

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN GONZALES,

Appellant,

vs.

STATE OF NEVADA

Respondent.

Electronically Filed  
Docket No. 78152  
District Court No. CV 20-547  
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Clerk of Supreme Court

**RESPONDENT'S ANSWERING BRIEF TO APPELLANT'S PETITION  
FOR REVIEW BY THE NEVADA SUPREME COURT OF THE ORDER  
OF THE COURT OF APPEALS PURSUANT TO NRAP 40(B),  
AND RESPONDENTS REPLY TO AMICUS BRIEFS**

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## STATEMENT OF THE ISSUES

Respondent objects to Appellant's statement of the issues in his Petition for Review by the Nevada Supreme Court of the Order of the Court of Appeals Pursuant to NRS 40(b) and notes the issues as follows:

ISSUE I: Does the fact that Appellant's attorney has five cases that involve the application of *NRS 34.810(1)(a)*, serve an extraordinary reason to justify review by this Court under *NRS 40(a) & (b)*?

ISSUE II: Did the Court of Appeals in its October 1, 2020 Order overrule the Nevada Supreme Court's prior decisions regarding the application of *NRS 34.810(1)(a)*?

ISSUE III: Did the Court of Appeals rule correctly when it determined that *NRS 34.810(1)(a)* was not ambiguous, and that the Nevada Legislature only intended to allow ineffective assistance of counsel claims relating to events that only challenge the validity of the guilty plea, and not to those claims dealing with counsel's representation at the sentencing stage of the case?

ISSUE IV: Did the Court of Appeals rule correctly when it determined that *NRS 34.810(1)(a)* was not ambiguous, and that the Nevada Legislature only intended to allow ineffective assistance of counsel claims relating to events that only challenge the validity of the guilty plea, and not to those claims dealing with counsel's representation at the appellate stage of the case?

STATEMENT OF FACTS

The Respondent objects to Appellant's asserted facts in his Petition for Review by the Nevada Supreme Court of the Order of the Court of Appeals Pursuant to NRAP 40(b), as well as the characterization of those facts, and adopts the facts set forth in the District Court's February 1, 2019 Order, denying both Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) filed on November 16, 2015, and his Supplemental Petition for Writ of Habeas Corpus (Post -Conviction) filed on May 15, 2017.

On January 17, 2013, Appellant was arrested by the Humboldt County Sheriff's Office for aggravated stalking charges against his ex-wife Connie Ramirez and her parents, who lived in Humboldt County, Nevada. Subsequently, on January 7, 2014, pursuant to a guilty plea agreement, Petitioner entered a plea of guilty to three counts of aggravated stalking, a Category B Felony, in violation of *NRS 200.575(2)*, and was thereafter sentenced on April 15, 2014 to three consecutive terms of a minimum of sixty-two to one hundred fifty-six months in the Nevada Department of Corrections. Petitioner's Judgment of Conviction was later affirmed on Appeal on November 12, 2014.

STANDARD OF REVIEW

The Respondent argues that it is a not a matter of right, but instead a matter of judicial discretion, for this Court to review Appellant's Petition for Review of the Order of the Court of Appeals dated October 1, 2020 in this case.

ARGUMENT

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2 ISSUE I: The fact that Appellant's attorney has five cases that involve the  
3 application of *NRS 34.810(1)(a)*, does not serve as extraordinary reason to justify  
4 review by this Court under *NRAP 40B(a) & (b)*.

