



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

No. S-1-SC-40337

MARCIAL ROMERO,

Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

ON GRANT OF PETITION FOR CERTIORARI

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STATEMENT REGARDING RECORDED PROCEEDINGS

Citations to the transcript of proceedings appear in the following form: (date, volume Tr. page:line). Please note that references to the record proper are cited as (RP ____).

STATEMENT OF COMPLIANCE

As required by Rule 12-213(F)(3) NMRA, I certify that this brief is proportionally spaced using Times New Roman and the body of the brief contains 5,742 words, not counting the table of contents or the table of authorities (not to exceed 11,000 for a brief in chief). This brief was prepared using Microsoft Word, version 2010.

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NATURE OF THE CASE

This case raises an issue of great importance for the practice of criminal law in New Mexico. Prosecutors in New Mexico routinely evade the statutorily mandated imposition of habitual offender sentencing enhancements. Furthermore, they do so with the cooperation of trial court judges (as well as defense attorneys). This practice has become so entrenched that the Court of Appeals, in its decision below, dismissed objections to this practice on the grounds that it is “common.” That it is common does not make it lawful.

The Courts cannot simply ignore the law. That is true even if the prosecution and defense both urge it to do so. Indeed, in such a situation the judge is the last line of defense in our system of law. The tectonic pressure of the need for plea bargains has lulled the New Mexico judiciary into participating in the thwarting of the Legislature’s duly legislated sentencing policies. Like many difficult systemic problems, the evasion of New Mexico sentencing law can be blamed on multiple parties. Where “the law” is concerned, however, the finger of public opprobrium typically ends up pointed at the judiciary. As a result, there has been an erosion of public confidence in the judicial system. “Public confidence in the integrity and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing

to follow the law.” *Matter of Eastburn*, 1996-NMSC-011, ¶ 19, 121 N.M. 531 (citation omitted).

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

In cause D-101-CR-2019-00709 in 2019 Marcial pleaded guilty to two counts of shoplifting (fourth degree felony). He also admitted to numerous prior felony convictions, stipulating to his identity, the validity of the prior convictions, and waiving almost all his rights in relation to potential habitual offender enhancement proceedings.

The “Habitual Offender Plea and Disposition Agreement” in this case states that Mr. Romero “will be ordered to serve a period of incarceration of 1 year at initial sentencing.” **[RP 112]**. It then states, “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, emphasis added]**. The agreement later states, under the heading “Habitual Offender Proceedings,” that “[I]f defendant violates any law after entering this plea 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.’” **[RP 113]**. “The State may also bring habitual

offender proceedings if the violation is admitted or proven, even if probation or parole is not revoked or Defendant is not convicted of a new crime.” **Id.** Finally, “Defendant waives any limitations with respect to the initiation of habitual offender proceedings.” **Id.**

Marcial was eventually released on probation, where he violated, and his probation was revoked. The order revoking his probation sentenced him to four years in the DOC, stating “This four (4) years of incarceration comes from imposing four (4) years of Habitual Offender Enhancement/HOE time.” **[04-03-23 Final Order pg. 3]**. Earlier, the order stated, “the State held four (4) years of HOE on [case].” **Id.** pg. 2.

Marcial is currently incarcerated at the Lea County Correctional Facility.

ARGUMENT

I. The Legislature did not intend to make habitual enhancements optional.

A. Preservation and Standard of Review

“In this case, however, the question of whether the trial court had the requisite statutory authority to sentence Defendant as it did is an issue of subject matter jurisdiction which cannot be waived and can be raised at any time.” *State v. Frost*, 2003-NMCA-002, ¶ 8, 133 N.M. 45 citing *Perez*, 2002–NMCA–040, ¶ 11, 132 N.M. 84 as “noting that, although the issue of whether the defendant could be

sentenced as an adult was not raised below, ‘a trial court lacks jurisdiction to impose an illegal sentence’ which is an issue ‘of subject matter jurisdiction, which cannot be waived and can be raised at any time.’”

