



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

No. S-1-SC-40337

MARCIAL ROMERO,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

**APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY
HON. JUDGE GLENN T. ELLINGTON PRESIDING**

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CITATIONS TO THE RECORD

The body of this brief conforms to Rule 12-318(F)(2) NMRA and is less than 35 pages. Undersigned counsel certifies that this brief is written in Times New Roman, a proportionally spaced font.

The digital audio recordings are playable with For The Record software. Citations to the recorded proceedings are in the form of [__-__-__ **CD** __:__:__]. The time and date stamp indicates the actual time of the day that the recording was made, not the elapsed time from the beginning of the recording.

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NATURE OF THE CASE

This is not a case of first impression. Defendant asks this Court to overturn at least three decades of precedent recognizing a prosecutor's discretion to seek habitual offender enhancements, and approving holding habitual offender enhancements in abeyance until a defendant completes their sentence. This is a question of long-settled law, not an "issue of great importance for the practice of criminal law in New Mexico." **[BIC 1]**

Defendant also asks this Court to invalidate an untold number of properly sanctioned plea agreements. Such a decision could cause an avalanche of appeals to be borne by the judicial system, the prison system, and may well operate to remove prosecutorial discretion in sentencing, currently geared at deterring re-offending, which is a stated Legislative purpose behind the habitual offender statutes. This outcome would harm not only the State, but also countless defendants who benefit from the type of plea agreements Defendant seeks to invalidate.

In New Mexico, the State "may seek [an habitual-offender] enhancement at any time following conviction, as long as the sentence enhancement is imposed before the defendant finishes serving the term of incarceration and any parole or probation that may follow that term." *State v. Triggs*, 2012-NMCA-068, ¶ 4 (quoting *State v. Trujillo*, 2007-NMSC-017, ¶ 10, 141 N.M. 451 (alteration in original)). The

State respectfully requests this Court quash certiorari and affirm Defendant's sentence.

SUMMARY OF FACTS AND PROCEEDINGS

The State offers the following supplement to the summary of facts and proceedings provided by Defendant. Defendant's case flows from two unconsolidated district court cases, governed by a "Habitual Offender Plea and Disposition Agreement" (Plea Agreement): *State v. Romero*, D-101-CR-2019-00708 and *State v. Romero*, D-101-CR-2019-00709 (1st Jud. Dist. Ct.). On August 23, 2021, Defendant entered the Plea Agreement to resolve both cases. **[RP 109]** In that agreement, Defendant admitted that he was convicted of six previous felonies and that each felony was "valid and free from error." **[RP 109-10]** Defendant admitted being the same person who committed each of those prior felonies. **[RP 110]**

The Plea Agreement stated that "Defendant will therefore be sentenced as a habitual offender, and Defendant's sentence will be enhanced per the terms of [the Plea Agreement]." **[RP 110]** At initial sentencing, the State sought to impose a one-year habitual offender enhancement on Count One of Defendant's sentence while holding the remainder of the habitual offender enhancement time in abeyance per the terms of the Plea Agreement. **[RP 111]** The Plea Agreement stated:

If the court accepts this agreement, Defendant will be ordered to serve a period of incarceration of 1 year at initial sentencing. Defendant may also be ordered to serve a period of probation . . . If the probation is later violated in any way, the State may seek to incarcerate Defendant

for the balance of the sentence and impose habitual offender enhancements as provided for by law.

[RP 112]

Under a section of the Plea Agreement entitled “Habitual Offender Proceedings,” Defendant agreed that:

UPON VIOLATION: Defendant understands that if Defendant violates any law after entering [the Plea Agreement] and before completing the sentence in this case, Defendant will be subject to habitual offender proceedings based on the convictions listed under the section labeled ‘Admission of Identity.’ The State also may bring habitual offender proceedings if Defendant violates any condition of probation or parole. The State may bring habitual offender proceedings if the violation is admitted or proven, even if the probation or parole is not revoked or Defendant is not convicted of a new crime . . . Defendant agrees that Defendant has no expectation of finality regarding sentence until the successful completion of the entire sentence, including any period of parole. Accordingly, Defendant waives any limitations with respect to the initiation of habitual offender proceedings.

