IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Petitioner, vs. The Honorable Stacy J. Louser, Judge of the District Court, North Central Judicial District, and Misty Lee Schwarz, Respondents.	**Supreme Ct. No. 20200322** **District Ct. No. 2020-CR-00564** **ORAL ARGUMENT REQUESTED**

PETITION FOR REVIEW
OF AN ORDER OF THE DISTRICT COURT
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT

HONORABLE STACY J. LOUSER

RESPONSE BRIEF OF THE HONORABLE STACY J. LOUSER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Statutes

STATEMENT OF ISSUES

[¶1] Whether a petition for supervisory writ is the appropriate means to review a district court's rejection of a plea agreement.

[¶2] Whether the district court improperly infringed upon prosecutorial discretion by rejecting the plea agreement in this case.

STATEMENT OF THE CASE

[¶3] Respondent suggests the petition's statement of the case is accurate.

STATEMENT OF FACTS

[¶4] Respondent agrees the petition presents legal and constitutional questions. Those questions involve a district court's rejection of a plea agreement pursuant to Rule 11(c)(3)(A) of the North Dakota Rules of Criminal Procedure, and the proper role of the judicial, executive, and legislative branches of government with respect to the rejected plea agreement involved in this particular case.

LAW AND ARGUMENT

I. A supervisory writ is not required to review a district court's rejection of a plea agreement.

[¶5] Generally, supervisory writs are reserved for "extraordinary cases in which there is no adequate alternative remedy." State v. Haskell, 2001 ND 14, ¶ 4, 621 N.W.2d 358. This Court ordinarily will not exercise its supervisory jurisdiction "where the proper remedy is an appeal." State ex rel. Madden v. Rustad, 2012 ND 242, ¶ 5, 823 N.W.2d 767.

[¶6] Although it does not appear this Court has previously reviewed a district court's rejection of a plea agreement on appeal, Rule 11 of the North Dakota Rules of Criminal Procedure provides a means for appellate review of such a decision. A defendant can enter a conditional plea of guilty to any "specified pretrial motion" while still "reserving in writing the right to have an appellate court review an adverse determination[.]" N.D.R.Crim.P. 11(a)(2). Here, the district court's orders denying the Rule 43 Plea Agreement (Index # 71) (Appellant's Appendix 10, hereinafter "App.") and denying the State's Motion to Amend the Charge (Index # 72) (App. 21-26) fall within Rule 11(a)(2)'s reference to any "specified pretrial motion." Thus, after the court denied those pretrial issues, the parties could have negotiated a conditional plea of guilty that reserved the right to have this Court review the district court's rejection of the original plea agreement. Then, following the entry of the conditional plea, the defendant could have filed an appeal with this Court to challenge the district court's rejection of the original plea agreement.

[¶7] In addition, the State could have filed its own appeal pursuant to N.D. R.App.P. 4(b)(1)(B) contending that the district court's rejection of the original plea agreement affected a "substantial right of the state." N.D.C.C. § 29-28-07(4). Indeed, if the Petitioner's argument that the district court's alleged improper infringement on the prosecutor's executive powers is important enough for the Court to consider the extraordinary remedy of a supervisory writ, then it seems such an infringement would necessarily qualify as affecting

a "substantial right" that would permit the State to request appellate review under N.D.C.C. § 29-28-07(4).

[¶8] Moreover, if both the State and the defendant appealed the district court's rejection of the original plea agreement following the entry of a conditional plea, this Court could follow the same procedure it did in this case to have counsel designated to file a responsive brief on behalf of the district court to defend the decision to reject the original plea agreement.

[¶9] Because there already exists an adequate alternative remedy in the form of a conditional plea reserving the right to appeal a district court's rejection of a plea agreement, the Court should dismiss this petition for a supervisory writ.

II. The district court did not improperly infringe upon prosecutorial discretion by rejecting the plea agreement in this case.

[¶10] Notwithstanding the availability of an adequate remedy on appeal, Respondent acknowledges this Court has discretion to exercise its original jurisdiction to address certain issues. See, e.g., Berg v. Jaeger, 2020 ND 178, ¶ 7, 948 N.W.2d 4. At bottom, the petition argues the judicial branch infringed upon an executive power in violation of the separation of powers doctrine, and thus appears to present the type of issue over which this Court could exercise its authority to issue a writ. See, e.g., North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 5, 916 N.W2d 83 (identifying a separation of powers issue as one "proper" for the exercise of the Court's original jurisdiction).

Should the Court choose to entertain this petition, Respondent asserts that three basic principles should guide the Court's review.

