial and appellate counsel) had the ability to determine whether he was ineffective or not by failing to object to the breach of the plea bargain. Mr. Cochran's view of the legal assistance he provided to Mr. Gonzales is irrelevant to this appeal. (RAB 5). The fact that Mr. Cochran refused to answer questions openly regarding his failure to object when the State argued for a sentence which was in direct violation of its obligation under the plea bargain to recommend concurrent sentences on each count does not support the District Court's decision that no breach of the plea bargain occurred. In fact, Mr. Cochran's credibility was lacking. 1AA 200, 206-207, 2AA 294A-295.

The District Court's ruling that enforcement of a plea bargain is related to sentencing matters rather than the guilty plea falls short. 2AA 295. Mr. Cochran could not have believed that the negotiation in this case was that the State would

concur with the Department of Parole & Probation because the guilty plea memo clearly indicated that the State agreed to recommend concurrent sentences on the three counts. The plea transcript said the same. 1AA 10, 13, 21, 185, 188. Mr. Cochran simply missed the improper argument and failed to adequately represent his client.

While it is true that the District Court did not find threats or coercion in the record at the plea, it had to find the State's promise to recommend concurrent sentences on the counts was the inducement for a plea of guilty to crimes that Mr. Gonzales did not actually commit. 2AA 293. The State's promise was breached when Mr. Pasquale sought imposition of two consecutive and one concurrent sentence by way of his argument that the Court should follow the recommendations found in the presentence report. The presentence report recommended Count I & II to be served consecutively and Count III to be served concurrently. 1AA 44, PSI Pages 8-9. The District Court did not rule whether the State breached the plea bargain. The District Court simply failed to determine the key issue raised herein. 1AA 283-295.

Appellate counsel did not raise the breach of plea argument on direct appeal, most likely because the attorney was the same as trial counsel, and Mr. Cochran knew that he failed to object to the breach and did not make an appropriate record for appellate review. The self serving testimony of Mr. Cochran that he believed

he raised all critical issues on appeal was not the question for the District Court. The question was whether there was a likelihood of success on appellate review for an omitted issue. Appellate counsel can be held ineffective if they fail to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983).

That question was answered simply by the District Court when it held that it was not bound by the Guilty Plea Agreement. 2AA 295. Nothing further was delineated to support the denial of the Petition on grounds that appellate counsel was ineffective.

Respondent argued that by entry of plea, Mr. Gonzales waived any right to appeal events occurring prior to the entry of his guilty plea. Yet, the actions of the State after the guilty plea should have been the subject of a direct appeal. Breach of the plea bargain is an appellate issue. Mr. Cochran chose to ignore the State's blatant breach of the plea bargain during the sentencing proceeding. It is impossible to know how this affected the sentencing proceeding.

ARGUMENT

- 1. Trial counsel and appellate counsel were ineffective by the failure to object to the breach of the plea bargain at the sentencing hearing, failing to seek specific performance of the plea agreement and failing to raise this critical issue on direct appeal.**

The Nevada Supreme Court has recognized that a defendant is entitled to enter into a plea agreement affecting fundamental rights. *Krauss v. State*, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000).

In this record, Judge Montero never advised this Court, or the Parties, that he was not influenced by the improper sentencing argument made by Deputy District Attorney Pasquale. Rather, the Judge Montero simply pointed out that he was not bound by the terms of the plea agreement. 2AA 295. The interests of justice and appropriate recognition of the duties of the prosecution has in relation to promises made in the negotiation of these pleas of guilty are best served by remanding the case to another Judge who has not been part of this process for further consideration of the appropriate relief for the breach—specific performance or withdrawal of the plea.

