No. _____

In the
Supreme Court of the United States

RYAN BEGAY,
Petitioner,
v.

STATE OF NEW MEXICO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "same elements" test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), adequately protects individuals from multiple punishments for "the same offence."

2. Petitioner Begay was acquitted of multiple charges based on a finding that he acted in self-defense. He was convicted of reckless child abuse on the basis of the identical act that was found to be both unitary and justifiable as self-defense—*viz.*, shooting at his assailant and unintentionally hitting a child in the leg. Does the Fourteenth Amendment's Due Process Clause permit this?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ryan Begay hereby petitions for a writ of certiorari to review the memorandum opinion of the New Mexico Court of Appeals in *State v. Begay*, No. A-1-CA-35964 (January 16, 2019). App. 3.

OPINIONS BELOW

The order of the New Mexico Supreme Court denying review can be found at Appendix A. App.1. The memorandum opinion of the New Mexico Court of Appeals can be found at Appendix B. App. 3. The judgment, sentence and commitment of the Second Judicial District Court can be found at Appendix C. App. 37.

JURISDICTION

On March 27, 2019, the Supreme Court of New Mexico issued its order denying review of the New Mexico Court of Appeals' memorandum opinion affirming Petitioner Begay's convictions and rejecting his double jeopardy and due process claims. App. 1, 3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, as follows: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. Amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The New Mexico statute penalizing reckless child abuse provides, in relevant part, as follows: "Abuse of a child consists of a person . . . negligently, and without justifiable cause, causing . . . a child to be . . . placed in a situation that may endanger the child's . . . health." NMSA 1978, § 30-6-1(D) (1973, as amended through 2009).

The New Mexico statute penalizing shooting from a motor vehicle provides, in relevant part, as follows: "Shooting at or from a motor vehicle consists of willfully discharging a firearm . . . from a motor vehicle with reckless disregard for the person of another." NMSA 1978, § 30-3-8(A) (1987, as amended in 1993).

STATEMENT OF THE CASE

Petitioner Begay and his girlfriend drove to an apartment complex in Albuquerque, New Mexico to buy heroin. After a heated argument took place between Petitioner Begay and Trey Gomez, Petitioner Begay and his girlfriend drove away. After hearing what sounded like bullets hitting their car from the direction of Trey Gomez, Petitioner Begay, in the passenger seat, returned fire. Although the bullets missed Trey Gomez, one of them struck a child in the leg, causing an injury that took one month to heal. Petitioner Begay later tossed the gun in a river.

The State of New Mexico did not charge Trey Gomez with any criminal offenses; instead, it charged Petitioner Begay with fifteen felonies. Out of the act of shooting at Trey Gomez in self-defense, Petitioner was charged with six counts of shooting from a motor vehicle not resulting in injury, four counts of aggravated assault with a deadly weapon, three counts of intentional child abuse, or in the alternative reckless child abuse (one count resulting in great bodily harm, the other resulting in no injury), and one count of shooting from a motor vehicle resulting in great bodily harm. App. 5, ¶ 4.

In a state court jury trial, App. 4-5, 37-38, the evidence showed that, unbeknownst to Petitioner Begay, there were several small children in the area. The only injury was to a child's leg. There was no evidence that Petitioner Begay aimed at the children or that he was aware of the presence of any of the children in the vicinity. Petitioner Begay aimed only at Trey Gomez, whom Petitioner Begay reasonably believed was shooting at him. Trey Gomez had recently been in prison, was known to carry a gun, and had threatened Petitioner Begay.

The investigating detective testified that he understood why Petitioner Begay shot back at Trey Gomez; he was defending his life. Trey Gomez stated in an interview—conducted within one hour of the incident—that he knew he was the intended target of Petitioner Begay's gunfire; he was very angry with Petitioner Begay and threatened him with physical harm using obscenities in a loud voice. Trey Gomez

was evidently angry that Petitioner Begay's girlfriend had purchased heroin from a different source.

Petitioner Begay was acquitted by directed verdict of all three counts of intentional child abuse. App. 40-41. The jury was instructed on self-defense, and found that Petitioner Begay had acted in self-defense when he shot at Trey Gomez, returning verdicts of not guilty on all four counts of aggravated assault with a deadly weapon and four of the counts of shooting from a motor vehicle. App. 40-41.

