STATE OF NEW MEXICO COURT OF APPEALS

STATE OF NEW MEXICO
TAXATION AND REVENUE DEPARTMENT,

Respondent-Appellant

v.

No. 33,101
Sandoval County
Hon. Louis P. McDonald
D-1329-CV-2009-02978

MYRON G. YEPA,

Petitioner-Appellee.

ANSWER BRIEF FOR THE PETITIONER-APPELLEE MYRON G. YEPA

Veronica C. Gonzales
Clinical Law Student for Petitioner
Southwest Indian Law Clinic
MSC11-6070,
1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

Heidi Todacheene
Clinical Law Student for Petitioner
Southwest Indian Law Clinic
MSC11-6070,
1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

Barbara Creel
Supervising Attorney
Southwest Indian Law Clinic
MSC11-6070,
1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

REFERENCES TO THE RECORD

Pursuant to Rule 12-213(a)(b) NMRA, references to the recorded transcript are by elapsed time from the start of the recording (e.g., "Tr. 10:25" indicates a point occurring ten minutes and twenty-five seconds after the start of the recording).

CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that the body of the attached brief complies with the 35-page limit in Rule 12-213(F)(3) NMRA and that the brief was prepared using a proportionally-spaced typeface, Times New Roman. The body of the brief contains 9,644 number of words. The word-count was obtained from the word-processing program Microsoft Word 2010.

TABLE OF AUTHORITIES

NEW MEXICO CASES

U.S. SUPREME COURT CASES

OTHER JURISDICTION CASES

STATUTES AND OTHER RULES

OTHER AUTHORITIES

SUMMARY OF THE PROCEEDINGS

A. Mr. Yepa's criminal charges for DWI were dismissed by the district court.

The Criminal Complaint was filed against Mr. Yepa charging him with aggravated DWI in Albuquerque, NM on September 7, 2008. [RP 34] The criminal case was dismissed *nolle pros* on December 10, 2008. [RP 36] The Bernalillo County Metropolitan Court did not convict Mr. Yepa and no order resulted. [RP 28, RP 36]

At the time of his arrest, Mr. Yepa received a "Notice of Revocation" (hereafter referred to as "Notice") providing for the separate administrative process required by the State of New Mexico Taxation and Revenue Department, Motor Vehicle Division (hereafter referred to as "MVD"). [RP 33] The Notice provided:

> I. **NOTICE OF REVOCATION**: YOUR DRIVING PRIVILEGES WILL BE REVOKED IN TWENTY (20) DAYS.
> ***Request for Hearing*:** You may request a hearing on this revocation. The request must be made in writing within ten (10) days from date of service of this notice.
> ***If you do not request a hearing,*** your driver license and/or driving privilege is hereby revoked, pursuant to the Implied Consent Act (Section 66-8-111 NMSA 1978), effective twenty (20) days from receipt of this notice.
>
> [...]
>
> **I received the Notice of Revocation on** Date: 9/7/08,
> Driver's Signature: Handcuffed. [RP 33]

On the back page of the Notice that Mr. Yepa received, the applicable portion of the "NOTICE AND DURATION OF REVOCATION" section provided:

> Under New Mexico law (section 66-8-111 NMSA 1978), upon receipt of a statement signed under penalty of perjury from a law enforcement officer (the front side of this document), the Secretary of the Taxation and Revenue Department shall revoke your driver license for at least the applicable period listed below:
>
> 2. For a period of six (6) months, or until all conditions for license reinstatement are met, whichever is later, if you are twenty-one years of age or older, took the chemical test, and the results showed a blood-alcohol concentration above the per se limit. [RP 61]

At the time, "all conditions for license reinstatement" were listed in Part B of the Implied Consent Act, which applied to drivers whose licenses were revoked for DWI or violation of the Implied Consent Act:

> [...] an additional fee of seventy-five dollars ($75.00) is required to be paid to reinstate the driver's license. Fees collected pursuant to this subsection are appropriated to the local government's road fund. [RP 40]

Mr. Yepa chose to forego the hearing and instead wait the six months to regain eligibility to reinstate his driver's license. Thus, the MVD revoked Mr. Yepa's license from September 27, 2009 to March 27, 2009. [RP 28, RP 39] Under the law at the time of the alleged DWI, Mr. Yepa was eligible to restore his license as of March 28, 2009. § 66-5-33.1, NMSA 1978. [RP 28, RP 39]

B. The New Mexico law changed in July 2009.

Then, the legislature enacted a new law (hereafter referred to as the "July 2009 Amendments") that increased the penalties for an alleged DWI. Parts B and C of the statute, provided the requirements to regain eligibility to reinstate a driver's license:

> (1) an additional fee of seventy-five dollars ($75.00);
> (2) completion of the license revocation period;
> (3) satisfaction of any court-ordered ignition interlock requirements; and
> (4) a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device.
>
> C. The department may reinstate the driving privileges of an out of state resident without the requirement that the person obtain an ignition interlock license for a minimum of six months, if the following conditions are met:
> (1) the license revocation period is completed
> (2) satisfactory proof is presented to the department that the person is no longer a resident of New Mexico; and
> (3) the license reinstatement fee is paid.
>
> D. Fees collected pursuant to Subsection B of this section are appropriate to the local governments road fund. [RP 41]

In late July 2009, Mr. Yepa attempted to restore his license. Although Mr. Yepa was not required to do so, he notified the Court of good cause to restore his license. § 66-8-102(K), NMSA 1978 (requiring that a fourth or subsequent offender applicant show good cause to get their license restored every five years). Mr. Yepa indicated on his request for restoration of his license that he had completed a substance abuse program, including a month-long treatment to assist

him with his dependency on alcohol. [RP 8, RP 12] The Yucca Lodge at Fort Bayard Medical Center and the Jemez Behavioral Health both commended Mr. Yepa's efforts in obtaining treatment. [RP 12-14] The MVD denied Mr. Yepa's application for reinstatement because of a new law that was retroactively being applied to him. [RP 41]

The MVD also provided Mr. Yepa with an internal memo, the "MVD Procedural Quick Update", which set forth, "effective July 1, 2009, a minimum of six months of driving with an ignition interlock device is required to reinstate a driver's license that has been revoked for DWI". [RP 42] The update stated, "There is no exemption from the new requirements." [RP 42] The document conflicted directly with the Notice Mr. Yepa was provided with and relied on when deciding to wait six months to regain eligibility. [RP 42]

The July 2009 Amendments further require in an application for an ignition interlock license that the applicant "shall provide proof of installation of the ignition interlock device by a traffic safety bureau-approved ignition interlock installer on any vehicle the applicant drives". § 66-5-503(B)(1) NMSA 1978. The July 2009 Amendments increased the punishment for Mr. Yepa to include 6 months of an ignition interlock license (which requires an interlock device and a car on which to put the device) and an additional $75 fee. [RP 41] The new law,

however, did not require a criminal conviction for DWI or a court order for an ignition interlock device. [RP 41]

C. Mr. Yepa is unable to obtain his license under the applicable law because the new law is more onerous.

Mr. Yepa has not been able to obtain his license under the applicable law, section 66-5-33.1 of the Implied Consent Act. Obtaining a new license under the amended law has proved difficult. Mr. Yepa is not employed in his trade of commercial driving due to the revoked license. [RP 1, RP 76] Therefore without income, he is unable to purchase or finance a vehicle to comply with the amended law's more onerous requirements, including the interlock device. Under the more onerous law, the interlock device will cost Mr. Yepa a total of $763. *See* **www.newmexico.gov/how-to-get-an-interlock.aspx** (establishing the cost to be $75 per month, $100 for installation, $113 for the interlock license and $100 for removal). There is limited financial assistance available for those who cannot afford the ignition interlock due to hardship. §66-8-102.3 NMSA 1978 (interlock device fund provides for up to $50 for install, $50 for removal and $30 per month *if* funds are available).

