



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 REPLY BRIEF

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 less than 15 pages long, as required by Rule 12-318(F)(2).

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Other State’s Cases and Rules

None.

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None.

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Other Authorities

None.

NATURE OF THE CASE

This case challenges the legality of Marcial's plea bargain and the sentence it called for (which required suspending his habitual offender enhancement).

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

Marcial agrees with the recitation of facts found in the answer brief.

[AB 2-5].

ARGUMENT

I. The state's attempts to paint the issues in this case as "well settled" fail.

The state complains that this Court recently "denied certiorari on a case which raised identically pled issues as [this] present matter." **[AB 6-7]**. However, "[A] denial of [certiorari] review carries no implication that the decision or opinion of the Court of Appeals was correct." *State v. Breit*, 1996-NMSC-067, ¶ 13, 122 N.M. 655, *cited by State v. Myers*, 2011-NMSC-028, ¶ 25, 150 N.M. 1. The state also cites the Court of Appeals memorandum opinion for the same case. **[AB 7, 11-12]**. *See* Rule 12-405 NMRA (specifying that only formal opinions involve "new points of law, making the decision of value as a precedent"). The answer brief even argues that "Tellingly, Defendant does not address or contend with any of the applicable precedent..." and then cites to the *Sepulveda* memorandum opinion, which is not precedent. **[AB 12]**.

The state also cites *State v. Banghart-Portillo*, 2022-NMSC-021, for the proposition 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 is not illegal.” [AB 7]. The state interprets that decision far too broadly. *Banghart-Portillo* did not raise the issues raised in this appeal. That case involved the imposition of an arguably ambiguous plea agreement, not whether the underlying plea agreement was itself legal. The case involved a defendant’s “reasonable expectation of finality” and its potential double jeopardy implications. *Id.* ¶ 27. Those issues are not present in the current case. Simply because this Court did not sua sponte address the legality of the underlying sentence in *Banghart-Portillo* does not mean that this Court found it was legal. “As a general rule, appellate courts rely on adversarial briefing to decide legal issues and avoid reaching out to construct legal arguments that the parties, intentionally or otherwise, have not presented.” *Price v. Legislative Council Committee of New Mexico Legislature*, 2021-NMSC-026, ¶ 58 (citation omitted).

Marcial Romero agrees with the state when it says, “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 follow that term.” [AB 7 **emphasis added, citation omitted**]. The problem is that the state seeks to evade

the import of the highlighted text. Plea agreements that envision the enhancement never being imposed are contrary to the statutes and the case law.

II. The case is not moot.

The state suggests that this case is moot and that “the court cannot grant actual relief,” and that there is “little to no benefit rendered to Defendant” if he should prevail [AB 8]. That is not so. Marcial seeks to be able to withdraw his plea, invalidating his conviction. That is a substantial benefit. The state complains that giving him a trial would be a burden. If that is so, the state could simply drop the charges as he has already served his sentence. If he went to trial, he might be found not guilty (and the weakness of the case may explain the state’s willingness to plea bargain in the first place). Or he might plead down to a misdemeanor time served. All of these outcomes would erase this felony conviction and, among other things, ensure that it was not used to give him a habitual enhancement in the future.

III. Acquiescence is not a powerful argument.

The state argues that the facts of this case represent long-standing practice, and that “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.” [AB 10].

Legislative acquiescence “falls far short of providing a basis to support a [statutory] construction ... so clearly at odds with [the statute's] plain meaning and legislative history.’ “[S]ubsequent legislative inactivity cannot ratify a clearly erroneous prior interpretation.” *Fry v. Lopez*, 2019-NMSC-013, ¶ 82 (internal citations omitted, cleaned up). “For these reasons, we are unpersuaded by the State's theory of legislative acquiescence.” *Id.*

Marcial does not agree that there is precedent establishing that suspending imposition of habitual offender enhancements is legal, but even if there were, acquiescence would not sustain the practice in light of the statute’s plain meaning, and even precedent “cannot ratify a clearly erroneous prior interpretation.” *Id.* The case cited by the state for the applicability of acquiescence was an administrative appeal where the Court of Appeals “[held] that the Board's interpretation of the statutory and administrative code provisions was reasonable.” In it, the Court ““g[ave] persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them.” *AMREP Southwest Inc. v. Sandoval County Assessor*, 2012-NCA-082, ¶ 9 (citation omitted). Marcial’s case does not involve administrative agency constructions. And, even if it did, “the appellate courts will not give persuasive weight to an agency's longstanding misapplication or misinterpretation of law.” *Id.* (citation

omitted).