[¶11] ***First***, the final decision in determining whether a criminal defendant can enter into a negotiated plea lies with the judicial branch of government, not the executive branch. This basic principle is clear within the language of Rule 11 of the Rules of Criminal Procedure itself. The sequential plea agreement procedure is set forth under Rule 11(c). The first step of the process involves negotiations directly between the prosecution and defendant or defendant's attorney, without interference by the court. See N.D.R.Crim.P. 11(c)(1); but see State v. Vandehoven, 2009 ND 165, ¶ 16, 772 N.W.2d 603 (explaining the prohibition on court involvement "applies *only* to negotiations before an agreement is reached, and *does not extend* to discussions regarding a plea agreement which has already been negotiated and agreed to by the parties.") (Emphasis added).

[¶12] The second step of the sequential process requires the parties to "disclose the plea agreement in open court when the plea is offered[.]" N.D.R.Crim.P. 11(c)(2).

[¶13] The third step of the process clearly indicates that any negotiated plea is not just a matter between the defendant and a prosecutor at his or her executive discretion, but requires *"[j]udicial consideration of [the] plea agreement."* Id. 11(c)(3) (Emphasis added). In addition, Rule 11(c)(3) explicitly indicates the district court has authority to "reject" an agreement.

Id. 11(c)(3)(A); see also id. 11(c)(3)(B) (implicitly recognizing the district court's authority to reject a recommended sentence for a nonbinding plea agreement reached pursuant to Rule 11(c)(1)(B)). This Court has expressly noted the district court's ability to "reject" a "plea agreement that either includes an agreement to dismiss other charges or an agreement that a specific sentence is the appropriate disposition of the case[.]" State v. Hutchinson, 2017 ND 160, ¶ 12, 897 N.W.2d 321 (citing N.D.R.Crim.P. 11(c)(3)(A)).

[¶14] The district court's inherent and express authority to reject plea agreements under Rule 11(c)(3) demonstrates that a prosecutor's executive power to negotiate pleas is not without limits, and judicial review is required to make the ultimate determination whether the plea agreement is in the public interest. North Dakota's rule is consistent with the law in other states, indicating the judicial branch has the ultimate authority to accept or reject a plea agreement and to determine whether pleas negotiated by a prosecutor are in the public's interest. See, e.g., State v. Conger, 797 N.W.2d 341, 684 (Wis. 2010) ("Thus, deciding whether to reject a plea agreement is squarely within the court's authority; to hold otherwise would permit encroachment by the executive branch into the realm that has historically . . . been that of the judicial branch. . . . [O]ur courts have been unfailingly consistent in holding that we do not impose such a limitation on a court when it is determining whether a plea agreement is in the public interest."); State v. A.T.C., 185 A.3d 233, 244 (N.J. Super. Ct. App. Div. 2018) ("While a prosecutor may exercise

discretion and enter into a plea agreement with a defendant, the sentencing judge may reject it if the interests of justice are not served. Sentencing remains a judicial function, and a sentencing court, notwithstanding the agreement of the parties, may refuse to accept any of the terms and conditions of a plea agreement.") (internal quotation marks and citations omitted); People v. Orin, 533 P.2d 193, 197 (Cal. 1975) ("Judicial approval [of a plea agreement] is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and the prosecution.").

[¶15] North Dakota's Rule 11(c) uses language identical to the provisions in the corresponding federal rule. See Fed. R. Crim. P. 11(c). The federal courts also recognize that the judicial branch makes the ultimate determination on a plea agreement negotiated by the executive branch. See Santobello v. New York, 404 U.S. 257, 262 (1971) ("A court may reject a plea in the exercise of sound judicial discretion."); United States v. Nicholson, 231 F.3d 445, 451 (8th Cir. 2000) ("Whether to approve or reject a plea agreement is a matter confided to the sound discretion of the trial court[.]"); see also State v. Trevino, 2011 ND 232, ¶¶ 9-10, 807 N.W.2d 211 (explaining that North Dakota's Rule 11 is similar to the federal rule and stating that "[w]hen our rule is derived from a federal rule, we may look to the federal courts' interpretation or construction of identical or similar language as persuasive authority for interpreting our rule.").

[¶16] The petitioner's reliance on State v. Loughead, 2007 ND 16, 725 N.W.2d 859, and Olsen v. Koppy, 1999 ND 87, 593 N.W.2d 762, is misplaced. Those cases are fully consistent with the basic principle that the final decision in determining whether a criminal defendant can enter into a negotiated plea lies with the judiciary, not the executive branch. Loughead addressed the prosecutor's discretion with respect to the *initial* "decision whether to prosecute and what charge to file," but did not address the limits on prosecutorial discretion with respect to the plea negotiation process after a charge has already been brought. Loughead, 2007 ND 16, ¶ 12, 725 N.W.2d 859 (internal quotation marks and citation omitted). Similarly, Koppy addressed a prosecutor's "discretion in refusing to *initiate* the prosecutions." 1999 ND 87, ¶ 5, 593 N.W.2d 762 (emphasis added).

