

## COURTS – ANCILLARY AND INCIDENTAL JURISDICTION: THE COURT’S CHECK ON PROSECUTORIAL DISCRETION

State v. Louser, 2021 ND 89, 959 N.W.2d 883.

### ABSTRACT

In *State v. Louser*, the North Dakota Supreme Court discussed how the discretionary power embodied in the district court impacted the State’s prosecutorial discretion when considering the separation of powers doctrine. In *Louser*, the district court denied the State’s motion to amend a charge and a plea agreement. The State sought a writ of supervision to compel the district court to amend the charge, contending the court violated the separation of powers doctrine and infringed upon the State’s prosecutorial discretion. The North Dakota Supreme Court first *held* this was an appropriate circumstance to exercise its supervisory jurisdiction because the State lacked the ability to realistically appeal the court’s order under North Dakota Century Code section 29-28-07. Second, the court *held*, as a matter of first impression, the district court’s discretionary power to allow and reject amendments to charges once a case is filed did not violate the separation of powers doctrine. The North Dakota Supreme Court explained once jurisdiction is obtained, the district court obtains the inherent power to do all things reasonably necessary to the administration of justice in the action before it. So, once a criminal charge is filed with the court, the sole discretion of the executive branch ends, and the judicial branch acquires a role in the proceeding, which includes protecting the public interest. Finally, the court *held* the district court appropriately exercised its discretion when it rejected the State’s plea agreement and its motion to amend the charge. The court looked at the plain language of the North Dakota Rules of Criminal Procedure to determine the district court did not abuse its discretion in rejecting the plea agreement. Further, the court looked at the relevant statute related to the charge in question and determined there was clear legislative directive, and therefore, the district court did not violate the separation of powers doctrine when it rejected the State’s motion to amend the charge and reject the plea agreement. As a case of first impression, *State v. Louser* emphasizes to prosecutors the importance of understanding the limitations of their prosecutorial discretion and that the court does have the power to take steps reasonably necessary to ensure the public interest is protected.

I. FACTS.....	134
II. LEGAL BACKGROUND.....	135
A. EXERCISING SUPERVISORY JURISDICTION AND THE POWER TO APPEAL.....	135
B. SEPARATION OF POWERS AND PROSECUTORIAL DISCRETION	137
C. NORTH DAKOTA’S DUI LAWS: FELONY V. MISDEMEANOR SENTENCING.....	138
III. ANALYSIS.....	139
A. DOES THE COURT HAVE JURISDICTION? .....	139
B. ALL ABOUT CHECKS AND BALANCES .....	140
C. THE FINAL HOLDING.....	144
IV. IMPACT .....	144
A. DOES THE REAL REMEDY LIE WITH THE LEGISLATURE? .....	145
B. JUDICIAL RESOURCES .....	146
V. CONCLUSION .....	147

## I. FACTS

In *State v. Louser*,<sup>1</sup> the State charged Misty Schwarz (“Schwarz” or “Defendant”) with her fourth driving under the influence of alcohol (“DUI”) offense and her sixth offense of driving with a suspended license within five years.<sup>2</sup> A plea agreement was reached on November 9, 2020, between the State and Schwarz, which stated the fourth offense DUI would be amended down to a third offense DUI.<sup>3</sup> This would change the offense level from a class C felony to a class A misdemeanor.<sup>4</sup> Further, the plea agreement “included a provision agreeing to a specific sentence.”<sup>5</sup> The State filed a motion to amend the charge, and at the final pretrial conference, the State argued the charge needed to be amended to a lower level offense so a longer sentence for Schwarz could be obtained in county jail.<sup>6</sup> The State urged the court to

---

1. 2021 ND 89, 959 N.W.2d 883.

2. *Id.* ¶ 2.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* ¶¶ 2-3.

allow the charge to be amended down because the Department of Corrections and Rehabilitation has a policy allowing DUI defendants to serve their time in a noncustodial halfway house, which results in a shorter custodial time than the county jail, due to the COVID-19 pandemic.<sup>7</sup> The State expressed concern because felony DUI defendants are not “in there long enough to dry out.”<sup>8</sup>

At the conference, the district court denied both the plea agreement and the motion to amend the charge to the third misdemeanor DUI offense.<sup>9</sup> The court noted credit for time served would be given for either the class C felony or class A misdemeanor, so concerns about halfway house placement “may or may not be an accurate representation of reality.”<sup>10</sup> The State sought to compel the district court with a writ of supervision to amend the charge and argued the court violated the separation of powers doctrine and also infringed on the State’s prosecutorial discretion.<sup>11</sup> The North Dakota Supreme Court held this was an appropriate case to exercise its supervisory jurisdiction to review the merits.<sup>12</sup>

## II. LEGAL BACKGROUND

In *Louser*, Justice VandeWalle of the North Dakota Supreme Court discussed three important doctrines of law that must be understood when determining whether a court may reject a plea.<sup>13</sup> The legal doctrines discussed in this case comment include: the North Dakota Supreme Court’s authority to exercise its supervisory jurisdiction, the separation of powers doctrine, and prosecutorial discretion.