Petitioner Begay was convicted of one count of reckless child abuse resulting in great bodily harm, two counts of reckless child abuse not resulting in injury, one count of shooting from a motor vehicle resulting in great bodily harm, one count of shooting from a motor vehicle not resulting in injury, and tampering with evidence. App. 4, 37-41. Other than the tampering offense, the remaining counts arose from Petitioner Begay's act of shooting at Trey Gomez in self-defense, an act found by the New Mexico Court of Appeals to be unitary. App. 25, ¶ 40.

At sentencing, Petitioner Begay was sentenced to eighteen years plus one year for firearm enhancement for reckless child abuse resulting in great bodily harm, and nine years plus one year for firearm enhancement, which were merged to run concurrently. App. 39-40. He was also sentenced concurrently on a number of other charges, including two counts of reckless child abuse resulting in no injury (one of which was reversed on appeal, App. 18-22), shooting from a motor vehicle resulting in no injury, and tampering with evidence. App. 38-39.

The double jeopardy and due process issues presented in this petition were raised in the trial court, on appeal to the New Mexico Court of Appeals and in a petition seeking discretionary review in the New Mexico Supreme Court.

In the trial court, Petitioner Begay moved to dismiss multiple guilty verdicts as constituting double jeopardy. *See* Defendant's Motion to Dismiss Convictions at 1 (*State v. Begay*, No. D-202-CR-2013-003307, filed May 16, 2016). He also asserted that the verdicts violated due process due to insufficient evidence and internal inconsistency, *see* Defendant's Motion to Set Aside the Verdict *passim* (*State v. Begay*, No. D-202-CR-2013-003307, filed May 16, 2016), contentions grounded in the federal constitutional guarantee of due process of law. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979) (explaining that "[a] reasonable doubt, at a minimum, is one based upon reason. Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.") (internal quotation marks omitted).

On appeal, Petitioner Begay raised, *inter alia*, the double jeopardy and due process issues presented in this petition. App. 5-16, 22-30.

The New Mexico Court of Appeals noted that Petitioner Begay contended "that the child abuse

convictions violate due process rights." App. 16, ¶ 22. With his respect to his double jeopardy claim, the appellate panel applied "the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 (1932)." App. 25, ¶ 41. No independent interpretation of the New Mexico State Constitution was addressed in the district court or the appellate court; the appellate panel did not decide Petitioner Begay's appeal on state constitutional grounds. There were no adequate and independent state grounds for the appellate court's affirmance of his conviction. The appellate court's affirmance on the two grounds underlying the questions presented in this petition was based on its interpretation and application of the federal constitutional right to due process of law and the federal constitutional prohibition against double jeopardy. App. 5-16, 22-30.

In Petitioner Begay's petition for discretionary review to the New Mexico Supreme Court, he again raised both issues. *See* Petition at 6-14 (*State v. Begay*, No. S-1-SC-37525, filed February 12, 2019).

The case has been remanded to the state trial court for re-sentencing in light of the reversal of one of the child abuse counts. *See* Mandate (*State v. Begay*, NMCA No. A-1-CA-35964, filed May 31, 2019). App. 22, 36. The ongoing proceedings in the state trial court will have no impact on the federal questions presented for review in this petition. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-81 (1975). The federal issues presented here are conclusive; they will survive and require decision

regardless of the outcome of future state-court proceedings. *See Cox*, 420 U.S. at 479-80.

BASIS FOR GRANTING THE WRIT AND ARGUMENT

Out of this prosecution two important federal constitutional questions arise. Acting in self-defense against his assailant, Petitioner Begay fired gunshots from an automobile, unintentionally hitting a child with a bullet, causing a leg wound. For this shooting, he was charged with fourteen separate crimes under overlapping statutes, even though there was only one person injured and the act of shooting was found to be unitary and a justifiable act of self-defense. His nineteen-year sentence and conviction of four felonies arising from a unitary act of self-defense violates both the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

I. The "same elements" test from *Blockburger* fails to give concrete meaning to the Framers' intent to protect individuals from multiple punishments for "the same offence."