D. The district court correctly determined that the retroactive law violated Mr. Yepa's state and federal constitutional rights and New Mexico law.

After a hearing on July 23, 2013 pursuant to Mr. Yepa's First Amended Complaint and for Declaratory and Injunctive Relief, the Court issued an Order on

August 8, 2013. [RP 162] The district court's Order for Declaratory Judgment and Permanent Injunctive Relief found and concluded that Mr. Yepa was eligible for reinstatement of his license six months from the date of revocation, and after payment of a $25 reinstatement fee, and a $75 fine for violation of the Implied Consent Act, NMSA 1978 §§ 66-8-105 to 112 (1978, as amended through 2007). [RP 163] The district court enjoined MVD from applying the July 2009 Amendments to Mr. Yepa because they were "an ex post facto application of law, and in violation of the Constitution of the United States, U.S. Const. art. I., §§ 9 and 10, N.M. Const, art. II, §18, and NMSA 1978, § 12-2A-8 (1997)." [RP 163]. The State appeals this holding.

SUMMARY OF THE ARGUMENT

The district court correctly determined that it had subject matter jurisdiction over Mr. Yepa's constitutional claims and exhaustion of remedies is not required in this case. The district court's holdings should be affirmed. First, the MVD's application of the July 2009 Amendments violate the U.S. Constitution because they were applied retroactively, are more onerous and are punitive in nature. Second, the MVD's application of the July 2009 Amendments violates the New Mexico Constitution because legislative intent and the punitive effect make the new law subject to Ex Post Facto laws. Even if this Court disagrees with the district court, appellant did not appeal a finding that the July 2009 Amendments

violated New Mexico statutory prohibitions against retroactive application or Ex Post Facto violations – both conclusive holdings – and therefore, their appeal must be dismissed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT HAD SUBJECT MATTER JURISDICTION TO HEAR AND DECIDE MR. YEPA'S CONSTITUTIONAL VIOLATIONS AND EXHAUSTION OF REMEDIES IS NOT REQUIRED.

A. Standard of Review

The court must review a district court's granting of subject matter jurisdiction under an abuse of discretion standard. *City of Las Cruces v. El Paso Elec. Co.,* 1998–NMSC–006, 124 N.M. 640, 954 P.2d 72. A lower court "is in the best position to resolve, in the first instance, the facts necessary for a determination of the constitutionality" of a given statute. *Id.* at ¶ 24. An appellate court "should exercise its discretion to decide the certified questions only with a full record before it, so that any decision on the constitutionality of [a statute] would not be based upon anecdotal and speculative argument". *Schlieter v. Carlos,* 1989–NMSC–037, ¶ 11, 108 N.M. 507, 775 P.2d 709.

B. The constitutional questions present in this case exceed MVD's authority for review.

The Motor Vehicle Division ("MVD") cannot decide constitutional questions. *Maso v. Taxation & Revenue Dep't, Motor Vehicle Div.,* 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276. In *Maso* the Court of Appeals of New Mexico ruled that the MVD lacks subject matter jurisdiction to consider matters beyond the scope of statute governing driver's license revocation proceedings and cannot

resolve due process issues even with a driver's consent." *Id.* at ¶ 12. *See Martinez v. N.M. State Eng'r Office,* 2000–NMCA–074, ¶ 22, 129 N.M. 413, 9 P.3d 657 (stating that because the State Personnel Board is a statutorily created administrative body, it is limited to authority expressed or implied by statute); *see also Gonzales v. Surgidev Corp.,* 1995-NMSC-036, ¶ 11, 120 N.M. 133, 899 P.2d 576 (explaining that "subject matter jurisdiction cannot be waived").

This Court held that "constitutional question raised by the Driver cannot be handled at the administrative level." *Maso*, 2004-NMCA-025 at ¶ 12. Furthermore, as provided in Section C of this Answer Brief, *Maso* reaffirms the primacy of N.M. Const. art. VI, § 13 granting district courts original jurisdiction over constitutional questions which forecloses exhaustion. *Id.* Forcing plaintiff's to adhere to exhaustion requirements where agencies have no jurisdiction in the first instance "would effectively foreclose any due process challenges to the administrative process, which would impermissibly constrain the right of access to the courts." *Maso*, 2004-NMCA-025 at ¶ 16.

More recently, in *Glynn*, this Court affirmed *Maso* when the Petitioner-Appellant asserted that the State was not allowed to decide constitutional questions. *Glynn v. State, Taxation and Revenue Dept., Motor Vehicle Div.,* 2011-NMCA-031, ¶ 12, 149 N.M. 518, 252 P.3d 742 (citing *Maso,* 2004-NMCA-025 at ¶ 12).There, this Court reasoned, "[b]ecause Section 66–8–112(E) specifies the

issues that the State can consider in a revocation proceeding, the State cannot adjudicate constitutional questions," such as the due process question asserted by the driver. *Id.*

Original jurisdiction is proper here under *Maso* and *Glynn* because Mr. Yepa has a constitutional challenge and the State cannot adjudicate constitutional questions due to their lack of subject matter jurisdiction to consider matters beyond their scope of adjudicatory authority under §66-8-112(E). Forcing Mr. Yepa to adhere to administrative exhaustion in this case would result in an unconstitutional denial of access to the courts. Because the State does not have jurisdiction to bring a final decision of his claims, Mr. Yepa would have no decision to appeal forcing him into a procedural dead end. *Maso,* 2004-NMCA-025 at ¶ 16. In addition, requiring exhaustion when the agency has no jurisdiction is futile.

Moreover, if this issue was decided in favor of the State, it would expand the scope of authority delegated to administrative bodies like the MVD and contradict the statutory limitations the legislature creates for them disrupting the parameters of our democratic system and lawmaking procedures. Therefore, *Maso* and *Glynn* support Mr. Yepa's argument that constitutional questions exceed the State's authority to review them because they cannot decide constitutional questions.

C. Exhaustion of administrative remedies is not required in this case because MVD does not have the authority to hear or decide constitutional questions.