This case involves statutory construction. Specifically, it regards sentencing statutes and their effects. “The standard of review for issues of statutory interpretation and construction is de novo.” *State v. Johnson*, 2001-NMSC-001, ¶ 5, 130 N.M. 6 (citation omitted).

It will be argued that one possible interpretation of the statutes would result in them being unconstitutional. It is a “well established principle of statutory construction that statutes should be constructed, if possible, to avoid constitutional questions.” *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 12, 111 N.M. 336. “Where a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality.” *Benavides v. E.N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 43 (internal quotation marks and citation omitted).

Should this Court reach the constitutionality of statutes, “This Court applies a de novo standard of review to a constitutional challenge to a statute.” *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 10 (citation omitted).

B. The habitual offender enhancement scheme and legislative intent.

The New Mexico Legislature has enacted a series of statutes dealing with the enhancement of sentences for habitual offenders NMSA 1978 sections 31-18-17 to -20. It is a “fundamental rule of statutory construction...that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent.” *Wilson v. Denver*, 1998-NMSC-016, ¶ 36, 125 N.M. 308 (citation omitted).

NMSA section 31-18-17 lays out the basic framework of enhancing a habitual offender’s sentence. A convicted person “who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge... is a habitual offender and his basic sentence shall be increased by one year.” NMSA 31-18-17(A). “The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless [certain conditions not applicable to this appeal apply].” *Id.* A person with two prior felony convictions has “his basic sentence increased by four years.” § 31-18-17(B) NMSA. “The sentence imposed by this subsection shall not be suspended or deferred.” *Id.* If a person has three or more prior felony convictions “his basic sentence shall be increased by eight years.” §§ NMSA 31-18-17(C). “The sentence imposed by this subsection shall not be suspended or deferred.” *Id.* The statute also defines “prior felony conviction.” §31-18-17(D) NMSA.

Two more statutes set out the mandatory nature of enhancing habitual offenders' sentences. Section 31-18-18 requires that certain government officials who become aware that a person "is or may be" a habitual offender report that fact to the district attorney, "who shall then file an information." § 31-18-19 NMSA states that "If at any time, either after sentence or conviction, it appears that a person convicted...is or may be a habitual offender, it is the duty of the district attorney...to file an information charging that person as a habitual offender."

This Court has addressed the intent of the statutes in light of their legislative history. It is worth reciting portions of the analysis at length:

{7} As originally passed within the comprehensive Criminal Sentencing Act in 1977, the present habitual offender enhancement statute was silent on the possibility of suspending or deferring a sentence. That silence was characterized as having left a "loophole * * * which allows recidivists to escape imprisonment." The Legislature moved to close that loophole by amending Section 31-18-17 at its next sixty-day general session.

{8} The 1979 amendment doubled the enhancements for third-time and fourth-time offenders, from two to four years and four to eight years, respectively, and added the following phrase at the end of each enhancement subsection: "and the sentence imposed by this subsection shall not be suspended or deferred." **Thus, the Legislature both increased the punishment for multiple offenders and evinced a clear intent that they must be made to serve at least the enhancement portion of their sentences.**

State v. Davis, 1986-NMSC-031, ¶ 7-8, 104 N.M. 229 (internal citations omitted) (boldface added).

{10} The provisions of the Habitual Offender Act are mandatory. The district attorney has an affirmative duty to prosecute habitual offenders. And the court has an affirmative duty to impose the appropriate level of sentence enhancement once the factual issues of identity and prior convictions are resolved against the respondent.

State v. Davis, 1986-NMSC-031, ¶ 10, 104 N.M. 229 (internal citations omitted).

The ruling of this Court in *Davis* was reflected by Court of Appeals decisions both before and after *Davis*. “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.” *State v. Sedillo*, 1971-NMCA-003, ¶9, 82 N.M. 287 (discussing a prior codification using the same language). “We agree with the State that the [enhancement] for habitual offenders is indeed mandatory...and that the sentence may not be suspended or deferred.” *State v. Arrington*, 1993-NMCA-055, ¶ 7, 115 N.M. 559 (citation omitted).