### A. EXERCISING SUPERVISORY JURISDICTION AND THE POWER TO APPEAL

When the State has no other adequate remedy, such as when an appeal is not available to them, the North Dakota Supreme Court may use its supervisory authority to examine a district court’s decision.<sup>14</sup> Using its supervisory authority, the court may issue a supervisory writ directing the district court to act, or refrain from acting.<sup>15</sup> In *Olsen v. Kopy*,<sup>16</sup> the court stated, “[o]ur

---

7. *Id.* ¶ 3.

8. *Id.*

9. *Id.* ¶ 4.

10. *Id.*

11. *Id.* ¶ 5.

12. *Id.* ¶ 8.

13. *Id.* ¶¶ 6-27.

14. *E.g.*, *Harris v. Lee*, 2010 ND 88, ¶¶ 5-7, 782 N.W.2d 626.

15. *Id.* ¶¶ 7, 15.

16. 1999 ND 87, 593 N.W.2d 762.

jurisdiction to issue supervisory writs is, in a sense, both appellate and original in character, because supervisory proceedings are independent in nature with process directed to a district court, but our decision reviews the court's judicial act."<sup>17</sup> In *Louser*, to determine whether this case was an appropriate circumstance to exercise its supervisory jurisdiction, the court looked to two sources of law: the North Dakota Constitution and section 27-02-04 of the North Dakota Century Code ("N.D.C.C.").<sup>18</sup> Article VI, section 2 of the North Dakota Constitution grants the court "original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction."<sup>19</sup> The court also reviewed section 27-02-04 of the N.D.C.C. which states in part, "[i]n the exercise of its appellate jurisdiction, and in its superintending control over inferior courts, [the court] may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction."<sup>20</sup>

In *Holbach v. City of Minot*,<sup>21</sup> the court stated the authority to issue supervisory writs is discretionary and cannot be invoked as a matter of right.<sup>22</sup> Supervisory writs are issued "to rectify errors and prevent injustice when no adequate alternative remedies exist."<sup>23</sup>

When the proper remedy is an appeal, supervisory jurisdiction is not generally exercised, as the authority should only be used in extraordinary cases.<sup>24</sup> The North Dakota Constitution states, "[a]ppeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law."<sup>25</sup> When the State may appeal from a criminal matter is governed by N.D.C.C. section 29-28-07.<sup>26</sup> The statute states:

An appeal may be taken by the state from:

1. An order quashing an information or indictment or any count thereof.
2. An order granting a new trial.
3. An order arresting judgment.

---

17. *Id.* ¶ 17 (citing Thomas J. Burke, *The Prerogative Jurisdiction of the Supreme Court*, 32 N.D. L. REV. 199-201 (1956)).

18. *Louser*, 2021 ND 89, ¶ 6, 959 N.W.2d 883.

19. *Id.*

20. *Id.*; N.D. CENT. CODE § 27-02-04 (2021).

21. 2012 ND 117, 817 N.W.2d 340.

22. *Id.* ¶ 12 (citing *Dimond v. State Bd. of Higher Educ.*, 1999 ND 228, ¶ 19, 603 N.W.2d 66).

23. *Holbach*, 2012 ND 117, ¶ 12, 817 N.W.2d 340 (quoting *Dimond*, 1999 ND 228, ¶ 19, 603 N.W. 2d 66) (internal quotations omitted).

24. *Id.*

25. N.D. CONST. art. VI, § 6.

26. *Louser*, 2021 ND 89, ¶ 7, 959 N.W.2d 883.

