No. 78152

IN THE NEVADA SUPREME COURT

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Elizabeth A. Brown
Clerk of Supreme Court

Melvin Leroy Gonzales,

Appellant,

v.

The State of Nevada,

Respondent.

AMICUS BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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Docket 78152 Document 2020-43020

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY OF *AMICUS CURIAE* & STATEMENT OF INTEREST

Nevada Attorneys for Criminal Justice (NACJ) is a state-wide, non-profit organization of criminal defense attorneys in Nevada. Our mission is to ensure accused persons receive effective, zealous representation through shared resources, legislative lobbying, and intra-organizational support. This includes the filing of Amicus Curiae Briefs pertaining to (1) state and federal constitutional issues; (2) other legal matters with broad applicability to accused persons; and (3) controversies with potential to impact our members' ability to advocate effectively for accused persons.

NACJ offers the collective experience of its members to assist this Court in deciding important issues presented by Petitioner Gonzales's case, and NACJ urges this Court to grant Petitioner Gonzales's petition for review.

This Amicus Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32. On November 10, 2020, this Court granted NACJ's motion for leave to file an amicus brief in support of Gonzales's petition for review.

ARGUMENT

A. The Nevada Court of Appeals has misapprehended state law

In its decision below, the Nevada Court of Appeals improperly restricted the scope of postconviction proceedings in guilty plea cases. NRS 34.810(1)(a) requires courts to dismiss a postconviction petition if the petitioner pled guilty and "the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." In *Gonzales v. Nevada*, the Nevada Court of Appeals interpreted this subsection in the narrowest way possible, holding that it "permits only ineffective-assistance claims that challenge the validity of the guilty plea." __ P.3d __, 2020 WL 5889017 (Nev. App. 2020). Consequently, the Court of Appeals continued, the district court had properly dismissed Mr. Gonzales's claims of ineffective assistance of appellate counsel and sentencing counsel. *Id.* at *6.

The statutory language does not mandate this interpretation, and it is inconsistent with both the legislative intent and this Court's prior caselaw. This Court should exercise its discretion to review the decision and correct this misapprehension. *See* NRAP 40B(a).

1. The statutory language does not require courts to dismiss all claims not challenging a plea

The Court of Appeals looked to the "plain language" of NRS 34.810(1)(a) and concluded that language had only one interpretation—that any habeas claims not challenging a plea are barred. *Gonzales*, 2020 WL 5889017, at *2. The Court of Appeals was incorrect.

The statute provides that:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

NRS 34.810(1)(a). Critically, this subsection focuses on convictions and petitions, not individual claims: A petitioner who pled guilty cannot challenge a conviction without challenging somewhere in a petition the basis for the plea.

Nowhere does the subsection mention what a court must do with individual claims contained within a petition that elsewhere challenges a plea. In other words, the subsection talks about dismissing a *petition* that doesn't include certain types of claims related to pleas; it doesn't talk

about dismissing a *claim* not related to pleas if the petition otherwise includes at least one of those claims. In contrast, the next subsection, NRS 34.810(1)(b), looks at individual claims, not the petition as a whole, requiring courts to dismiss particular "grounds" in the petition if those "grounds" were raised or could have been raised earlier.

For petitioners like the one in *Gonzales*, the decision below prevents all claims challenging events after entry of the plea, including ineffective assistance during sentencing proceedings or on appeal. Because this outcome is not required by the statutory language, this Court should exercise its discretion to grant review.

2. The legislative history does not support the interpretation of NRS 34.810(1)(a) by the Court of Appeals

Despite the Court of Appeals' belief that the statutory language was plain and only susceptible to a single meaning, the language itself clearly did not support the Court of Appeals' interpretation as discussed in the prior subsection. Thus, not only is the Court of Appeals' interpretation wrong, this mistake indicates that the language of the statute is open to more than one plausible interpretation. As a result, Legislative history and intent is critical to provide guidance on the appropriate

interpretation of the statute. As shown below, consistent with the Legislative history and intent, 34.810(1)(a) should be interpreted as allowing post-plea ineffective assistance of counsel claims.

Though dicta in light of its ruling on what it believed to be the plain language of NRS 34.810(1)(a), the Court of Appeals explained the background of the subsection. *Gonzales*, 2020 WL 5889017, at *2–5. The subsection has existed since 1985, when the Legislature attempted to consolidate different post-conviction provisions in one statutory scheme. *See Gonzales*, 2020 WL 5889017, at *3. But the history of the subsection, and the legal landscape it was enacted within, do not support the narrow interpretation given it by the Court of Appeals.