1. The rationale for the statutes.

“The chief purposes of habitual-offender statutes are (1) the deterrent/rehabilitative purpose of discouraging those who have previously committed serious crimes from engaging in similar conduct within New Mexico and (2) the punitive/protective purpose of incarcerating for a longer period of time those who have shown a repeated inclination to commit serious offenses.” *State v. Edmondson*, 1991-NMCA-069, ¶ 13, 112 N.M. 654. “In consonance with those

purposes our supreme court has not read exceptions into the broad language of the habitual-offender statute.” Id.

One of the purposes, deterrence, includes incapacitation, which simply means that a person in prison usually cannot commit crimes against the public at large. One example is that of Zachary Babitz, who killed an 83 year old man in Santa Fe and stole his car. See

<https://www.krqe.com/news/crime/why-was-a-suspected-santa-fe-killer-with-a-lengthy-criminal-history-out-of-jail-before-murder/> , last viewed 02-

27-25. A state legislator in the story is quoted as saying “please don’t buy into the notion that the legislature is responsible for this because we don’t have a great enough sentencing.” Id. In Babitz’s plea agreement for his prior charge, the state agreed to “hold the remaining (seven years) [HOE time] in abeyance” [03-07-19], *State v. Zachary Babitz*, D-202-CR-2018-03448

“habitual offender plea and disposition agreement, pg. 3]. While the details of his case are complicated, it serves as an example of how thwarting the legislature’s will can lead to tragedy. Another example is that of Andrew Romero, who shot and killed Rio Rancho police officer Gregg Benner.

[https://www.santafenewmexican.com/news/local_news/ag-come-together-to-keep-violent-criminals-off-streets/article_1170bd11-7602-5d9c-8c5d-](https://www.santafenewmexican.com/news/local_news/ag-come-together-to-keep-violent-criminals-off-streets/article_1170bd11-7602-5d9c-8c5d-d209906b282e.html)

[d209906b282e.html](https://www.santafenewmexican.com/news/local_news/ag-come-together-to-keep-violent-criminals-off-streets/article_1170bd11-7602-5d9c-8c5d-d209906b282e.html) , last viewed 2-27025. As the story relates, Romero had

“a long criminal record, but a plea agreement favorable to him kept him out of prison earlier this year.”

On the rehabilitative side of the coin, the mandatory habitual enhancement scheme provides for a graduated response to continuing criminal conduct. The mandatory prison terms assist offenders who take advantage of treatment and other programs in jail or prison. For example, drug addicts will often plead guilty several times but have their “mandatory” HOE time held in abeyance. It is only after they have been convicted of multiple felonies that the prosecutor drops the proverbial hammer on them, with lengthy enhancements for multiple priors. In other words, rather than get the mandatory one-year enhancement (and an opportunity to ‘clean up’), they are released to the streets to pick up another (and often another...) conviction, often with plea bargains holding the “mandatory” HOE time in abeyance. Eventually, when the offender has accumulated “enough” priors they will be hit with multiple multi-year enhancements.

The wisdom of an offender taking such a plea bargain is not at issue in this case, rather the legality of taking it is. From the point of view of a busy prosecutor, such a process “makes sense.” The prosecutors don’t “waste their time” prosecuting people to get a “mere” one year incarceration. Rather, they give the offender enough rope and then, when it is fashioned

into a noose, they use an abbreviated process (because most protections have been waived in the plea bargains) to put people in prison for lengthy stays. However, following this process defeats the graduated incapacitance and rehabilitation steps envisioned by the Legislature's duly enacted scheme.