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6 *NRAP 40B(b)* notes that "Review of decisions of the Court of Appeals by the  
7 Nevada Supreme Court *is limited to the circumstances* set forth in these Rules and is an  
8 *extraordinary remedy* outside the normal process of appellate review, which is not  
9 available as a matter of right. (*Emphasis added*). Having five cases that involve the  
10 application of *NRS 34.810(1)(a)*, as Appellant attorney asserts, hardly serves as  
11 extraordinary reason to justify review by this Court under *NRAP 40B(a) & (b)*.  
12 Furthermore, nor does an evaluation of the three factors for review, as defined by  
13 *NRAP 40B(a)*, justify an exercise of this Court's discretion in this case. The rules of  
14 statutory interpretation are hardly new to this Court, *see Hobbs v. State*, 127 Nev. 234,  
15 251 P.3d 177 (2011) and *State v. Lucero*, 127 Nev. 92, 249 P.3d 1226 (2011); there is no  
16 Nevada Supreme Court case which conflicts with the statutory interpretation of *NRS*  
17 *34.810(1)(a)*, as to what the Nevada Legislature intended in its present form; nor does  
18 this case involve fundamental issues of statewide public importance that can't  
19 otherwise be properly amended by the Nevada Legislature through its upcoming  
20 legislative session, if it so desires. *See NRS 34.810(1)(a)*. As a result, all that is  
21 presented to this Court is a desire on behalf of the Appellant, the Nevada Attorney  
22 General's Office, and the Nevada Attorneys for Criminal Justice to have ineffective  
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1 assistance of counsel claims, that either arise before or after the entry of a guilty plea,  
2 to be litigated in a state forum, instead of a federal forum, as the Court of Appeals  
3 noted, even though this Court has previously stated in *Pellegrini v. State*, 117 Nev. 860,  
4 870 n.11, 34 P.3d 519, 526 n.11 (2001), as pointed out clearly by the Court of Appeals  
5 here, that “*postconviction habeas review at the state level is a creation of state law*,” and that the  
6 U.S. Constitution, “*provides no right to post-conviction habeas review by state courts*.” (*Emphasis*  
7 *added*). See *Ripppo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018); and  
8 *Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020, page 12 n.3).

11 ISSUE II: The Court of Appeals in its October 1, 2020 Order did not overrule  
12 the Nevada Supreme Court’s prior decisions regarding the application of NRS  
13 34.810(1)(a).

15 Appellant can point to no Nevada Supreme Court decision which contains a  
16 contrary interpretation of NRS 34.810(1)(a). It is worth pointing out that, although  
17 not binding, there is persuasive authority from this Court that reaches the very same  
18 conclusion that the Court of Appeals did in its October 1, 2020 Order, that NRS  
19 34.810(1)(a) limits the types of claims that can be raised when a defendant pleads  
20 guilty, and that the Court of Appeal’s decision here is not a one-off opinion.

23 Several earlier unpublished Nevada Supreme Court opinions have considered  
24 the applicability of NRS 34.810(1)(a) to post-plea claims of ineffective assistance of  
25 counsel and held that its plain language precludes such claims. For instance, in  
26 *Maestas v. State*, 422 P.3d 1233 (Nev. 2018) the Nevada Supreme Court recognized that  
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1 the petitioner's claim that his constitutional right to due process was violated by  
2 pretrial publicity "falls outside the scope of a postconviction habeas petition that  
3 challenges a judgment of conviction pursuant to a guilty plea." *See Maestas, supra* 422  
4 P.3d 1233, n. 2 (Table), 2018 WL 3629443 n. 2 (Nev. July 26, 2018). Furthermore, in  
5 *Mack v. State*, 410 P.3d 981 (Nev. 2018), the Nevada Supreme Court recognized that a  
6 guilty plea and an *Alford* plea limited the petitioner "to raising claims that the plea was  
7 entered involuntarily or unknowingly or without the effective assistance of counsel." <sup>1</sup>  
8 *See Mack, supra* 410 P.3d 981 (Table), 2018 WL 366896 \*1 (Nev. January 10,  
9 2018). Other cases also recognize the limited scope of claims available after a guilty  
10 plea. *See e.g. Strohmeyer v. State*, 450 P.3d 918 (Table), 2019 WL 5491702 (Nev. October  
11 24, 2019); *Bishop v. State*, 438 P.3d 339 (Table), 2019 WL 1643779 (Nev. April 12,  
12 2019); *Birch v. State*, 435 P.3d 1223 (Table), 2019 WL 1244773 (Nev. March 15, 2019);  
13 *Edwards v. State*, 435 P.3d 1229 (Table), 2019 WL 1255196 (Nev. March 19, 2019);  
14 *State v. Patterson*, 2020 WL 2521784 (Nev. May 15, 2020). Although not binding  
15 precedent, these cases can be considered as persuasive authority for the premise that  
16 the language of NRS 34.810(1)(a) means what it says on its face. NRAP  
17 36(c)(3). When a defendant pleads guilty, under NRS 34.810(1)(a) he is limited to  
18 raising claims related to the voluntariness, knowingness, or assistance of counsel  
19 provided in entering the plea. All other claims are therefore barred.

