

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

MELVIN LEROY GONZALES,

Appellant,

v.

Docket No. 78152

THE STATE OF NEVADA,

Respondent.

Electronically Filed  
Oct 18 2020 11:30 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S PETITION FOR REVIEW BY THE NEVADA SUPREME  
COURT OF THE ORDER OF THE COURT OF APPEALS  
PURSUANT TO NRAP 40(B)**

COMES NOW, Appellant, MELVIN LEROY GONZALES, by and through  
KARLA K. BUTKO, Ltd., as prepared and submitted by KARLA K. BUTKO,  
Attorney, and hereby petitions the Nevada Supreme Court to review the Per  
Curium Order affirming the district court's denial of postconviction relief, dated  
October 1, 2020. This Petition is based upon NRAP 40(B).

Under NRAP 40(B), the Nevada Supreme Court may review the decision of  
the Court of Appeals of the State of Nevada when the question presented is one of  
first impression of general statewide significance, when the case involves  
fundamental issues of statewide public importance, or when the Court of Appeals  
has misapprehended standing Nevada law.

## **QUESTIONS PRESENTED FOR REVIEW**

1. This is a critical issue for Nevada Supreme Court review. This attorney alone has five cases which involve application of NRS 34.810(1)(a) as a procedural bar to preclude review of ineffective assistance of counsel claims raised under the 6<sup>th</sup> & 14<sup>th</sup> Amendments.
2. The Court of Appeals of the State of Nevada misapprehended standing Nevada case authority and effectively overruled the Nevada Supreme Court's prior decisions.
3. Application of NRS 34.810(1)(a) as announced in the Order is unconstitutional. Defendants have a right to the effective assistance of counsel at a critical stage of the proceedings under the 6<sup>th</sup> & 14<sup>th</sup> Amendments. The Court of Appeals application of NRS 34.810(1)(a) as a procedural bar precludes review of counsel's representation at the sentencing stage of the case. The sentencing hearing is a critical stage of the case.
4. Application of NRS 34.810(1)(a) as announced in the Order is unconstitutional. Defendants have a right to the effective assistance of counsel at a critical stage of the proceedings under the 6<sup>th</sup> & 14<sup>th</sup> Amendments. The Court of Appeals application of NRS 34.810(1)(a) as a procedural bar precludes review of counsel's representation at the direct appeal stage of the case. The direct appeal is a critical stage of the case.

## **ARGUMENT IN SUPPORT OF SUPREME COURT REVIEW**

### **Facts in Support of Supreme Court Review:**

On postconviction, Mr. Gonzales raised several issues. He argued that his attorney was ineffective at the sentencing stage of the case and at the direct appeal stage of the case. Mr. Gonzales directly attacked the guilty plea arguing that the plea was not knowing or voluntary. Mr. Gonzales alleged a breach of the plea bargain when the State argued for a more excessive sentence than the plea bargain allowed and that appellate counsel failed to address the breach of the plea bargain.

In its review, the Court of Appeals ruled: "The scope of claims that may be

raised in a postconviction petition challenging a conviction entered as a result of a guilty plea are limited to claims that challenge the validity of the guilty plea” Page 10. Further: “An ineffective-assistance claim must challenge events that affected the validity of the guilty plea”. Page 11.

The claims of breach of plea bargain occurred after the entry of the guilty plea so they were not sufficient pleaded to fall within the scope of claims permitted by NRS 34.810(1)(a) and were dismissed. Page 12.

In a footnote, the Court of Appeals advises offenders to seek redress of their constitutional deprivations through the federal courts in the first instance. Page 12.

In a footnote, the Court of Appeals held that the district court found Mr. Gonzales’s claims attacking the guilty plea lacked merit. Page 13. In summary, the Court of Appeals stated: “Because all of Gonzales’s ineffective-assistance claims were outside the scope of cognizable claims under NRS 34.810(1)(a), the district court properly dismissed them.” Page 14.

It should be noted that Mr. Gonzales did not waive effective assistance of counsel either in the written plea agreement or during the plea canvas. The State’s direct plea agreement stated: “The State agrees to recommend that the penalty on each count run concurrent to each other.” The plea canvas omitted the term that the State agreed to recommend concurrent sentences. At the sentencing hearing, the State argued for a sentence in excess of the concurrent recommendation. Appellate counsel did not raise that issue on direct appeal in Docket 65768. 1AA

10, 21, 27-28,

**Issue One: This is a critical issue for Nevada Supreme Court review. This attorney alone has five cases which involve application of NRS 34.810(1)(a) as a procedural bar to preclude review of ineffective assistance of counsel claims raised under the 6<sup>th</sup> & 14<sup>th</sup> Amendments.**

This issue is ripe for Supreme Court determination. The unconstitutional application of NRS 34.810(1)(a) is common issue in postconviction litigation at this time. A published opinion is needed to clarify this subject.

