ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. No. 30,285

JEROME D. BLOCK, a.k.a. JEROME D. BLOCK II and
JEROME D. BLOCK JR., and
JEROME D. BLOCK, a.k.a. JEROME D. BLOCK SR.,

Defendants-Appellees.

REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MICHAEL E. VIGIL, District Judge

Oral Argument Is Requested

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TABLE OF CONTENTS

Page

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TABLE OF AUTHORITIES

Page

New Mexico Cases

Cases from Other Jurisdictions

Page

Constitutional Provisions and Statutes

Page

ARGUMENT

Defendants don not address the State's argument that the district court erred in its reading of the Voter Action Act. Instead, they devote much of their brief to quoting the district court's decision. [AB 5, 6, 7, 8, 9, 13, 14, 18, 19, 32, 33, 40, 42, 43, 44, 46, 47, 48] But a flawed analysis does not improve with repetition. The district court's dismissal of the charges under the Act should be reversed.

I. THE VOTER ACTION ACT DOES NOT LIMIT THE ATTORNEY GENERAL'S AUTHORITY

Defendants conceded in the district court that "the Attorney General is typically vested with broad authority to prosecute criminal cases." [RP(138) 640] They now seek to take back that concession. They begin with patently incorrect assertion that "[t]he attorney general is not a constitutional officer." [AB 10] *Contra* N.M. Const. art. V, §§ 1, 3. They ignore this Court's pronouncement that "[t]he attorney general is the State's highest ranking law enforcement officer, elected by the people of New Mexico." *State v. Armijo*, 118 N.M. 802, 816, 887 P.2d 1269, 1283 (Ct. App. 1994). They maintain that, far from the State's chief law enforcement officer, "the attorney general is *secondary* to district attorneys." [AB 13] (emphasis added). *Contra State v. Naranjo*, 94 N.M. 407, 410, 611 P.2d 1101, 1104 (1980) (per curiam) (Attorney General has "*concurrent power* with the district attorneys to prosecute criminal offenses") (emphasis added); *State ex rel. Att'y Gen. v. Reese*, 78 N.M. 241, 245, 430 P.2d 399, 403 (1967) (Attorney

General has "*concurrent right* with the district attorney") (emphasis added). They maintain as well that "the attorney general is subordinate to" and "must take a secondary role to" the Secretary of State, relegating the Attorney General to the role of providing legal advice upon the Secretary's request. [AB 15, 27, 32]

One may ask: When did the Attorney General get demoted from New Mexico's chief law enforcement officer to the Secretary of State's consultant? Defendants rely on Section 1-19A-17 of the Voter Action Act, NMSA 1978, § 1-19A-17 (2003). But they concede, as they must, that to apply Section 1-19A-17 the Court must "'look first to the words chosen by the Legislature and the plain meaning of the Legislature's language.'" [AB 7] (quoting *State v. Martinez*, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747). To apply the "words chosen by the Legislature" means neither to read words *out of* the statute nor to read words *into* it. *See State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579; *State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821.

Defendants' rendition of the Voter Action Act does not abide by these basic canons. Defendants paraphrase Section 1-19A-17 as follows: "[T]he secretary of state *may*, upon a finding of a violation under the Voter Action Act, *either* impose a fine *or* transmit such finding to the attorney general for criminal prosecution, *but not both*." [AB 6] (emphasis added).