The Supreme Court of New Mexico ruled exhaustion only applies where an administrative agency has the authority to pass on *every question* raised by one seeking judicial review. *Smith v. City of Santa Fe,* 2007-NMSC-055, ¶ 27, 142 N.M. 786, 171 P.3d 300 (emphasis added; internal quotations and citations omitted). *Smith* held that exhaustion was not required for the purposes of declaratory relief since the plaintiff did not initiate administrative proceedings before seeking relief from the district court. *Id.* (affirmed by *Headen v. D'Antonio*, 2011-NMCA-058, 149 N.M. 667, 253 P.3d 957). Generally, a party must exhaust administrative remedies unless those remedies are inadequate. However; where there is no applicable statutory remedy, there is no need to exhaust administrative procedures. *Callahan v. New Mexico Federation of Teachers,* 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51. Moreover, "[e]xhaustion of remedies concerns the timing of judicial review of an administrative action and applies only in situations where an administrative agency has original jurisdiction." *Summit Prop., Inc. v. Pub. Serv. Co. of N.M.,* 2005–NMCA–090, ¶ 21, 138 N.M. 208, 118 P.3d 716.

Following the Supreme Court of New Mexico's precedent in *Smith* and *Callahan*, exhaustion of administrative remedies is not required here because the Department does not have the authority to decide constitutional questions. Nor can

exhaustion be required since Mr. Yepa did not initiate the administrative proceedings. Because Mr. Yepa did not invoke the administrative process, he must proceed to district court like the plaintiff in *Smith*. As in *Callahan*, there is no statutory scheme that would allow either the State to hear *or* decide Mr. Yepa's constitutional question. If the legislature intended administrative agencies to have original jurisdiction over constitutional questions then they would have created a statutory scheme and provided applicable remedies, especially in situations like Mr. Yepa's.

The State's reliance upon *Alvarez v. State Taxation and Revenue Dep't* to support an exhaustion requirement is misplaced. [BIC 13] The *Alvarez* plaintiffs did not raise a constitutional challenge to invoke the district court's jurisdiction. *Alvarez v. State Taxation and Revenue Dep't,* 1999-NMCA-006, 126 N.M. 490, 492, 971 P.2d 1280. Instead, the plaintiffs, who had three DWI convictions, argued that the Department was bound by the criminal court judgment and the plea agreement to treat them as "first offenders." *Id.* at ¶ 7. There, this Court found concluded that the "[p]laintiffs have never applied for, much less been denied, a driver's license..., this Court concluded," and so, "[a]ccordingly, they failed to take the mandated administrative steps necessary to vest jurisdiction in the district court." *Id.* at ¶ 10. Here, the district court correctly found it had original

jurisdiction over the constitutional questions raised by Mr. Yepa's petition. [RP 162]

Moreover, the State wrongly applies *New Energy Economy* because the Court here is not intervening in an administrative proceeding since the 2009 Amendments were already adopted as law. [BIC 13] *New Energy Economy Inc. v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, 249 P.3d 746. The State mistakes our constitutional question with *New Energy Economy*'s administrative rule-making proceedings. *Id.*

Lastly, the State inappropriately extends the *U.S. Xpress* holding outside the context of the Tax Administration Act to any challenge of an administrative action. [BIC 14] *U.S. Xpress v. State Taxation and Revenue Department*, 2006-NMSC-017, 139 N.M. 589, 136 P.3d 999. "[T]he holding of *U.S. Xpress* is expressly limited to claims falling within the Tax Administration Act, NMSA 1978, Section 7-1-1 through -82 (1979, as amended through 2006)." [NPSD 4] Mr. Yepa's case does not involve the Tax Administration Act, and the exhaustion doctrine is inappropriate outside the context of *U.S. Xpress*. Thus, *Alvarez*, *New Energy Economy*, and *U.S. Xpress* are not applicable to this case. Accordingly the MVD does not have jurisdiction to hear or decide constitutional law questions in Mr. Yepa's case and exhaustion of administrative remedies is not required here.

II. THE STATE'S APPLICATION OF THE JULY 2009 AMENDMENTS TO MR. YEPA VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS GUARANTEED BY THE U.S. CONSTITUTION.

A. Standard of Review

The district court's order enjoining the State from applying the July 2009 Amendments to Mr. Yepa because they were "an ex post facto application of law" should be affirmed. The standard of review for issues of statutory and constitutional interpretation is *de novo*. *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457, 461 (a constitutional challenge to a statute is reviewed *de novo*); *State ex rel. Foy v. Austin Capital Management, Ltd.*, 2013-NMCA-043, ¶ 6, 297 P.3d 357, 364 (quoting *State v. Lucero,* 2007-NMSC-041, ¶ 8, 142 N.M. 102, 104, 163 P.3d 489, 491) ("issues of statutory and constitutional interpretation are reviewed *de novo*"), *cert. granted* 2013-NMCERT-___ (No. 34,013, Mar. 15, 2013).

B. The State of New Mexico violated the Ex Post Facto prohibitions of the U.S. Constitution because the July 2009 Amendments were applied retroactively, were more onerous, and were punitive in nature.

The U.S. Constitution prohibits the passage of Ex Post Facto laws. U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed [by Congress]"); U.S. Const. art. I, § 10, cl. 1 ("No state shall [...] pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"). "So much importance did the convention attach to [the *ex post facto* prohibition], that it

is found twice in the Constitution." *Kring v. Missouri*, 107 U.S. 221, 227, 2 S.Ct. 443, 27 L.Ed 506 (1883).

The Ex Post Facto clause "flatly prohibits retroactive application of penal legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S.Ct. 1483 (1994).The U.S. Supreme Court has held that a new law that retroactively increases the punishment for an offense is a violation of Ex Post Facto prohibitions. *See Calder v. Bull,* 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed 648 (1798) (stating that the Ex Post Facto clause prohibits states from enacting any law that "changes the punishment, and inflict greater punishment, than the law annexed to the crime, when committed"). Ex Post Facto protections prohibit the State's actions in this case.