This attorney directs this Court to the following cases which involve various approaches by the district court judges. Other cases currently pending (from this law office) which involve application of NRS 34.810 include the following:

*Jonathan Jaramillo v. State*, Docket: 81088; *Preston Heller v. State*, Docket 81410, Docket 78152; *Christian Scott v. State*, Docket 81071 and *Muhammad v. State*, Docket 81367. Another case was dismissed and will be the subject of appeal once the Order is entered by the Clerk of the 2<sup>nd</sup> JD, *Garcha v. State*, CR18-0381. The notice of appeal filed on the *Garcha* case on October 16, 2020.

Counsel notes that the *Jaramillo* and *Scott* were murder cases went to jury trial and that in spite of lengthy postconviction claims, neither was granted an evidentiary hearing. The *Scott* case was heard by Judge Freeman, Department 9, 2<sup>nd</sup> JD. The *Jaramillo* case was heard by Judge Walker, Department 7, 2<sup>nd</sup> JD. The

*Heller* case was<sup>2</sup> heard by Judge Drakulich, Department 1, 2<sup>nd</sup> JD. This case was heard by Judge Montero, 6th Judicial District Court. The Garcha case was dismissed by Judge Lynn Simons, Department 6, 2<sup>nd</sup> JD.

These are the type of Orders that NRAP 40(b) was anticipated to demonstrate review is required by the Nevada Supreme Court.

**Issue 2: The Court of Appeals has misapprehended standing Nevada law:**

The Nevada Supreme Court has previously ruled, on many published opinions, that sentencing is a critical stage of the case, that counsel must be effective under the 6<sup>th</sup> & 14<sup>th</sup> Amendments, and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In *Weaver v. Warden*, 107 Nev. 856, 858, 822 P.2d 112, 114 (1991), the Nevada Supreme Court specifically ruled:

“Post-conviction petition for writ of habeas corpus is appropriate vehicle for modifying sentence which is infirm for any reason.”

The Nevada Supreme Court reversed and remanded for resentencing after district court refused to grant petition for habeas corpus based on state's argument for sentence in excess of that agreed to in the bargain. *Kluttz v. Warden*, 99 Nev. 681, 669 P.2d 244 (1983).

The Order of the Court of Appeals explicitly overrules *Brown v. State*, 110 Nev. 846, 850-52, 877 P.2d 1071 (1994) and *Wilson v. State*, 105 Nev. 110, 112-117, 771 P.2d 583 (1989).

The sentencing stage of the criminal case is a critical stage of the proceeding as held in the longstanding case of *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland* test. In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114). The Order of the Court of Appeals overrules that reasoning as well.

Mr. Gonzales did not waive effective assistance of trial or appellate counsel during the plea canvas, in the plea memorandum or at sentencing.

The bottom line is that the Order of the Court of Appeals effectively overrules the Nevada Supreme Court's longstanding holdings in the above- named cases. This Order cannot stand and should be set aside by the Nevada Supreme Court.

**Issue 3: Counsel must be effective at the sentencing stage of the case.  
Postconviction review is proper and the only vehicle available for review.**

In *Weaver v. Warden*, 107 Nev. 856, 858, 822 P.2d 112, 114 (1991),

the Nevada Supreme Court specifically ruled:

“Post-conviction petition for writ of habeas corpus is appropriate vehicle for modifying sentence which is infirm for any reason.”

NRS 34.810(1)(a) read identically when *Weaver* was decided.

Directly on point is the case of *Wilson v. State*, 105 Nev. 110, 112-117, 771 P.2d 583 (1989) where ineffective assistance of counsel was found at sentencing after a guilty plea. his discretion enables the sentencing judge to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant. *Norwood v. State*, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996); *Wilson v. State*, 105 Nev. 110, 771 P.2d 583 (1989)

In *Brown v. State*, 110 Nev. 846, 850-52, 877 P.2d 1071 (1994), counsel was deemed ineffective at sentencing phase by failing to request that defendant's sentences run concurrently and by failing to present witnesses to testify in defendant's behalf. When a judge has sentencing discretion, as in the instant case, possession of the fullest information possible regarding the defendant's life and characteristics is essential to the selection of the proper sentence. *Wilson v. State*, 105 Nev. 110, 115, 771 P.2d 583, 586 (1989) (citing *Lockett v. Ohio*, 438 U.S.

586, 603 (1978)).

Mr. Gonzales demonstrated by his pleadings that he was entitled to relief.

Mr. Cochran did not object to the State's sentencing argument, which was in excess of the plea bargain.

The Guilty Plea Agreement provided as follows:

"Both sides are free to argue at time of sentencing. The State agrees to recommend that the penalty on each count run concurrent to each other." 1AA 21. Melvin was advised in that document that the possible sanction was 2-15 years in prison but that probation was available. 1AA 24.

