IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40604

STATE OF NEW MEXICO,

Respondent-Appellant,

v.

HEZEKIAH EAKER,

Petitioner-Appellee.

STATE OF NEW MEXICO'S REPLY BRIEF

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TABLE OF CONTENTS

Citations to the record proper are in the form [RP]. Citations to the audio transcript of proceedings are the form [Date CD Hour:Minute:Second]. Recordings were prepared using For The Record software.

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

STATE STATUTES AND RULES

REFERENCES

I. Introduction

Defendant was convicted of Incest and third degree Criminal Sexual Penetration (CSP). He was timely sentenced to three years at NMCD for CSP, and, under the plain language of NMSA 1978, § 31-21-10.1 (A) (2007), he must also serve an indeterminate parole term of five-to-twenty years as part of that sentence. Section 31-21-10.1(A) provides: "If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole."

Defendant's sentencing was delayed, due largely to his own litigation tactics and mistakes, resulting in a windfall: he got over three years presentence credit before finally arriving at NMCD. The habeas court erroneously discharged Defendant from parole because "[he]never served any incarceration in the Department of Corrections as to count one[, the CSP conviction]." **[RP 454]** To further reward Defendant by releasing him from parole supervision he clearly needs, and at the expense of public safety, would be not only a travesty of justice and an abrogation of the law; it would

also encourage future sex offenders to intentionally delay sentencing to avoid parole.

Severe crimes indicate severe sentences, including longer commitments, and prison rather than jail. Thus, the sentence reflects the severity of the crime. Accordingly, the sentence alone can trigger the parole requirement. The plain language of Section 31-21-10.1(A) proves this to be the Legislature's intention for sex offenders.

Had the Legislature intended to require sex offenders to have actually served time at NMCD for the parole term to attach, it would have worded Section 31-21-10.1 like NMSA 1978 § 31-21-10(D) (2009)[1], which governs non sex offenders, and explicitly requires that the time has been served at NMCD for parole to attach. Instead, the Legislature patently excepted sex offenders from the reach of Section 31-21-10 and provided that the mandatory term of sex offender parole attaches when a defendant is "sentence[d].".

The language throughout the Probation and Parole Act differentiates sentencing from time served, with resulting and intended differences.

[1] Section 31-21-10 has been amended since 2009, the date of the law in effect when Defendant raped his sister and was sentenced for the same. However, no substantive changes were made in the subsequent amendments.

Defendant's attempts to deny such differentiation fail and demonstrate an erroneous conflation of a *sentence imposed* with *time served.*

The habeas court below made these errors, and discharged Defendant from parole supervision. This Court should reverse that court's decision and require Defendant to serve parole, as sentenced.

The State fully incorporates, herein, all arguments and references from within its Brief in Chief.

ARGUMENT

The plain language of Section 31-21-10.1 requires that Defendant serve an indeterminate parole term, regardless of where he served his basic sentence. In the alternative, the sentencing order did not specify the order Defendant's incest term and CSP terms were to be served, and this Court should construe the CSP term as having been served second, thus within the walls of NMCD.

I. Section 31-21-10.1(A) requires that Defendant serve an indeterminate parole term.

A. The sentence triggers the parole term.

The State does not disagree that only prison sentences trigger parole. **[AB 17]** This principle is codified by NMSA 1978 § 33-2-19 (1990) and

reinforced in *State v. Brown*, 1999-NMSC-004, 126 N.M. 642. And sentences of a year or more must be served in prison not jail. *See Brown*, 1999-NMSC-004, ¶ 10 ("Pursuant to NMSA 1978 § 33-2-19...all persons convicted of any crime where the punishment is imprisonment for a term of one year or more, after accounting for any period of the sentence being suspended or deferred and any credit for presentence confinement, shall be imprisoned in a corrections facility unless otherwise provided by law, and judgments must be issued accordingly.") (Internal quotation marks omitted). It is logical: severe crimes result in severe sentences, including more time, prison, and often, parole.

In contrast, misdemeanors, lesser offenses, result in shorter sentences, served in jail, with no parole. *See* NMSA 1978 § 31-19-1(A) (1984). ("Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not more than one thousand dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.").