IV. Avalanche not ahead.

The answer brief warns “Such a decision [in favor of appellant] could cause an avalanche of appeals to be born by the judicial system...” [AB 1].

This is unlikely, because this Court can deter any potential avalanche by making relief prospective. This case does not ask nor require that this Court make any determination on retroactivity. But if such a case ever arises, “[i]t is within the inherent power of this Court to give its decision prospective or retroactive application without offending constitutional principles.”

Santillanes v. State, 1993-NMSC-012, ¶ 36, (citing *Lopez v. Maez*, 1982-NMSC-103, ¶ 17, 98 N.M. 625). “Many times in the past, the courts of this state have given prospective effect to new principles that changed existing law.” *Santillanes*, 1993-NMSC-012, ¶ 35. “[R]etrospective or prospective application must be determined on a case by case basis by looking at three issues: the purpose of the new rule, the reliance placed upon the old rule, and the effect upon the administration of justice that retroactive application would have.” *Id.* ¶ 36.

V. This Court should practice constitutional avoidance.

This Court can rule on other grounds and decline to address the constitutional issues raised. *State ex rel. Torrez v. Board of County*

Commissioners for Lea County, S-1-SC-39742, ¶ 4, (NMSC Jan. 9, 2025) 2025 WL 52496, citing *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28 (“It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.” ((internal quotation marks and citation omitted.) Our forbearance of the constitutional questions, however, should not be construed as commentary on their merit. Rather, we heed the canon of constitutional avoidance and refrain from deciding constitutional issues unnecessary to the disposition of this case.)

VI. Clarification of constitutional claims.

A. The class, the standard, and equal protection.

The class is those who are charged with crimes and treated differently based on whether or not they use their constitutional right to a trial. **[contrast with AB 25-26]**. Because differential treatment based on the invocation of a constitutional right is invidious discrimination strict scrutiny should apply.

“Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as ... voting ...—which the Constitution explicitly or implicitly guarantees....” *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 57, citing *Marrujo*, 1994-NMSC-116, ¶¶ 10-12, 118 N.M. 753.

“Under this analysis the burden is placed upon the state to show that the restriction of a fundamental right ... supports a compelling state interest, and

that the legislation accomplishes its purposes by the least restrictive means. Otherwise the statute will be invalidated....” Id.

The right to a trial is fundamental personal right and strict scrutiny should apply.

B. The record on equal protection.

The answer brief states that “the record in this case is entirely undeveloped – Defendant made no effort to show that this purported difference actually occurs.” [AB 25]. Marcial concedes that the record is not as fully developed as he might wish, but at this point he must deal with the record as it is, and there is a sufficient record for a ruling. This Court’s own extensive experience and knowledge of the legal practices in this state is sufficient to establish the practice of imposing habitual enhancements on those who use their right to trial, while effectively (if illegally) waiving it for those who agree to plea bargain.

It should be noted that it is unlikely that a trial attorney, who wants a case to plea, would make a record of why the plea deal is unconstitutional. Some might argue that this is a feature, not a bug, of our judicial system, in that it permits Courts to postpone (or ignore) many problems. At any rate, the equal protection argument may indeed have to await another day. However, the canon of constitutional avoidance does not require that the

constitutional question be won on its merits, but rather that it should be avoided by interpreting the statute to make the constitutional merits argument unnecessary.

C. Separation of powers.

The state argues that *Sedillo*, 1971-NMCA-003, the Court of Appeals found that a prior codification of the habitual offender statute did not violate the separation of powers. However, *Sedillo* found the statute constitutional by explicitly finding that the statute did *not* permit the waiving of habitual enhancements. In this case, the state is arguing that this Court reverse that Court's rationale while leaving its ultimate conclusion intact. This is not correct, as the brief-in-chief outlines. **[BIC 20-21]**.

Of note, the separation of powers issues presents a legal question that does not require a record like that for equal protection. Indeed, this Court will often utilize mandamus if separation of powers is raised. *See, e.g., Unite N.M. v. Oliver*, 2019-NMSC-009, ¶ 2 (determining that mandamus was proper solely because the issue involved the separation of powers under Article III, Section 1 of the New Mexico Constitution); *State ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, ¶¶ 11-13, 145 N.M. 563, (determining mandamus was appropriate because the issue was of great public importance and involved the enforcement of a state officer's statutory

duty). Marcial's case involves a state officer's (prosecutor's) statutory duty.

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 12th day of May 2025.

 /s\ Steven J. Forsberg
Public Defender Department