As the State has pointed out, however, Section 1-19A-17(A)'s directive that the Secretary "shall" impose a fine or transmit a finding to the Attorney General prescribes what the Secretary is minimally *required* to do without limiting what she *may* do. [BIC 13] (citing *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 206 P.3d 135). As the State has noted, had the Legislature intended to limit what the Secretary is permitted to do, it would have used the word "may." [BIC 15] Defendants do not respond to the State's argument. Instead, they simply read the mandatory "shall" out of the statute while reading "may" into the statute. [AB 6]

As the State has noted, the directive to impose a fine "or" transmit a finding does not prohibit the Secretary from doing both because the word "or" denotes alternatives which may be complementary rather than mutually exclusive. [BIC 13-14] (citing *Swink v. Fingado*, 115 N.M. 275, 279 n.10, 850 P.2d 978, 982 n.10 (1993); *State ex rel. Haynes v. Bonem*, 114 N.M. 627, 632, 845 P.2d 150, 155 (1992)). As the State has noted, had the Legislature intended to limit the Secretary's authority to one of two mutually exclusive alternatives, it would have used language such as "but not both." [BIC 15] Defendants do not respond to the State's argument. Instead, they simply read the non-exclusive "or" out of the statute while reading the mutually exclusive "either . . . or . . . but not both" into the statute. [AB 6-7]

As the State has noted, the first nine words of the statute—"In addition to other penalties that may be applicable"—make it especially clear that a fine and a transmittal of a finding are not mutually exclusive. [BIC 14] The district court disregarded those nine words, realizing that the Legislature's words would require the court to "rewrite" its preferred interpretation of the statute. [RP(138) 939] As the State has pointed out, however, the words "in addition to" are precisely the sort that indicate complementary rather than mutually exclusive alternatives, and the district court's excision of those words fails to give effect to every part of the statute. [BIC 14] (citing *Davis v. Farmers Ins. Co.*, 2006-NMCA-099, ¶¶ 22-23, 140 N.M. 249, 142 P.3d 17; *Smallwood*, 2007-NMSC-005, ¶ 11).

Defendants do not respond to the State's argument. Nor do they attempt to defend the district court's disregard of the Legislature's words. Instead, like the child who believes that when his eyes are closed his parents cannot see him, Defendants close their eyes to the opening words of the statute. Not once in the thirty-two pages of Point I of the argument do they acknowledge those words. [AB 2-33] Even in Point II, where Section 1-19A-17(A) is quoted, the Answer Brief still fails to address the opening nine words. [AB 41] Defendants have done the same thing without acknowledgment that the district court did openly—they have read the first nine words of Section 1-19-17 out of the Act.

Most significantly for present purposes, as the State has argued, Section 1-19A-17 is at most limitation on the authority of the Secretary of State, not on the authority of the Attorney General. [BIC 15-17] The district court reached the opposite result on the rationale that if the Legislature had intended to allow the Attorney General to exercise his "usual broad authority to initiate criminal charges . . . , it would have said so, particularly given the intricacies of the statutory scheme it established." [RP(138) 940] As the State has noted, however, that Section 1-19A-17 contains no exception providing for other than the Attorney General's usual authority to "prosecute . . . all actions and proceedings, civil or criminal, in which the state may be a party or interested." NMSA 1978, § 8-5-2 (1975); [BIC 16-17]. The New Mexico Legislature could have "otherwise provided" in Section 1-19A-17, as the Ohio legislature did in its elections code, but the New Mexico Legislature did not. [BIC 16, 20-23]

Defendants do not respond to the State's argument. Instead, they mimic the district court's rationale, inferring an intent to limit the Attorney General's usual broad authority from the "omission . . . of any provision" for a "specific grant of independent power." [AB 27] The Attorney General's basic authority to bring criminal proceedings, however, is not an authority to prosecute "as *otherwise granted* by law." *Compare* [AB 22, 27, 30], *with* § 8-5-2. Rather, it is an authority to prosecute "*all* actions and proceedings" in which the State may be a party or

interested "*[e]xcept* as *otherwise provided* by law." § 8-5-2 (emphasis added). That the Voter Action Act does not "otherwise grant" prosecutorial authority is inconsequential. The question is whether it "otherwise provides" for an exception to the Attorney General's usual broad authority. It does not. § 1-19A-17. Defendants have read into the Act a limitation that is not there.

Defendants also argue that "the Election Code as a whole . . . grants primary investigative and enforcement authority to the secretary of state, thereby limiting the attorney general's normal power to prosecute." [AB 18-19] In so arguing, however, Defendants read language out of the Election Code while reading other language into it.