C. The Legislature's intent is lost.

The habitual offender statutes make enhancement mandatory and impose a duty on various government agents to inform the district attorney of its potential applicability, and finally they impose a duty on the district attorney to seek habitual enhancement by filing an information. Despite this clear statutory language, however, over time various decisions have muddied the waters. For example, in *March v. State*, 1989-NMSC-065, ¶ 5, 109 N.M. 110, this Court held that "It seems clear enough that, while charging a person as an habitual offender is mandatory, a prosecutor has discretion as to *when* to charge the defendant as an habitual offender so long as the trial court retains jurisdiction over the defendant." (emphasis added). The court did not say that a prosecutor had discretion as to *whether* a prosecutor charged a defendant as a habitual offender, only *when*. The mandatory nature of charging a habitual offender remained, but a prosecutor could apparently wait until the last moment to do so.

In *March*, this Court cited to *State v. Mayberry*, 1982-NMCA-061, ¶ 10, 97 N.M. 760. *Mayberry* dealt with a delay in the filing of a habitual enhancement

information, but in it the court emphasized “There being nothing suggesting that the delay in filing the habitual offender charge was for improper motives, this argument is frivolous.” Id. The delay in that case was merely incidental.

Attempting to avoid the mandatory nature of the habitual enhancement in order to obtain a plea bargain, however, is indeed an “improper motive.”

Some confusion may come from a combination of wishful thinking and language in NMSA 31-18-19 that states that “If at any time, either after sentence or conviction... [the district attorney shall pursue enhancement].” The “any time” language is intended to ensure that if a district attorney only learns of prior convictions late in the process (even after sentencing) they can still pursue the enhancement as duty demands. It was not intended to permit district attorneys to evade their duty to enhance by “sitting on” an information until the convict’s sentence has run and the court loses jurisdiction. Rather, it was insurance that if there was a delay ascertaining prior convictions (in the days before fast and reliable electronic database access) the enhancement could still be made.

Indeed, it can be inferred from the statutes that prosecutors have a duty to contemporaneously file an enhancement information when they learn of its applicability. NMSA 31-18-18, requiring reporting to district attorneys, states that the “district attorney, who shall *then* file an information.” The statute does not say the district attorney shall “eventually” file an information. It implies that the

district attorney's obtaining knowledge of valid prior convictions should trigger the filing of an information in short order. There is no arbitrary deadline or time limit specified, but that does not mean that a prosecutor can simply choose to wait for years before filing the information, let alone wait until so much time has passed that the court has lost jurisdiction and thereby evading the mandatory nature of the enhancement.

The Court of Appeals, however, later opined that "The district attorney *may* file an habitual-offender information after sentence or conviction. Section 31-18-19." *State v. Freed*, 1996-NMCA-044, ¶ 2, 121 N.M. 569 (emphasis added). It is unclear whether this language evinces a misunderstanding of the statutes or was simply an inartful use of language. It is true that a habitual offender information "may" be filed after sentence or conviction. The person may or may not have valid prior convictions. However, it is mandatory for the prosecutor to file if there are valid prior convictions. In this case, the word "may" does not imply unfettered discretion on the part of prosecutors.

D. The sentence was illegal and Marcial should be given an opportunity to withdraw his plea.

"Sentences must be imposed as prescribed by statute, [and an illegal sentence] being unauthorized by law, [is] null and void[.]" *State v. Peters*, 1961-NMSC-160, ¶ 5, 69 N.M. 302 (citation omitted). "There can be no plea bargain to an illegal sentence; even when a defendant, prosecutor, and court agree on a

sentence, the court cannot give the sentence effect if it is not authorized by law.”

U.S. v. Greatwalker, 285 F.3d 727, 729-30 (8th Cir. 2002) (internal citations omitted).

If a defendant enters into a plea agreement that includes as a material element a recommendation for an illegal sentence and the illegal sentence is in fact imposed on defendant, the guilty plea is invalid and must be vacated because the basis on which defendant entered the plea included the impermissible inducement of an illegal sentence. *People v. Hummel*, 131 P.3d 1204, 1206 (Co. Ct. App. 2006) (citation omitted). When a trial court vacates an illegal sentence that it entered in accordance with a plea agreement, the illegality voids the entire agreement and not merely the sentence. *People v. Sweeney*, 967 N.E.2d 876, ¶ 25 (App. Ct. Ill. 3rd Dist. 2012) (citation omitted).