[RP 113]

After approving the Plea Agreement, the district court entered the Judgement and Sentence on September 2, 2021. In D-101-CR-2019-00708, Defendant was sentenced to a period of 18 months, with 18 months suspended, but enhanced by 1 year as a habitual offender. **[RP 194]** That 1 year was offset by Defendant’s pre-sentence confinement time of 618 days. **[RP 220]** After that offset, Defendant still had 253 days of presentence confinement time remaining which was used to reduce the probation term and sentencing jurisdiction on D-101-CR-2019-00708 to 295 days from sentencing, or June 12, 2022. **[RP 220]** On that day, Defendant began

serving his sentence in D-101-CR-2019-00709. **[Id.]**

In D-101-CR-2019-00709, Defendant was sentenced to a period of 18 months, with 18 months suspended. **[RP 124]** Defendant was also sentenced to 18 month supervised probation sentences in both cases which were to run consecutively for a total of three years on probation. **[RP 194, 124]** Because all of Defendant presentence confinement time was used in D-101-CR-2019-00708, the probation term in D-101-CR-2019-00709 was to run until December 12, 2023 with four years of habitual offender enhancement being held in abeyance. **[RP 220]**

Defendant's probation was revoked at least two times following initial sentencing with a petition, and a amended petition, to revoke his probation being filed in both underlying cases on May 11, 2022 and November 22, 2022. **[RP 133, 165]** Both the petition and amended petition were filed before the district court lost sentencing jurisdiction.

On April 3, 2023, within the period of sentencing jurisdiction, the district court entered its final order on a petition to revoke probation. It revoked Defendant's probation and imposed the four years of habitual offender enhancement. **[RP 221]** Defendant also received credit for time served. **[Id.]**

Defendant appealed the district court's probation revocation determination to the Court of Appeals. Then, in his Memorandum in Opposition to the Court of Appeals' proposed summary affirmance, Defendant wholly abandoned his original

questions to instead argue for the first time that he was “induced to plead by the promise of an illegal sentence, and the sentence imposed was illegal.” Memorandum in Opposition, *State v. Romero*, A-1-CA-41125 (N.M. Ct. App. Oct. 1, 2023).

In a memorandum opinion, the Court of Appeals affirmed Defendant’s revocation of his probation. *State v. Romero*, A-1-CA-41125, mem. op. ¶ 9 (N.M. Ct. App. Feb. 14, 2024) (nonprecedential). The Court of Appeals rejected Defendant’s use of *State v. Sedillo*, 1971-NMCA-003, 82 N.M. 287, determining that the language from that case that Defendant relied upon was nonbinding dicta. *Id.* ¶ 4. The Court of Appeals clarified that the reason the *Sedillo* court determined the sentence of the *Sedillo* defendant was unconstitutional was not because the prosecutor had “no sentencing discretion[,]” but rather because the Court determined there was “uneven enforcement of the Habitual Offender Act occurring in practice.” *Id.* ¶ 5. The Court of Appeals also rejected Defendant’s equal protection argument, because it was undeveloped, and Defendant’s separation of powers argument because it “had been considered and rejected by our Supreme Court.” *Id.* ¶ 8. Defendant then filed certiorari to this Court, which was granted.

Defendant was released from custody onto parole on April 14, 2025, and is currently in Española, New Mexico.

ARGUMENT

I. NEW MEXICO LAW REGARDING HABITUAL OFFENDER ENHANCEMENT IS SETTLED.

A. LEGAL STANDARD

“[W]hether a trial court has jurisdiction in a particular case is a question of law that we review de novo.” *State v. Banghart-Portillo*, 2022-NMSC-021, ¶ 11 (internal citation omitted). Additionally, “to the extent that this Court is required to interpret a plea agreement, the terms of the plea agreement are also reviewed de novo.” *Id.*

If this Court is required to interpret a plea agreement, it “construe[s] the terms of [a] plea agreement according to what [Defendant] reasonably understood when he entered the plea.” *State v. Yazzie*, 2018-NMCA-001, ¶ 9 (internal quotation marks and citation omitted). “A plea agreement is a unique form of contract whose terms must be interpreted, understood, and approved by the district court.” *Id.* “To the extent that our analysis requires interpretation of the judgment and sentence, we review de novo ‘the district court’s interpretation and application of the sentencing law[.]’” *Id.*

B. ANALYSIS

The arguments advanced by Defendant are not novel and fail under the plain text of the relevant statutes and under this Court’s precedent. This Court, as recently as 2021, denied certiorari on a case which raised identically pled issues as those

present matter.¹ Order Denying Certiorari, *State v. Sepulveda*, S-1-SC-39038, (N.M. Dec. 21, 2021). Further, in 2022, in *Banghart-Portillo*, 2022-NMSC-021, this Court reiterated the underlying premise that, if the terms of a plea agreement are clear as to how habitual offender enhancements are to be applied, and that violation of probation would trigger enhancement, the plea agreement is not illegal. *Id.* ¶ 18. This is because there is no reasonable expectation of finality for a Defendant as to his sentence. *Id.* While there is a dissent in *Banghart-Portillo*, the dissenting justices joined the majority on these overarching statutory interpretation issues. *Id.* ¶¶ 29-30 (Thompson, J., dissenting.)