Thus, as the State has noted, for purposes of the Election Code as a whole the Secretary of State "*shall* . . . report possible violations of the Election Code of which [s]he has knowledge to the district attorney or the attorney general for prosecution." NMSA 1978, § 1-2-2(E) (2005) (emphasis added); *see* [BIC 28-29]. The Secretary's duty to report is mandatory. *See Marbob Energy Corp.*, 2009-NMSC-013, ¶ 22. The mandatory duty to report presupposes that the Attorney General and the District Attorneys have independent authority to investigate and prosecute the "possible violations," or else the act of reporting would be meaningless. *See* § 1-2-2(E). Defendants do not respond to the State's argument. Instead, they disregard the Secretary's duty to report and read it out of the Election

Code. They make no attempt to reconcile the Secretary's mandatory duty to report with their position that she has discretionary power to report or not to report a violation to the Attorney General. [AB 4-5, 14-19]

Defendants also cite the Campaign Reporting Act, arguing that nowhere in that Act "does the Legislature suggest that the attorney general has any original enforcement, investigative, or prosecutorial powers." [AB 16-18] Defendants again assume that the Legislature, having already vested the Attorney General with broad authority to prosecute, would find it necessary to "otherwise grant" authority in the Campaign Reporting Act. The opposite is evident from the plain language of the Act. Just as neither the Voter Action Act nor Section 1-2-2(E) provides for an exception to the Attorney General's usual broad authority, so the enforcement provisions of the Campaign Reporting Act presuppose that the Attorney General and the District Attorneys have their usual authority to bring criminal as well as civil enforcement proceedings. NMSA 1978, §§ 1-19-34.4(G), 1-19-34.6(A), 1-19-36(B) (1995).

Moreover, having found no limitation on the Attorney General's authority in the text of the Campaign Reporting Act, Defendants read a limitation into the statute: In reciting the Secretary's mandatory duty to refer possible violations for enforcement under Section 1-19-34.6, Defendants insert the contingent term "whereupon": "*Whereupon*, '[t]he attorney general . . . may institute a civil action

in district court . . . .'" [AB 18] (quoting NMSA 1978, § 1-19-34.6(A)) (emphasis added). Again, Defendants read into the statute language that is not there.

None of this is to deny that the Secretary of State has an important role in the administrative enforcement of the Election Code. The State has previously noted that, in fact, the Legislature gave the Secretary *greater* powers of administrative enforcement under the Voter Action Act than she has under the Campaign Reporting Act. [BIC 23-25]; *compare* § 1-19A-17(A) (empowering Secretary herself to impose civil penalties), *with* § 1-19-34.6(A) (requiring Secretary to refer matter to Attorney General or District Attorney for enforcement). Defendants' error, as the State has pointed out, is in the assumption that the Secretary's administrative authority and the Attorney General's prosecutorial authority are mutually exclusive. [BIC 25-26] Indeed, as the State has also noted, under Defendants' reading of the Voter Action Act the Secretary forfeits her own authority to enforce the Act if she refers the matter to the Attorney General for criminal enforcement. [BIC 26-27] Defendants offer no reason why the Legislature, in a statute authorizing the distribution of large sums of public money into private campaign coffers, would so hobble both the Secretary's administrative enforcement authority and the Attorney General's criminal enforcement authority.

The Secretary of State's administrative enforcement powers under the Voter Action Act are not unlike the Federal Election Commission's "exclusive

jurisdiction with respect to the civil enforcement" of the Federal Election Campaign Act. 2 U.S.C. § 437c(b)(1); *see, e.g., Bialek v. Mukasey*, 529 F.3d 1267, 1269-70 (10th Cir. 2008). Federal courts have repeatedly held that the FECA's mechanism by which the FEC may refer matters to the Attorney General for prosecution is not the *exclusive* criminal enforcement mechanism. [BIC 17-20] Defendants nevertheless continue to press the argument that Section 1-19A-17(A)'s mechanism by which the Secretary may refer matters to the Attorney General is "the *exclusive* enforcement mechanism." [AB 10] They advance two attempts to distinguish the federal law. [AB 23-33] Both attempts fail.