The Legislature added NRS 34.810(1)(a) against a background of caselaw from this Court and the United States Supreme Court, which had examined the availability of post-conviction relief after a guilty plea. This Court in 1970 explained that, "when a guilty plea is not coerced, and the defendant was represented by competent counsel, at the time it was entered, the subsequent conviction is not open to collateral attack and any errors are superseded by the plea of guilty." *Mathis v. Warden, Nev. State Penitentiary*, 86 Nev. 439, 441, 471 P.2d 233, 235 (1970) (citing

Hall v. Warden, 83 Nev. 446, 434 P.2d 425 (1967), and *Powell v. Sheriff*, 85 Nev. 684, 462 P.2d 756 (1969)). That same year, in the "*Brady* trilogy," the United States Supreme Court "refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 265 (1973); *see Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970). Then, three years later, the United States Supreme Court reaffirmed that a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett*, 411 U.S. at 267.

Although the Court of Appeals acknowledged these cases, *Gonzales*, 2020 WL 5889017, at *3, it failed to recognize a crucial defining factor—all the cases cited by the Court of Appeals addressed the waiver only of errors that occurred *before* a guilty plea. *See Tollett*, 411 U.S. at 266–67; *Mathis*, 86 Nev. at 440, 471 P.2d at 234; *see also Kirksey v. State*, 112 Nev. 980, 998–99, 923 P.2d 1102, 1114 (1996). Under the reasoning of these cases, a defendant who plead guilty cannot raise a standalone constitutional claim that would have been the basis for a pre-trial motion

(for example, a Fifth Amendment claim involving the voluntariness of a confession). But under those cases, a defendant who pled guilty still could raise in a post-conviction petition claims based on constitutional deprivations occurring after that guilty plea (in addition to claims alleging constitutional deprivations that caused the guilty plea).

The Court of Appeals cited these cases for the proposition that a defendant who pleads guilty waives certain categories of claims. But the Court of Appeals ignored this distinction between claims that could have been raised before the plea, as opposed to claims that arose only after the plea. These cases may apply waiver doctrine to the first category of claims, but they do not apply waiver doctrine to the latter category. The Legislature was obviously cognizant of the case law. Its intent was to limit pre-plea claims in the same way they had been limited by this Court and the Supreme Court. But there is nothing to indicate the Legislature was intending to bar *post*-plea ineffective assistance of counsel claims.

The Court of Appeals' reasoning was therefore incorrect. The Legislative history and intent support an alternative interpretation allowing for a petitioner who pled guilty to raise post-plea ineffective

assistance of counsel claims. The lower court's misguided approach requires this Court's intervention to correct.

3. The Court of Appeals reads NRS 34.810(1)(a) in a way inconsistent with this Court's cases and the statutory scheme as a whole

The Court of Appeals, after concluding that NRS 34.810(1)(a) restricted petitioners only to claims challenging a plea, gave two examples of types of claims that are not allowed: ineffective assistance of appellate counsel and ineffective assistance of sentencing counsel. *Gonzales*, 2020 WL 5889017, at *6. But this Court regularly reviews, despite a guilty plea, claims of ineffective assistance of appellate counsel. *See, e.g.*, *Keohokalole v. State*, 126 Nev. 730, 367 P.3d 789, 2010 WL 3497639, at *2–4 (2010) (unpublished table disposition); *Kirksey*, 112 Nev. at 997–98, 923 P.2d at 1113; *see also Toston v. State*, 127 Nev. 971, 976–80, 267 P.3d 795, 799–802 (2011). And this Court similarly reviews claims of ineffective assistance of sentencing counsel after a guilty plea. *See, e.g.*, *Weaver v. Warden, Nevada State Prison*, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991); *Wilson v. State*, 105 Nev. 110, 112-18, 771 P.2d 583, 584-88 (1989).

Should this Court allow the reasoning of the Court of Appeals to stand, these types of claims will not be allowed in the future, implicitly undermining this Court's decisions.

Similarly, the Court of Appeals' interpretation is inconsistent with the statutory scheme as a whole. A statute must be interpreted in the context of, and in harmony with, the larger statutory scheme. *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 826-27, 192 P.3d 730, 734 (2008) ("Statutes are to be read in the context of the act and the subject matter as a whole. . . . Whenever possible, we will interpret a statute in harmony with other rules and statutes."). One section of a statute should not be interpreted in a way that creates an internal inconsistency within the statutory scheme as a whole. But that is precisely what the Court of Appeals' interpretation does.