E. The problems and a potential solution.

The key problem is that prosecutors are evading their duty to enforce the habitual offender enhancement statutes in order to obtain plea bargains from defendants. The practice has ensnared the Judiciary, as trial courts are routinely provided documents with legal efficacy (namely, a copy of the plea agreement) that demonstrate that the offender’s sentence should be enhanced, but then the judge does not carry out his or her duty to impose the enhancement. When the judge approves of a plea bargain that may result in the enhancement never being

imposed, s/he is approving and participating in the evasion of the law.

“The judicial power to modify sentences is subject to legislative limitation.” *State ex rel. Schiff v. Madrid*, 1984-NMSC-047, ¶ 9, 101 N.M. 153 (citations omitted). “It therefore follows as a necessary incident of this power that the Legislature has the right to regulate or restrict the circumstances in which courts may suspend sentences in order to ensure the efficacy of those criminal penalties.” *State v. Mabry*, 1981-NMSC-067, ¶ 18, 96 N.M. 317. The legislature, by making the habitual enhancements mandatory, has restricted the power of the courts to suspend the imposition of such enhancements.

As a practical matter, the Courts lack the ability to ensure that prosecutors fulfill their legal duty to file a habitual offender information. A trial court judge is in no position to determine whether an offender has prior valid convictions, s/he is reliant on the good faith efforts of prosecutors to follow the law. If prosecutors fail to follow the law the judge will normally have no idea and is not blameworthy. However, when presented with a plea agreement that lists valid priors, to which the offender admits identity and validity, then the Court has no choice but to impose the habitual offender enhancements or reject the plea bargain. To do otherwise is to flout the law.

The underlying problem is that courts, along with prosecutors and defense

attorneys, are under tremendous pressure to close cases, and plea bargaining has become the de facto method of load management. There may be concerns that prohibiting prosecutors from deferring habitual enhancements will eliminate a vast number of plea bargains and increase the strain on the system. There are two counterarguments: (1) if the law is unworkable, then it is up to the legislature to change it, and (2) attorneys will quickly adjust to new circumstances and the sausages will still get made.

There is a possible Gordian solution to the problem. This Court, taking into account the drift away from the Legislature's intent in enacting the enhancement statutes, could simply rule that any habitual offender enhancements have to be made at initial sentencing, *unless good cause is shown*. This will preserve the ability of prosecutors to file a late information if they have a reasonable explanation for the delay. It would be in the trial court's discretion whether good cause exists for excusing the late filing. This Court could make clear that plea bargaining away habitual enhancements is not lawful and therefore is not good cause for delaying the filing of an information.

This would eliminate the temptation to try and defer the filing of enhancement informations. In effect, it would give prosecutors a "use it or lose it" proposition. A prosecutor might still not comply with the law but his or her decision would not involve the Courts. They would simply not file the information

and, as far as the judge is concerned, there were no valid priors. Since the enhancement under the new ruling is now lost at initial sentencing there is no need to provide the trial court with a list of priors or admission of identity and validity. Such a practice may not be ideal (indeed, some would consider it reprehensible) but it would minimize the problem and disentangle the judiciary from involvement in an evasion of the law. “Public confidence in the integrity and impartiality of the judiciary can only be eroded by the spectacle of a judge refusing to follow the law.” *Matter of Eastburn*, 1996-NMSC-011, ¶ 19, 121 N.M. 531 (citation omitted).

II. The habitual enhancement scheme is unconstitutional as currently practiced.

A. Constitutional avoidance.

This Court should, if at all possible, decide in Mr. Romero’s favor based on legislative intent. It is a “well established principle of statutory construction that statutes should be constructed, if possible, to avoid constitutional questions.”