First, Defendants argue that the New Mexico Attorney General enjoys no "presumption of prosecutorial authority" comparable to the United States Attorney General's broad authority to prosecute criminal cases. [AB 23-27, 30] Actually, the State does not assert a "presumption" of prosecutorial authority. More than a presumption, the Legislature has made a *statutory grant* of authority, "[e]xcept as otherwise provided by law," to "prosecute . . . all actions and proceedings, civil or criminal, in which the state may be a party or interested." § 8-5-2. The United States Attorney General's authority is analogous. It originates in and is limited by a statute notably similar to Section 8-5-2: "*Except as otherwise authorized by law*, the conduct of litigation in which the United States . . . is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the

Attorney General." 28 U.S.C. § 516 (1966) (emphasis added). As § 516 says explicitly, and as Defendants themselves acknowledge, what Congress gives, Congress may take away. [AB 24] (citing *Case v. Bowles*, 327 U.S. 92, 96-97 (1946)).

For both the New Mexico Attorney General and his federal counterpart, then, the authority to prosecute is granted by the legislative branch. For both, that authority is qualified by what may be otherwise "authorized" or "provided" by law. For both, that authority remains except as otherwise authorized or provided by law. For both, that authority does not abate when it is not "otherwise granted" in each new statute the legislative branch enacts.

Second, Defendants note that Congress considered, but then rejected, proposals to grant exclusive criminal jurisdiction under the FECA to the FEC, and to require the FEC's consent before the Attorney General could bring a criminal prosecution under the FECA. [AB 31-32]; *see Fieger v. United States Att'y Gen.*, 542 F.3d 1111, 1118 (6th Cir. 2008). But it is unremarkable that the New Mexico Legislature did not similarly consider a proposal to give the Secretary of State exclusive criminal jurisdiction under the Voter Action Act. Rather, it would have been remarkable if anyone had proposed such an idea given that the Secretary has never had any type of prosecutorial authority at all. *See, e.g.*, NMSA 1978, §§ 1-2-1(A)(3), 1-2-2(E).

Casting beyond the New Mexico Election Code and its federal analog in the FECA, Defendants come up with four statutes in which, they argue, the Legislature has "otherwise granted" authority to prosecute. [AB 19-22] They conclude that in "statutes concerning complex regulatory schemes," the authority to prosecute is conferred only by "specific jurisdictional grants." [AB 19, 22] (capitalization omitted).

The statutes cited by Defendants do not bear the weight of their argument. They merely reflect that in a few instances the Legislature has chosen to clarify whether the usual authority of the Attorney General and the District Attorneys is or is not "otherwise limited" for purposes of a particular statute. *See* NMSA 1978, § 58-13C-508(J) (2009) (clarifying that Uniform Securities Act does not limit authority of Attorney General or District Attorney to bring criminal proceedings); NMSA 1978, § 58-13A-14 (1985) (clarifying that Model State Commodity Code does not limit authority of Attorney General or District Attorney to bring criminal proceedings); NMSA 1978, §§ 76-15-7(F), (G) (1949) (providing that District Attorneys may institute criminal proceedings under Fruit and Vegetable Standards Act, whereas actions for injunctive relief on behalf of agency are to be brought through Attorney General); NMSA 1978, § 2-11-5 (1977) (clarifying that Lobbyist Regulation Act does not limit Attorney General's powers and duties). The idea that the Legislature may occasionally clarify its intent at the risk of redundancy is

hardly earth-shattering. It does not compel the conclusion that the Attorney General is divested of his usual broad authority unless a "specific grant of independent power" [AB 27] is "otherwise granted" in each new statute the Legislature enacts.