[¶17] As other courts have explained, limits on prosecutorial discretion and the judiciary's role in accepting plea agreements are both triggered at the point in time when the court's jurisdiction is invoked with respect to already-filed charges. See, e.g., Conger, 797 N.W.2d at 683 ("[W]e reconcile the apparent tension between powers within the prosecutor's realm and those within the court's realm with reference to the point in time that marks the boundary between the two in any given case: the point at which the court's jurisdiction is invoked. . . . The discretion resting with the district attorney in determining whether to commence a prosecution is almost limitless ...; however, when the jurisdiction of the court is invoked by the commencement of a criminal

proceeding, the court can exercise the discretion [to reject a plea agreement or the dismissal of a charge]").

[¶18] Initial charging decisions of the Loughead and Koppy type are executive in nature, not judicial. Nor does the judiciary involve itself in the initial plea negotiations between the defendant and the prosecutor under N.D.R.Crim.P. 11(c)(1). But after a plea agreement is disclosed in open court under N.D.R.Crim.P. 11(c)(2), the discretion of the executive branch is not unfettered, otherwise there would be no need for "judicial consideration" of the plea agreement under N.D.R.Crim.P. 11(c)(3). Rule 11 clearly contemplates that the district court will do more than just rubber stamp an executive decision. Indeed, Rule 11 provides that the judicial branch, not the executive, has the final say on whether the public interest is served by either accepting or rejecting a plea agreement.

[¶19] ***Second***, in those instances when a district court rejects a plea agreement, the prosecutor's executive power to negotiate pleas is sufficiently protected by the availability of appellate review of a plea rejection under an abuse-of-discretion standard.

[¶20] In Conger, for example, the Supreme Court of Wisconsin held "that a circuit court may, in an appropriate exercise of discretion, reject a plea agreement that it deems not to be in the public interest" and then went on to apply that "proper standard of review to the circuit court's exercise of discretion." 797 N.W.2d at 687. Before reaching that conclusion, the Court

engaged in a lengthy and well-reasoned discussion of the respective roles of the prosecutor and trial court when exercising executive and judicial authority in the realm of plea agreements, as well as the legislature's role in placing limits on the prosecutor's "unchecked discretion," id. at 683, following the point of the initial charging decision. See generally id. at 677-687.

[¶21] As stated above, after the court's jurisdiction is invoked by the commencement of a case, the judiciary's ability to review the prosecutor's executive action is triggered. See id. at 683. Furthermore, the availability of appellate review of the trial court's discretionary role strikes the proper balance between the exercise of executive and judicial discretion, and ensures that a trial court does not improperly cross the line (i.e., abuse its discretion) when reviewing a prosecutor's exercise of executive authority.

[¶22] In other words, "the sentencing court maintains oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner . . . thus satisfying separation of powers principles." State v. A.T.C., 217 A.3d 1158, 1171 (N. J. 2019). And appellate courts maintain oversight over the district courts to ensure that a plea rejection does not unduly interfere with prosecutorial discretion, further satisfying separation of powers principles.

[¶23] Other state courts also routinely apply an abuse-of-discretion standard to a trial court's decision to reject a prosecutor's negotiated plea agreement. See, e.g., Washington v. State, 844 A.2d 293, 295 (Del. 2004) ("The appeal presents issues relating to the trial court's case management and the

acceptance or rejection of a plea offer, issues that this Court reviews for abuse of discretion."); State v. Montiel, 95 P.3d 1216, 1218 (Utah Ct. App. 2004), aff'd,122 P.3d 571 (Utah 2005) ("Ordinarily, a trial court's acceptance or rejection of a guilty plea is reviewed under an abuse of discretion standard."); People v. Copenhaver, 21 P.3d 413, 416 (Colo. Ct. App. 2000) ("We also disagree with defendant's contention that the trial court abused its discretion in rejecting his plea agreement. Whether to accept a plea agreement is a matter committed to the discretion of the trial court, which is to exercise independent judgment in deciding whether to accept or reject the agreement."); State v. Holtry, 638 P.2d 433, 436 (N.M. Ct. App. 1981) ("We hold that the 'abuse of discretion' test shall also apply when a trial judge accepts or rejects a plea and disposition agreement, and that the trial judge's ruling will not be disturbed on appeal unless there has been an abuse of discretion.").

[¶24] Finally, there is a ***third*** principle that should guide the Court's review of the district court's rejection of the plea agreement in this particular instance. It is this: there are times when the legislature limits the discretion of both the prosecutor *and* the court regarding the negotiation and acceptance of plea agreements by *mandating* a particular level of punishment for a particular crime.