Since *Santobello*, the Nevada Supreme Court has stated that the State's violation of a plea agreement requires reversal. *Santobello v. New York*, 404 U.S. 257 (1971). The Court has implicitly rejected harmless-error analysis in the event of a breach of a plea agreement, and in *Echeverria* the Court made that rejection explicit. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003); *Citti v. State*, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991); *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986)); see also *Kluttz v. Warden*, 99 Nev. 681, 684, 669

P.2d 244, 246 (1983); *Riley v. Warden*, 89 Nev. 510, 513-14, 515 P.2d 1269, 1271 (1973).

Had this issue been raised on direct appeal, it would have been successful. Mr. Gonzales would have received a remedy. Mr. Gonzales has the choice of remedies, i.e., withdrawal of the guilty plea or a new sentencing, and at this point in time, he wishes to withdraw the guilty plea. Alternatively, Mr. Gonzales is entitled to strict performance of the plea bargain.

Mr. Gonzales did not have control over the issues raised by Mr. Cochran on direct appeal. Even after being confronted with the flagrant breach of the plea bargain, Mr. Cochran refused to recognize the issue. Clearly, Mr. Gonzales did not have the ability to raise this issue on direct appeal and he has demonstrated prejudice to overcome NRS 34.810. The District Court abused its discretion when it refused to hold the State to strict performance of a plea bargain. Mr. Gonzales was deprived of his fundamental right to enter into a contractual plea bargain with the State and have the State fulfill its contractual obligation.

Mr. Gonzales pled the fact that his guilty pleas were entered without the assistance of competent counsel under the 6th & 14th Amendments. 1AA 120. This is not a second or successive petition. The District Court's use of NRS 34.810(1)(a) as a sword to strike the claims from review was misplaced. Mr.

Gonzales argued that counsel was ineffective for his failure to enforce the terms of the plea bargain, object to the violation of the plea bargain and appellate review of that key legal issue. The District Court's Order cannot withstand constitutional review.

Of interest for the Court is a review of the Opening Brief in Docket 65768. In the direct appeal, Mr. Cochran argued that Mr. Gonzales should have been convicted of Category C felonies rather than the felony charges which Mr. Cochran advised Mr. Gonzales to plead to, three Category B aggravated stalking felonies. This admission demonstrates the lack of effort provided on the defense of this case. There is no logic in raising an issue of what the applicable law is on this case during direct appeal after a guilty plea. That approach is flawed. Motion work at the District Court stage would have been a proper approach to determine which statutory scheme applied to the case. However, the issue of the violation of the plea bargain by the State was legally correct and viable for direct appellate review.

It is a miscarriage of justice when a breach of a plea bargain occurs. This sentence was a grossly unfair outcome. *Black's Law Dictionary* 1149 (10th ed. 2014) (defining miscarriage of justice). One must believe that the State's argument was prejudicial to Mr. Gonzales. The lengthy terms of imprisonment, with the Court imposing all three prison terms to be served consecutively, netting an

aggregate mandatory service of 15.5 years in prison for text threats, demonstrates prejudice.

As for other issues found in Appellant's Opening Brief, Appellant stands by his arguments therein.

CONCLUSION

Mr. Gonzales's rights under the Due Process Clause of the 5th & 14th Amendments were violated by the District Court. His trial and appellate counsel was ineffective under the 6th & 14th Amendments and *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Gonzales should be entitled to withdraw his guilty pleas and start this case over.

Alternatively, Mr. Gonzales is entitled to a new sentencing hearing before a judge who has not been part of the case to date.

DATED this 27 day of August, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages.

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 Rules of Appellate Procedure. The document was prepared in Word. There are 7 typed pages; 1,857 words in this brief and 186 lines of type. The Brief has been prepared in Word, proportionally spaced type, 14 point Times New Roman with 2.0 line spacing.

DATED this 27 day of August, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

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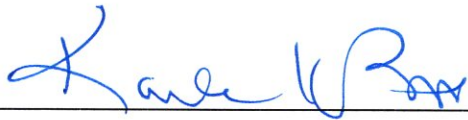
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DATED this 27 day of August, 2019.



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