Well-established precedent recognizes that “a prosecutor may seek [an habitual offender] enhancement at any time following conviction, as long as the sentence enhancement is imposed before the defendant finishes serving the term of incarceration and any parole or probation that may follow that term.” *Trujillo*, 2007-NMSC-017, ¶ 10 (quotation marks and citation omitted.). Defendant does not distinguish this authority or explain why it should not apply. Rather, Defendant altogether ignores precedent contradicting his understanding of statute and invites this Court to adopt an overly restrictive interpretation of NMSA 1978, Sections 31-18-17 to -20 (1953, as amended through 2003) that would read each of the statutes in isolation from all caselaw interpreting the same.

¹ There were also a few issues in *Sepulveda* which are not pled as part of this appeal.

Notably, Defendant seeks relief even though he is no longer incarcerated and is, in fact, now on parole—relief from which is the only relief he might still achieve. Having served his full sentence, following a probation violation which caused him to serve his entire habitual offender enhancement period, Defendant’s case is arguably moot, aside from reprieve from parole. Should this Court determine that Defendant’s plea agreement was illegal and void his agreement—Defendant would thereafter be subject to either: (1) a full trial, with no additional time left to serve, or (2) he could enter into another plea agreement, again with no additional time left to serve. Such an outcome would be heavily prejudicial to the State in resources and time, with little to no benefit rendered to Defendant. This Court does not generally address moot cases— “[a] case [where there is] no actual controversy . . . and the court cannot grant actual relief.” *State v. Zachariah G.*, 2021-NMCA-036, ¶ 5 (internal quotation marks and citations omitted). However, “[n]otwithstanding this general rule, appellate courts may exercise their discretion to review moot cases that present ‘issues of substantial public interest or which are capable of repetition yet evade review.’” *Id.* ¶ 10. Defendant seems to argue that this appeal falls into the latter category and, to the extent that this Court would agree with Defendant, the State addresses the lack of merit to the questions raised by Defendant.

1. *Defendant’s Argument Omits Precedent Addressing His Legal Issue.*

The State does not contest that Sections 31-18-17 to -20 state what they state.

Section 31-18-17(A) provides for habitual offender sentence enhancements using mandatory language a qualifying sentence “shall be increased” and the enhancements “shall not be suspended or deferred[.]” **[BIC 5]** Section 31-18-18 creates a duty for certain government officials to report individuals who may be a habitual offender to the district attorney “who shall then file an information.” *Id.* Section 31-18-19 states “[i]f at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender.” *Id.*

While the Legislature makes the law, it is the prerogative of our appellate courts to interpret that law. *Amdor v. Grisham*, 2025-NMSC-____ ¶¶ 29-30 (N.M. Mar. 6, 2025) (stating that “[i]n construing a statute, [this Court’s] central concern is to determine and give effect to the intent of the Legislature . . . [this Court] begins with the plain language of the challenged statute, and when it is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation . . . [this Court] generally give[s] the statutory language its ordinary and plain meaning unless the Legislature indicates a different interpretation is necessary . . . However, [this Court is] not be bound by a literal interpretation of the words if such strict interpretation would defeat the intended object of the

Legislature.” *Id.* (internal quotation marks, citations, and brackets omitted)).

This Court has further determined that “If statutory language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity, or contradiction, the court should reject the plain meaning rule in favor of construing the statute according to its obvious spirit or reason.” *Id.* ¶ 30. (internal citation omitted). “In ascertaining a statute's spirit or reason, we consider its history and background, and we read the provisions at issue in the context of the statute as a whole, including its purposes and consequences. All parts of a statute must be read together to ascertain legislative intent, and [this Court is to] read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole,” thereby rendering “no part of the statute . . . surplusage or superfluous.” *Id.* (internal quotation marks and citations omitted).

For the last three decades, our appellate courts have done just this. Rather than read the habitual offender enhancement statutes individually and in isolation, appellate courts have read them harmoniously and in consideration of the Legislative goals behind the statutes. Despite the caselaw interpreting these statutes extending back for decades, the Legislature has never sought to correct our appellate courts interpretation of the habitual offender enhancement statutes—seemingly lending Legislative approval of our appellate court’s precedent. *See AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 18 (“[i]f our view is mistaken, we

assume the Legislature will correct it.”).

The cases Defendant relies upon harken back to the 1980’s and before—cases which are either not on point or have been effectively abrogated or limited by later cases. Defendant argues the Legislature “evinced a clear intent that [habitual offenders] must be made to serve at least the enhancement portion of their sentences[,]” citing *State v. Davis*, 1986-NMSC-031, 104 N.M. 229. **[BIC 6]** However, *Davis* can be readily distinguished in two ways. First, the Legislature left discretion with district attorneys when creating the mandatory minimums allowing district attorneys to determine *when* to bring these enhancements—a discretion which has never been curtailed. Second, *Davis* did not involve a plea agreement which is the crux of Defendant’s primary argument.