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27 <sup>1</sup>See *North Carolina v. Alford*, 400 U.S. 25 (1970).  
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1 The legislature is free to impose reasonable regulations on the writ of habeas  
2 corpus, such as procedural bars, so long as they do not impair the traditional efficacy  
3 of the writ. *See Passanisi v. Director, Nevada Dep't of Prisons*, 105 Nev. 63, 66, 769 P.2d  
4 72, 74 (1989). Habeas corpus litigation is a collateral attack to a conviction "intended  
5 for the purpose of testing the legality of detention." *Sheriff, Clark County v. Hatch*, 100  
6 Nev. 664, 666, 691 P.2d 449, 450 (1984). Thirty-five years ago, the Nevada Legislature  
7 saw fit to limit post-conviction claims raised when the petitioner pleads guilty. *See*  
8 *NRS 34.810(1)(a)*. This Court should not accept the invitation to disregard the clear  
9 limitation the Nevada Legislature placed on habeas corpus litigation in plea cases.  
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12 As noted above, the issue here is the appropriate forum for Appellant to raise  
13 his ineffective assistance of counsel claims relating to the performance of his counsel,  
14 either before or after the entry of his guilty plea. In the present case, the Nevada  
15 Legislature clearly limited post-conviction relief to certain claims not affecting the  
16 validity of the guilty plea. (*See Gonzales v. State of Nevada*, No. 78152-COA, October 1,  
17 2020, pages 5 and 12, n.3). Moreover, even the U.S. Supreme Court of the United  
18 States, recognizes the importance of limiting collateral attacks in plea cases. *See Bousley*  
19 *v. U.S.*, 523 U.S. 614, 621 (1998) (noting that guilty pleas may only be attacked for  
20 claims concerning the voluntariness and intelligence of a plea and reasoning that "the  
21 concern with finality served by the limitation on collateral attack has special force with  
22 respect to convictions based on guilty pleas").  
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27 Contrary, contrary to Appellant's assertions, the Court of Appeals fully  
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acknowledged Appellant's rights to bring ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Court of Appeals did not indicate that *Strickland, supra* does not apply to trial or appellant counsel, but only stated that the Nevada Legislature had limited ineffective assistance of counsel claims under NRS 34.810(1)(a) to only those effecting the validity of the guilty plea itself. (See *Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020, page 5). In summary, the issue here is the proper forum to raise these specific ineffective assistance of counsel claims, not that *Strickland, supra* does not apply to ineffective assistance of counsel claims prior to and after the entry of a plea of guilty.

ISSUE III: The Court of Appeals ruled correctly when it determined that NRS 34.810(1)(a) was not ambiguous, and that the Nevada Legislature only intended to allow ineffective assistance of counsel claims relating to events that only challenge the validity of the guilty plea, and not to those claims dealing with counsel's representation at the sentencing stage of the case.

While the Court of Appeals noted that Appellant's claims that his trial 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 this alleged brief on appeal, these claims were not sufficiently plead to fall with the scope of claims permitted by NRS 34.810(1)(a), this does not negate the fact that the District Court below had already rejected these claims under *Strickland, supra*. (See *Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020, page 12).

