IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN GONZALES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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

APPEAL FROM JUDGMENT OF THE HONORABLE
MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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ROUTING STATEMENT

As a supplement to the prior filed routing statement, in *Gonzales v. State*, 136 Nev. ___, 136 Adv. Op. 60 (October 1, 2020), an Opinion was issued by the Court of Appeals interpreting NRS 34.810(1)(a) as a procedural bar to preclude allegations of ineffective assistance of counsel at sentencing stages, for failure to file winning suppression or pretrial motion work and on direct appeal if the defendant entered a plea of guilty or guilty but mentally ill. The petition for review under NRAP 40(B) has been filed. The Nevada Attorney General's Office filed an amicus brief. The Nevada Attorneys For Criminal Justice (NACJ) filed an amicus brief. This Brief is filed in response to all filed documents herein.

Other cases currently pending (from this law office) which involve application of NRS 34.810 include the following: *Jonathan Jaramillo v. State*, Docket: 81088 -- Department 7, 2nd JD, Judge Walker murder conviction after jury trial; *Muhammad v. State*, Docket 81367, *Heller v. State*, Docket 81410-- Department 1, 2nd JD; *Garcha v. State*, Docket 81956 -- Department 6, 2nd JD, a plea entered pursuant to *North Carolina V. Alford* and a claim of actual innocence; *Christian Scott v. State*, Docket 81071-- Department 9, Second JD,

murder conviction after jury trial; *Lorenzo Fernandez, Jr. v. State*, CR19-2240, D15, 2nd JD, dismissed actual innocence claims pursuant to NRS 34.810(1)(a) and the *Gonzales case*.

Unpublished cases from the Court of Appeals with conflicting determinations that refused to interpret NRS 34.810(1)(a) as a broad procedural bar include: *D'Vaughn Keithan King v. State*, Docket 74703 and *Mark Leonard Sharp v. State*, Docket 78240.

This is an issue of first impression. This is an issue of statewide interest. There are conflicting rulings on the same statutory construction issue. There are constitutional claims which arise by the application of NRS 34.810(1)(a) to preclude access to court by way of the "Great Writ", which include limitation of the Writ itself, Equal Protection and Due Process. This is an issue that must be settled by the Nevada Supreme Court.

STATEMENT OF FACTS

Respondent requests this Court to apply NRS 34.810(1)(a) to preclude various issues raised by Mr. Gonzales from state court postconviction review by

application of NRS 34.810(1)(a) as a procedural bar and a sword. RAB *passim.*

Respondent advised this Court that the plea bargain required the State to concur with the recommendation of the Department of Parole & Probation and that the State did so, arguing that there was no breach of the plea bargain. RAB 8, 8-22. In reality, the guilty plea agreement, 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. The State's unobjected to argument at sentencing was to argue for the recommendation of Parole & Probation to be imposed. The presentence report recommended consecutive time on Counts I & II, but concurrent time on Count III. That was not the term of the plea bargain on the case. At the conclusion of the hearing, Judge Montero sentenced Melvin to three consecutive terms of 156 months in prison with parole eligibility at 62 months on each count. Trial counsel did not object. Trial counsel did not appeal the breach of the plea bargain. Trial counsel testified at an evidentiary hearing that they did not believe the plea bargain was breached. The State had an affirmative obligation to recommend concurrent sentences on the charges and failed to do so.

The District Court held that Mr. Gonzales claims of ineffective assistance of counsel on breach of the plea bargain grounds were defaulted by NRS 34.810(1)(a)

and that Mr. Gonzales did not demonstrate a miscarriage of justice which would gain him relief under *Mazzan v. State*, 112 Nev. 843, 921 P2d. 923. 2AA 294A, 295.

In this case, the district court did not determine whether counsel was effective; instead, it determined that it would not rule upon the substantive issue of whether counsel was constitutionally effective at the sentencing or appellate stages because NRS 34.810(1)(a) acts as a procedural bar to raising the allegation of ineffective assistance of counsel at those stages after entry of a plea. 2AA 282-295.