1. The July 2009 Amendments were applied retroactively.

"Law violates Ex Post Facto Clause only if it: punishes as crime an act previously committed, which was innocent when done; makes more burdensome the punishment for crime after its commission; or deprives one charged with crime of any defense available under law in effect when act was committed." *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). A statute violates this constitutional prohibition if it operates retroactively and to the detriment of a defendant. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Here, the department took a newly amended law and applied it to Mr. Yepa's actions that occurred a year earlier. At the time of the offense, the 2008 law required revocation of a driver's license for six months beginning twenty days after the date of arrest for the first DWI, even if there was no conviction, and a $100 fee for full license reinstatement. § 66-5-33.1; [RP 40] Mr. Yepa's underlying charge occurred on September 7, 2008 and his license was revoked on September 27, 2008. [RP 39]

After his charged offense and the required six-month period under the state law, the New Mexico legislature amended the Implied Consent Act in January 2009, and the new law *became effective on July 1, 2009*. [RP 42] The new law included no language that it was to be applied retroactively. However, the State retroactively applied the 2009 Amendments to Yepa although the alleged offense was committed nearly *a year prior* to the statute taking affect. [RP 42] Mr. Yepa's criminal case had even been dismissed *six months before* the Amendments went into effect on July 1, 2009. [RP 42] Mr. Yepa applied for reinstatement in July 2009 and the State retroactively applied the Amendments to him. [RP 8]

2. The July 2009 Amendments were more onerous.

This prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Cummings*

v. Missouri, 71 U.S. 277, 290, 18 L.Ed 356 (1866). The test and history of the Ex Post Facto Clause make clear that it prohibits states from enacting any law that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." C*alder v. Bull*, 3 U.S. at 390 (1978). Ex Post Facto laws "extend to *penal* statutes". *Id.* (emphasis in original) In this case, the application of the new law is detrimental to Mr. Yepa.

The New Mexico legislature amended the Implied Consent Act in the spring of 2008, which became effective on July 1, 2009. [RP 42] This new law added an additional punishment: the installation of an ignition interlock device for six months. [RP 42] At the time of the underlying offense the only requirement was a waiting period of six months. The record shows that, " all conditions for license reinstatement" of the Implied Consent Act were as follows:

> [...] an additional fee of seventy-five dollars ($75.00) is required to be paid to reinstate the driver's license. Fees collected pursuant to this subsection are appropriated to the local governments road fund. [RP 40]

The July 2009 Amendments increased the penalties for an alleged DWI in Part B of the statute, which provided the requirements to regain eligibility to reinstate a driver's license:

> (1) an additional fee of seventy-five dollars ($75.00);
> (2) completion of the license revocation period;
> (3) satisfaction of any court-ordered ignition interlock requirements; and

(4) a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device.

C. The department may reinstate the driving privileges of an out of state resident without the requirement that the person obtain an ignition interlock license for a minimum of six months, if the following conditions are met:
"(1) the license revocation period is completed
(2) satisfactory proof is presented to the department that the person is no longer a resident of New Mexico; and
(3) the license reinstatement fee is paid.

D. Fees collected pursuant to Subsection B of this section are appropriate to the local governments road fund. [RP 41]

The July 2009 Amendments further require an application for an ignition interlock license that the applicant "shall provide proof of installation of the ignition interlock device by a traffic safety bureau-approved ignition interlock installer on any vehicle the applicant drives". §66-5-503(B)(1) NMSA 1978. The July 2009 Amendments severely increased the punishment for Mr. Yepa to include six months of an ignition interlock license (which requires an interlock device and a car on which to put the device) and an additional $75 fee. [RP 41]

The July 2009 Amendments required an additional fee, a more costly ignition interlock license, a car on which to put the device and an additional six months with a restricted license. Thus leading to the Ex Post Facto problem.

3. The newly imposed July 2009 Amendments are punitive in nature.

The newly imposed laws inherently are punitive in nature and in effect. The fact that the new law spanned both the criminal and civil statutes is not dispositive. The threshold question is whether "the intention of the legislature was to impose the punishment. *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). "If the statute imposes a disability for the purposes of punishment- that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). As set forth below, tougher drunk driving laws in terms of a criminal sentence, fines and civil fees and devices, are intended to punish the offender in wholesale, comprehensive and definitive terms. This is true as a response to the state of New Mexico's well-documented reputation. [1]

While the interlock license creates a means for an alleged DWI offender to continue driving, the interlock license and required *device* are punitive because they are expensive. *See* www.newmexico.gov/how-to-get-an-interlock.aspx (establishing the cost to be $75 per month, $100 for installation, $113 for the interlock license and $100 for removal). Furthermore, the State offers little

[1] *See* New York Times article referring to how New Mexico "lawmakers wrestle with how to make the state's highways and rural roads safer[...]" by "criminalizing addiction", http://www.nytimes.com/2013/03/09/us/new-mexico-alcohol-sales-dwi-convicts.html?_r=1&; *See also* other newspaper articles referring to Gallup, NM as "Drunk City, USA" http://articles.philly.com/1999-02-27/news/25504684_1_gallup-drunk-city-mckinley-county; http://articles.latimes.com/1990-05-14/news/mn-135_1_drunk-city; http://articles.chicagotribune.com/1989-03-30/news/8903310059_1_gallup-drunk-tank-bars-and-liquor-stores.

financial assistance available for those with a hardship. §66-8-102.3 NMSA 1978 (interlock device fund provides for up to $50 for install, $50 for removal and $30 per month *if* funds are available).

Furthermore, the July 2009 Amendments require that the offender have a car. § 66-5-503(B)(1) NMSA 1978 (the applicant "shall provide proof of installation of the ignition interlock device by a traffic safety bureau-approved ignition interlock installer on any vehicle the applicant drives"). Without a job because of the revoked license Mr. Yepa cannot purchase a car or pay the fees associated with the ignition interlock license. Without a car Mr. Yepa cannot comply with the increased penalties and thus is subject to a potential permanent bar from ever driving again.

This penalty is punitive because it amounts to a potential permanent bar from driving, a penalty harsher than that for out-of-state residents punished in New Mexico, an out-of-state resident punished by their own state, or those for repeat offenders in New Mexico. (Discussed further in Section III below.)

The July 2009 Amendments are a constitutional Ex Post Facto violation for three reasons: (1) the 2009 Amendments were enacted close to a year *after* Mr. Yepa's license was revoked on September 7, 2008, subjecting him to an illegal constitutional violation of retroactive application of the law; (2) the 2009 Amendments both changes the punishment *and* inflicts greater punishment on Mr.

Yepa, which did not exist at the time he was eligible to reinstate his driver's license because the amendment imposes additional monetary punishment and physical restraint in the form of an ignition interlock and implied ownership of a vehicle; (3) the law is punitive in effect and operation, which negates the New Mexico's legislature's attempt to frame the law as civil. Therefore, the U.S. constitutional limitations on Ex Post Facto laws prohibit the State from retroactively applying the 2009 Amendments to Mr. Yepa.

This Court's precedent in applying Supreme Court precedent is further evidence that State's application of the July 2009 Amendments is federally unconstitutional under the *Mendoza-Martinez* factors. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct.554, 9 L.Ed.2d 644 (1963). This Court applies the *Kennedy v. Mendoza-Martinez* test to determine whether the statute is punitive and thus subject to the prohibition against Ex Post Facto laws. *State v. Kirby*, 2003-NMCA-074, ¶¶ 28-38, 133 N.M. 782, 70 P.3d 772 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169 (1963)). Although the Supreme Court of the United States indicated that the seven-factor test is "neither exhaustive nor dispositive" in *U.S. v. Ward*, 448 U.S. 242, 249, 100 S.Ct. 2636, 14 ERC 1673 (1980), the New Mexico Court of Appeals has applied this test. The seven factors as stated by this Court are:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a

> punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purposed assigned.