In Petitioner Begay's case, the New Mexico appellate court found that the act of shooting at Trey Gomez and unintentionally striking J.A. in the leg was unitary, yet it authorized multiple punishments. App. 25, ¶ 40. This wildly unreasonable result is the predictable fruit of the "same elements" test, which fails to protect individuals from multiple punishments for a single criminal act.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the

Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It protects individuals against three types of prosecutorial abuse—*viz.*, (1) "a second prosecution for the same offense after acquittal[,]" (2) "a second prosecution for the same offense after conviction[,]" and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)*, overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989); *see also Brown v. Ohio*, 432 U.S. 161, 165 (1977). Petitioner Begay's case involves the third protection.

The current approach to cumulative punishment in cases such as this, dates to 1932, when the Court, in a very brief opinion, articulated what has come to be known as the "same elements" test:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304.

Under the *Blockburger* approach, the Double Jeopardy protection has been narrowly circumscribed to guarantee only that the will of the legislature is not thwarted: "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from

prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). *See Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("[T]he question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent."); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) (describing the *Blockburger* test as a "rule of statutory construction").

The cabined nature of the inquiry under *Blockburger* was underscored in *Johnson*: "Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." *Johnson*, 467 U.S. at 499 n. 8.

The diminished protection under this approach has been faithfully followed by lower federal courts:

> [t]he Double Jeopardy Clause does not prohibit cumulative punishments for a single incidence of criminal behavior when the legislature clearly intends to prescribe cumulative punishments. In the context of cumulative punishments, the 'interest that the Double Jeopardy Clause seeks to protect' is "'limited to ensuring that the total punishment did not exceed that authorized by the legislature.'"

Williams v. Singletary, 78 F.3d 1510, 1512 (11th Cir. 1996) (quoting *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (quoting *United States v. Halper*, 490 U.S. 435, 450 (1989))). *Accord Garrett v. United States*, 471 U.S. 773, 778 (1985); *Johnson*, 467 U.S. at 499-50; *Hunter*, 459 U.S. at 366-39. *See also Cummings v. Evans*, 161

F.3d 610, 614 (10th Cir. 1998); *McCloud v. Deppisch*, 409 F.3d 869, 873 (7th Cir. 2005); *United States v. Anderson*, 783 F.3d 727, 738-39 (8th Cir. 2015); *United States v. Martin*, 523 F.3d 281, 290 (4th Cir. 2008); *United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998); *United States v. Moore*, 43 F.3d 568, 571 (11th Cir. 1994); *United States v. Overton*, 573 F.3d 679, 690-91 (9th Cir. 2009); *United States v. Patel*, 370 F.3d 108, 114 (1st Cir. 2004); *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997); *United States v. Singleton*, 16 F.3d 1419, 1422 (5th Cir. 1994); *United States v. Xavier*, 2 F.3d 1281, 1291-92 (3d Cir. 1993).

The reach of the *Blockburger* test throughout our Nation's state courts can hardly be overstated. At least thirty-four states and the District of Columbia have adopted this test, including Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See* Susan R. Klein, *Double Jeopardy's Demise*, 88 Cal. L. Rev. 1001, 1012 & n. 42 (May 2000) (listing state court decisions adopting *Blockburger*).

New Mexico courts have followed the "same elements" test articulated in *Blockburger*. *See, e.g., Swafford v. State*, 1991-NMSC-043, ¶ 7 (noting that New Mexico courts have followed the *Blockburger* test); *State v. Swick*, 2012-NMSC-018, ¶ 11 (describing *Blockburger* test followed by New Mexico courts); *State*

v. Ramirez, 2018-NMSC-003, ¶¶ 38-43 (applying *Blockburger* test); *State v. Simmons*, 2018-NMCA-015, ¶¶ 29-32 (same).

Under the "same elements" test, courts are oddly subservient to the legislative branch—the analysis asks if the Legislature intended to punish X in two different statutes. If it so intended, then the court allows it.

This absurd result is illustrated in Petitioner Begay's case. The New Mexico Court of Appeals determined that Petitioner Begay's conduct was unitary, App. 25 ("[W]e conclude that the conduct underlying both the child abuse convictions and the shooting from a motor vehicle conviction . . . was unitary."), and deferred to the legislature and the prosecutor, placing no meaningful limit on the number of punishments that could be imposed arising from this unitary act.