[¶25] "The legislature validly exercises its police powers when defining what acts constitute criminal offenses, and establishing the minimum and maximum sentences for offenses." State v. Wika, 1998 ND 33, ¶ 16, 574

N.W.2d 831. "A sentence that does not conform with the letter of the authorizing criminal statute is erroneous." Id. ¶ 15. Neither the judicial branch nor the executive branch can disregard the legislature's role in setting statutory requirements or limits. See id. ("However, the trial court must act within statutory limits."); see also Conger, 797 N.W.2d at 683 (describing "the legislature" as "another check on the power of the district attorney"); see also State ex rel. Kurkierewicz v. Cannon, 166 N.W.2d 255, 261 (Wis. 1969) (noting a prosecutor "in Wisconsin, at least . . . is subject to the enactments of the legislature").

[¶26] The plea agreement in this case involved charges brought under N.D.C.C. § 39-08-01. Significantly, that statute sets forth an increased gradation for successive offenses initially involving misdemeanor level crimes but rising to felony level "for any fourth or subsequent offense within a fifteen-year period." Id. § 39-08-01(3). The statute mandates that persons convicted of violating the statute "*must* be sentenced in accordance with" the increased gradation of offenses under N.D.C.C. § 39-08-01(5) (emphasis added). "The word 'must' as ordinarily used indicates a mandatory and not merely a directory or nonmandatory duty." Fed. Land Bank of St. Paul v. Waltz, 423 N.W.2d 799, 802 (N.D. 1988). Thus, there are some instances where the legislature acts within its sphere in mandating a particular sentence for a particular crime, and neither the judicial branch nor the executive branch have

the discretion to interfere. Crimes charged under N.D.C.C. § 39-08-01 involve one of those instances.

[¶27] The application of these three basic principles to the district court's plea rejection in this case demonstrates that the petition for review should be denied. First, the district court did not interfere in any way with the prosecutor's executive discretion to file a charge. Nor did the district court involve itself in the initial plea discussions. But once the felony level charge had already been brought disclosing three prior misdemeanor offenses within a fifteen-year period, and the plea agreement was disclosed in open court, the district court appropriately exercised the power of the judicial branch to determine whether the proposed agreement was in the public's interest.

[¶28] Second, the district court did not abuse its discretion in rejecting the plea agreement. The district court thoroughly explained its reasons for rejecting the agreement in the order denying the prosecutor's motion to amend the charge, focusing on its belief that the reduction in charge was inappropriately lenient. See Index 72, ¶¶ 6-11 (App. 22-25). The reasons given for rejecting the plea agreement included the fact that the Respondent was personally aware of the defendant's prior criminal history, including the third offense DUI the prosecutor wanted to omit to avoid the felony level offense mandated by N.D.C.C. § 39-08-01 for a fourth offense, because she had been the sentencing court involved in that case. See id. ¶ 10 (App. 24) ("Moreover, it was before this very Court that Schwarz entered her plea of guilt, while

represented, to the third offense charge in file 51-201[8]-CR-2100, the factual basis of which included Schwarz's affirmance of two prior offenses in 2015 and 2016."). The defendant's prior criminal history is an appropriate factor for a district court to consider in rejecting a proposed plea agreement. See, e.g., Copenhaver, 21 P.3d at 417 ("Among the factors which a trial court may properly consider [in rejecting a plea agreement] are the defendant's previous criminal history[.]").

[¶29] Finally, and most significantly, the reasons given by the district court for rejecting the plea agreement in this particular instance focused on the impropriety of manipulating the felony level offense mandated by the legislature in N.D.C.C. § 39-08-01. See Index # 72 ¶¶ 7, 9, 11 (App. 23, 25). Simply stated, and contrary to the implications of the arguments raised in the petition, after a charge had already been filed in this case the executive branch had no more discretion to manipulate the mandatory directives of the legislature set forth in N.D.C.C. § 39-08-01 than did the judicial branch.

CONCLUSION

[¶30] Respondent respectfully requests the Court to dismiss this petition for supervisory writ because an adequate remedy already exists to review a district court's rejection of a plea agreement in the form of a conditional plea and appeal following the rejection of an original proposed plea agreement. If the Court entertains the petition, Respondent respectfully requests that the petition be denied.

Dated this 22nd day of January, 2021.

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[¶1] The undersigned certifies pursuant to N.D. R. App. P. § 32(a)(8)(A) that the **RESPONSE BRIEF OF THE HONORABLE STACY J. LOUSER** contains 19 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Century 12 point font.

Dated this 22nd day of January, 2021.

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