1 In the present case, the facts presented to the District Court was that Appellant  
2 alleged a breach of the plea agreement in this case by the State, where his trial counsel at  
3 the evidentiary hearing in this case before the District Court on his Writ of Habeas  
4 Corpus Petition (Post-Conviction), failed to even acknowledge that a breach did in fact  
5 occur. While the law for ineffective assistance of counsel claims under *Strickland, supra*,  
6 is different from an analysis of a breach of a plea agreement on direct appeal under *Van*  
7 *Buskirk v. State*, 102 Nev. 241, 720 P.2d 1215, (1986), at the above evidentiary hearing,  
8 Appellant's trial and appellate counsel succinctly testified that he did not believe that the  
9 State breached the plea agreement, which is entirely reasonable in explaining why  
10 Appellant's counsel did not object to any such breach at the sentencing hearing or raise  
11 the issue on direct appeal. The testimony at the evidentiary hearing in the District  
12 Court clearly showed that Appellant's counsel felt that the State did concur with the  
13 recommendation contained in the Nevada Department of Public Safety, Division of  
14 Parole and Probation, prepared Presentence Investigation Report, and it was this  
15 concurrence that was satisfactory to the heart of Appellant's trial counsel that there was  
16 no breach of the plea argument by the State. Appellant can point to nothing in the  
17 record that would otherwise support his post-conviction interpretation of the  
18 sentencing record, other than arguing that there was no good reason for his defense  
19 counsel not to object to the State's argument at sentencing or argue this issue on direct  
20 appeal. (See *Appellant's Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-*  
21 *Conviction)*). Appellant's arguments otherwise clearly fall outside the scope of NRS  
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1 34.810(1)(a), thus leaving Appellant the opportunity to bring their ineffective  
2 assistance of counsel claims into federal court (*See Gonzales v. State of Nevada*, No.  
3 78152-COA, October 1, 2020, pages 5 and 12, n.3).

4 Finally, it should also be pointed out that unlike in Court of Appeals here, the  
5 legislative scope of NRS 34.810(1)(a), was not before this Court in *Weaver v. Warden*,  
6 107 Nev. 856, 822 P.2d 112 (1991); *Klutz v. Warden*, 99 Nev. 681, 669 P.2d 244 (1983);  
7 *Brown v. State*, 110 Nev. 846, 877 P.2d 1071 (1994); *Wilson v. State*, 105 Nev. 110, 771  
8 P.2d 583 (1989); nor in *Mempa v. Ray*, 389 U.S. 128 (1967), and that *Weaver, supra*,  
9 *Klutz, supra*, *Wilson, supra* and *Mempa, supra*, all were decided before NRS 177.375(1)  
10 was repealed by the Nevada Legislature, effective on January 1, 1993.

11 ISSUE IV: The Court of Appeals ruled correctly when it determined that NRS  
12 34.810(1)(a) was not ambiguous, and that the Nevada Legislature only intended to  
13 allow ineffective assistance of counsel claims relating to events that only challenge the  
14 validity of the guilty plea, and not to those claims dealing with counsel's  
15 representation at the appellate stage of the case.

16 Under the same analysis as noted in the discussion here dealing with Issue 3,  
17 Appellant's claims that his appellant counsel was ineffective in not raising his  
18 sentencing allegations of ineffective assistance on appeal also lacks merit. In *Morales v.*  
19 *State* (Nev., 2014) this Court held that to prove ineffective assistance of appellate  
20 counsel a petitioner "must demonstrate that counsel's performance was deficient in  
21 that it fell below an objective standard of reasonableness, and resulting prejudice such  
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1 that the omitted issue would have a reasonable probability of success on appeal," citing  
2 *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8.