This approach is characterized by fealty to not only the will of the legislature in creating overlapping statutes but more ominously to the unfettered whim of the prosecutor to charge as many offenses as he or she wishes. Due to the failure of the "same elements" test to place meaningful limits on prosecutorial abuse and overreach, *Blockburger* has been harshly criticized for over a half century.

The jurisprudence in this area has been marked by inconsistent opinions, leading Chief Justice Rehnquist to describe it as a "Sargasso Sea." *Albernaz*, 450 U.S. at 343.

The *Blockburger* test, requiring courts to divine legislative intent, has not been easily or consistently applied. In this case, the New Mexico appellate court remarked that one of the most difficult steps in the *Blockburger* analysis is "trying to determine whether the Legislature intended to impose cumulative punishment for unitary conduct violating two statutes that survive the *Blockburger* elements test." App. 27, ¶ 42. *See also* Susan R. Klein, *Double Jeopardy's Demise*, 88 Cal. L. Rev. 1001, 1001-02 (May 2000) (referring to "the Supreme Court's inconsistent opinions in this area"). In recognition of the problems with the *Blockburger* test, scholars have offered many alternative tests. *See, e.g.,* Michael S. Moore, Act and Crime (1993) (promoting a theory of action); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1814-15 (1997) (proposing a "same is same" approach); Susanah M. Meade, *Double Jeopardy Protection--Illusion or Reality?*, 13 Ind. L. Rev. 863 (1980) (describing a "gravamen-of-offense" test); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 Cal. L. Rev. 1027 (1995) (outlining a "single blameworthiness" test).

One of the central deficiencies of current double jeopardy jurisprudence, in the context of the prohibition against multiple punishments, is that the Clause doesn't do any work: "What burden does the Clause shoulder, when in its absence judges would nevertheless be bound by legislative intent regarding whether a criminal charge can be brought and whether retrial can occur?" Klein, *supra*, at 1019. The legislative fealty approach, enshrined in the "same

elements" test under *Blockburger*, emasculates the Double Jeopardy Clause.

Evidence of the intent of the Framers and ratifiers "is essentially nonexistent." Klein*, supra*, at 1002. *See also id.* at 1020 ("[N]either a review of Blackstone's *Commentaries on the Laws of England*, an inquiry into the Framers' and ratifiers' intent, nor the study of historical practice regarding double jeopardy issues at the time of and shortly after ratification, offers much illumination as to how the Clause ought to be interpreted in modern times."); Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 801 (1988) (outlining the paucity of historical evidence regarding the Framers' interpretation of the Double Jeopardy Clause); Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. Tex. L. Rev. 735, 796 (1983).

Textual evidence of the original meaning of the Double Jeopardy Clause can be found in the neighboring clauses. Other rights protected by the Fifth Amendment evince a common aim of protecting individuals from governmental overreach particularly in the context of criminal prosecutions where the potential for government overreach poses a threat to liberty. The right to indictment by grand jury, and the right against compelled self-incrimination, like the double jeopardy protection, place limits on how prosecutors may secure the deprivation of one's liberty. *See Costello v. United States*, 350 U.S. 359, 261-62 (1956) (purposes served by right to indictment by grand

jury); *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 55-63 (1964), *abrogated on other grounds in* (discussing history and purposes of right against self-incrimination). The takings clause does for one's property interests what the due process guarantee does for one's liberty interest—both place procedural limitations on how an individual's property or liberty may be taken away by the government. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (discussing purpose of takings clause). The Double Jeopardy Clause, when interpreted with reference to its neighbors in the Fifth Amendment, protects an individual from prosecutorial harassment and abuse.

The need for re-visiting the original meaning of the Double Jeopardy Clause arises in part from concrete changes in the practical world of criminal justice in contemporary America:

> [O]ur present criminal law landscape is radically different from the world of the Framers. What the Framers understood as an 'offense' no longer exists. Judges no longer create offenses, that task is assigned to the legislatures. As a consequence of this new legislative power, coupled with our move from an agrarian to a complex industrialized society, there are presently thousands of legislatively enacted felony statutes, both on the state and federal law. Rather than being distinct, a large percentage of these statutes proscribe identical or nearly identical misconduct.

Klein, *supra*, at 1027. The contemporary landscape of criminal prosecutions would be unrecognizable to the

Framers, particularly "state and federal legislators' penchant for enacting duplicative statutes proscribing identical misconduct." *Id.* at 1001.