Id. (alteration, internal quotation marks and citation omitted).

The 2009 Amendments are punitive *in effect* under the seven factor *Mendoza-Martinez* test: (1) the requirement for Mr. Yepa to install an ignition interlock and the severely limited funds available for indigents in state subsidies restrains such persons from driving and prohibits Mr. Yepa's ability to work and earn income as a commercial driver; (2) ignition interlock laws have been a criminal sanction for DUI under NMSA 1978 § 66-8-102 (1999, prior to Amendments through 2010). Requiring installation of an ignition interlock device and increasing fees for the reinstatement of a driver's license is punitive; (3) Mr. Yepa *did not* have knowledge that when the act was committed that he would be subject to the 2009 Amendments. He relied on the law at the time that he could reinstate his license after the six-month revocation period; (4) the interlock device is a deterrent to prevent DUIs. The fees resulting from the 2009 Amendments are punitive in nature because they are greatly increased ranging from $50 to $200 for the ignition interlock installation, $50 to $100 for a monthly operation fee, and residual fees of $113 for an interlock license, and $100 for removal. [RP 122] *See*

www.newmexico.gov/how-to-get-an-interlock.aspx. Thus, the legislature's decision to increase the fees serves a retributive purpose; (5) Mr. Yepa's underlying violation of the Implied Consent Act, NMSA 1978, § 66-8-102 (2008), triggers the requirement of an ignition interlock device is a criminal charge of DUI. Therefore, the sanctioned behavior is already a crime and the 2009 Amendments are punitive in nature; (6) the 2009 Amendments do not have rationally related connection to a legitimate non-punitive purpose because there is no basis for punishing first-time offenders *who have never been convicted* for a potentially infinite amount of time. For those who were eligible for reinstatement before the 2009 Amendments took effect, it unfairly subjects Mr. Yepa to a heighted sanction without warning; (7) the restraint imposed by the 2009 Amendments is excessive because Mr. Yepa has already served his six-month revocation *plus* an additional *five years*. Additionally, he spent two months in jail even though *he was never convicted of DUI*. The 2009 Amendments sanctions are irrational with respect to their purpose of public safety. To impose an exceedingly excessive punishment on an indigent like Mr. Yepa, who relied on the law before the imposition of the 2009 Amendments that took effect, is unjust because he has no source of income to earn a living as a truck driver and his livelihood depends on his licensure. Furthermore, the State offers little financial assistance available for those with a hardship. §66-8-102.3 NMSA 1978 (interlock device fund provides for up to $50 for install, $50 for

removal and $30 per month *if* funds are available).Therefore, the 2009 Amendments are *punitive in effect* under the seven factor *Mendoza-Martinez* test and the U.S. constitutional Ex Post Facto limitations prohibit the State's unlawful retroactive application of the 2009 Amendments.

III. THE STATE'S APPLICATION OF THE JULY 2009 AMENDMENTS TO MR. YEPA ALSO VIOLATES THE NEW MEXICO CONSTITUTION, WHICH PROVIDES GREATER PROTECTIONS AGAINST EX POST FACTO LAWS.

A. Standard of Review

The district court's order enjoining the State from applying the July 2009 Amendments to Mr. Yepa because they were "an ex post facto application of law" should be affirmed. The standard of review for issues of statutory and constitutional interpretation is *de novo. Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037 at ¶ 11 (a constitutional challenge to a statute is reviewed *de novo*); *Foy v. Austin Capital Management, Ltd.*, 2013-NMCA-043 at ¶ 6 (quoting *State v. Lucero,* 2007-NMSC-041 at ¶ 8) ("issues of statutory and constitutional interpretation are reviewed *de novo*"), cert. granted 2013-NMCERT-___ (No. 34,013, Mar. 15, 2013).

B. The State violated the Ex Post Facto prohibitions of the New Mexico Constitution as evidenced by the legislative intent.

Similarly, the New Mexico Constitution contains a provision prohibiting the passage of Ex Post Facto laws. N.M. Const. art. II, § 19 ("No ex post facto law,

bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature"). The New Mexico Supreme Court and the New Mexico Court of Appeals have held that a new law that retroactively increases the punishment for an offense is a violation of Ex Post Facto prohibitions. *State v. Orduñez,* 2012-NMSC-024, ¶ 14, 283 P.3d 282 (*referencing State v. Romero*, 2011-NMSC-013, ¶ 10, 150 N.M. 80, 257 P.3d 900) (a law which "makes criminal a previously innocent act, increases the punishment or changes the proof necessary to convict the defendant violates the prohibition against passage of ex post facto laws"); *State v. Adam M.,* 1998-NMCA-014, ¶ 7, 124 N.M. 505, 953 P.2d 40 ("The ex post facto prohibition does not allow for a law that increased the punishment for an offense after the offense has been committed").

New Mexico appellate courts have indicated that specifically penal laws are constitutionally prohibited under the Ex Post Facto Clause of the New Mexico Constitution. *See Orduñez,* 2012-NMSC-024 at ¶ 14 (quoting *Landgraf v. USI Film Prods.,* 511 U.S. at 2244 (1994)) ("The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation"); *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264, (quoting *Collins v. Youngblood*, 497 U.S. at 41 (1990)) (this means "that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them").

This Court, in *Foy v. Austin Capital Management, Ltd.* articulated one way to determine whether a civil statute is penal or remedial as a two-step process. *Foy v. Austin Capital Management, Ltd.*, 2013-NMCA-043 at ¶¶ 15-16. First, the threshold question is whether "the intention of the legislature was to impose the punishment". *Id.* at ¶ 15 (quoting *Smith v. Doe*, 538 U.S. at 92 (2003)). The second inquiry looks to whether the statutory scheme is "punitive in purpose or effect. *Id.* at ¶ 16 (quoting *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002–NMSC–014, ¶ 11, 132 N.M. 187, 46 P.3d 94 ("[T]he court must determine whether the sanction established by the legislation was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect")).

1. The intent of the legislature and the Executive was to punish DWI offenders harshly because New Mexico had the worst DWI problem in the nation.

Legislators made it their mission to see to it that drunk drivers were punished harshly to reduce the number of repeat offenders; clearly evidencing a punishing and deterring purpose of punitive statutes. For example, former House Judiciary Committee Chairman (now Speaker of the NM House of Representatives) W. Ken Martinez proposed that *every* vehicle sold in New Mexico be equipped with an interlock device. Requiring ignition interlocks on "every car, truck and commercial vehicle, would *shift the focus* to preventing drunk driving, [from] *punishing* those who already have killed and injured others."

House Voters to Require Ignition Interlocks on Every N.M. Vehicle, Albuquerque Journal, (Feb. 16, 2004), http://www.abqjournal.com/xgr/apinterlock02-16-04.htm. *See also Paul v. Davis*, 424 U.S. 693, 734 n.18, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (Brennan, J., dissenting) (stating that requiring every person to install the device is the only way to actually prevent drunk driving without "singl[ing] an individual out for *punishment* outside the judicial process").