3 At the evidentiary hearing in this case, Appellant's counsel testified that he  
4 raised on appeal the two issues that he felt that had the most merit, and that Appellant  
5 has failed to show that this decision was not unreasonable under the standards  
6 articulated under *Strickland, supra* or *Morales, supra*. Nevertheless, as the Court of  
7 Appeals noted here, these claims were not sufficiently plead to fall with the scope of  
8 claims permitted by NRS 34.810(1)(a), but this does not negate the fact, as noted  
9 previously, that the District Court below had already rejected these claims under  
10 *Strickland, supra*. (See *Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020,  
11 page 12).

12 Furthermore, Appellant cites *Pellegrini v. State, supra*, for the right of the district  
13 court to hear post-conviction habeas writs. but *Pellegrini* allowed wide latitude in how  
14 this Court applied the time bar for successive petitions, citing *Pennsylvania v. Finley*, 481  
15 U.S. 551 (1987), for the rule that the federal constitution provides no right to post-  
16 conviction habeas review by state courts. It should be noted that the application of  
17 procedural bars, like NRS 34.810(1)(a), is mandatory in Nevada. *State v. Eighth Judicial*  
18 *Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). In *Pellegrini, supra*,  
19 this Court rejected a flexible approach to procedural bars. Instead, it reaffirmed the  
20 strict procedural bar approach. See *Passanisi v. Director, Nevada Dep't of Prisons*, 105 Nev.  
21 63, 66, 769 P.2d 72, 74 (1989) (the legislature is free to impose reasonable regulations  
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1 on the writ of habeas corpus, such as procedural bars, so long as they do not impair  
2 the traditional efficacy of the writ).

3 In summary, as was noted by the Court of Appeals, Appellant has other forums  
4 to raise his ineffective assistance of counsel claims. As a result, the only issue before  
5 the Court of Appeals, and this Court now, is whether *NRS 34.810(1)(a)*, as passed by  
6 the Nevada Legislature, affords post-conviction habeas writ review to Appellants of  
7 claims alleging ineffective assistance of counsel before and after the entry of a guilty  
8 plea, and the Court of Appeals was correct when it ruled that the legislature  
9 determined that it simply did not.  
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#### 11 RESPONDENTS REPLY TO AMICUS BRIEFS

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13 In the present case, this Court allowed amicus briefs to be filed by both the  
14 Nevada Attorney General's Office and the Nevada Attorneys for Criminal Justice, but  
15 both lack merit, with the issues alleged therein simply beyond the purview of this  
16 Court.  
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19 In their amicus brief, the Attorney General's Office noted that while the Court  
20 of Appeals held that a petitioner who pleads guilty cannot enforce now their right to  
21 the effective assistance of counsel of post-plea trial and appellate counsel in state  
22 court, the Court of Appeal's decision did not "abrogate a defendant's right to the  
23 effective assistance of counsel in post-plea proceedings," because offenders can "seek  
24 redress of constitutional deprivations in federal courts in the first instance." (*Emphasis*  
25 *original*) See *Attorney General's Amicus Brief page 2-3*). This is noteworthy in the sense that  
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1 Appellant effectively argues otherwise. (See *Appellant's Petition for Review by the Nevada*  
2 *Supreme Court of the Order of the Court of Appeals Pursuant to NRAP 40(b) Appeals*, Pages 6  
3 & 10). Furthermore, for exhaustion purposes under 28 U.S.C. §2254(b), if the Nevada  
4 Legislature intended NRS 34.810(1)(a) only to apply to post-conviction relief claims  
5 affecting the validity of a guilty plea, and that is the role that the Nevada Legislature  
6 determined that the state courts should play in post-conviction habeas claims, it  
7 cannot be otherwise argued that NRS 34.810(1)(a) would act as a procedural bar for a  
8 petitioner to seek habeas review in federal court. (See *Rose v. Lundy*, 455 U.S. 509, 518  
9 (1982)). As to the interplay between federal and state procedural bars, this Court in  
10 *Brown v. McDaniel*, 130 Nev. 565, 574–75, 331 P.3d 867, 873–74 (2014) stated:

13 “We also reject the suggestion that we should adopt an exception similar  
14 to that adopted in *Martinez* [*Martinez v. Ryan*, 132 S.Ct. 1309 (2012)]  
15 because the Legislature intended that the state habeas remedy be  
16 “coextensive” with the federal habeas remedy and exceptions to federal  
17 procedural bars. Although the Legislature may have created the statutory  
18 post-conviction remedy in response to United States Supreme Court  
19 decisions that implied “the need for an appropriate state post-conviction  
20 collateral remedy to review claimed violations of federally protected  
21 rights,” *Marshall v. Warden*, 83 Nev. 442, 444, 434 P.2d 437, 438–39  
22 (1967) (citing *Case v. Nebraska*, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d  
23 422 (1965)) (indicating that the Nevada Legislature's adoption of the  
24 post-conviction collateral remedy act in 1967 was in response to the  
25 Supreme Court's extension of numerous federal protections to state  
26 criminal cases), *superseded by statute as stated in* *Passanisi v. Dir., Nev. Dep't of*  
27 *Prisons*, 105 Nev. 63, 67, 769 P.2d 72, 75 (1989), the statutory provisions  
28 and legislative history do not evidence an intent that Nevada's statutory  
procedural bars be coterminous with the federal doctrine of procedural  
default. The doctrine of procedural default applied by federal habeas  
courts is based in principles of comity; it is “designed to ensure that  
state-court judgments are accorded the finality and respect necessary to  
preserve the integrity of legal proceedings within our system of

1 federalism.” *Martinez*, 566 U.S. at ----, 132 S.Ct. at 1316. In contrast, as  
2 explained above, Nevada's statutory procedural bars are designed to  
3 streamline the post-conviction review process and ensure the finality of  
4 judgments of conviction while leaving open a safety valve for defaulted  
5 violations of state law and constitutional rights in very limited  
6 circumstances.<sup>9</sup> The state procedural bars to post-conviction habeas  
relief thus “exist to implement policies independent from those  
animating the [federal doctrine of procedural default].” *In re Reno*, 55  
Cal.4th 428, 146 Cal.Rptr.3d 297, 283 P.3d 1181, 1233, & n30 (2012).

7 See *Brown v. McDaniel*, *supra*.

8 As a result, a petitioner still has avenues to pursue their ineffective assurance of  
9 counsel claims that they are not presently able to raise in state court under NRS  
10 34.810(1)(a). To argue as the Attorney General does in their amicus brief that state  
11 courts are required to protect rights secured by both the U.S. Constitution and  
12 Nevada Constitution would provide a U.S. Constitutional right to post-conviction  
13 review by state courts, where such a right does not presently exist, and fails to answer  
14 why any such violation of Nevada Constitutional rights could not be addressed in the  
15 first instance on direct appeal after the entry of a guilty plea. See *Rippo v. State*, *supra*.

16 Likewise, Nevada Attorneys for Criminal Justice (NACJ), in arguing against the  
17 Court of Appeals interpretation of NRS 34.810(1)(a), is asking this Court to encroach  
18 on the legislative function of creating law by ignoring the plain meaning of the statute,  
19 which as noted above, is simply beyond the purview of this Court. Besides not citing  
20 any caselaw to support their position, the NACJ asserts that the wording of NRS  
21 34.810(1)(a), allows individual claims of ineffective assistance of counsel beyond what  
22 the Court of Appeals determined here to be the plain meaning of the of the statute is  
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1 unpersuasive. In *NRS 34.810(1)(a)*, the Nevada Legislature used the word “allegation,”  
2 which is virtually identical in meaning to the word “claim,” and that allegations  
3 challenging a guilty plea, which was entered without effective assistance of counsel,  
4 are the only ineffective of assistance claims permissible under *NRS 34.810(1)(a)*,  
5