The federal code contains more than three thousand crimes. *See* Sara Sun Beale*, Too Many and Yet Two Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 980 & n. 10 (1995). The radical difference between what we now regard as offenses and those that would have been recognizable to the Framers has been well documented by legal historians. *See, e.g.,* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 341-44 (1956) (describing the enormous difference between offenses at common law and in the early days of our Republic, and what we call "offenses" today).

"It is unquestionable that the proliferation of overlapping and duplicative criminal statutes vastly increases the opportunities for government harassment of defendants . . . ." Klein*, supra*, at 1039. Unless the original meaning of the prohibition against multiple punishments is put into practice,

> [l]egislators will continue to enact more and tougher anticrime measures, and those accused of crimes will continue to constitute a politically powerless and disfavored group, so long as the vast majority of Americans correctly conclude that they are highly unlikely to be the target of a police investigation, but much more likely to be the victim of a crime. Regardless of one's position on other criminal law and procedure

> fronts, the protection against double jeopardy is one constitutional criminal procedural guarantee for which state and federal legislators ought not to be given the final word.

Klein, *supra*, at 1049.

Since the founding, criminal law has morphed into a complex matrix of overlapping statutes that would bewilder the Framers. One commentator highlighted this contrast in reference to the original meaning of the Clause:

> [T]he scarcity of common law felonies meant that colonial judges rarely confronted the issue of whether two offenses were the same, much less whether 'sameness' was determined by the legislature or the court. If the clause had any meaning at all when ratified, it must have prevented the government from recharging a defendant with a particular theft because it was dissatisfied with an acquittal on that theft. Yet that is precisely what the government can do today as a result of the plethora of duplicative and overlapping criminal statutes . . . .

Klein, *supra*, at 1002-03. Where there are overlapping statutes, as in Petitioner Begay's case, "a prosecutor's ability to bring multiple charges for a single offense may increase the risk that a defendant will be convicted on at least one of these charges, on the theory that if you throw enough mud some of it will stick." Klein, *supra*, at 1010. *See Hunter*, 459 U.S. at 369 (Marshal and Stevens, J.J., dissenting).

The idea of allowing the extent of double jeopardy protections to be determined only by the will of the legislature would not have occurred to the Framers. As Susan Klein observed, "the question of whether the clause limited a *legislative* definition of 'offense' never arose; certainly the Framers could not have anticipated that Congress and state legislatures would, eventually, completely appropriate this heretofore judicial function." Klein*, supra*, at 1025. In the pre-1792 world, at both the federal and state levels, the task of defining offenses fell to common law judges. *See* Morton J. Horwitz*, The Transformation of American Law, 1780-1860*, at 9-16 (1977) (observing that it took nearly two centuries for judges to yield to legislatures their power to define crime).

The "same elements" test not only produces absurd results, but more importantly fails to protect individual liberty from overzealous prosecutors. For instance, "[w]hether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying the lather to one' face an act? . . . Yes, yes, yes." Larry Simon*,* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 276 (1965). If there are no limitations whatsoever on prosecutorial choices as to which of multiple statutes to proceed to trial on, there is no real protection against multiple punishments for a single proscribed act.

An alternative to the *Blockburger* test would acknowledge the legislature's prerogative in deciding what conduct to criminalize, but place limits on a

prosecutor's imposing cumulative punishments. Chief Justice Warren endorsed such an approach:

> In this case I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale.

Gore v. United States, 357 U.S. 386, 394 (1958) (Warren, C.J., dissenting).

The better approach would not place any new limits on what legislatures choose to criminalize, but only on how prosecutors act on the available criminal statutes. To give meaning to the Framers' intention to protect individuals from prosecutorial overreach, in the context of modern penal codes characterized by multiple overlapping statutes atomizing unitary conduct into myriad crimes, limitations should be placed to guard against prosecutorial abuse. Where unitary conduct is criminalized in multiple statutes, as in Petitioner Begay's case, prosecutors must choose which of the available alternatives they will pursue. Unless such limitations are put in place by the judiciary, modern legislative and prosecutorial practice will overrun individual liberty.