As he did before the Court of Appeals, Defendant also cites *Sedillo*, 1971-NMCA-003, as support for his conclusion that there is “no merit to the claim that our statutory law gives the district attorney discretion as to whether he will invoke the habitual criminal provision.” **[BIC 7, citing *Sedillo*, 1971-NMCA-003, ¶ 7]** The Court of Appeals more recently determined that “[t]his statement in *Sedillo* is not essential to its holding and is thus nonbinding dicta Additionally, more recent authority from our Supreme Court has reaffirmed a prosecutor’s discretion in bringing habitual offender proceedings against a defendant.” *State v. Sepulveda*, A-1-CA-37570, mem. op. ¶ 5 (N.M. Ct. App. Aug. 31, 2021). Replying upon these

older cases, Defendant concludes that because the habitual offender statutes says “shall,” that defendants must serve the habitual offender enhancement as soon as a court concludes that a defendant is a habitual offender, no matter what.

Defendant’s conclusion is without support from modern precedent. Tellingly, Defendant does not address or contend with any of the applicable precedent which clearly states that, as long as a defendant’s sentence enhancement is imposed before the defendant finishes serving the term of incarceration and any parole or probation that may follow that term, a habitual offender enhancement may be held in abeyance by the district attorney and a district court to be later sentenced upon probation violation. *See Sepulveda*, A-1-CA-37570, mem. op. ¶ 5 (stating that a “prosecutor may seek a[] habitual-offender enhancement at any time following conviction, as long as the sentence enhancement is imposed before the defendant finishes serving the term of incarceration and any parole or probation that may follow that term[.]” (internal citation omitted); *see also State v. Freed*, 1996-NMCA-044, ¶ 14, 121 N.M. 569 (same); *State v. Villalobos*, 1998-NMSC-036, ¶ 10, 126 N.M. 255 (same); *Trujillo*, 2007-NMSC-017, ¶ 10 (same); *State v. Lovato*, 2007-NMCA-049, ¶ 6, 141 N.M. 508 (same); *State v. Leyba*, 2009-NMCA-030, ¶ 11, 145 N.M. 712 (same); *Triggs*, 2012-NMCA-068, ¶ 4 (same); *Yazzie*, 2018-NMCA-001, ¶ 10 (same); *Banghart-Portillo*, 2022-NMSC-021, ¶ 2 (same).

There are also additional cases which, while not directly opining on the above

premise, also imply that same standard. *See Martinez v. Romero*, 626 F.2d 807, 808, 810 (10th Cir. 1980) (determining that a certain measure of prosecutorial discretion is “inevitable” in the “performance of the prosecutorial function.”); *State v. Gaddy*, 1990-NMCA-055, ¶ 2, 110 N.M. 120 (holding that the habitual offender enhancement was illegal because the defendant had already finished serving his underlying sentence); *State v. Roybal*, 1995-NMCA-097, 120 N.M. 507 (stating that there was no objectively reasonable expectation of finality until the parole period ends); *State v. Sanchez*, 2001-NMCA-060, 130 N.M. 602 (holding that a plea agreement similar to Defendant’s was legal and binding.).

In operation, the Court of Appeals and this Court have uniformly concluded that the practice of holding habitual offender enhancements in abeyance through a plea agreement is not illegal and does not violate a defendant’s constitutional rights. Admittedly, this is not an all-or-nothing determination as our appellate courts have used certain metrics to guide them in concluding whether plea agreements in certain cases are or are not illegal such as: (1) the language contained in the plea agreement itself, (2) whether a defendant’s plea was knowing and voluntarily entered into, and (3) confirmation that a defendant’s underlying sentence, parole or probation was still pending when his sentence was enhanced. All these metrics are met as to this Defendant.

First, with respect to the language of the plea agreement, our precedential

cases have carved distinction between language which does and does not pass the muster of legality. Most recently, this Court determined that the plea agreement in *Yazzie*, 2018-NMCA-001, exemplified a legal plea agreement which held habitual offender enhancements in abeyance. *Banghart-Portillo*, 2022-NMSC-021. In pertinent part, the terms of the plea agreement from *Yazzie* provided that the defendant

would receive a three-year sentence on [c]ount 1 and a one-and-one-half-year sentence on [c]ount 2. These sentences were to be served consecutively. Under the terms of the plea agreement, the State also filed a supplemental information charging [the defendant] as the same person convicted of the following felony offenses, to which Defendant admitted his identity [to several prior crimes]. As a result of [the defendant's] admission regarding his prior felonies, the sentence on [c]ount 2 received a habitual offender enhancement of eight years of mandatory incarceration. The plea agreement further stipulated that three years of [the defendant's] underlying sentence for [c]ounts 1 and 2 would be suspended but was silent as to which specific count the suspended sentence related. This gave [the defendant] an initial incarceration exposure of at least eight years and up to nine and one-half years. Finally, the plea agreement stated that if the district court accepted the agreement, [the defendant] could also be ordered to serve a period of probation. If [the defendant] later violated his probation, he could be incarcerated for the balance of the sentence and have an additional eight . . . year habitual enhancement apply to [c]ount 1; thus as to [c]ount 1 [the defendant] could be incarcerated for up to eleven . . . years with two . . . years of parole if probation is violated.”