4. An order made after judgment affecting any substantial right of the state.

5. An order granting the return of property or suppressing evidence, or suppressing a confession or admission, when accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. The statement must be filed with the notice of appeal.<sup>27</sup>

When considering whether the proper remedy is an appeal, the court evaluates whether an appeal is realistic in the set of circumstances before it.<sup>28</sup> If an appeal requires the court or the parties to consent to a course of action in order to get the appeal, such as in the present case, the court takes this into consideration.<sup>29</sup>

#### B. SEPARATION OF POWERS AND PROSECUTORIAL DISCRETION

Like the United States Constitution, “[t]he North Dakota Constitution creates three branches of government and vests each branch with a distinct type of power.”<sup>30</sup> “The legislative power is vested in the legislative assembly . . . [t]he executive power is vested in the governor . . . [t]he judicial power of the state is vested in a unified judicial system . . . .”<sup>31</sup> The North Dakota Constitution deems these three branches of government coequal.<sup>32</sup>

Prosecutors work in the executive branch of the government and possess prosecutorial discretion.<sup>33</sup> Prosecutorial discretion refers to powers prosecuting attorneys have in their roles.<sup>34</sup> “A prosecuting attorney has power on various matters including those relating to choosing whether or not to bring criminal charges, deciding the nature of charges, plea bargaining and sentence recommendation.”<sup>35</sup> The North Dakota Supreme Court has defined prosecutorial discretion: “[p]rosecutors generally have broad discretion to enforce criminal laws. ‘[S]o long as the prosecutor has probable cause to believe . . . the accused committed an offense defined by statute, the decision whether . . . to prosecute, and what charges to file . . . generally rests entirely

---

27. N.D. CENT. CODE § 29-28-07 (2021).

28. *Louser*, 2021 ND 89, ¶ 8, 959 N.W.2d 883.

29. *Id.*

30. *Id.* ¶ 9 (quoting *N.D. Legis. Assemb. v. Burgum*, 2018 ND 189 ¶ 40, 916 N.W.2d 83).

31. *Id.*

32. *Louser*, 2021 ND 89, ¶ 9, 959 N.W.2d 883. (citing N.D. CONST. art. XI, § 26).

33. *See Imbler v. Pachtman*, 424 U.S. 409, 419 (1976).

34. *Pet. for Supervisory Writ*, ¶ 10, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322) (quoting *Prosecutorial Discretion Law and Legal Definition*, USLEGAL <https://definitions.uslegal.com/p/prosecutorial-discretion/>).

35. *Id.*

in [the prosecutor's] discretion.”<sup>36</sup> In *State v. Loughead*<sup>37</sup> the North Dakota Supreme Court stated, “[t]he prosecutor’s discretion, however, is subject to constitutional restraints.”<sup>38</sup> For example, “[t]he Due Process Clause prohibits prosecutors from basing a decision to prosecute on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”<sup>39</sup>

Judges also have discretion in their roles. The Eighth Circuit has discussed the topic:

Judicial discretion is variously defined. The sense in which the term [judicial discretion] is commonly used is defined . . . as ‘[t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.’<sup>40</sup>

Specifically, trial judges have broad discretion in their role as safeguards for “both the rights of the accused and the interests of the public in the administration of criminal justice.”<sup>41</sup> The North Dakota Supreme Court has supported trial judges in exercising their discretion in a wide variety of issues.<sup>42</sup>

### C. NORTH DAKOTA’S DUI LAWS: FELONY V. MISDEMEANOR SENTENCING

*Louser* arises from the prosecutor’s intention to work around North Dakota’s DUI laws to get a longer sentence for Schwarz.<sup>43</sup> Section 39-08-01 of the N.D.C.C. is one of North Dakota’s DUI statutes.<sup>44</sup> DUI offense grades increase with the number of prior DUI convictions and can reach a class C felony for a fourth DUI conviction in fifteen years.<sup>45</sup> The sentencing provision of the statute uses the language, “[a] person convicted of violating this section . . . must be sentenced in accordance with this subsection.”<sup>46</sup> A felony DUI conviction results in a one year and one day prison sentence while a

---

36. *Id.* (quoting *State v. Loughead*, 2007 ND 16, ¶ 12, 726 N.W.2d 859).

37. 2007 ND 16, 726 N.W.2d 859.

38. *Id.* ¶ 12.

39. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

40. *Home Owners’ Loan Corp. v. Hoffman*, 134 F.2d 314, 316 (8th Cir. 1943) (quoting *BOUV.LAW DICT., RAWLE’S THIRD REVISION*, 884).

41. CRIMINAL JUSTICE STANDARDS § 6-1.1(a) (AM. BAR. ASS’N 2000).

42. *Stroschein v. Stroschein*, 390 N.W.2d 547 (N.D. 1986) (judge had discretion to not order mental examination); *Gullickson v. Kline*, 2004 ND 76, ¶ 15, 678 N.W.2d 138 (“trial court has broad discretion over the conduct of a hearing . . .”).