In the final analysis, and after surveys of the New Mexico Statutes Annotated are completed, the basic question remains: Did the Legislature intend to make the Secretary of State "the gatekeeper for prosecutions" under the Voter Action Act? [AB 33] That result would surely come as a surprise to the Secretary herself, who was the first to say that she is not a prosecutor and has no legal training, and that any decision to bring a criminal prosecution is not within her statutory duty. [RP(138) 652, 655; CD, 2/8/10, 10:36:13 - 10:37:00, 10:42:04 - 10:42:10] Nor does it sit well with the Supreme Court's recognition that "the determination of whom and when to prosecute . . . lies . . . at the heart of the prosecutor's powers," and that a decision to grant "broad and sweeping immunity" from prosecution—"a decision not to prosecute at all"—is one which even "courts are not well-suited to make." *State v. Belanger*, 2009-NMSC-025, ¶ 50, 146 N.M. 357, 210 P.3d 783.

The State has pointed out that it makes no sense that the Legislature would task an official having neither prosecutorial nor legal experience with the heavy responsibility of deciding who will be prosecuted. [BIC 25-26] Defendants do not

respond to the State's argument. Instead, they posit that the Voter Action Act grants the Secretary the discretion to decide whether "the public interest is best served" by a criminal prosecution. [AB 5] But no such words can be found in the Act. The Legislature has given prosecutorial discretion not to the Secretary, but to the Attorney General, by directing him to "prosecute . . . all actions and proceedings, civil or criminal, in which the state may be a party or interested *when, in his judgment, the interest of the state requires such action* or when requested to do so by the governor." § 8-5-2(B) (emphasis added). Defendants have simply read the Attorney General's prosecutorial discretion out of the New Mexico statutes, and they have read into the statutes a prosecutorial discretion on the part of the Secretary that is not there.

In sum, nothing in the plain language or the legislative history, background, or policy implications of the Voter Action Act supports the view that the Attorney General's usual broad authority over criminal prosecutions has been shifted to the Secretary of State. This conclusion follows, first and foremost, from "the words chosen by the Legislature." *Martinez*, 1998-NMSC-023, ¶ 8. Defendants have not shown otherwise by offering up words chosen by Defendants.

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PROSECUTION

Defendant Block Jr. begins his argument on the double jeopardy issue by conceding error in the district court's dismissal of the Voter Action Act charges in

Counts III and IV. [AB 34] As the State has explained, the district court dismissed every charge under the Act without pausing to consider whether the conduct at issue was unitary or separate. [BIC 33-34] Although Defendant Block Jr. casts blame on the State for what he calls a "vague Indictment," he does not otherwise attempt to justify the district court's *sua sponte* dismissal of charges that he did not ask the court to dismiss and that nobody ever claimed to be based on unitary conduct. [AB 34]

Defendant Block Jr.'s argument regarding Counts I and II does not require extended discussion because it collapses into the argument throughout the rest of the Answer Brief that Section 1-19A-17 poses civil and criminal penalties as mutually exclusive alternatives: "*either* the issuance of a fine, *or* a criminal punishment, *but not both*." [AB 39, 40, 42, 46] (emphasis added, capitalization omitted). That reading of Section 1-19A-17 is as incorrect for purposes of the double jeopardy claim as it is for purposes of prosecutorial authority. Most conspicuously, it ignores the Legislature's explicit provision that a civil penalty is "[i]n addition to other penalties that may be applicable," § 1-19A-17(A), and it replaces the non-exclusive "or" with the mutually exclusive "either . . . or . . . but not both."