When a similar issue arose, several Justices recognized the repugnance of *Blockburger* and expressed their eagerness to abandon its flawed reasoning in favor of a superior alternative that provides meaningful protection against prosecutorial overreach. For instance, in *Gore*, where the Court considered whether a defendant "can be punished twice because his conduct violates" two overlapping statutes, 357 U.S. at 393-94 (Warren, C.J., dissenting), several Justices expressed their readiness to dispense with *Blockburger*: "Congress defined three distinct crimes, giving the prosecutor on these facts a choice. But I do not think the courts were warranted in punishing petitioner three times for the same transaction. I realize that *Blockburger*[] holds to the contrary. But I would overrule that case." *Gore*, 357 U.S. at 395 (Douglas, Black, JJ., dissenting).

Justice Douglas sought to restore the original protections intended by the Double Jeopardy Clause: "I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act." *Id.* at 396. Under this approach, he "would hold that the prosecutor was given the choice of one of three prosecutions for this single sale." *Id.*

In Petitioner Begay's case, nothing in the *Blockburger* test would have precluded the prosecution from taking him to trial fourteen times for the shooting—once for shooting from a motor vehicle resulting in great bodily harm; six more times for shooting from a motor vehicle not resulting in injury; once more for reckless child abuse resulting in great

bodily harm; two more times for reckless child abuse not resulting in injury; and four more times for aggravated assault with a deadly weapon. Only joinder rules stand in the way. *See* Rule 5-203(A) NMRA. In practical terms, Petitioner Begay faced fourteen separate offenses against which to defend, in spite of the unitary nature of the conduct at issue. Under the original meaning of the Double Jeopardy Clause, the prosecutor would be compelled to elect which of these fourteen charges to bring.

One might argue that the doctrine of *stare decisis* precludes overruling *Blockburger* due to the age of that precedent. But, as Justice Thomas recently wrote, "demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation" should not be elevated "over the text of the Constitution." *Gamble v. United States*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (June 17, 2019) (Thomas, J., concurring) at 2. Under Justice Thomas's view, "[a] demonstrably incorrect judicial decision . . . is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power." *Id.* at 9.

Justice Ginsburg has also observed that *stare decisis* "'is not an inexorable command.' *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Our adherence to precedent is weakest in cases 'concerning procedural rules that implicate fundamental constitutional protections.' *Alleyne v. United States*, 570 U.S. 99, 116, n. 5 (2013)." *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Ginsburg, J., concurring) at 7. She would lay to rest the separate-sovereigns doctrine under the

Double Jeopardy Clause. *See id.* The reasons for restoring the multiple prosecutions protection to its original meaning are even stronger than those in the separate-sovereigns context. It is time to lay the "same elements" doctrine to rest.

The protections in the Double Jeopardy Clause have deep historical roots. *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Gorsuch, J., concurring) at 2 (finding antecedents in the law of ancient Athens, the Roman Republic, the Old Testament, and the earliest days of the common law in England).

Protecting individuals from governmental action is at the heart of the Double Jeopardy Clause. *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Ginsburg, J., concurring) at 4. She observed that the clause "by its terms safeguards the person and restrains the government." *Id.* (internal quotation marks and citation omitted).

The independence of the judiciary is necessary for the protection of liberty. *See* The Federalist No. 78, 466 (C. Rossiter ed. 1961) ("[T]here is no liberty if the power of judging be not separated from the legislative and executive powers."). Justice Thomas underscored the fact that the Court's "judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, [the Court] should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous." *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Thomas, J., concurring) at 17. Adherence to the original meaning of the Double Jeopardy Clause as giving expression to a core Fifth Amendment right demands that the courts exercise

their inherent judicial authority to elevate the Constitution over acts of legislative will or prosecutorial power.

The supremacy of the Constitution is inherent in its nature. *See* Akhil Reed Amar, America's Constitution 5 (2005) (explaining that the Constitution is a constitutive document); Vasan Kesavan, *The Three Tiers of Federal Law*, 100 N.W. U. L. Rev. 1479, 1499 n. 99 (2006) (arguing that "[i]t is unnecessary for the Constitution to specify that it is superior to other law because it is higher law made by We the People—and the only such law)".

Justice Thomas also observed that "the Court has long recognized the supremacy of the Constitution with respect to executive action and 'legislative act[s] repugnant to' it." *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Thomas, J., concurring) at 9 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952); *see also* The Federalist No. 78 at 467 ("No legislative act, therefore, contrary to the Constitution, can be valid.")).