At the plea canvas, counsel did not put on the record the key portion of the plea bargain, the State's obligation to recommend concurrent sentences on all three counts. At the sentencing hearing, the State argued that the Court should follow the recommendation in the presentence report. The presentence report recommended consecutive time on Counts I & II, but concurrent time on Count III. That was not consistent with the terms of the plea bargain on the case and was an argument for a sentence in excess of that agreed to by the plea bargain. At the conclusion of the sentencing hearing, Judge Montero sentenced Melvin to three consecutive terms of 156 months in prison with parole eligibility at 62 months on each count.

Counsel was ineffective at sentencing when counsel failed to invoke the terms of the plea bargain and failed to object to the State's sentencing argument. This claim

was properly raised on postconviction. *Kluttz v. Warden*, 99 Nev. 681, 669 P.2d 244 (1983). In *Kluttz*, the Nevada Supreme Court reversed and remanded for resentencing after district court refused to grant petition for habeas corpus based on state's argument for sentence in excess of that agreed to under the plea bargain.

Appellate also directs this Court to the following cases which are impacted by the Court of Appeals application of NRS 34.810(1)(a) as a procedural bar to postconviction review on ineffective assistance of counsel: *Johnson v. State*, 133 Nev. Adv. Op. 73, decided October 5, 2017; *Rippo v. State*, 132 Nev. Adv. Op. 11, decided February 25, 2016; *Burnside v. State*, 131 Nev. Adv. Op. 40, 352 P.3d 627, 638 (2015); *LaChance v. State*, 130 Nev. 263, 321 P.3d 919 (2014)

The Court of Appeals Order cannot withstand further review.

**Issue 4: Ineffective-assistance of appellate counsel claims are properly raised on postconviction. The Court of Appeals Order on this case deprives Mr. Gonzales of the ability to have appellate counsel's representation reviewed. NRS 34.810 does not apply to effective assistance of appellate counsel issues.**

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Although deference is given to appellate counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be

held ineffective if they fail to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983).

A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland* test. In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114).

*Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001) held that such a claim is appropriately raised for the first time in a post-conviction petition. Because of the usual need for an evidentiary hearing to resolve a claim of ineffective counsel, the failure to raise the claim on direct appeal does not constitute a waiver of the claim for purposes of post-conviction proceedings. *Daniels v. State*, 100 Nev. 579, 580, 688 P.2d 315, 316 (1984), overruled on other grounds by *Varwig v. State*, 104 Nev. 40, 752 P.2d 760 (1988).

The Order from the Court of Appeals effectively applied NRS 34.810(1)(a) so as to preclude the review of whether appellate counsel was effective under the 6<sup>th</sup> & 14<sup>th</sup> Amendments to the United States Constitution. This Order is unconstitutional. In order to withstand review, the Nevada Supreme Court would need to overturn

federal constitutional law which provides the right to effective assistance of counsel on direct appeal, decline to review those issue under Nevada standing law of *Lara* and *Kirksey*, and send all matters to the federal court system unexhausted.

The Order of the Court of Appeals misapprehends standing federal case authority and standing Nevada law.


Appellate counsel in this case did not raise the meritorious issue of the breach of the plea bargain on direct appeal. That is a key issue for appellate review.

### **CONCLUSION**

Mr. Gonzales requests this Court review the Order of the Court of Appeals of the State of Nevada in Docket 78152, dated October 1, 2020 and vacate the Order of the Court of Appeals.

These cases involve an issue of paramount concern and warrant review by the Nevada Supreme Court.

DATED this 18 day of October, 2020.

By:   
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## CERTIFICATION OF COMPLIANCE

I hereby certify that I have read this document entitled:

APPELLANT'S PETITION FOR REVIEW BY THE NEVADA  
SUPREME COURT OF THE ORDER OF THE COURT OF APPEALS  
PURSUANT TO NRAP 40(B)

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. 40(b), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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.

I hereby certify that this Petition for Review is in compliance with NRAP 40(B) in that the Petition for review does exceed 10 typed pages but meets the word count and line count limits found at NRAP 40(b)(3). The document was prepared in Word Perfect, Times New Roman .14 font, proportionally spaced type with 2.45 line spacing to imitate the double spacing found in Word. There are 2,487 words in the document and 242 lines of type.

DATED this 18<sup>th</sup> day of October, 2020.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I have caused this Notice to be delivered to all parties to this action by

E-FLEX delivery system of the Nevada Supreme Court.

addressed as follows:

United States Postal Service, First Class Mail, to

Michael McDonald, Humboldt County District Attorney  
Anthony Gordon, Deputy District Attorney  
Humboldt County District Attorney's Office

P. O. Box 909  
Winnemucca, NV 89446

DATED this 18<sup>th</sup> day of October, 2020.

  
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KARLA K. BUTKO, Esq.