Id. ¶¶ 3-4 (internal citation, brackets, and quotation marks omitted). This Court determined that the “express terms of the plea agreement in *Yazzie* were clear that the defendant would receive a habitual offender enhancement of up to eight years on [c]ount 1 if he violated probation.” *Banghart-Portillo*, 2022-NMSC-021, ¶ 18.

Drawing the distinction, this Court then determined that the plea agreement in *Banhart-Portillo* was different from that of *Yazzie*. In *Banhart-Portillo*, the defendant's written plea agreement only specified “that she faced zero to three years of incarceration.” *Id.* ¶ 18. Additionally, the defendant’s plea agreement was “silent about the possibility of enhancement of either count if she violated probation.” *Id.* This Court concluded that “the express terms of the plea agreement and structure of the sentence did not create such a clear and reasonable expectation for [the defendant]” thus making the defendant’s “written plea agreement . . . ambiguous in the sense that it did not specify the consequences she faced if she violated probation following her admission of the two prior felonies.” *Id.* While there was a dissent in *Banhart-Portillo*, on these underlying points this Court was agreed.

Here Defendant’s Plea Agreement was clear and is more like that plea agreement found in *Yazzie*. Defendant’s Plea Agreement expressly detailed the potential sentence exposure itself as well as the additional exposure under the habitual offender enhancement statute should Defendant violate. It also expressly indicated that if Defendant violated the terms of his probation that he would have the additional enhancements applied to his sentence, what those enhancements would be, and to which counts they would apply. **[RP 112-13]** Unlike the plea agreement in *Banhart-Portillo*, there was no silence as to the terms of the agreement or how Defendant’s sentence would operate.

Second, in addition to the clear written plea agreement, Defendant participated in a plea colloquy with the district court. The district court described the Plea Agreement in detail to Defendant, including the four new charges of which Defendant agreed to plead guilty to two and noting that the State would agree to dismiss the other two cases. [08-17-2021 CD 11:16:00-:18:59] Defendant expressed understanding that the two counts he was pleading guilty to would run consecutive for three years of jurisdiction. [Id.] The district court also went over each of Defendant's six priors for enhancement purposes. [Id.] The district court explained that the State was going to prosecute one year of enhancement on count number one while holding the remainder of the enhancement time in abeyance, but if Defendant came back before the district court on a probation violation his sentence could be enhanced. [Id.] The district court went over all of Defendant's constitutional rights and after going through each one, asked Defendant if he wanted to go forward with the plea. Defendant said "Yes." [Id. 11:19:00-03] The district court also asked Defendant if he read the agreement before he signed it, which he said he did. [Id. 11:19:10-:13] The district court asked him if he went over the Plea Agreement with his attorney and whether his attorney had answered any questions he may have had, and Defendant said he did. [Id. 11:19:17-19] The district court asked Defendant if he had any concerns or complaints about the way he had been represented by his attorney to which he responded he did not. [Id. 11:19:20-:38] The district court also

confirmed that, aside from the text of the Plea Agreement, no one had promised Defendant anything or threatened him in any way to get him to sign the Plea Agreement. Defendant stated that no one had. [*Id.* 11:21:11] In sum, Defendant's Plea Agreement was knowingly, voluntarily and intelligently entered into. [**RP 119**]

Finally, Defendant was still serving his underlying sentence, specifically his probation, when he violated the terms of his Plea Agreement and, thereafter, had his sentence enhanced. The enhancement was ordered prior to the expiration of Defendant's sentence. As he had no reasonable expectation of finality in his sentence, the Plea Agreement was not illegal. *Banghart-Portillo*, 2022-NMSC-021, ¶ 18.