Punishing Petitioner Begay multiple ways for a unitary act offends "the Fifth Amendment's seemingly plain command." *Gamble*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Gorsuch, J., concurring) at 3. A single, unbroken, unitary course of criminal conduct has been criminalized and punished by applying several separate criminal statutes—twice as reckless child abuse (once resulting in no injury, the other time for causing great bodily harm) and two more times as

shooting from a motor vehicle (once resulting in no injury, the other time for causing great bodily harm).

If the original guarantee against multiple punishments were applied in Petitioner Begay's case, it would prohibit punishing him with an eighteen-year sentence for causing a leg wound to a child by shooting at Trey Gomez from a motor vehicle and again punishing him with a nine-year sentence for causing a leg wound to the same child by the same act of shooting at Trey Gomez from a motor vehicle. The act at the core of each of the fourteen crimes leveled against Petitioner Begay is his act of shooting at Trey Gomez in self-defense, period. The only crime that is distinct is tampering with evidence, which Petitioner Begay did not contest on appeal and does not contest here. All of the remaining offenses, including five offenses for which he was convicted at trial, stem from the unitary act of shooting at Trey Gomez in self-defense. It insults the Framers to persist in allowing multiple punishments for a unitary act such as this.

II. Where a justifiable shooting in self-defense unintentionally results in a child's injury, due process precludes a conviction for reckless child abuse.

Petitioner Begay's case also raises the question whether the Fourteenth Amendment's due process protection allows a criminal conviction for reckless child abuse based on a justifiable act of shooting in self-defense that also unintentionally caused injury to a child.

The Fourteenth Amendment provides that no state will deprive an individual of liberty without due process of law. U.S. Const. amend. XIV. New Mexico denied Petitioner Begay this basic guarantee when it convicted him of reckless child abuse resulting in great bodily harm, where he was unaware of the presence of a child, he acted in self-defense, and his conduct was unitary.

Self-defense is a justification of conduct that would otherwise be criminal. Petitioner Begay's act of shooting at Trey Gomez was found to be unitary with his act of unintentionally striking J.A.'s leg with a bullet that was intended for Trey Gomez but missed its target. Since this a unitary act, it defies reason for a court to convict Petitioner Begay and sentence him to nineteen years in prison for reckless child abuse, while simultaneously exonerating him on grounds of self-defense based on the very same conduct,

The jury in Petitioner Begay's case was instructed on self-defense as follows:

> Evidence has been presented that [Petitioner] Begay acted in self defense. [Petitioner Begay] acted in self defense if:
>
> 1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of Carlos [Trey] Gomez approaching [Petitioner Begay and two others] in an aggressive manner and hitting their vehicle with unknown propellants;
>
> 2. [Petitioner Begay] was in fact put in fear of immediate death or great bodily harm and shot a firearm because of that fear; and
>
> 3. The apparent danger would have caused a reasonable person in the same circumstances to act as [Petitioner Begay] did.
>
> The burden is on the state to prove beyond a reasonable doubt that [Petitioner Begay] did not act in self-defense. If you have a reasonable doubt as to whether [Petitioner Begay] acted in self defense, you must find [him] not guilty.

Jury Instruction No. 9, *State v. Begay*, No. D-202-CR-2013-03307 (2d Jud. Dist. Ct., N.M., May 16, 2016).

The jury was instructed as follows regarding the *mens rea* required to return a guilty verdict on the count of reckless child abuse injuring J.A.:

> [Petitioner] Begay showed a reckless disregard without justification for the safety or health of [J.A.]. To find that [Petitioner] Begay showed a reckless disregard, you must find that [Petitioner] Begay's conduct was more than merely negligent or careless. Rather, you must find that [Petitioner] Begay caused a substantial

> and unjustifiable risk of serious harm to the safety or health of [J.A.]. A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than [Petitioner] Begay out of concern for the safety or health of [J.A.].

Jury Instruction No. 12, *State v. Begay*, No. D-202-CR-2013-03307 (2d Jud. Dist. Ct., N.M. 2016).