Similarly, New Mexico's U.S. Senator Tom Udall introduced a bill to make New Mexico's ignition interlock program a federal law, stating, "We're not against people social drinking. We're against repeat offenders getting in a car at over .08 (blood alcohol limit)." *Udall Wants Interlock Law for U.S.,* Albuquerque Journal, (Dec. 22, 2009). http://abqjournal.com/news/washington/22231271662newsstate12-22-09.htm. The former Governor of New Mexico, Bill Richardson, indicated that New Mexico has a great DWI program, "We started with stiffer laws for repeat offenders--an additional four years added to a drunk driver's sentence for each prior conviction. [..] We also cracked down on repeat offenders in other ways, lowering the DWI blood alcohol limit from .08 to .06 and making participation in a treatment program mandatory. We set up a hotline to report suspicious driving and created a radio/TV advertising campaign that featured me hammering home the anti-DWI

point in six words: "You drink, you drive, you lose." No exceptions." *Between Worlds* by Bill Richardson, (Nov 3, 2005) pp. 323-325.

Considering the social platforms politicians were talking about at the time of its enactment and Congressman Kennedy Martinez' desire to put them on every car, the legislators and the executive made it their mission to punish DWI offenders and rid the state of the DWI problem.

2. The legislators intended to punish alleged offenders with a harsh statute as evidenced by the text of the drunk driving law.

The Court must look at the language of the statute itself. *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 8, 15 P.3d 1233, 1235. Appellant has not alleged anything within the text of the statute that indicates an intent to make the ignition interlock device requirement a remedial statute. Even if there had been remedial language in the statute, the New Mexico legislature's "description of a statute as civil does not foreclose the possibility that it has a punitive character." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777, 114 S.Ct. 1937, 128 L.Ed2d 767 (1964).

However, a reading of the statute reveals a punitive nature. For example, the ignition interlock device penalty is imposed for every person who is even *accused* of drunk driving. § 66-5-33.1(B) NMSA 1978 (requiring a minimum of six months with an interlock ignition device for every person who is accused of DWI). While the Criminal Code first requires a conviction in order to impose an interlock

ignition device punishment, the Motor Vehicle Code does not require a conviction by imposing a six month minimum *in addition to* any court-ordered requirements. § 66-8-102(N) NMSA 1978 ("Upon a conviction pursuant to this section, an offender shall be required to obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles driven by the offender, pursuant to rules adopted by the traffic safety bureau."); § 66-5-33.1(B) NMSA 1978 (requiring a minimum of six months with an interlock ignition device).

The July 2009 Amendments' punishment as applied to Mr. Yepa in the administrative realm is harsher than any punishment he could have received on the criminal side and is therefore indicative of a penal nature.

3. The legislature intended to enact the July 2009 Amendments to be the most punitive in any state to combat the rampant DWI problem.

The statute is punitive because it applies a punishment harsher than that required by other states, harsher than that required by New Mexico for out of state residents and harsher than that for repeat offenders.

A comparison to the State's treatment of out-of-state residents caught in New Mexico reveals a punitive intent by the New Mexico legislature. For example, on the back page of the Notice provided to Mr. Yepa, the State lays out an exception for out-of-state-residents. [RP 43] Further, in the procedural update, the

state sets forth, "As proof that the applicant is no longer a resident of New Mexico, we will accept a single document showing residency in another state. The document should be of a type that we routinely accept as proof of residency for issuance of a New Mexico license or ID." [RP 43] While an exception would be made for an out of state resident, an exception would not be made for Mr. Yepa, who was pulled over nearly a year before the Amendments were enacted, was not convicted and was already eligible for a restored license. An exception was not made for Mr. Yepa, an indigent who could not afford a car to put the device on, whose livelihood depended on having a driver's license even though it was his first offense and he had completed treatment programs successfully on his own accord.

A comparison to other states reveals a punitive intent by the New Mexico legislature. Appellee's Memorandum in Opposition of Proposed Summary Disposition, emphasized that of all 50 states plus the District of Columbia that impose some form of interlock requirement for DWI offenders, New Mexico is the *only* state with a statute allowing potentially indefinite suspension *without* a criminal conviction. This is because there is no ability to get a waiver of the requirement for hardship, inability to maintain gainful employment or passage of time. *See* Appellee's Memorandum in Opposition of Proposed Summary Disposition, pp. 7-10.

In addition, this Court should take note that while other courts that have considered the retroactive requirement of ignition interlock devices to not be in violation of Ex Post Facto laws, those courts operate under a statute that first requires a conviction, unlike New Mexico. *See State, Dept. of Highway Safety and Motor Vehicles v. Butler*, 959 So. 2d 434 (Fla. Dist. Ct. App. 3d Dist. 2007) (the State had legislative authority to require installation of the device when considering a hardship driver's license, although requirement was not mandatory at time of motorist's last *conviction*); *Gordon v. Massachusetts Registry of Motor Vehicles*, 2006 WL 708658 (Mass. Super. Ct. 2006) (even though the motorist had been *convicted* of OUI for the second time before the adoption of the statute, the motorist did not apply for restoration of his previously-suspended license until after the statute's effective date); *Alexander v. Com., Dept. of Transp.*, 583 Pa. 592, 880 A.2d 552, 15 A.L.R.6th 843 (2005) (subjecting the motorist to the interlock requirement as a condition to restoring his license after it was suspended for his third driving under the influence *conviction* did not implicate retroactivity because the triggering event was the third conviction, which occurred after the effective date of the interlock statute); *Doyon v. Department of Highway Safety and Motor Vehicles*, 902 So. 2d 842 (Fla. Dist. Ct. App. 4th Dist. 2005) (the state motor vehicles department or the district court can retroactively require a motorist recently *convicted* of DUI to have ignition interlock devices installed); *Stair v.*

Com. Dept. of Transp., 911 A.2d 1014 (Pa. Commw. Ct. 2006) (application of ignition interlock law enacted after licensee's prior *convictions* for DUI requiring the installation of interlock device as condition of restoration of licensee's operating privileges following subsequent DUI *conviction* was not unlawfully retroactive); *Frederick v. Com.*, 802 A.2d 701 (Pa. Commw. Ct. 2002) (the court held that applying a new statute requiring *convicted* repeat offenders to install an interlock device when one of the DUI convictions occurred before the effective date of the statute did not violate Ex Post Facto principles).