Therefore, under the metric historically used by our appellate courts, Defendant's Plea Agreement was not illegal because the language contained in the Plea Agreement itself was clear and unambiguous, Defendant's plea was knowing and voluntarily entered into, and Defendant's underlying sentence, parole or probation was still pending when his sentence was enhanced. As such, Defendant should not be allowed to withdraw his plea. [**BIC 12**]

2. *Defendant's Remaining Arguments As To Illegality Are Not Supported By Precedent.*

Rather than engage with controlling precedent, Defendant explores: (a) his understanding of Legislative intent underlying the statutes and (b) Defendant's perceived "problem" and his "potential solution[.]" [**BIC 7-16**] Instead of diving

straight into addressing these contentions, Defendant begins with delving into boilerplate, shocking language to build up to his points. **[BIC 8-9]** First, Defendant's argument amounts to nothing more than utilization of boilerplate language which seems to have little to do with Defendant's case.² Rather, Defendant seems to seek broad relief, almost class-action-like, for all presently incarcerated habitual offenders who had sentence enhancements resulting from violations of plea agreements while not operating to gain relief for Defendant, himself, and potentially placing future defendants out of reach of this deterring/rehabilitative option. Defendant does not argue the merits of his case, instead raising the actions of others³ in other hypothetical contexts which does not help this Court determine whether, in this context, Defendant's Plea Agreement was illegal. As this is not a class action, the use of boilerplate language and argument centered around the actions of unrelated other people, are irrelevant. **[Id.]** Defendant does not have standing to assert the rights of other defendants. Even under his interpretation of the law, Defendant received the proper sentence: his basic sentence with appropriate habitual offense enhancements.

Defendant also goes as far as to insert shocking language in his brief—painting a graphic illustration of a beleaguered prosecutor using plea agreements,

² See identically worded brief in *State v. Gonzalez*, S-1-SC-40397.

³ Defendant's reference to "Romero," **[BIC 8]**, is not a reference to *this* Defendant Romero.

such as the one here, as a “noose” to hang defendants (with longer prison sentences) because to have to enforce lesser habitual offender enhancements would be a “waste of their time.” **[BIC 9-10]** This entirely baseless and speculative attack is meritless and, while shocking, offers little value to this Court’s determination. It is defense attorneys who are meeting directly with defendants and advising them to enter into these agreements as applicable to a particular case, not the prosecutors. Surely Defendant seeks not to impugn the important contributions both state prosecutors and defense attorneys bring to New Mexicans. Surely defense attorneys are not advising their clients to enter illegal sentences because to do otherwise would be a “waste of time.” **[BIC 9]** This Court should not indulge Defendant’s inferences or shocking language—especially where these literary devices do not advance the question before this Court and are entirely unsupported by the record in this case. As discussed above, Defendant went into this agreement with his eyes open: he knowingly and voluntarily entered into a plea agreement that gave him a valuable opportunity. If he had complied with terms of his probation, he would have avoided significant prison time. But because he did not, the State—in full compliance with the plea agreement and governing law—imposed the habitual offenses.

Setting aside the boilerplate accusations and shocking language, Defendant describes the Legislative intent behind the Habitual Offender Enhancement statutes as being for “deterrent/rehabilitative purpose of discouraging those who have

previously committed serious crimes from engaging in similar conduct within New Mexico” and as a “punitive/protective purpose of incarcerating for a longer period of time those who have shown a repeated inclination to commit serious offences.”

[BIC 7] But Defendant makes no argument as to how plea agreements, such as the one here, *do not* deter reoffenders or how they *do not* allow for rehabilitation. In fact, plea agreements operate as a deterrent/rehabilitative tool used by prosecutors and defense counsel alike. These plea agreements hold longer prison sentences in abeyance and give defendants an opportunity to not re-offend while often requiring them—as was the case here—to seek accountability and treatment.

The court system is also not free from Defendant’s spurious attacks as he also accuses our appellate courts of “mudd[ying] the waters” of what the Legislature intended through their “various decisions” from the 1980’s. **[BIC 10]** Defendant cites to *March v. State*, 1989-NMSC-065, 109 N.M. 110, and *State v. Mayberry*, 1982-NMCA-061, 97 N.M. 760, as alleged exemplar cases which broadened the Legislature’s intent by giving prosecutors discretion over “when” to charge, but still limiting prosecutors by requiring them to charge a habitual offender and determining that a plea agreement constituted improper motive for a prosecutor to delay. **[BIC 10-11]** However, the “when” is important. Our courts have defined what is meant by “when.” And the definition is different than what Defendant advances.

Defendant does not address any of this Court’s cases which define “when.”

Specifically, a prosecutor may bring habitual offender enhancements “as long as the sentence enhancement is imposed before the defendant finishes serving the term of incarceration and any parole or probation that may follow that term.” *Triggs*, 2012-NMCA-068, ¶ 4 (quoting *Trujillo*, 2007-NMSC-017, ¶ 10 (alteration in original)). Defendant’s failure to engage with this Court’s modern precedent is telling, and it answers the question on appeal. There is no question that the Legislatures intent is being met through this Court’s precedent.