STATEMENT OF THE ISSUES

1. **THIS COURT IS NOT BOUND BY ANY AUTHORITY TO ADOPT THE STATE'S UNCONSTITUTIONAL INTERPRETATION OF NRS 34.810(1)(a).**

2. **THE STATE'S INTERPRETATION OF NRS 34.810(1)(a) RESULTS IN AN UNCONSTITUTIONAL IMPLIED WAIVER OF A DEFENDANT'S RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.**

3. **RESPONDENT'S INTERPRETATION OF NRS 34.810(1)(a) EFFECTIVELY SATISFIES THE EXHUASTION REQUIREMENT FOR FEDERAL RELIEF DESPITE CONTRARY TO LEGISLATIVE INTENT.**

4. **THE COURT OF APPEALS' INTERPRETATION OF NRS 34.810(1)(a) IS INCONSISTENT WITH THIS COURT'S CASES, THE NEVADA STATUTORY SCHEME AND IS UNCONSTITUTIONAL.**

5. **PLEADING DEFENDANTS REPRESENT THE OVERWHELMING MAJORITY OF DEFENDANTS; DEPRIVING THEM OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING DIRECTLY PREJUDICES DEFENDANTS.**

6. **RESPONDENT'S INTERPRETATION DENIES PLEADING DEFENDANTS THE RIGHT TO EQUAL PROTECTION BY REVOKING SENTENCING PROTECTIONS GRANTED TO TRIAL DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS**

7. **RESPONDENT'S INTERPRETATION OF NRS 34.810(1)(a) UNCONSTITUTIONALLY SUSPENDS THE RIGHT TO HABEAS CORPUS IN VIOLATION OF THE UNITED STATES AND NEVADA CONSTITUTIONS**

8. **THE COURT OF APPEALS SHOULD HAVE RULED ON THE SUBSTANTIVE ISSUE OF THE BREACH OF THE PLEA BARGAIN TO AVOID STATUTORY CONSTRUCTION OF NRS 34.810(1)(a).**

ARGUMENT

1. THIS COURT IS NOT BOUND BY ANY AUTHORITY TO ADOPT THE STATE'S UNCONSTITUTIONAL INTERPRETATION OF NRS 34.810(1)(a).

Standard of Review for *Arguments 1-7*:

The right to seek the remedy of habeas corpus is protected by the Nevada Constitution. Article 1, Section 5. This court reviews the constitutionality of a statute and questions of statutory construction de novo. Beyond the statutory context, when interpreting ambiguous statutes, this court looks to the statute's

legislative history and construes the statute in a manner that conforms to reason and public policy. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). This court applies a de novo standard of review to constitutional challenges. *Grupo Famsa v. Eighth Judicial Dist. Court*, 132 Nev., Adv. Op. 29, 371 P.3d 1048, 1050 (2016).

Argument:

Respondent argued extensively in its Answering Brief that NRS 34.810(1)(a) should be applied as a procedural bar against Mr. Gonzales's postconviction claims; despite the merit to Mr. Gonzales's underlying allegations.

Respondent cited to the Court of Appeals' decision in *Gonzales v. State*, 136 Nev. ____, 136 Nev. Adv. Op. 60 (Nev. App. 10/1/20) in support of its position that if a Defendant enters a guilty plea that defendant may only raise claims relating to the actual plea itself and all other claims are procedurally barred from state court review by NRS 34.810(1)(a). The *Gonzales* case is currently the subject of a timely petition for review filed under NRAP 40(B) and briefing is in process.

Respondent's position relies entirely upon whether this Court upholds the

Court of Appeals on its *Gonzales* decision or whether the *Gonzales* case is properly overruled by the Nevada Supreme Court. The ruling in *Gonzales* is only persuasive authority until this court has made the definitive ruling in the present matter.

Respondent repeatedly cited this Court to nonbinding precedent to justify its unconstitutional application of NRS 34.810(1)(a) to this appeal. See 5, 6, 9, and 10 of Respondent's Answering Brief. The preponderance of respondent's supportive authority is simply not binding on this Court. This Court is wholly free to make its own determination of the reasonableness of the State's interpretation of NRS 34.810(1)(a) and, despite the authority presented by the state, is not bound by stare decisis.