Under Chapter 34, "*[a]ny person* convicted of a crime under sentence of death or imprisonment who claims the conviction was obtained, *or that the sentence* was imposed in violation of the Constitution of the United States of the Constitution of laws of this State . . . . may . . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction *or sentence*." NRS 34.724(1) (emphasis

added). The Court of Appeals' interpretation of the statute, which restricts those who pled guilty from raising, at the very least, claims challenging the effectiveness of sentencing counsel, is inconsistent with the general scope of postconviction petitions under Chapter 34, which allows any person to challenge the constitutionality of the imposition of sentence on its own.

In sum, the Court of Appeals' interpretation of the statute is inconsistent with this Court's prior precedent and the statutory scheme as a whole. It requires this Court's intervention.

B. The Court of Appeals' interpretation of NRS 34.810(1)(a) raises serious constitutional problems

The Court of Appeals' decision below precludes petitioners who have pled guilty from raising constitutional claims that should be available to them on collateral review. As a result, it causes serious constitutional problems under the Suspension Clause, the Equal Protection Clause, and the Due Process Clause.

The doctrine of constitutional avoidance dictates that, where the language of a statute is susceptible to multiple plausible interpretations, a court should avoid an interpretation that would raise serious

constitutional questions. *See Degraw v. The Eighth Judicial District* Court, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018). The Court of Appeals' decision runs afoul of this principle. Alternatively, to the extent the Court of Appeals' interpretation is the only plausible one, NRS 34.810(1)(a) violates the State and Federal Constitution.

1. The Court of Appeals' interpretation of NRS 34.810(1)(a) violates the State and Federal Suspension Clauses and Article 6, section 6 of the Nevada State Constitution

The Court of Appeals' interpretation of NRS 34.810(1)(a) unconstitutionally alters the scope of the writ, violating the State and Federal Suspension Clauses and Article 6, section 6 of the Nevada Constitution.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. This provision is incorporated in the Nevada Constitution, Declaration of Rights, art. 1, § 5: "The privilege of the writ of Habeas Corpus, shall not be suspended unless when in cases of rebellion or invasion the public safety may require its suspension." The Nevada Constitution also confers affirmative jurisdiction to issue the

writ upon the Supreme Court and its Justices, art. 6, § 4, and upon the district courts, art. 6, § 6.

These constitutional provisions, read together, prohibit "[a]ny attempt by the Legislature to abolish habeas corpus." *Grego v. Sheriff, Clark County*, 94 Nev. 48, 49, 574 P.2d 275, 276 (1978). The Legislature has the authority to place a "reasonable regulation" on the writ, but it may not impair "the traditional efficacy of the writ." *Id.* at 50, 574 P.2d at 276; *accord Passanisi v. Direct, Nevada Dept. of Prisons*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989). In other words, while the Legislature may "impose certain procedural requirements," it may not alter "the scope of the writ of habeas corpus." *Grego*, 94 Nev. at 50, 574 P.2d at 276; *accord Gary v. Sheriff, Clark County*, 96 Nev. 78, 79-80, 605 P.2d 212, 214 (1980).

The Court of Appeals' interpretation of 34.810(1)(a) represents an unconstitutional suspension of the writ of habeas corpus. It goes beyond a "reasonable regulation," instead limiting the scope and efficacy of the writ by precluding claims that fall squarely within the scope of the writ.

For example, the Court of Appeals' interpretation unconstitutionally precludes claims related to sentencing proceedings. A defendant has the constitutional right to the effective assistance of counsel at sentencing, in both capital and non-capital cases. *See, e.g.*, *Thomas v. State*, 120 Nev. 37, 44–45, 83 P.3d 818, 823 (2004) (granting post-conviction petition based on ineffective assistance of counsel at penalty phase in capital case); *Brown v. State*, 110 Nev. 846, 850–53, 877 P.2d 1071, 1073–75 (1994) (granting post-conviction petition based on ineffective assistance of counsel in non-capital case). But under the reasoning of *Gonzales*, defendants who plead guilty can no longer challenge their attorney's effectiveness at sentencing. *See Gonzales*, 2020 WL 5889017, at *6.

A defendant also has the right to the effective assistance of appellate counsel. *Burke v. State*, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). But those claims also are precluded under the Court of Appeals' decision. *See Gonzales*, 2020 WL 5889017, at *6.

Chapter 34 allows "*[a]ny person* convicted of a crime" to "file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence." NRS 34.724(1) (emphasis added). Claims of

ineffective assistance of counsel fall squarely within the scope of post-conviction petitions. *See Pelligrini v. State*, 117 Nev. 860, 882, 34 P.3d 519, 534 (2001) ("Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition. . . ."). Chapter 34 petitions are the exclusive means for raising these types of constitutional challenges. NRS 34.724(2)(b); *see generally McConnell v. State*, 125 Nev. 243, 247–48, 212 P.3d 307, 310 (2009).