Lovelace Med. Ctr. v. Mendez, 1991-NMSC-002, ¶ 12, 111 N.M. 336. If the habitual offender enhancement statutes are interpreted as permitting their deferral (or abandonment) as part of plea bargaining, they would be unconstitutional.

“Where a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality.” *Benavides v. E.N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 43 (internal quotation marks and citation omitted).

The Constitutionality of the statute was not addressed in the District Court. This Court has discretion under certain circumstances to resolve any issue raised on appeal, regardless of whether the district court had an opportunity to resolve that issue. *See* Rule 12-321 (limiting appellate scope of review to issues where it “appear[s] that a ruling or decision by the [district] court was fairly invoked,” but granting appellate courts the discretion to consider unpreserved questions involving the “fundamental rights of a party”);

B. Equal protection and due process.

The Due Process Clauses of both the New Mexico Constitution and the United States Constitution provide that no state shall deprive any person of life, liberty, or property, without due process of law. N.M. Const. art. II, § 18; U.S. Const. amend XIV, § 1. “Article II, Section 18, ensuring due process ... [has] been interpreted as providing greater protection than [its] federal counterpart[].” *Montoya v. Ulibarri*, 2007-NMSC-035, ¶22, 142 N.M. 89.

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. It is invidious discrimination, based as it is on a desire to prevent the defendant from exercising his constitutional right to a trial.

Selective prosecution, if based upon improper motives, can also violate equal protection. Thus, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right, although its general validity as a measure enacted in

the legitimate exercise of state power is beyond question... Selective prosecution involving failure to prosecute all known lawbreakers, due either to ineptitude or lack of resources, resulting in people who are equally guilty of crimes or other violations receiving unequal treatment, is not a violation of equal protection; however, selective prosecution, where the decision to prosecute is made either **in retaliation for the exercise of a constitutional right**, such as the right to free speech or the free exercise of religion, or because of membership in a vulnerable group, is actionable under the Equal Protection Clause.

16B Am Jur 2d Constitutional Law § 941 “What constitutes selective enforcement or discriminatory administration.” (emphasis added).

The crux of the problem is that judges are required to impose the enhancements when the prosecutor proves them. This shifts discretion in sentencing from the neutral judge to the partisan prosecutor and permits prosecutors to selectively punish those who utilize their right to a trial.

Prosecutors have a well-nigh unreviewable prosecutorial discretion when it comes to charging or not charging crimes. In New Mexico, however, the habitual offender statutes authorize enhancement of an underlying sentence and do not constitute a separate and distinct offense. *State v. Gaddy*, 1990-NMCA-055, ¶ 8, 110 N.M. 120 (citation omitted). Thus, imposition of habitual time is a sentencing decision and not a charging one.

Shifting sentencing power from the judge to a prosecutor raises multiple problems. To begin with, it denies the offender the right to have a neutral judge determine his sentence, which is a requirement of due process.

“The essential elements of the adversary process, some or all of which may be required as part of the due process afforded an individual when the government deprives him of life, liberty, or property through the action of a state agency, are... (2) a neutral decision-maker;” *Board of Educ. Of Carlsbad Mun. Schools v. Harrell*, 1994-NMSC-096, ¶ 25, 118 N.M. 470.

Furthermore, the practice of unequally enforcing the habitual offender enhancement statutes based largely on whether a person will utilize their right to demand a trial is also a violation of equal protection. In a challenge to the State HOE statutes in federal court, the federal judge noted that “Although he concedes that, under New Mexico law, a prosecutor has the ‘duty (where applicable) . . . to file an information charging the person as a habitual offender,’ petitioner suggests that in actual practice unbridled discretion is vested in the prosecutor.” *Martinez v. Romero*, 626 F.2d 807, 810 (10th Cir. 1980). The Court then stated, “Petitioner presents us with no support for the proposition that the habitual offender statute has not been uniformly applied...” *Id.* (internal citations omitted). In 1980 such evidence may have been lacking, but 45 years later this Court can rely on its own experience to see how different the situation is today. The federal Court thus held that “In no sense does the statutory scheme delegate to the prosecution the legislative responsibility to fix criminal penalties.” *Id.* (citation omitted).