2. THE STATE'S INTERPRETATION OF NRS 34.810(1)(a) RESULTS IN AN UNCONSTITUTIONAL IMPLIED WAIVER OF A DEFENDANT'S RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Argument

This Court, in *Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001), held that ineffective assistance of counsel claims are appropriately

raised for the first time in a post-conviction petition at the district court. This approach was reaffirmed by the Court in *Jeffries v. State*, 133 Nev. Adv. Op. 47, decided July 6, 2017, which cited to *Daniels v. State* and *Pellegrini*, supra at883.

This court will normally decline to review claims of ineffective assistance of counsel on direct appeal unless an evidentiary hearing has been held in the district court. See *Gibbons v. State*, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

In other words, *Pellegrini* confirms that claims for ineffective assistance of counsel are not subject to implied waiver. Nowhere in NRS 34.810(1)(a) does it state that a pleading defendant is waiving their right to effective assistance of counsel at sentencing, on appeal, and pre-trial by entering a plea. The State's interpretation of NRS 34.810(1)(a) as a waiver of constitutional rights is, therefore implied. *Pellegrini* confirms that the State's interpretation is, therefore, unconstitutional.

Respondent's approach and argument for application of NRS 34.810(1)(a) as a procedural sword is simply wrong. The Defendant has a right to the effective assistance of counsel under the 6th & 14th Amendments to the United States Constitution and the Nevada Constitution, Article 1, Section 8. The Sixth Amendment right to counsel provides every criminal defendant with the right to have representation during each "critical stage" of adversarial proceedings.

The United States Supreme Court has concluded that sentencing is such a "critical stage" for purposes of the Sixth Amendment right to counsel. *United States v. Wade*, 388 U.S. 218, 226-27 (1967); see also U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (indicating the Sixth Amendment right to counsel is applicable to the states through the Fourteenth Amendment). 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).

Respondent's approach overrules the case of *Hood v. State*, 111 Nev. 335, 890 P.2d 797 (1995), which, like *Pellegrini*, held that a defendant cannot waive his or her rights to post-conviction remedies as part of a plea bargain. Again, this Court has affirmed in multiple prior cases that the right to effective assistance of counsel is not something that can be waived, despite what the State would lead this Court to believe.

Indeed, the State is asking pleading defendants to waive inchoate constitutional error—they are asking defendants to waive errors that have not yet even occurred in their case. This State is demanding pleading defendants waive errors that they may not know exist in their defense case, such as suppression issues. The simple act of pleading cannot deprive defendants of their right to

effective assistance of counsel at all critical stages of the proceedings.

Next, the State's interpretation will deprive defendants of the unique remedies afforded by the post-conviction process. Post-conviction remedies differ significantly from the remedies of a direct appeal. Unlike a direct appeal, post-conviction proceedings collaterally attack the constitutional validity of the conviction, or the legality of continued confinement on a basis other than the manner in which the conviction was obtained. It directly attacks the constitutional merit of a conviction.

It would be unconscionable for the state to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on a defendant's waiver of the right to pursue post-conviction remedies. *Hood v. State*, 111 Nev. 335, 890 P.2d 797 (1995). This would allow the State to prosecute and sentence constitutionally infirm convictions. The State's interpretation leads to constitutionally dangerous conclusions.

Finally, Nev. Art. 6, § 4, guarantees a right to appeal in felony cases. Under the State's interpretation, if a defendant pled guilty and his attorney failed to adequately represent him on direct appeal, application of *Gonzales* would preclude state court review. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113

(1996), would be overruled. The right to appeal felony convictions guaranteed by the Nevada Constitution would be rendered null and void for pleading defendants because there would be no right to effective counsel—ineffective counsel can sometimes be more dangerous than no counsel.

3. RESPONDENT'S INTERPRETATION OF NRS 34.810(1)(a) EFFECTIVELY SATISFIES THE EXHUASTION REQUIREMENT FOR FEDERAL RELIEF DESPITE CONTRARY TO LEGISLATIVE INTENT.