Thus, the severity of the crime dictates both the length of the sentence, the place of incarceration, and whether parole will be required. A sentence

to NMCD therefore is, itself, an indication that a crime is severe. That is why the sentence, itself, triggers parole in Section 31-21-10.1.

But the reasonable presumption that a prison sentence will result in NMCD confinement, even if that does not occur, does not abrogate the triggering power of the sentence itself. Neither Section 33-2-19 nor *Brown* contradicts this conclusion.

Defendant should have been timely confined at NMCD for the aggregate of his sentences; the record proves that was the sentencing court's intention. But that Defendant's eventual arrival at NMCD was delayed—whether by tactics or mishaps—does not negate the effect of the sentence to NMCD, itself. The sentence is the harbinger of the crime's severity, and the trigger to the parole term in Section 31-21-10.1 (A).

The language is clear: "If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the...court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole[.]" § 31-21-10.1(A).

B. Section 31-21-10 does not govern sex offenders.

Section 31-21-10.1 plainly *does not* require actual prison service for parole to attach, and Defendant's arguments to the contrary fail.

First, both *Brown* and *Thompson*, as cited by Defendant, **[AB 17]** reaffirm Section 31-21-10.1 by referencing only sentencing as precedent to parole, with no mention of time served.

And Section 31-21-10 governs general, non-sex offender parole, so every subsection Defendant cites from it fails to prove what Section 30-21-10.1 requires for sex offenders. **[*Id.* 17-19]** This is most obvious in Subsection (D), which explicitly excludes sex offenders. *See* § 31-21-10.1 ("[E]xcept for certain sex offenders as provided in Section 31-21-10.1...").[2] But there is additional evidence throughout Section 31-21-10.

For example, Subsection (B) states, "a person who was sentenced to life imprisonment shall be required to undergo a minimum period of parole of five years." *Id.* Compare Section 31-21-10.1(A), which requires an indefinite,

[2] Section 31-21-10 (D) both differentiates Section 31-21-10.1 by exclusion and also prescribes a shorter duration of parole for non sex offenders, consistent with the principle that lesser crimes lead to lesser punishment. Additionally, Incest is not a sex offense, as Defendant seems to suggest. **[AB 27]** *Compare* NMSA 1978 § 30-10-3 (1963) (Incest), *with* Section 31-21-10.1(I) (listing which offenses define a sex offender).

five-to-twenty or five-to-life parole term for basic sex offender sentences as short as three years, like Defendant's.

Thus, while it takes a *life* sentence for a general, non sex offense to trigger *just five* years of parole under Section 31-21-10, it takes only a *three year* sentence for a sex offense—like Defendant's—to trigger an indefinite parole term of up to twenty years. Such clear sentencing differences illustrate that Sections 31-21-10 and 31-21-10.1 are mutually distinct.

Additionally, Section 31-21-10(B), like Section 31-21-10.1(A), demonstrates that, for the most severe crimes (*i.e*, those resulting in a life sentence), it is the sentencing, itself, that triggers parole.

And while the use of "inmates" and "institution," does point to NMCD, it does not undermine the distinct application and meaning of Section 31-21-10.1. **[AB 19]** It does the opposite: Section 31-21-10.1 exclusively uses the term "sex offenders," instead of "inmates," indicating that sex offender convicts need not have yet served time at NMCD for the parole term to attach. *See* Section 31-21-10.1(I)(2) ("'sex offender' means a person who is convicted of, pleads guilty to or pleads nolo contendere to...criminal sexual penetration in the first, second or third degree")); *cf.* Justia Legal Dictionary

https://dictionary.justia.com (defining "inmate" as "[a]n individual who is kept under official custody in a facility such as a prison[.]")

None of Defendant's citations to Section 31-21-10 advance his argument that parole does not attach for a sex offender based on sentencing alone, because, again, Section 31-21-10 does not apply to sex offenders.

As for NMSA 1978 § 31-21-5(B) (2023), **[AB 19]** again, the reasonable presumption that a sentence to NMCD will result in incarceration there does not annul the parole-triggering effect of the sentence to NMCD, itself.

Defendant argues that NMSA 1978 Section 31-18-15(C) does not exclude sex offenders. **[AB 24]** But it does. Section 31-18-15(C) specifically references Section 31-21-10, not Section 31-21-10.1 and, true to the difference, the reference is followed by additional language that parole will be served "after the completion of any actual time of imprisonment."