Furthermore, many states offer additional protections to defendants by requiring a conviction *and* a court order before allowing the state agency to require an ignition interlock device, unlike New Mexico which allowed the state agency to apply a retroactive punishment to Mr. Yepa. *See Karz v. Dickenson*, 2006 WL 1041992 (Fla. Dist. Ct. App. 2d Dist. 2006) (upon a third conviction of driving under the influence of intoxicating liquor, the Florida Department of Highway Safety and Motor Vehicles had exceeded its authority in administratively imposing the system where the court had failed to do so judicially); *Embrey v. Dickenson*, 906 So. 2d 316 (Fla. Dist. Ct. App. 1st Dist. 2005) (motor vehicle department did not have authority to require the imposition of the device in the absence of a court order upon the motorist for his second *conviction* of driving under the influence); *Dickenson v. Aultman*, 905 So. 2d 169 (Fla. Dist. Ct. App. 3d Dist. 2005) (noting

that while Fla. Stat. Ann. § 322.16 provided general authority for the department to impose time and purpose restrictions on drivers' licenses and to effect other administrative measures necessary to ensure the safety of the state's highways, that court reasoned that Fla. Stat. Ann. § 322.16 did not grant the department the independent authority to impose a criminal punishment for a *conviction* of DUI); *Doyon v. Department of Highway Safety and Motor Vehicles*, 902 So. 2d 842 (Fla. Dist. Ct. App. 4th Dist. 2005) (administrative imposition of an ignition interlock system, where the court *convicting* the motorist failed to impose the requirement, would constitute double jeopardy); *Turner v. Com., Dept. of Transp., Bureau of Driver Licensing*, 805 A.2d 671 (Pa. Commw. Ct. 2002) (the statute gave the court the sole authority to order installation, and the department had no unilateral authority to impose ignition interlock device requirements upon offenders if the trial court failed to do so*); Schneider v. Com., Dept. of Transp., Bureau of Driver Licensing*, 790 A.2d 363 (Pa. Commw. Ct. 2002), appeal granted, 577 Pa. 674, 842 A.2d 408 (2004) (although the defendant had two DUI offenses and the trial court was required to order installation of an ignition interlock device, the court's failure to do so did not mean that the bureau had been given authority to override the trial court's order and require installation).

This comparison reveals that the New Mexico intended to punish first-time offenders like Mr. Yepa because the legislature does not first require a conviction,

much less a court order for an ignition interlock device. Mr. Yepa has been subjected to the harshest statute of any of the fifty states and District of Columbia for a first time offense because even though he was not convicted, he could potentially be punished forever for not having a car on which to install the ignition device. By comparing other states, it is clear that the July 2009 Amendments were meant to be punitive.

C. Even if the legislature did not intend to create a punitive statute, the July 2009 Amendments still violate the New Mexico Constitution because they are punitive in purpose and effect.

Even if the Court believes the Appellant's argument that the legislature did not intend for the statute to be punitive, the July 2009 Amendments are punitive *in effect* to Mr. Yepa. To determine whether a statute is considered punishment a reviewing court must determine whether the sanction that the legislature imposed was sufficiently punitive it its effect that, on balance, the punitive effects outweigh the remedial effect. *State v. Block,* 2011-NMCA-011, ¶ 28, 150 N.M. 598, 263 P.3d 940 (quoting *City of Albuquerque v. One (1) White Chevy Ut.,* 2002-NMSC-014 at ¶ 11); *see also U.S. v. Ward,* 448 U.S. at 242 (1980)(quoting *Rex Trailer Co. v. United States,* 350 U.S. 148,154, 76 S.Ct. 219, 222, 100 L.Ed. 149 (1956) (stating that the court may also consider whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for

sanctions so punitive as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty").

Even if the legislature had characterized the July 2009 Amendments as civil or remedial, this label is not conclusive if the effect is punitive. *State v. Nunez*, 2000-NMSC-013 at ¶ 46 ("[I]n New Mexico, the fact that the Legislature has chosen to label a proceeding 'civil' or 'criminal' is not dispositive of the true nature of that proceeding"); *Foy,* 2013-NMCA-043 at ¶ 12 (reaffirming *Nunez*' reasoning that it is the nature of the statute as a whole that decides the issue); *State v. Kirby*, 2003-NMCA-074 at ¶ 29 (disavowing the Supreme Court of the United States opinions that rely on the label that the enacting legislative body gives to determine whether a statute is punitive or remedial).

Similarly, previous cases addressing the remedial effect of license revocations alone do not help this Court decide whether the July 2009 Amendments imposing the potentially harshest penalty in the country to Mr. Yepa are punitive or not. *See State ex rel Schwartz v. Kennedy,* 1995-NMSC-069, ¶ 38, 120 N.M. 619, 904 P.2d 1044 (while the Court held that administrative license revocations are remedial and not punitive, it did not consider ignition interlock devices which were not required until 14 years later); *State v. Druktenis,* 2004-NMCA-032, ¶¶ 29-31, 34 fn.1, 135 N.M. 223, 86 P.3d 1050 (relies on double jeopardy precedent to determine that a sex offender statute is not punitive because

the information is already publicly available); New Mexico Attorney General Opinion No.11-03, 2011 WL 1314448 (March 16, 2011) (wrongfully relying on *Schwartz v. Kennedy* to determine that the ignition interlock punishment is equal to a simple license suspension and therefore not in violation of Ex Post Facto laws). Here, the July 2009 Amendments not only impose a license suspension or interlock license, but more importantly impose a costly ignition interlock device, a car on which to install it and an additional fee all of which have a punitive effect on Mr. Yepa. The statute's effect is punitive in nature because Mr. Yepa cannot afford to comply with the newly applied license reinstatement conditions, resulting in a potential indefinite ban from driving.

The statute's punitive effect is further evidenced by a comparison to New Mexico's treatment toward repeat offenders. A potentially indefinite suspension is not applied to a first time offender in the statute, but instead is imposed on a fourth or subsequent conviction only. § 66-8-102(N)(4) ("The offender shall operate only those vehicles equipped with ignition interlock devices for: (4) the remainder of the offender's life, for a fourth or subsequent conviction pursuant to this section.") Even then, the law allows the repeat offender to apply for a district court's order to remove the ignition interlock device requirement and for restoration of a driver's license after five years and every five years thereafter. § 66-8-102(N)(4) NMSA 1978. Mr. Yepa is effectively being punished more harshly than a fourth or

subsequent offender. By not writing in a similar time limiting provision or waiver for hardship into the Motor Vehicle Code for indigent first time offenders like Mr. Yepa, the effect is that the statute is extra punitive to Mr. Yepa. The punishment imposed by the July 2009 Amendments is punitive in effect because it can result in a potentially indefinite suspension for Mr. Yepa regardless of the fact that he is a first-time alleged offender who was not convicted and is indigent.

IV. THE STATE FAILED TO ATTACK A CONCLUSIVE FINDING AND AN ISSUE ON APPEAL REQUIRING THEIR APPEAL TO BE DISMISSED.

Here the State failed to present any arguments regard the merits of Mr. Yepa's constitutional Ex Post Facto issues. Instead the State set forth a single argument on appeal, namely that Mr. Yepa failed to exhaust administrative remedies. [BIC 13-15] Appellant's Brief in Chief narrowed the attack to an exhaustion issue thereby waiving an attack on the findings of both a constitutional violation and a statutory violation.