The Court of Appeals' interpretation of 34.810(1)(a) is an unconstitutional limitation on the scope of the writ. It effectively abolishes the writ for these two types of claims of ineffective assistance of counsel for petitioners who pled guilty. Under the State Constitution, the Legislature does not have the authority to limit the writ in this way. This is a substantive restriction on the scope of the writ that goes well beyond the procedural limitations that the Nevada Supreme Court has held are reasonable regulations of the writ. *See Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001) (one-year time limitation on successive petitions); *Passanisi*, 105 Nev. at 66, 769 P.2d at 74 (procedural prerequisite to filing post-conviction petition); *Dromiack v. Warden, Nevada State Prison*, 97 Nev. 348, 349, 630 P.2d 751, 752 (1981)

(limitations on successive petitions); *Gary*, 96 Nev. at 80, 605 P.2d at 214 (limitation on appeals from pre-trial writs); *Grego*, 94 Nev. at 49-51, 574 P.2d at 275-77 (conditioning use of pretrial writ based on waiver of speedy trial right).

The Court of Appeals' interpretation of 34.810(1)(a) raises serious constitutional concerns under the Suspension Clause.[1] Under the doctrine of constitutional avoidance, an alternative interpretation should be adopted. Alternatively, to the extent the lower court's interpretation is the only plausible one, the statute is unconstitutional. In addition to the lower court's error, these questions are of first impression for this

[1] 34.810(1)(a) presents a related serious constitutional problem. The federal constitution requires that the scope of collateral review in state court also include new constitutional rules that are retroactive because they are substantive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). 34.810(1)(a) would also be unconstitutional if interpreted to preclude a petitioner from seeking collateral review on a new substantive constitutional rule that went beyond "an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel."

Court. They provide significant reasons for this Court to grant the petition for review. *See* NRAP 40B(a).

2. The Court of Appeals' decision violates the Equal Protection Clause because it results in differential treatment of similarly situated habeas petitioners

"The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). Strict scrutiny is applied in equal protection cases "involving fundamental rights" like privacy or marriage, and in suspect-class cases. *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). To withstand strict scrutiny, a law must be "narrowly tailored and necessary to advance a compelling state interest." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). In cases not involving fundamental liberties, a lower (rational basis) standard applies, which requires the challenged law to be "rationally related to a legitimate governmental interest." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000).

Under either standard, the Court of Appeals' interpretation of the Statute does not withstand Equal Protection scrutiny. In *Wilson v. State*, 105 Nev. 110, 112, 771 P.2d 583, 584 (1989), this Court granted habeas relief under the Statute to a petitioner whose sole claim was ineffective assistance of counsel during post-plea sentencing. Gonzales has asserted an identical claim (in addition to appellate counsel ineffectiveness), yet the Court of Appeals found his claim is neither cognizable nor redressable under the Statute. The resulting differential treatment of habeas petitioners asserting identical claims contravenes the Equal Protection principle that similarly situated persons receive "like treatment under the law," and it cannot withstand strict scrutiny or rational basis review.

The same can be said with respect to a comparison between petitioners who were convicted after a trial and those who pled guilty. Petitioners who pled guilty are similarly situated to these petitioners under Chapter 34. They are both requesting relief from "a judgment of conviction or sentence in a criminal." NRS 34.720. Further, Chapter 34 allows "*[a]ny person* convicted of a crime" to "petition for a writ of habeas corpus to obtain relief from the conviction or sentence." NRS 34.724(1) (emphasis added).

Petitioners who were convicted after trial are allowed to raise claims of ineffective assistance at sentencing and on appeal. However, under the Court of Appeals' interpretation of 34.810(1)(a), petitioners who plead guilty are treated differently and cannot raise these types of claims. There is no basis under any equal protection level of review for treating these two similarly situated classes of petitioners differently. Regardless of whether a petitioner was convicted after trial or pled guilty, the petitioner retains the right to the effective assistance of counsel at sentencing and on appeal. A defendant who pleads guilty does not waive the right to counsel at sentencing or on appeal.

To the extent habeas relief implicates due process—a fundamental right—and is therefore subject to strict scrutiny, the Court of Appeals' interpretation of the Statute is not narrowly tailored to advance any compelling state interest. On the contrary, it represents a decidedly untailored categorical bar to *all* post-plea sentencing-IAC claims, and there is no "compelling state interest" in affording relief to some habeas petitioners but not others under the same Statute. The Court of Appeals' interpretation of the Statute likewise fails under rational basis review

because there is no rational basis for such disparate treatment of similarly situated habeas petitioners.