Defendant Block Jr. argues that the civil penalty must be construed as a criminal punishment because "the remedial aspects of the law would be taken care

of by the reimbursement provisions," under which a violator "may be required to return" or "shall return" public monies distributed to him or her, §§ 1-19A-17(A), (B). [AB 46] That argument ignores that, as the State has previously pointed out, reimbursement of misappropriated money does not remedy the far-reaching damage to public confidence in the State's electoral process, nor does it even compensate the public for the costs of investigation and enforcement occasioned by a violation. [BIC 43-44] It also ignores that, as the State has pointed out, this Court held a $75,000 civil penalty to be remedial rather than punitive although the penalty was over and beyond (1) the obligation to offer full refunds to all harmed purchasers, and (2) the State's separately assessed costs of investigation. [BIC 43]; *see State v. Kirby*, 2003-NMCA-074, ¶¶ 5-6, 37, 133 N.M. 782, 70 P.3d 772. Defendant Block Jr. does not respond to the State's arguments.

Defendant Block Jr. also contends that the civil penalty is on balance more punitive than remedial. [AB 47-49] His contention should be rejected because:

(1) Defendant is incorrect that a civil penalty constitutes "an affirmative disability or restraint." A civil fine neither approaches "the infamous punishment of imprisonment" nor carries "the stigma of a criminal conviction." *Kirby*, 2003-NMCA-074, ¶ 30 (internal quotation marks and citation omitted).

(2) Defendant ignores the fact that civil fines and assessments have not historically been regarded as punishment, but "are traditionally a form of civil remedy." *Id.* ¶ 31 (internal quotation marks and citation omitted).

(3) Defendant ignores the fact that whereas a criminal punishment under the Act comes into play "*only* on a finding of scienter," a civil penalty does not require such a finding. *Id.* ¶ 32 (emphasis added, internal quotation marks and citation omitted). Whereas criminal intent is an essential element of a criminal punishment, which comes into play only when a person willfully or knowingly violates the Act, § 1-19A-17(B), a civil penalty may be imposed on any person "who violates" the Act, culpably or not, § 1-19A-17(A). It is irrelevant that the Secretary may in some cases consider "any circumstances out of the candidate's control." § 1-19A-17(A). A finding regarding circumstances out of the candidate's control is not a finding of scienter; and, in any event, civil penalties can be imposed under the Act—as they were on Defendant Block Jr.—without a finding regarding such circumstances. [RP(138) 649-50, 700-01] That is, the civil penalty "does not come into play *only* on a finding of scienter." *Kirby*, 2003-NMCA-074, ¶ 32 (emphasis added, internal quotation marks and citation omitted).

(4) Defendant's contention that the civil penalty serves as retribution is unsupported. His contention that it serves as a deterrent is insufficient because

"deterrence may serve civil as well as criminal goals." *Id.* ¶ 34 (internal quotation marks and citation omitted).

(5) Defendant ignores the fact that the unitary conduct on which the civil penalty and criminal charges are based "is insufficient to render the money penalties . . . criminally punitive . . . particularly in the double jeopardy context." *Id.* ¶ 35 (internal quotation marks and citation omitted).

(6) Defendant ignores the fact that "there exists an alternative, remedial purpose to which the civil penalty may rationally be connected." *Id.* ¶ 36.

(7) Defendant's contention that two $5,000 fines and a $1,000 fine are excessive ignores the substantial harm to the public interest, including loss of public confidence in the State's electoral process, inflicted by violations of the Act.

(8) Defendant ignores the fact that "the Legislature chose to label the penalty a *civil* penalty," signifying its understanding of the purpose and effect of the sanction. *Id.* ¶ 38.

In sum, Defendant Block Jr. has failed to show that the civil penalty in the Voter Action Act is a criminal punishment in its purpose or effect. His claim that criminal charges under the Act put him in double jeopardy therefore fails.

CONCLUSION

The district court's dismissal of all charges under the Voter Action Act should be reversed.

Respectfully submitted,

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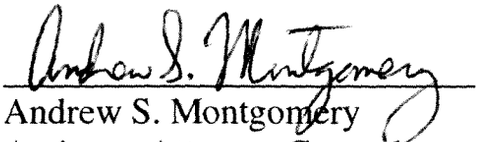

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