Argument

Both the federal court system and the Nevada court system have the obligation to guard and protect rights secured by the Constitution. *Rose v. Lundy*, 455 U.S. 509, 518 (1982). A rule requiring exhaustion of all claims in state courts promotes comity and furthers the purposes underlying the exhaustion doctrine, as codified in §§ 2254(b) and (c), of protecting the state courts' role in the enforcement of federal law and preventing disruption of state judicial proceedings. *Rose*, supra at Pp. 455 U. S. 513-520. The interpretation of NRS 34.810(1)(a) as held by the Court of Appeals in *Gonzales* removes the state court's right and ability to protect the constitutional rights of its citizens by impliedly waiving any

right to effective assistance of counsel at critical stages of the case.

Respondent also argued that finality of a judgment should trump constitutional rights to effective assistance of counsel. This argument should cause an outcry. Justice is not served by placing procedural impediments to preclude valid claims that would otherwise afford a defendant relief from a sentence or conviction. The prosecutor is a minister of justice. The prosecutor's goal it to seek justice. That goal is thwarted when access to court is denied. Due process is violated.

What *Gonzales* does, is that it requires Defendant's to accept any conclusion of their case, without recourse to state court, if they accept a plea bargain. Prosecutorial misconduct that may occur after entry of plea would not be subject to review by the state court system. Indeed, prosecutors are free to breach any and all plea bargains at sentencing. In other words, *Gonzales* effectively eliminates any benefit of pleading—prosecutors can make overly attractive plea bargains that incite defendants into acceptance only to have the agreement rendered null and void at sentencing when the prosecutor is free to argue for any sentence.

There is no justification for the citizens of Nevada to have no recourse to the

state court if their attorney failed to represent them constitutionally adequately. *Strickland v. Washington*, 466 U.S. 668 (1984).

Of critical importance, if this Court accepts the State's interpretation of NRS 34.810(1)(a), then pleading defendants have no State-level recourse for ineffective assistance of counsel following the entry of a plea. In other words, the simple act of pleading satisfies the exhaustion prong for federal habeas review. There is absolutely no legislative history to support this result. This Court should not place itself in a legislative position absent express authority from the legislature to do so.

4. THE COURT OF APPEALS' INTERPRETATION OF NRS 34.810(1)(a) IS INCONSISTENT WITH THIS COURT'S CASES, THE NEVADA STATUTORY SCHEME AND IS UNCONSTITUTIONAL.

Argument:

The interpretation of NRS 3.810(1)(a) urged by the State is inconsistent with prior authority and needlessly overrules decades old, established case law. For example, in *Doyle v. State,* 116 Nev. 148, 158, 995 P.2d 465, 472 (2000). This Court held that when ineffective assistance of counsel claim is based upon counsel's failure to file motion to suppress confession or motion to suppress

evidence allegedly obtained in violation of Fourth Amendment, the prejudice prong must be established by showing that claim was meritorious and that there was reasonable likelihood that exclusion of the evidence would have changed result of trial. U.S. Const. amends. 4, 6. The blanket application of *Gonzales*, supra, would overrule *Doyle.* There would be no state court access to argue that counsel was ineffective because the defendant pled guilty and the suppression issues were waived on appeal.

Take this one step differently, if the defendant enters a plea of guilty but withholds the right to appeal the motion to suppress by NRS 174.035(3) and the attorney fails to appeal the case, under *Gonzales*, there would be no access to state court for review of counsel's representation because the client pled guilty; effectively overruling the protections established in *Doyle*. Following *Gonzales*, it now appears that the simple act of pleading removes the evaluation of valid suppression issues from the State courts.

The sheer mass of *Strickland* caselaw that the State is asking this Court to impliedly overrule for pleading defendants is staggering. *Strickland* established a

two-prong approach to evaluating counsel's performance: (1) deficient performance that (2) caused prejudice. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency. See *Strickland*, 466 U.S. at 695.

The proper measure of an attorney's investigation is that of reasonableness under prevailing professional norms. See *Strickland* at 688 and *Rompilla v. Beard*, 545 U.S. 374 at 387 (2005). *Rompilla* found counsel ineffective because they failed to review public court files that the prosecution had declared it intended to use as proof of the aggravating factors. *Id.*. at 383-90. The Court found counsel's failure to review this public evidence was ineffective. *Id.*

The Ninth Circuit Court of Appeals reviewed the mitigation investigation required by defense counsel in the case of *Andrews v. Davis*, 944 F.3d 1092 (9th Cir. 2019), a California death penalty case litigation. Andrews gained postconviction relief because his trial attorneys failed to adequately investigate and present available mitigation evidence for the Defendant, in violation of the 6th & 14th Amendments and the right to effective assistance of counsel.