The reference to Section 31-21-10 followed by additional language absent from Section 31-21-10.1 serves to exclude Section 31-21-10.1, which is neither referenced in Section 31-18-15(C), nor includes the additional language. Thus, Section 31-18-15(C) does not apply to sex offenders.

And, contrary to Defendant's assertion, **[AB 22]** the very fact that NMSA 1978 Section 31-21-10 (H), and Section 31-21-10.1 (H) each except "all

inmates except geriatric, permanently incapacitated and terminally ill inmates" demonstrates that the two statutes do not overlap and are thus distinct.

C. Section 31-21-10.1 specifically governs parole for sex offenders.

Finally, throughout Section 31-21-10.1, every subsection, (A) through (I), refers consistently and exclusively to "sex offenders;" the Legislature deliberately did not name sex offenders "inmates," or "persons," as done exclusively throughout Section 31-21-10, governing non sex offenders.

The only time "sex offender" appears in Section 31-21-10, is in Subsection (D), which specifically excepts them to clarify that the two-year parole, applicable to non sex offenders convicted of a first, second or third degree felony, does not apply to sex offenders, who must serve indefinite terms of parole of five-to-twenty or five-to-life under Section 31-21-10.1.

And, again, Section 31-21-10.1(A) requires that convicted *sex offenders* (as opposed to "inmates") who have been *sentenced* (as opposed to who "have served time") must serve an indefinite parole term. ("If the district court *sentences* a *sex offender* to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex

offender to serve an indeterminate period of supervised parole[.]" *Id.* (A) (emphasis added).

II. Defendant's sentence was not suspended.

If, hypothetically, a sex offender's sentence were suspended, there is nothing in the law to preclude imposing parole as required by Section 31-21-10.1. Defendant disagrees. **[AB 29-33]**

First, however, Defendant's sentence was not suspended; he was given a conditional discharge, then adjudicated as guilty when the conditional discharge was revoked.

Analysis, much less resolution, of this hypothetical issue is irrelevant to the outcome of this case. Whether parole can be imposed in the event of a suspended sentence is not before this Court, which "do[es] not sit to decide hypothetical issues or to give advisory opinions[.]" *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982).[3]

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[3] Moreover, the habeas court's conclusion that the State's reasoning would render Section 31-21-10.1 absurd was reached erroneously. **[RP 455]** This Court has determined that "the absurdity doctrine applies when the literal application of a statute results in an absurdity that the Legislature 'could not have intended.'" *State v. Montano*, 2024-NMSC-019, ¶ 20. As discussed, the Legislature's specific use and application of the terms "sentencing" versus "time served," and "sex offender" versus "inmate," demonstrate intentional differentiation of those terms, and supports a reasoned interpretation of Section 31-21-10.1 as meaning exactly what it says. *See*

But, even if that question were before the Court, that a suspended sentence requires an indefinite probation term would not present a practical problem as Defendant suggests. **[AB 32]** While, as Defendant notes, "there is no provision...that allows for probation credit to apply to parole credit," **[*id.*]** the converse is not true: "Section 31-20-5 (B) authorizes the time served on parole to be credited as time served on probation." *Brown*, 1999-NMSC-004, ¶ 12. *See* NMSA 1978 § 31-20-5(B)(1) (2003) ("[T]he period of probation shall be served subsequent to any required period of parole, with the time served on parole credited as time served on the period of probation and the conditions of probation imposed by the court deemed as additional conditions of parole[.]").

Therefore, if Defendant's sentence had been suspended, he could still serve the required parole term triggered by the (suspended) sentence to NMCD, and get simultaneous credit against his probation term under Section 31-20-5. But it was not suspended, and the issue is therefore not before this Court.

State ex rel. Stratton v. Serna, 1989-NMSC-062, ¶ 6, 109 N.M. 1 ("Statutory language should be interpreted literally").

III. Defendant's served time at NMCD should be attributed to the CSP sentence.

As previously argued, if this Court does not find that the CPS parole term was triggered by the sentencing language in Section 31-21-10.1, it should attribute Defendant's time at NMCD toward the CPS sentence.