Simply put, the Court of Appeals' interpretation of the Statute violates the Equal Protection Clause because, even though Gonzales is similarly situated to the petitioner in *Wilson* and those who were convicted after trial, he was treated differently under the statute.

3. The Court of Appeals' decision violates due process because it arbitrarily deprives him of the "process" that is "due" under *Wilson*

Where state law creates procedures that safeguard fundamental liberty interests, the arbitrary denial of such procedures is a violation of due process. For example, Nevada's habitual sentencing statute (NRS 207.010) creates a constitutionally protected liberty interest in a sentencing procedure by requiring a sentencing court to review a defendant's prior felonies and make particularized findings that habitual adjudication is "just and proper." *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995); *see also Hughes v. State*, 116 Nev. 327, 332 (2000) ("Nevada law created a constitutionally protected liberty interest in such a sentencing procedure.") A sentencing court's failure to comply with this

procedure violates a defendant's due process rights. *See Walker*, 50 F.3d at 673.

As with Nevada's habitual statute, the Statute, as interpreted by *Wilson*, likewise creates a procedure protecting liberty interests. Specifically, it reifies a criminal defendant's constitutional right to effective post-plea counsel and allows for vindication of this right under Nevada habeas law. Indeed, *Wilson*'s result—habeas relief based purely on a claim of ineffective post-plea (sentencing) counsel—cannot be interpreted any other way.

Because *Wilson*'s interpretation of the Statute creates a procedure under which claims for ineffective post-plea counsel are cognizable and redressable under Nevada habeas law, the arbitrary denial of that procedure is a due process violation. Stated differently, the right to assert such a claim under the Statute is the "process" that is "due" a habeas petitioner (like Gonzales). It necessarily follows that the Court of Appeals' decision—to preclude Gonzales from using the *same* procedure to vindicate the *same* constitutional right as the petitioner in *Wilson*—is therefore a violation of due process.

C. Allowing the decision to stand will lead to a broad array of unintended results for criminal defendants

This Court should exercise its discretion to review the decision below because failing to do so will lead to unintended, absurd results. *See* NRAP 40B(a); *cf. Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 546, 331 P.3d 850, 854 (2014), as modified on denial of reh'g (Nov. 24, 2014) (explaining that this Court will "construe unambiguous statutory language according to its plain meaning unless doing so would provide an absurd result").

For example, adopting the reasoning of the decision below will preclude all claims of ineffectiveness during sentencing proceedings. *See Gonzales*, 2020 WL 5889017, at *6. But those proceedings often mirror guilt proceedings, particularly in capital cases, and defendants should not be expected to waive their constitutional right to effective representation by choosing to plead guilty. *See Weaver*, 107 Nev. at 858–59, 822 P.2d at 114 (considering merits of claim despite guilty plea); *Wilson*, 105 Nev. at 112–18, 771 P.2d at 584–88 (same).

Criminal defendants in Nevada also have the right to effective representation on appeal. *See Kirksey*, 112 Nev. at 998, 923 P.2d at 1113. That right applies even when a defendant pleads guilty. *See id.* And when an attorney fails to properly advise a criminal defendant about appellate rights, the defendant can argue a constitutional violation in a post-conviction petition. *See Toston v. State*, 127 Nev. at 976–80, 267 P.3d at 799–802. But the decision from the Court of Appeals explicitly removes from defendants any way to vindicate this right in state court, *Gonzales*, 2020 WL 5889017, at *6, allowing no redress for otherwise meritorious claims of ineffective assistance.

Other examples are easily imagined. A criminal defendant, following the reasoning from the Court of Appeals, would have no remedy in state court should his attorney abandon him after his plea, *see Maples v. Thomas*, 565 U.S. 266 (2012), develop a post-plea conflict, *see Cuyler v. Sullivan*, 446 U.S. 335, 348–49 (1980), fail to object to prosecutorial misconduct during a capital sentencing hearing, *see Darden v. Wainwright*, 477 U.S. 168, 181 (1986), or fail to object to removal of potential jurors from that penalty phase based on race, *see Batson v. Kentucky*, 476 U.S. 79 (1986). Because criminal defendants are

constitutionally ensured the right to bring these claims in state court, this Court should exercise its discretion to review and reverse the decision below.

CONCLUSION

For the foregoing reasons, this Court should grant Gonzales's petition for review.

Dated November 25, 2020.

Respectfully submitted,

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Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
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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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14 point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

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:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 4198 words; or

[ ] Does not exceed 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 is 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 Rules of Appellate Procedure.

Dated November 25, 2020.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Charles L. Finlayson and Michael Macdonald.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following persons:

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