Next, Defendant’s perceived “problem” and “potential solution[,]” are not reflective of an actual problem in need of a solution—since there is already extensive precedent. **[BIC 13-15]** As long as plea agreements are being entered into as defined by our appellate courts, they are legal and binding. Defendant’s “Gordian solution,” having this Court “simply rule that any habitual offender enhancements have to be made at initial sentencing, unless good cause is shown” ironically ties a knot in an otherwise straightforward string of caselaw stretching from the 1990’s to present. **[BIC 15]** First, habitual offender enhancements are made at the initial sentencing hearings; they are just then held in abeyance operating as a deterrent to defendants serving their sentences and parole/probation. Second, Defendant’s “good cause shown” standard would not operate in harmony with this Court’s precedent and, also, does not work in harmony with Defendant’s own argument. **[Id.]** If a prosecutor does not charge the habitual offender enhancement at the initial hearing—defendants

escape culpability under those statutes in this “use it or lose it” scenario. [*Id.*] But up until this point of his brief, Defendant argued that habitual offender enhancements are mandatory and cannot be escaped. [BIC 1-14]

This Court should let Greek legends lie and uphold its decades-old precedent—precedent that has never been “corrected” by the Legislature over the last three decades. The Legislature’s decision not to further address this Court’s interpretation of statute underscores the propriety of our appellate court’s statutory construction. Defendant’s Plea Agreement is legal and binding. He should not be allowed to withdraw his plea.

II. THERE IS NO CONSTITUTIONAL CONFLICT WITH HOW THE HABITUAL OFFENDER ENHANCEMENTS ARE APPLIED AND THERE IS NO SEPARATION OF POWERS VIOLATION.

Defendant raises both equal protection and separation of powers arguments. This Court has held “that an unconditional plea—a plea that does not reserve specific issues for appeal—together with a waiver of the right to appeal waives a defendant’s right to challenge either their conviction or their sentence on direct appeal. *See State v. Chavarria*, 2009-NMSC-020, ¶¶ 9, 17, 146 N.M. 251. “Thus, a voluntary guilty plea ordinarily constitutes a waiver of the defendant’s right to appeal [their] conviction on other than jurisdictional grounds.” *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410; *see also Trujillo*, 2007-NMSC-017, ¶ 8 (“[A] plea of guilty does not waive jurisdictional errors.”). As discussed in the section above, Defendant’s

Plea Agreement was voluntarily entered into and was legal—as such his alleged constitutional questions should be barred.

Even if this Court concluded that Defendant did not waive his constitutional arguments, they still fail. With respect to Defendant’s equal protection argument, in particular, Defendant makes this argument without providing this Court with a complete analysis. The Court of Appeals refused to address Defendant’s argument because he failed to “sufficiently develop[]” the argument “apart from a block quotation to an encyclopedia discussing selective prosecution and therefore, the issue is not adequately developed for review.” *Romero*, A-1-CA-41125, mem. op. ¶ 7. The argument before this Court is slightly more developed, but still omits the level of scrutiny, the protective class Defendant claims, and how Defendant’s rights have been violated. **[BIC 17-20]** The State contends that this Court could decide not to reach this question for the same reason the Court of Appeals chose not to address equal protection. *See State v. Guerra*, 2012-NMSC-014, ¶ 21 (stating that appellate courts are under no obligation to review unclear or undeveloped arguments); *see also State v. Duttie*, 2017-NMCA-001, ¶ 15 (for an appellate court to “rule on a inadequately briefed constitutional issue would essentially require it to do the work on behalf of [the defendant]”).

Should this Court reach Defendant’s constitutional questions, the State provides the following response.

A. LEGAL STANDARD & LEVEL OF SCRUTINY

This Court “would begin by applying the two-step equal protection analysis adopted in *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 9, 138 N.M. 331 . . . [which applied a] two-part test” determining whether two classes at issue were similarly situated. *State v. Franklin*, 2018-NMSC-015, ¶ 11. To determine “whether two classes are similarly situated this Court would review to see if “individuals in the group affected . . . have distinguishing characteristics relevant to interests the State has the authority to implement.” *Id.* ¶ 13. If the two classes are not similarly situated, the analysis ends. *Id.* ¶ 11.

Second, if the parties are similarly situated, “this Court [would then] determine the appropriate level of scrutiny.” *Id.* Here, the analysis would end at the first prong of the test. To the extent that this Court reaches the second prong, the level of scrutiny would be rational basis. *See, e.g., Marrujo v. N.M. Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 12, 118 N.M. 753 (applying the rational basis standard to those interests “that are not fundamental rights, suspect classifications, important individual interests, and sensitive classifications”); *Nordlinger v Hahn*, 505 U.S. 1, 10 (1992) (“[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.”)