Prejudice can be presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *United States v. Cronic*. 466 U.S. 668 (1984); accord *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984).

An attorney must make reasonable investigation in preparation for trial or make a reasonable decision not to investigate. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996). In the Gonzales case, reasonable investigation certainly included efforts to present the readily available plea bargain, object to the breach of the plea bargain and appealing that issue on direct appeal. This defendant could not have logistically committed the offenses to which his attorney was having him plead guilty. The actual offense violated NRS 200.575(3) because he sent text messages and the sentencing scheme was far less onerous.

The duty to provide mitigation evidence applies to all sentencing hearings. The Supreme Court has clearly established that a sentencing court must consider all mitigating evidence; state law may not, for example, impose a threshold requirement that a defendant demonstrate a causal connection to the offense. See *Smith v. Texas*, 543 U.S. 37, 43–49 (2004) per curiam); *Tennard v. Dretke*, 542 U.S. 274, 283–88 (2004); *Penry v. Lynaugh*, 492 U.S. 302, 319–28 (1989), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 110–17; *Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978). Of course, the

sentencing court is free to assign little weight to mitigating evidence, but such evidence may not be stripped of all weight as a matter of law. See *Harris v. Alabama*, 513 U.S. 504, 512 (1995).

In *Poyson v. Ryan*, 879 F.3d 875, 892–93 (9th Cir. 2018), there was evidence of repeated physical and emotional childhood abuse, sexual assault, coerced alcohol and drug use, developmental delays, the sudden death of a close parental figure, and severe head injuries resulting in headaches and loss of consciousness. This critical mitigation evidence should have been presented to the sentencer.

The leading cases of *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000) are both worthy of review.

In *Wiggins*, counsel had no strategic reasons for not presenting evidence of Wiggins' life history or family background. *Wiggins*, 539 U.S. at 515-17. Wiggins's counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless. Id. at 525. Using that fact, the Court distinguished Wiggins from *Strickland*. Id. (citing *Strickland*, 466 U.S. at 699 (where counsel made a reasonable decision "that character and psychological evidence would be of little help.").

In *Williams*, the attorney did not begin preparing for the penalty phase until just a week before trial, and consequently had no strategic reason for not presenting extensive evidence. *Williams*, 529 U.S. at 395. Even the prosecution in *Williams* barely disputed that counsel's representation during sentencing fell short of professional standards. *Id.*

The State could not cite this Court to *one case* which has held that counsel does not have to be effective at the sentencing stage of the case or on direct appeal. That is because such a holding would violate the 6th & 14th Amendments. The State's urged interpretation denies pleading defendants the protections of the entirety of the protections cited above. The State's argument deprives pleading defendants of critical constitutional protections.

5. PLEADING DEFENDANTS REPRESENT THE OVERWHELMING MAJORITY OF DEFENDANTS; DEPRIVING THEM OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING DIRECTLY PREJUDICES DEFENDANTS.

Argument:

In the current day of criminal defense, 94% of state cases end by way of plea negotiation. See *Missouri v. Frye*, 132 S. Ct. 1399, at 1386-1387, (2012). 94% of all criminal cases result in a pleading defendant. If this Court adopts the State's urged interpretation, 94% of <u>all</u> criminal defendants will have no right to the effective assistance of counsel at sentencing or on direct appeal.

Sentencing matters are the key place where an effective attorney makes the difference between life in prison or a lesser sanction. Consecutive versus concurrent sentences matter greatly to the ability of a prisoner to attend programs or gain parole and be released from prison. To say that the state court system does not wish to review counsel's performance at sentencing is to offend justice. For the state court system in Nevada to disregard these critical stages of the proceedings defies logic.