The jury found Petitioner not guilty of all four counts of aggravated assault with a deadly weapon on grounds of self-defense. App. 41. The jury also found Petitioner Begay not guilty of four counts of shooting from a motor vehicle. App. 41. Necessarily, the jury found that the prosecution failed to present sufficient evidence to prove that Petitioner Begay did not act in self-defense when he shot at Trey Gomez. Ergo, no rational jury could have found that Petitioner Begay had the reckless *mens rea* necessary for the child abuse count.

His acting in self-defense makes his conduct law-abiding. *See* 22 C.J.S. *Criminal Law* § 60 (2006) (Killing in self-defense is justifiable because "an otherwise criminal action becomes permissible under the circumstances. Self-defense is a complete defense; if established, a defendant is not guilty of the crime."); 2 Charles E. Torica, *Wharton's Criminal Law* § 138 (15th ed. 2013) (noting that a killing in self-defense is justifiable because "the killing of the assailant was 'authorized' by the law").

Under New Mexico law, the *mens rea* for reckless child abuse is far greater than ordinary negligence. *See State v. Consaul*, 2014-NMSC-030, ¶ 37. New Mexico's child abuse statute is meant to criminalize "conduct that is morally culpable, and not merely inadvertent." *Id.* ¶ 32 (citing *Santillanes v. State*, 1993-NMSC-012, ¶ 28). *See also Consaul*, ¶ 36 ("The Legislature intended to punish acts done with a reckless state of mind consistent with its objective of punishing morally culpable acts and not mere inadvertence.").

Ordinarily, negligent conduct, even if criminalized, warrants a minor punishment. *See* 1 Charles E. Torica, *Wharton's Criminal Law* § 27 (15th ed. 2013) ("[N]egligence represents the least blameworthy of all the culpable mental states, hence the negligent offender is usually not subjected to severe punishment; and there is a tendency in penal codes to recognize negligence only in limited instances."). In contrast, recklessness sufficient to warrant punishment under New Mexico's child abuse statute requires a much higher degree of culpability: "Typical definitions of recklessness require an actor to consciously disregard a substantial and unjustifiable risk of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Consaul*, 2014-NMSC-030, ¶ 37 (citing *Model Penal Code* § 2.02(2)(c) (definition of "recklessly").

The conviction of Petitioner Begay for reckless child abuse cannot stand in light of the fact that he was acquitted of other charges on grounds of self-defense, and the conduct at issue was found to be unitary. *See*

App. 25, ¶ 40. With respect to the charge of reckless child abuse resulting in great bodily harm, the jury was instructed that in order to return a guilty verdict, it must find, *inter alia*, that Petitioner Begay "did not act in self-defense." Jury Instruction No. 12, *State v. Begay*, No. D-202-CR-2013-03307 (2d Jud. Dist. Ct., N.M. May 16, 2016). The only act that could constitute child abuse on this record was Petitioner Begay's act of shooting at Trey Gomez and missing his intended target, unintentionally injuring J.A. This act was found by the New Mexico appellate court to be identical to the act that was the basis for the charge of shooting from a motor vehicle. App. 25, ¶ 40. The jury acquitted Petitioner Begay of all four counts of aggravated assault with a deadly weapon, which was based on the act of shooting at Trey Gomez. App. 41. The jury also acquitted Petitioner Begay of four counts of shooting from a motor vehicle, on grounds that he was acting in self-defense when he shot at Trey Gomez. App. 41.

Under these circumstances, no rational jury could find that Petitioner Begay met the *mens rea* of recklessness required to convict for reckless child abuse. In the context of criminal prosecutions, a conviction cannot stand unless each of the essential elements is proved beyond a reasonable doubt. *See Winship*, 397 U.S. 358 (holding that the Due Process Clause protects the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *Jackson*, 443 U.S. 307 (explaining that "[a] reasonable doubt, at a minimum, is one based upon reason. Yet a properly instructed jury may occasionally

convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.") (internal quotation marks omitted).

The Fourteenth Amendment's constitutional guarantee of due process was denied to Petitioner Begay because he was acquitted of multiple offenses based on the jury's finding that he acted in self-defense, but was nevertheless convicted on other counts that arose from the same act of self-defense.

CONCLUSION

For these reasons, Mr. Begay respectfully requests this Court to issue a writ of certiorari to review the memorandum opinion of the New Mexico Court of Appeals.

Respectfully submitted,

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