6 Likewise, nor does the legislative history of *NRS 34.810(1)(a)*, support the  
7 NACJ interpretation of *NRS 34.810(1)(a)*, which should be noted, the Court of  
8 Appeals did not find it necessary here to even address because *NRS 34.810(1)(a)*, was  
9 not ambiguous. *See Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020, page  
10 5), *citing Coleman v. State*, 134 Nev. 218, 219, 416 P.3d 238, 240 (2018) for the rule that  
11 “when the language is clear and unambiguous, we must give effect to that intent  
12 without looking beyond the plain language.” The NACJ has simply failed to explain to  
13 this Court why the Court of Appeals was wrong in giving *NRS 34.810(1)(a)* its plain  
14 meaning, and why this plain meaning only applies to ineffective assistance of counsel  
15 claims before the guilty plea, as opposed to claims that arise after the guilty plea itself.  
16 Moreover, the NACJ fails to cite any actual legislative history in their amicus brief that  
17 the Nevada Legislature intended to only limit pre-plea ineffective assistance of  
18 counsel claims in the same way they have previously been limited by this Court, and  
19 not at the same time, bar post-plea ineffective assistance of counsel claims. *See Nevada*  
20 *Attorneys for Criminal Justice Amicus Brief*, page 7.  
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25 The NACJ in their amicus brief claims that the Court of Appeals disregarded  
26 previous opinions of this Court allowing ineffective assistance claims of appellate  
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counsel and ineffective assistance of claims of sentencing counsel after a guilty plea. See *Kirksey, supra*; *Toston v. State*, 127 Nev. 971, 267 P.3d 795 (2011); *Weaver, supra* and *Wilson, supra*. However, none of the above cases specifically addressed the legislative scope of NRS 34.810(1)(a). As noted above, if the Nevada Legislature subsequently desires to allow the ineffective assistance of counsel claims that the Court of Appeals here determined to be outside the scope of NRS 34.810(1)(a), it is free to do so. Moreover, there is nothing to suggest in the Court of Appeals interpretation of NRS 34.810(1)(a), that would be inconsistent with the overall statutory scheme in NRS Chapter 34. Contrary to the assertions of the NACJ in their amicus brief, NRS 34.724(1) only indicates that a post-conviction petition for a writ of habeas corpus may be filed to obtain relief from the conviction or sentence, but it does not define its actual scope, which NRS 34.810(1)(a) does. See *Nevada Attorneys for Criminal Justice Amicus Brief*, page 9. To not read both NRS 34.724(1) and NRS 34.810(1)(a) together would as well violate previous opinions of this Court dealing with statutory interpretation, especially since neither NRS 34.724(1) and NRS 34.810(1)(a) are not at all inconsistent with each other. See *Butler v. State*, 120 Nev. 879, 892, 102 P.3d 71, 81(2004). (In giving effect to a statute's plain meaning, statutes "must be construed as a whole."). In summary, as noted above, it is for the Nevada Legislature to define the scope of allowable ineffective assistance of counsel claims under NRS 34.810(1)(a), and not of NACJ or any other litigate before this Court.