43. *Louser*, 2021 ND 89, ¶ 3, 959 N.W.2d 883.

44. N.D. CENT. CODE § 39-08-01 (2021).

45. *Pet. for Supervisory Writ*, ¶ 12, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322); N.D. CENT. CODE § 39-08-01(3) (2021).

46. N.D. CENT. CODE § 39-08-01(5) (2021).

third DUI conviction in seven years carries a 120-day imprisonment along with other conditions.<sup>47</sup>

Although this DUI statute naturally gives the class C felony conviction a much longer sentence, a new policy affects this standard.<sup>48</sup> The State described the Department of Corrections and Rehabilitation's policy: "A defendant sentenced to the mandatory felony DUI sentence is assessed for 21 days and then most likely placed in a noncustodial halfway house."<sup>49</sup> Next it noted this is not enough time to "dry-out" and therefore "the 120 day mandatory A misdemeanor sentence" would provide that extra needed time.<sup>50</sup>

### III. ANALYSIS

Justice VandeWalle authored the *Louser* opinion in which the North Dakota Supreme Court unanimously made three rulings.<sup>51</sup> First, the court held this case was an appropriate situation to exercise its supervisory jurisdiction.<sup>52</sup> Second, the court held the district court's discretionary power to reject amendments to charges once a case is filed does not violate the separation of powers doctrine.<sup>53</sup> Finally, the court held the district court appropriately exercised its discretion when it rejected the plea agreement and amendment to the charge.<sup>54</sup> The court, therefore, denied the State's petition.<sup>55</sup> Whether the district court's discretionary power to allow or reject amendments to charges once a case is filed violated the separation of powers doctrine was an issue of first impression.<sup>56</sup> The court relied on case law from North Dakota and other states, and also looked at language from the North Dakota Rules of Criminal Procedure.<sup>57</sup>

#### A. DOES THE COURT HAVE JURISDICTION?

First, the court had to determine whether they could exercise their supervisory jurisdiction to hear the case on its merits.<sup>58</sup> The court examined the sources of their authority to issue supervisory writs by looking to Article VI, section 2 of the North Dakota Constitution, and N.D.C.C. section 27-02-04

---

47. *Id.*

48. Pet. for Supervisory Writ, ¶ 14, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322).

49. *Id.*

50. *Id.*

51. *State v. Louser*, 2021 ND 89, 959 N.W.2d 883.

52. *Id.* ¶ 8.

53. *Id.* ¶ 20.

54. *Id.* ¶ 27.

55. *Id.* ¶ 28.

56. *Id.* ¶ 10.

57. *Id.* ¶¶ 9-27.

58. *Id.* ¶ 6.

to ultimately conclude this was an appropriate circumstance to use their discretionary supervisory authority.<sup>59</sup> Here, the State cannot appeal from either the order denying the motion to amend the charge or the order denying the plea agreement because none of the criteria in section 29-28-07, which covers what the State may appeal from, was applicable.<sup>60</sup> Respondent Louser made several arguments that the defendant could appeal the orders if they enter a conditional plea of guilty to the original charge while reserving the right to appeal.<sup>61</sup> Louser further argued the State could have also appealed upon Schwarz entering a conditional plea of guilty because the orders affected a “substantial right of the state,” which makes the action appealable under section 29-28-07(4).<sup>62</sup>

The court did not find this argument persuasive, stating, “[t]his course of action would require both parties and the district court to agree before this Court could review the matter under N.D.C.C. section 29-28-07(4). However, nothing requires Schwarz to agree to a conditional plea agreement, and nothing requires the court to accept a conditional plea agreement.”<sup>63</sup> Unless Schwarz and the court agree to the conditional plea agreement, “the State lacks the ability to realistically appeal the court’s orders under N.D.C.C. section 29-28-07 . . . .”<sup>64</sup> Because the State is left without a remedy, the court concluded this would be an appropriate circumstance to use their supervisory judgment and consider the State’s issues on the merits.<sup>65</sup>

## B. ALL ABOUT CHECKS AND BALANCES

The North Dakota Supreme Court had never addressed whether there is a violation of the separation of powers doctrine, or whether there is an infringement on prosecutorial discretion, when a district court judge rejects a plea agreement and refuses to amend a charge.<sup>66</sup> The court, in reaching their holding that the separation of powers doctrine in this case was not violated, looked to case law and statutes from North Dakota, Kentucky, Wisconsin, and the United States Supreme Court to come to its conclusion.<sup>67</sup>

The court in *Koppy v. Graff*<sup>68</sup> addressed a similar issue when the district court refused to grant the State’s motion to dismiss a charge against a

---

59. *Id.*

60. *Id.* ¶ 8.