The habeas court patently misconstrued the sentencing order, stating that it ordered the CSP term (and the attached indeterminate parole term) to be served first, "followed by" the Incest term. **[RP 454]**

But the sentencing order did not specify the order in which the counts should be served. **[RP 193-194]** And in the absence of an ordered sequence, the listed order of convictions in a judgment and sentence is irrelevant. *See State v. Utley*, 2008-NMCA-080, ¶ 10, 144 N.M. 275 (holding that while the sentencing documents commonly "list[] the most serious crime first...the order [i]s 'insignificant.'"). *See also State v. Romero*, A-1-CA-27050, mem. op. at *1 (N.M. Ct. App. Feb. 17, 2009) (nonprecedential) ("[A] district court may impose a two-year parole period following convictions of third and fourth degree felonies, regardless of the order of the crimes in the judgment and sentence."). Therefore, the habeas court's presumption that Defendant served the CSP sentence before arriving at NMCD was erroneous, and this

Court should construe the CSP sentence as sequenced last, thus including time Defendant spent at NMCD.

The New Mexico Court of Appeals' decision in *Utley*, 2008-NMCA-080 is instructive in this case and the State asks that this Court revisit the reasoning applied in *Utley*, as argued on pages 23-25 of the State's Brief in Chief. In *Utley*, the Court affirmed the district court and construed the sentencing order to allow for the defendant to participate in a treatment program during her parole period, to "better prepare herself for returning to society." *Id.* ¶ 2

The Court further noted that "the district court's position is supported by...the legislative intent behind the Probation and Parole Act...to treat persons convicted of crimes based on their individual needs when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare." *Id.* ¶ 9 (citation and internal quotation marks omitted).

The sentencing court in this case, likewise, expressed serious concern regarding Defendant's need for supervision at least four times on the record. At the November 3, 2014, hearing, after Defendant violated probation, it stated that the community plan which had been in place since his conditional

discharge had been "a disaster" and that it was "gravely concerned about community safety" because there was a "substantial possibility" that Defendant would commit a new sex offense in the future. **[11-3-2014 CD 5:01:35-5:02:05]**

At the December 30, 2015, reconsideration hearing, the sentencing court stated that, while Defendant "had been given the benefit of the doubt" when granted a conditional discharge, he had violated probation conditions by use of alcohol and drugs and had provided "evidence that he has the continual potential for future sex crimes." **[12-3-2015 CD 11:53:05-11:53:28]**

And in the Amended Order Revoking Probation, the court ordered that Defendant enter and successfully complete the sex offender treatment program, **[RP 195]** and recommended that he "be paroled into the [sex offender treatment] program at the Las Vegas Behavioral Medical Center as a condition of parole." **[*Id.* 196]**

Thus, because the sentencing court wanted to keep Defendant under supervision, his CSP term should be construed as coming last, and the attendant parole term enforced. The counts' listed positions on the sentencing order are irrelevant, and, as in *Utley*, the sentencing court was

gravely concerned with both Defendant's rehabilitation and his threat to public safety.

Additionally, the parole term must be served directly after the basic sentence. If served first, Defendant's three-year sentence for CSP ended before NMCD started running his parole term, and the break in between would have been impermissible. A sentence cannot be divided into fragments or served in installments, and the parole period is part of the sentence of a convicted person. *See Brock v. Sullivan*, 1987-NMSC-013, 105 N.M. 412, ¶¶ 10-11. Therefore, parole must directly follow the basic sentence. *Gillespie v. State*, 1988-NMSC-068, ¶ 2, 107 N.M. 455.

When suspending a year of the total sentence without ordering indeterminate probation, **[AB 39]** the sentencing court may have failed to consider the consequences of Defendant's delayed conscription to NMCD. However, while the failure to consider such repercussions was likely an oversight, the court's intention that Defendant serve parole and receive sex offender treatment was abundantly clear. **[RP 195-196]**

The plain language of Section 31-21-10.1, the Legislative intent for sex offender supervision, and the sentencing court's clear and reasoned intentions require that Defendant serve parole for his rape charge.

CONCLUSION

For the foregoing reasons the State requests that this Court reverse the habeas court's decision to discharge Defendant from parole.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 2,966 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that on June 23, 2025, I filed or caused to be filed a true and correct copy of the foregoing Reply Brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Sarah M. Karni
Assistant Solicitor General