“The motion presents an issue which courts with uniformity have held is not

one which will be the basis for relief unless there is shown to be present in it an element of intentional or purposeful discrimination, or intentional or arbitrary action amounting to an unjust and illegal discrimination between persons in similar circumstances.” *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175 (citations omitted), *cited by State v. Sandoval*, 1969-NMSC-075, ¶ 3, 80 N.M. 333.

Enhancing sentences based on the exercise of the right to demand trial is “unjust and illegal discrimination.”

C. Separation of powers.

“The Respondents' actions implicate the doctrine of separation of powers.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343. “The balance and maintenance of governmental power is of great public concern.” *Id.* “Also, no factual issues require further clarification; this dispute concerns a purely legal question—the limits upon executive and legislative power under the state constitution.” *Id.* “Moreover, because of these questions' significance to the balance of power among government branches, we have no doubt that they eventually would have reached this Court. Last, early resolution of this case is desirable... Furthermore, since the conclusion of this case affects numerous citizens... an immediate hearing of these issues benefits all concerned parties.” *Id.*

While prosecutors get vast leeway in making charging decisions, sentencing authority divides between the legislative and judicial branches. *See State v. Sedillo*,

1971-NMCA-003, ¶9, 82 N.M. 287 (holding that because habitual enhancement was mandatory, and the prosecutor had no discretion in its application, the statute did not violate the separation of powers.).

A recent case from another state (which has constitutional language similar to New Mexico's) succinctly explained:

Under our constitution, the power to define criminal conduct and fix its punishment is vested in the legislative branch, **whereas the imposition of a sentence within these legislative limits is a judicial function.** It has been long established and well settled that the defining of a criminal act is purely a legislative function. Similarly, the Legislature has the authority to fix the penalty range that can be imposed for the crimes it has defined. The Legislature determines the nature of the penalty imposed, and so long as that determination is consistent with the Constitution, it will not be disturbed by the courts on review. Once the Legislature has defined the crime and the corresponding punishment for a violation of the crime, **it is the responsibility of the judicial branch to apply those punishments according to the nature and range established by the Legislature.**

State v. Gnewuch, 3 N.W. 3d 295, 316 (S.Ct. Nebraska 2024) (footnotes omitted) (emphasis added).

In addition, while the prosecutor may participate in the sentencing proceedings, the prosecutor may not control or decide what a guilty offender's punishment shall be. **The discretion to determine the appropriate sentence is vested in the judiciary.** We have refused to hold otherwise specifically because it would constitute a transfer of a function of the court to the prosecutor. In Nebraska, after a criminal defendant is found guilty of an offense, **it is then solely the role of the judiciary to sentence the defendant.**

Id. 319 (footnotes omitted) (emphasis added).

Similarly, see *State v. Second Judicial District Court in and for*

County of Washo, 432 P.3d 154 (S. Ct. Nevada 2018) (citing other state’s case law stating that the legislature “cannot abort the judicial process by subjecting a judge to the control of the district attorney” and finding a statute providing a prosecutorial veto over sentencing unconstitutional).

SUMMARY

Marcial received an illegal sentence. Since his plea was conditioned on receiving that illegal sentence, he should be permitted to withdraw his plea. The New Mexico habitual offender scheme is mandatory, and prosecutors cannot evade it or make it contingent as part of plea bargaining. The promulgation of an order that HOE time must be proven at initial sentencing, absent good cause shown, would help mitigate the effects of the widespread noncompliance with the legislature’s mandate.

CONCLUSION

For the reasons stated herein, Mr. Romero asks this Court to reverse his conviction and remand for further proceedings consistent with the holdings of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was caused to be served to the Attorney General by means of e-filing this 5th day of March 2025.

____\s\ Steven J. Forsberg____
Public Defender Department