61. *Id.*

62. *Id.*; N.D. CENT. CODE § 29-28-07 (2021).

63. *Louser*, 2021 ND 89, ¶ 8, 959 N.W.2d 883.

64. *Id.*

65. *Id.*

66. *Id.* ¶ 10.

67. *Id.* ¶¶ 10-20.

68. 484 N.W.2d 855 (N.D. 1992).

defendant charged with being an accomplice to murder.<sup>69</sup> In *Graff*, the State moved to dismiss the charge without prejudice after obtaining new information about a witness, and the district court denied the motion and went forward with the trial, which would bar the State from bringing any subsequent charges against the defendant due to double jeopardy.<sup>70</sup> The *Graff* court used its supervisory authority to interpret North Dakota Rule of Criminal Procedure 48(a) which states:

(a) By Prosecuting Attorney. No criminal case pending in any court shall be dismissed by any prosecuting attorney except upon motion and with the court's approval. Such motion shall be supported by a written statement concisely stating the reasons for the motion. The statement shall be filed with the record of the case and be open to public inspection. A dismissal may not be ordered during the trial without the defendant's consent.<sup>71</sup>

In *Graff*, the court noted the "rule clearly states the 'court's approval' is required."<sup>72</sup> Further, the court then compared North Dakota Rule of Criminal Procedure 48(a) to the Federal Rule of Criminal Procedure 48 which states, "[a]t common law, the decision not to prosecute was one entirely left to the prosecutor"<sup>73</sup> but Rule 48 gives "trial courts discretion when entering motions to dismiss by the prosecution."<sup>74</sup> The court in *Graff* stressed that although the prosecution is in the best position to evaluate the charges based on the evidence, the decision to dismiss "is not absolute and is subject to review by the trial court under Rule 48(a)."<sup>75</sup> The *Graff* court explains:

Rule 48(a) has been viewed as a way to check the absolute power of the executive. Although the prosecutor has discretion in this area, the trial court should not merely serve as a "rubber stamp" for the prosecutor's decision.<sup>76</sup> The trial court has an important function to protect the public interest and prevent harassment of the defendant.<sup>77</sup>

Another case the court looked to was *United States v. Cowan*,<sup>78</sup> which reviewed Federal Rule of Criminal Procedure 48(a).<sup>79</sup> In *Cowan*, the court

---

69. *Louser*, 2021 ND 89, ¶ 10, 959 N.W.2d 883.

70. *Kopyy v. Graff*, 484 N.W.2d 855 (N.D. 1992).

71. N.D.R. CRIM. P. 48(a); *Graff*, 484 N.W.2d at 856.

72. *Graff*, 484 N.W.2d at 857.

73. *Id.* (referencing *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973)).

74. *Id.* (referencing *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982)).

75. *Id.* at 858 (referencing *United States v. Welborn*, 849 F.2d 980, 983 (5th Cir. 1988)).

76. *Id.*

77. *Id.*

78. 524 F.2d 504 (5th Cir. 1975).

79. *Louser*, 2021 ND 89, ¶ 12, 959 N.W.2d 883 (referencing *Cowan*, 524 F.2d at 505).

concluded the federal rule which “required permission of a court to dismiss criminal charges ‘was intended to modify and condition the absolute power of the Executive, consistently with the Framers’ concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives.’”<sup>80</sup> The *Cowan* court held the requirement to obtain the court’s permission to dismiss criminal charges was not a violation of the separation of powers doctrine.<sup>81</sup>

The court next reviewed *Hoskins v. Maricle*,<sup>82</sup> where the Kentucky Supreme Court discussed a trial court’s rejection of a plea agreement between several defendants and the Commonwealth of Kentucky.<sup>83</sup> *Hoskins* went to trial on several issues, but the judge later declared a mistrial, and before a second trial the parties agreed to a plea agreement which required the State to amend its indictment.<sup>84</sup> The judge denied the motion to enter guilty pleas to a lesser charge, which effectively overruled the plea agreement.<sup>85</sup> The court then reviewed the Kentucky Constitution which states, “[t]he power to charge persons with crimes and to prosecute those charged belongs to the executive department.”<sup>86</sup> The *Hoskins* court clarified, “the law of the Commonwealth since at least 1854 has permitted a Commonwealth’s attorney to dismiss an indictment but only “with the permission of the court.”<sup>87</sup> Next, the court reviewed the Kentucky Rules of Criminal Procedure, which required the permission of a court to amend or dismiss criminal charges, similar to the Federal Rules of Criminal Procedure 48(a).<sup>88</sup> The *Hoskins* court again looked to *United States v. Cowan* to conclude the judge did not violate the separation of powers doctrine when it rejected the plea agreement because “a court, once having obtained jurisdiction of a cause of action, has, incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it.”<sup>89</sup>