B. DEFENDANT MISTAKES THE CLASSES AT ISSUE—HE IS SIMILARLY SITUATED TO DEFENDANTS WHO HAVE ENTERED A SUBSTANTIALLY SIMILAR PLEA AGREEMENT AND VIOLATED THE SAME—NOT THOSE WHO SUCCESSFULLY COMPLETED THEIR SENTENCE.

Defendant raises an unsubstantiated claim that it “is a violation of equal protection and due process for prosecutors to threaten to impose habitual offender enhancements on defendants if they go to trial.” [BIC 17] Without a more fulsome argument, the State can only presume what Defendant intends to argue. Specifically, it seems that Defendant defines his “classes” for equal protection purposes as: (1) those, such as Defendant, who entered into plea agreements and then violated the conditions of their agreement causing their sentence to be enhanced and (2) those who entered into plea agreements and then successfully completed their sentence without reoffending. [BIC 18] Defendant contends that the State “unequally” enforces “the habitual offender enhancement statutes based largely on whether a person will utilize their right to demand a trial.” [BIC 19] Notably, the record in this case is entirely undeveloped—Defendant made no effort to show that this purported difference actually occurs.

But even if it did, these two classifications of people are not similarly situated. The group of people who enter into plea agreements, such as the one here, and then successfully complete their sentence, without reoffending, exemplify that the system can act as a deterrent or as a rehabilitative mechanism—one of the purposes of the statutes. They are differently situated from those who violate the terms of their

probation. Defendant is similarly situated to the class of people who enter plea agreements and then reoffend. He makes no allegation as to how he is being treated disparately from the remainder of that class. Because the two classes are not similarly situated the analysis ends. *Franklin*, 2018-NMSC-015, ¶ 11.

However, to the extent that this Court reaches the second prong, the level of scrutiny would be rational basis. There is a rational relationship between the State offering defendants plea agreements that would limit habitual offender enhancement exposure—deterrence and rehabilitation. While there will be those who successfully complete their sentence and never serve habitual offender enhancement time, that success illustrates that the State’s rational reason for entering into these plea agreements operates to also achieve the other Legislative intent—keeping the public safe from reoffenders. For equal protection claims under the United States Constitution, the federal rational basis test “only requires a reviewing court to divine the existence of a conceivable rational basis” to uphold the state action against a constitutional challenge. *See Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 26.

In New Mexico the rational basis test is “robust” and to “advance a successful challenge “under . . . standard of review, a challenger must demonstrate that the classification created by the [S]tate action is not supported by a firm legal rationale or evidence in the record.” *State v. Ortiz*, 2021-NMSC-029, ¶ 32. Because the State’s actions here are “rationally related to the goals of punishment as well as

rehabilitation” Defendant’s equal protection rights were not violated here. *See State v. Tafoya*, 2010-NMSC-019, ¶ 26, 148 10 N.M. 391. Further, there is no evidence in the record about any other person’s plea agreement or re-offending status. [**See generally RP**] As such, Defendant asks this Court to envision hypothetical people who entered into a plea agreement similar to his and then abided by the terms of that agreement and never had to have their sentence enhanced. [**BIC 18-19**] As discussed above, these hypothetical people are first, not in the same class as Defendant and, second, Defendant raises no argument that he is being treated any differently from those offenders who entered into plea agreements, reoffended, and then were subject to habitual offender enhancements. [**Id.**] There is no equal protection violation.

Additionally, as stated by the Court of Appeals in its memorandum opinion, Defendant argues that “the [Plea Agreement] violates the separation of powers doctrine because it shifts sentencing authority to the prosecutor and away from its proper place in the judicial and legislative branches.” *Romero*, A-1-CA-41125, mem. op. ¶ 8. Defendant reiterates that argument here. [**BIC 20-22**] The Court of Appeals determined that that argument has already been considered and rejected in New Mexico. *Romero*, A-1-CA-41125, mem. op., ¶ 8; *see also Sedillo*, 1971-NMCA-003, ¶¶ 9-10 (holding that the predecessor statute to NMSA 1978, Section 31-18-17 (2003) did not violate separation of powers and that uneven enforcement of the Habitual Offender Act does not make the law unconstitutional). As New Mexico has

answered this question, this Court need not turn to nonbinding cases from other jurisdictions. **[BIC 21]**

CONCLUSION

Here, this Court and our Court of Appeals have issued numerous cases over the last three decades addressing each of Defendant's arguments on appeal. Defendant does not contend with this precedent, instead opting to embrace a purely hypothetical, but disparate argument. Here, Defendant's Plea Agreement was legal and binding, there has been no equal protection violation, and no separation of powers violation. This Court should respectfully affirm Defendant's revocation of his probation, affirm his conviction, and quash certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2025, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused counsel of record to be served by electronic means.

/s/ Serena R. Wheaton

SERENA R. WHEATON