This Court needs to acknowledge that attorneys have rules of ethics that are codified. No attorney should force a client to waive their own effectiveness in order to gain a plea bargain. No prosecutor should force a waiver of effective assistance of counsel in order to garner a plea bargain to any criminal charge. Both of these scenarios violate the rules of professional conduct. A conflict of interest would arise each time a defense attorney had a client sign a waiver about their representation in order to solidify a plea bargain. The client has a right to conflict free representation. See *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Strickland v. Washington*, 466 U.S. 668 (1984).

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6. RESPONDENT'S INTERPRETATION DENIES PLEADING DEFENDANTS THE RIGHT TO EQUAL PROTECTION BY REVOKING SENTENCING PROTECTIONS GRANTED TO TRIAL DEFENDANTS IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

Argument:

All defendants have the right to effective assistance of counsel at critical stages of the proceedings. See *Strickland*, 466 U.S. at 695; *United States v. Wade*, 388 U.S. 218, 226-27 (1967); see also U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). No matter whether a defendant pled or went to trial, all defendants have the same right to effective counsel at sentencing.

The State's interpretation, however, creates two different classes of defendants who have different constitutional rights. If a defendant goes to trial, then they have a constitutional right to effective counsel at sentencing, pre-trial, and on appeal. However, the second that a defendant enters a plea, they now have no right to effective counsel at pre-trial, suppression, sentencing and on appeal. The State's urged interpretation provides different constitutional rights to defendants in violation of the Fifth and Fourteenth amendments. Application of NRS 34.810(1)(a) as suggested by the State would treat similarly situated

defendants disparately.

7. RESPONDENT'S INTERPRETATION OF NRS 34.810(1)(a) UNCONSTITUTIONALLY SUSPENDS THE RIGHT TO HABEAS CORPUS IN VIOLATION OF THE UNITED STATES AND NEVADA CONSTITUTIONS

Argument:

Respondent's approach to postconviction matters effectively abolishes the right to habeas corpus. The Legislature cannot impair the scope of the writ of habeas corpus. *Grego v. Sheriff*, 94 Nev. 48, 574 P.2d 275 (1978). This Court should decline the State's suggestion that the writ of habeas corpus be effectively suspended for pleading defendants in Nevada. The claims raised by Mr. Gonzales in his post-conviction action were properly pled, supported by the actual record of the court, but were denied the ability to be proven at an evidentiary hearing and be decided on the merits by the district court. Material witnesses were in place and ready to testify. The appeal from the denial of postconviction relief by the district court should be decided substantively by this Court.

8. THE COURT OF APPEALS SHOULD HAVE RULED ON THE SUBSTANTIVE ISSUE OF THE BREACH OF THE PLEA BARGAIN TO AVOID STATUTORY CONSTRUCTION OF NRS 34.810(1)(a).

Standard of Review:

This court will normally decline to review claims of ineffective assistance of counsel on direct appeal unless an evidentiary hearing has been held in the district court. See *Gibbons v. State*, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

Argument:

The Court of Appeals had a full record upon which to determine that, indeed, the State breached the plea bargain in this case. To fail to evaluate the breach of plea bargain claim and the ineffective assistance of counsel issue relating to the plea bargain breach was wrong. Once that claim is evaluated, there is no need to conduct a statutory construction argument on application of NRS 34.810(1)(a) on this particular case.

CONCLUSION

It is impossible to conform the application of NRS 34.810(1)(a) in the matter delineated in *Gonzales* and see any improvement in defense counsel services with a new agency, Nevada Department of Indigent Defense Services (DIDS), whose goal is to improve indigent defense services.

This Court should refuse to apply NRS 34.810(1)(a) in the manner observed in *Gonzales* as it violates standing case authority in Nevada, Equal Protection and

Due Process, the 6th Amendment, and deprives defendants of access to state court review if they accepted a plea offer.

DATED this 29 day of December, 2020.

By: _____

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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)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 15 pages but it meets the word and line counts found in the appellate rules.

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. There are 23 typed pages, 4,348 words in this brief and 433 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

DATED this 29 day of December, 2020.

By: Karla K Butko

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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

X E Flex Delivery of the Nevada Supreme Court System

addressed as follows:

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DATED this 29 day of December, 2020.

KARLA K. BUTKO, Esq.