Finally, the North Dakota Supreme Court reviewed *State v. Conger*<sup>90</sup> where a Wisconsin trial court denied a motion to amend a charge and rejected a plea agreement, which lead the State to argue its prosecutorial discretion was infringed upon.<sup>91</sup> The *Conger* court concluded, “[B]oth the fact that the

---

80. *Id.* (quoting *Cowan*, 524 F.2d at 513).

81. *Id.*

82. 150 S.W.3d 1 (Ky. 2004).

83. *Louser*, 2021 ND 89, ¶ 13, 959 N.W.2d 883 (referencing *Hoskins*, 150 S.W.3d at 4-5).

84. *Hoskins*, 150 S.W.3d at 4-5.

85. *Id.* at 5.

86. *Id.* at 12.

87. *Id.*

88. *Id.* at 15-16.

89. *Id.* at 17 (quoting *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984)).

90. 2010 WI 56, 325 Wis.2d 664, 797 N.W.2d 341.

91. *Id.* ¶ 21.

court's jurisdiction is 'invoked by the commencement' of a case<sup>92</sup> and that the legislature has granted prosecutors sole discretion to amend a charge only prior to arraignment mean that the prosecutor's unchecked discretion stops at the point of arraignment."<sup>93</sup> The court followed their precedent and held a "court may, in an appropriate exercise of discretion, reject a plea agreement that it deems not to be in the public interest."<sup>94</sup>

When considering these cases, the North Dakota Supreme Court distinguished North Dakota law from Wisconsin law because "neither state statute nor the North Dakota Rules of Criminal Procedure grant a prosecutor unfettered power to amend a complaint or information until arraignment."<sup>95</sup> North Dakota's rules require prosecutors to obtain a court's permission before a complaint or information can be amended.<sup>96</sup> North Dakota Rule of Criminal Procedure 7(e) states:

Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding. If the prosecuting attorney chooses not to pursue a charge contained in the initial information, a dismissal of that charge must be stated in the amended information.<sup>97</sup>

Applying *Conger*, the North Dakota Supreme Court held, "in North Dakota the prosecutor's unchecked discretion ends when the case is filed. Once the case is filed, Rules 7(e) and 3(c), N.D.R.Crim.P., grant the district court the power to allow and reject amendments to the charges."<sup>98</sup> The court noted the word 'may' in North Dakota Rule of Criminal Procedure 7(e) "provides the court discretion to make this determination."<sup>99</sup> "Interpreting the rules to allow a prosecutor unfettered discretion to amend a criminal charge, as the State wishes, would make the rules become 'bruten fulmen (empty noise.)'"<sup>100</sup> To conclude this issue of first impression, the court stated:

Once the court obtains jurisdiction over an action, it also obtains the 'inherent power to do all things reasonably necessary to the administration of justice in the case before it.' When the prosecutor files a criminal charge with the court, the sole discretion of the executive

---

92. *Id.* ¶ 22 (referencing *State v. Kenyon*, 85 Wis.2d 36, 45, 270 N.W.2d 160 (1978)).

93. *Id.*

94. *Id.* ¶ 27.

95. *State v. Louser*, 2021 ND 89, ¶ 18, 959 N.W.2d 883 (referencing N.D.R.Crim.P. 3(c); N.D.R.CRIM. P.7(e)).

96. *Id.*

97. *Id.* (quoting N.D.R.Crim.P. 7(e) (emphasis added)).

98. *Id.* ¶ 19.

99. *Id.*

100. *Id.* (quoting *McCullough v. Swanson*, 245 N.W.2d 262, 265 (N.D. 1976)).

branch ends and the judicial branch acquires a role in the proceeding. This role includes protecting the public interest. Once the case is filed with the court, the court must ensure the administration of justice in the case before it. This duty provides a check and balance on the executive's power to ensure the laws of this State are faithfully executed.<sup>101</sup>

The court held the district court's discretionary power does not violate the separation of powers doctrine, and therefore, "the court's role in approving or rejecting amendments to criminal charges does not violate the separation of powers embodied in the North Dakota Constitution."<sup>102</sup>