Furthermore, the Appellant failed to attack the District Court's finding that the retroactive application violated state law. The State Appellate Rule 12-213 of the State Court Rules requires that "[appellant's] argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive." NMRA 12-213(A)(4). Here, the appellant did not appeal the district court's finding that the State's application of the July 2009 Amendments violates the statutory prohibitions

of retroactive application under § 12-2A-8 (1997) and therefore, that finding is conclusive. Appellant's appeal should be dismissed on these grounds.

The district court correctly decided that the State violated § 12-2A-8 (1997), which provides that, "a statute or rule operates prospectively only unless the statute or rule expressly provides otherwise or its content requires that it operate retrospectively." This embodies the prohibition against retroactive application within the New Mexico Constitution. N.M. Const. art. IV, § 34 ("[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.")

A. The legislature knows how to retroactively apply a statute to avoid constitutional and statutory violations but they deliberately chose not to do so here.

The application of this to Mr. Yepa's case does not depend on whether he had a vested right to a driver's license or not, but rather the intent of the legislature. *State v. Morales*, 2010-NMSC-026, ¶ 6, 148 N.M. 205 (citing *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182). New Mexico law presumes the statute to operate prospectively unless there is a clear legislative intent to give the statute retroactive effect. *State v. Ordunez,* 2012-NMSC-02 at ¶ 13 (citing *Swink v. Fingado*, 1993-NMSC-013, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993)); *see also Vartelas v. Holder*, 132 S.Ct. 1479, 1486, 182 L.Ed.2d 473 (2012).

In the case of *State v. Smith*, the legislature exercised its powers to apply a penal statute retroactively despite statutory and constitutional prohibitions against doing so, under the emergency clause. *State v. Smith*, 2004-NMSC-032, ¶ 26, 136 N.M. 372, 379, 98 P.3d 1022, 1030. In *State v. Smith*, the New Mexico Supreme Court concluded that a law did not violate the retroactive prohibition where the legislature put a law into effect immediately under an emergency clause. *Id.* (holding that because a bill with harsher DWI penalties had gone into effect immediately under its emergency clause, it did not violate Ex Post Facto provision of state constitution).

When the legislature has not exercised its powers under the emergency clause to enact a retroactive statute that is penal, the law cannot be applied retroactively. In *State v. Adam M.,* this Court held that the remedy for a prohibited retroactive law is to instead apply the law in effect at the time of the offense. *State v. Adam M.,* 1998-NMCA-014 at ¶ 7 (holding that where a juvenile relied on the law at the time in entering a plea agreement, the new law at the time he turned 18 could not be retroactively applied).

Here, the legislature did not exercise their powers under the emergency clause to enact the July 2009 Amendments in order to avoid a statutory violation. Therefore, the State's retroactive application of the law to Mr. Yepa is prohibited by statute. The remedy is to apply the law in effect on September 7, 2009, the date

of the underlying charge and arrest. Like *Adam M.*, Mr. Yepa relied on the law of the time in choosing to forego a hearing and instead wait the six months to get his license back. This Court should presume that the law in effect at the time of the arrest should apply rather than the law at the time Mr. Yepa applied for license reinstatement (as the State argues). By requiring an ignition interlock license, ignition device, and car, in its retroactive application of the July 2009 Amendments without the requisite legislative intent to do so, long after Mr. Yepa was alleged to have committed a DWI, the State has violated New Mexico law.

B. The district court correctly held that New Mexico state law presumes the July 2009 Amendments should have been applied prospectively.

If there is not any legislative guidance, as in this case, the Court should resort to "judicially created presumptions in order to determine how a statute should be applied." *State v. Ordunez,* 2012-NMSC-024 at ¶ 8 (citing *Grygorwicz v. Trujillo*, 2006-NMCA-089, ¶ 10, 140 N.M. 129). The Court should try to construe the statute to avoid unconstitutionality. *Id.* at ¶ 14 (citing *State v. Flores*, 2004-NMSC-021, ¶ 16 135 N.M.759, 93 P.3d 1264)).

In the case of *Morales*, the New Mexico Supreme Court considered the context under which the presumption of prospectively applies. *State v. Morales*, 2010-NMSC-026 at ¶ 6. The court considered that, "a statute or a regulation is considered retroactive if it impairs vested rights acquired under prior law ***or*** requires new obligations, imposes new duties, ***or*** affixes new disabilities to past

transactions." *Id. at* ¶ 9. (quoting *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500) (emphasis added). The relevant portions here are "requires new obligations, imposes new duties" or "affixes new disabilities to past transactions".

In Mr. Yepa's case, the new obligation and duty is the costly ignition interlock device, which also requires a car. Mr. Yepa chose to forego his administrative hearing and wait the six months for his license to be reinstated. Thus, because the presumption of constitutionality and the presumption of prospectively applied laws applies, the district court correctly held that the State's application of the July 2009 Amendments to Mr. Yepa violated New Mexico state law. In addition, because appellant did not specifically attack this finding or the finding of an Ex Post Facto violation under the U.S. and New Mexico Constitutions, an attack is waived and the appeal should be dismissed.

CONCLUSION

The State's appeal should be dismissed because the State did not attack the district court's holding that the July 2009 Amendments violated New Mexico state law, and therefore it is conclusive. In the alternative, the district court's decision to enjoin the State from applying the July 2009 Amendments to Mr. Yepa should be affirmed because they are an Ex Post Facto law prohibited by the United States and New Mexico Constitutions, U.S. Const. art. I., §§ 9 and 10, N.M. Const., art. II, § 18, and NMSA 1978, § 12-2A-8 (1997).

REQUEST FOR ORAL ARGUMENT

The Appellee requests oral argument in this case due to the complex nature of the constitutional issue and the liberties at stake in the case. Furthermore, this will assist the Court in providing guidance to the lower courts applying the July 2009 Amendments or similar laws that are penal in nature.

Respectfully submitted,

Veronica C. Gonzales
Clinical Law Student for Petitioner Yepa
Southwest Indian Law Clinic
MSC11-6070, 1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

Heidi J. Todacheene
Clinical Law Student for Petitioner Yepa
Southwest Indian Law Clinic
MSC11-6070, 1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

Barbara Creel
Supervising Attorney
Southwest Indian Law Clinic
MSC11-6070, 1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-5265

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was mailed to all parties on October 9, 2014.

Heidi Todacheene

As required by State Appellate Rule 12-307(E), the following list contains the names of the persons served and the addresses used for service.

Myron Yepa
Petitioner-Appellee
P.O. Box 96
Jemez Pueblo, NM 87024

MVD Legal Services Bureau
DWI Legal
Attorney for Respondent-Appellant
P.O. Box 630
Santa Fe, NM 87504

Peter Breen
New Mexico Taxation and Revenue Department
Legal Services Bureau
Special Assistant Attorney General
Attorney for Respondent-Appellant
P.O. Box 630
Santa Fe, NM 87504-0630