The NACJ next raises various issues under the Suspension Clause of the United

1 States Constitution, Article 1, §9, cl 2 and the Nevada Constitution Article 6, §6, as  
2 well as the Equal Protection Clause of the Fourteenth Amendment to the U.S.  
3 Constitution, and the Due Process Clause of the Fourteenth Amendment to the U.S.  
4 Constitution. *See Nevada Attorneys for Criminal Justice Amicus Brief, page 11*. However, as  
5 noted above, the Federal Constitution provides no right to post-conviction habeas  
6 review by state courts. *See Pellegrini v. State, supra*, 117 Nev. at 870 n.11, 34 P.3d at 526  
7 n.11 (2001).  
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9  
10 In the present case, the Nevada Legislature here has only limited the scope of  
11 NRS 34.810(1)(a), to those claims affecting the validity of the guilty plea, and neither  
12 suspended, nor abolished the post-conviction writ of habeas corpus in Nevada. The  
13 NACJ has noted in their amicus brief, that this Court has itself limited procedurally  
14 this right numerous times.<sup>2</sup> *See Nevada Attorneys for Criminal Justice Amicus Brief, page 14*  
15 15. Additionally, neither the Court of Appeal's decision violated either the Equal  
16 Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution, nor the Due  
17 Process Clause of the Fourteenth Amendment to the U.S. Constitution, since being a  
18 criminal defendant is not a protected class, and that the Nevada Legislature did not  
19 deny any defendant the right to actually file a post-conviction writ of habeas corpus,  
20 other than deciding what claims it would permissibly allow to be brought under NRS  
21 34.810(1)(a). By limiting the types of post-conviction habeas corpus claims under NRS  
22 34.810(1)(a), the Nevada Legislature had a rational basis in doing so, as to provide  
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27 <sup>2</sup> It should be noted that the application of *Montgomery v. Louisiana*, 577 U.S. 460,  
28 (2016) to NRS 34.810(1)(a) is not ripe to the issues in this case.

1 certainly to the Nevada courts after a defendant had constitutionally entered a plea of  
2 guilty in a criminal proceeding.


3 Finally, as to the array of unintended results that the NACJ raises in their  
4 amicus brief, nothing in the Court of Appeals Order here in interpreting what the  
5 Nevada Legislature intended by *NRS 34.810(1)(a)*, can be argued as leading to an  
6 absurd result when the Nevada Legislature under *Pellegrini v. State, supra* had the right  
7 to limit writ of habeas corpus claims under *NRS 34.810(1)(a)* to only those claims  
8 concerning the validity of a guilty plea, especially since a federal forum is readily  
9 available to any petitioner to seek redress as to other claims outside of those allowed  
10 under *NRS 34.810(1)(a)*. *Gonzales v. State of Nevada*, No. 78152-COA, October 1, 2020,  
11 page 12 n.3); *Nevada Attorneys for Criminal Justice Amicus Brief*, page 21-22.) At the end  
12 of the day, any grievance that the NACJ has as to the claim limitations in *NRS*  
13 *34.810(1)(a)*, needs to be addressed with the Nevada Legislature and not in this Court.  
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CONCLUSION

Based on the arguments above, the State of Nevada respectfully asks this Court to deny review of Appellant's Petition for Review by the Nevada Supreme Court of the Order of the Court of Appeals Pursuant to *NRAP 40(b)*.

Dated this 16<sup>th</sup> day of December, 2020.

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ATTORNEY CERTIFICATION OF COMPLIANCE

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 in type face of 14 point and Garamond type face.

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 does not exceed 4,667 words.

Finally, I hereby certify that I have read the respondent brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all the applicable Nevada Rules of Appellate Procedure, in particular NRAP 23(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 mater relied on is to be found. I understand that I may be subject to sanctions in

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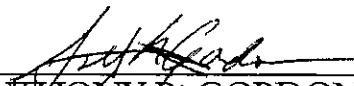
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1 the event that the accompanying brief is not in conformity with the requirements of  
2 the Nevada Rules of Appellate Procedure.

3 Dated this the 16<sup>th</sup> day of December, 2020.

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CERTIFICATE OF SERVICE

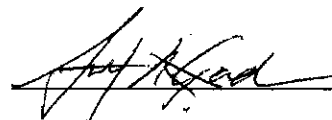
Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 16<sup>th</sup> day of December, 2020, I mailed/delivered a copy of the **RESPONDENT'S ANSWERING BRIEF TO APPELLANT'S PETITION FOR REVIEW BY THE NEVADA SUPREME COURT OF THE ORDER OF THE COURT OF APPEALS PURSUANT TO NRAP 40(B), AND RESPONDENTS REPLY TO AMICUS BRIEFS** to:

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