### C. THE FINAL HOLDING

In determining whether the district court erred in its denial of the motion to amend the charge and rejection of the plea agreement, the court reviewed this decision under the abuse of discretion standard.<sup>103</sup> The court reviewed North Dakota Rules of Criminal Procedure 7(e), which allows the state to amend an information with the approval of the district court, and 11(c)(3)(A), which allows the court to accept or reject a plea agreement when the plea agreement requires the State to "not bring, or . . . move to dismiss, other charges' or has an agreement to a specific sentence . . ." <sup>104</sup>

N.D.C.C. section 38-08-01(3) ("DUI Statute") coordinates the offense level with the number of previous DUI convictions.<sup>105</sup> "The statute requires the court to take judicial notice to determine if a current offense is a subsequent offense" and further lists required minimum mandatory sentences depending on how many prior DUI convictions a defendant has.<sup>106</sup> The district court followed legislative directive when it denied the motion to amend the charge and rejected the plea agreement, as Schwarz's record reflected three previous DUI offenses.<sup>107</sup> "The State's petition for a writ of supervision directing the court to grant the State's motion to amend the charge is denied."<sup>108</sup>

## IV. IMPACT

The North Dakota Supreme Court addressed the issue of whether a district court's discretionary power to allow and reject amendments to the charges once a case is filed violates the separation of powers doctrine for the

---

101. *Id.* ¶ 20.

102. *Id.*

103. *Id.* ¶ 21.

104. *Id.* ¶ 22 (quoting N.D.R.Crim.P. 11(c)(1), (3)(A)).

105. N.D. CENT. CODE § 39-08-01(3) (2021); *Louser*, 2021 ND 89, ¶ 23, 959 N.W.2d 883.

106. *Louser*, 2021 ND 89, ¶ 23, 959 N.W.2d 883; N.D. CENT. CODE § 39-08-01(3) (2021).

107. *Louser*, 2021 ND 89, ¶ 27, 959 N.W.2d 883.

108. *Id.* ¶ 28.

first time.<sup>109</sup> Plea agreements are an essential part of the criminal justice system, and many involve either agreeing to plead to a lesser criminal charge or pleading to some of the counts charged and the prosecutor agreeing to dismiss the others. During oral arguments, many important points were discussed that will impact the prosecutors practicing in North Dakota.<sup>110</sup>

#### A. DOES THE REAL REMEDY LIE WITH THE LEGISLATURE?

The North Dakota Supreme Court issued a ruling stating “[o]nce the case is filed with the court, the court must ensure the administration of justice in the case before it. This duty provides a check and balance on the executive’s power to ensure the laws of this State are faithfully executed.”<sup>111</sup> The DUI statute mandates the court to take notice of a defendant’s subsequent offenses, as the offense level increases based on prior offenses.<sup>112</sup> This mandatory minimum set by the legislature creates an obligation for the court to follow, and the judge’s discretion becomes bound to the legislative’s directive.<sup>113</sup> As the respondent states in her brief, “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.”<sup>114</sup> Justice VandeWalle asked a question to appellant’s counsel that stresses an important point: “isn’t your real remedy with the legislature?”<sup>115</sup>

“Mandatory incarceration statutes curb the discretion of prosecutors and judges over certain offenses or types of offenders.”<sup>116</sup> This legislative directive seems to conflict with the notion mentioned by many courts in the past, that prosecutors are in the best position to know the facts, evidence, and the appropriate crimes to charge a specific defendant.<sup>117</sup> This conflict was discussed by the State in oral arguments.<sup>118</sup> A common scenario was presented: defendant is charged with crime “x” but then agrees to cooperate with

---

109. *Id.* ¶ 10.

110. See Oral Argument, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

111. *Louser*, 2021 ND 89, ¶ 20, 959 N.W.2d 883.

112. N.D. CENT. CODE § 39-08-01(3) (2021).

113. Response Brief of the Honorable Stacy J. Louser ¶¶ 26, 29, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322).

114. *Id.* ¶ 26.

115. Oral Argument at 45:34, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

116. ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 4.4 (3d ed. 2021).

117. See *Koppy v. Graff*, 484 N.W.2d 855, 858 (N.D. 1992); *United States v. Welborn*, 849 F.2d 980, 983 (5th Cir. 1988).

118. Oral Argument at 10:20, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

the prosecutor and law enforcement to accomplish another goal, and then the prosecutor subsequently moves to amend or dismiss one or more charges in reflection of that cooperation.<sup>119</sup> Both the State and the North Dakota Supreme Court brought up this issue during oral arguments, as the common practice of prosecutors is to initially charge defendants with what they can, and then amend or dismiss those charges based on new facts.<sup>120</sup>

N.D.C.C section 39-08-01(3) and similar statutes where the legislature mandated a certain sentence be given in respect to a defendant's criminal history, does not give prosecutors the freedom to take into account defendant specific facts, such as cooperation or, as in this case, current Department of Corrections and Rehabilitation policies.<sup>121</sup> Due to the practice being so common, North Dakota practitioners must be aware of which criminal statutes may leave a district judge bound by the words of the legislature, and take that into consideration from initial charging decisions to plea agreement negotiations.

## B. JUDICIAL RESOURCES

A question was presented to the State: could the prosecutor in this case simply dismiss the charges and recharge Shwarz with the desired statute?<sup>122</sup> The State stressed this would not be an effective precedent to set in terms of court resources, and further, the costs incurred by defendants for prolonged representation cannot be ignored.<sup>123</sup> Further, the State insisted at the final pretrial conference that only evidence to the Class A misdemeanor would be presented if the case were to go to trial,<sup>124</sup> as the State believed they were entitled to a lesser or a necessarily included offense.<sup>125</sup> This course of action meant a felony jury pool would be called to listen to evidence that would only prove the misdemeanor offense.<sup>126</sup> A trial also means the attorneys may have less time for other cases and the case will end up on the judge's docket, even though Shwarz and the State in this case both wanted the charges to be

---

119. *Id.* at 11:08, 28:55.

120. *Id.* at 11:08, 29:40, 30:18.

121. *Id.*; *Louser*, 2021 ND 89, ¶ 23, 959 N.W.2d 883; *See also* N.D. CENT. CODE § 19-03.4-03(2) (2021) ("If a person previously has been convicted of an offense under this title, other than an offense related to marijuana or tetrahydrocannabinol, or an equivalent offense from another court in the United States, a violation of this subsection is a class C felony.").

122. Oral Argument at 3:24, *State v. Louser*, 2021 ND 89, 959 N.W.2d 833 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

123. Oral Argument at 43:12, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

124. Pet. for Supervisory Writ, ¶ 16, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883, (No. 20200322).

125. Oral Argument at 08:16, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883 (No. 20200322), <https://www.ndcourts.gov/supreme-court/dockets/20200322>.

126. Pet. for Supervisory Writ, ¶ 16, *State v. Louser*, 2021 ND 89, 959 N.W.2d 883, (No. 20200322).

amended, which would allow this case to end with a plea agreement.<sup>127</sup> Therefore, the practical implications of *Louser* may increase the burden on judicial and executive resources because judges must follow legislative directive, even when amending a plea agreement could serve the interests of justice to a greater extent.

## V. CONCLUSION

In *State v. Louser*, the North Dakota Supreme Court made three findings.<sup>128</sup> First, the court held they would exercise their supervisory jurisdiction to review the case on its merits.<sup>129</sup> Second, the court held, as a matter of first impression, a district court's discretionary power to allow and reject amendments to charges once a case is filed does not violate the separation of powers doctrine.<sup>130</sup> Finally, the court held the district court appropriately exercised its discretion when it rejected the plea agreement and the State's motion to amend the charge to a Class A misdemeanor from a Class C felony.<sup>131</sup> The court looked to the North Dakota Rules of Criminal Procedure and to cases from Wisconsin, Kentucky, and the United States Supreme Court to come to their holding that "[w]hen the prosecutor files a criminal charge with the court, the sole discretion of the executive branch ends and the judicial branch acquires a role in the proceeding."<sup>132</sup> *Louser* has clarified for North Dakota prosecutors where their sole discretion ends and when the court begins its role to protect the public interest, and has reiterated the importance of statutory construction.<sup>133</sup>

*Elizabeth Rotherham\**

---

127. *Id.* ¶ 5 (“[T]he State and defense had informed the trial court the parties had reached a plea agreement to a third offense A Misdemeanor DUI and an A Misdemeanor DUS.”).

128. *State v. Louser*, 2021 ND 89, ¶¶ 8, 28 959 N.W.2d 883.

129. *Id.* ¶ 8.

130. *Id.* ¶ 20.

131. *Id.* ¶ 27.

132. *Id.* ¶¶ 9-20.

133. *Id.* ¶¶ 18-20, 27.

\*2023 J.D. Candidate at the University of North Dakota School of Law. I want to thank the NORTH DAKOTA LAW REVIEW board and its members for all the hard work they have put into making this case comment publish worthy. I would also like to thank my family, friends, and mentors who have become my amazing support system that always believes in me and pushes me to do my best, especially my little sister, Jill, my parents, and my fiancé, Konrad.