No. 19-3

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**

## REPLY BRIEF FOR PETITIONER

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## PETITIONER'S REPLY BRIEF

### 1. Respondent's argument rests on false premises.

Respondent's arguments against reviewing the decision below rest on false premises. Although the conduct at issue was found by the New Mexico Court of Appeals to be unitary, Respondent contends, without citing any authority, that it was ***not*** unitary. *See* Resp. 4 (stating that Petitioner Begay's conduct "does not constitute unitary conduct"). Respondent ignores the fact that the New Mexico Court of Appeals rejected this contention, ruling that Petitioner Begay's conduct was unitary:

> Here, Defendant fired multiple gunshots toward a group of people in quick succession from a moving vehicle. One of those shots struck J.A. in the thigh, while the other shots created a substantial and unjustifiable risk to the health and safety of Me. G. On these facts, we conclude that the conduct underlying both the child abuse convictions and the shooting from a motor vehicle convictions---as each pertain to J.A. and Me. G.---was unitary.

App. 25, ¶ 40. Respondent's baseless assertion to the contrary also ignores New Mexico appellate rules, under which the Court of Appeals' decision is "the law of the case." *See* Rule 12-405(A) NMRA 2019.

**2. The decision by the New Mexico appellate court is important.**

The Respondent contends that the decision of the New Mexico Court of Appeals should not be reviewed because it is unpublished, contending that this fact somehow makes the appellate decision below unimportant. Resp. 3. But New Mexico appellate rules make clear that non-publication "does not mean that the case is considered unimportant." Rule 12-405 NMRA 2019.

Moreover, appellate courts frequently issue unpublished opinions. *See, e.g.,* Leonidas Ralph Meacham, Admin. Office of the U.S. Courts, *Judicial Business of the United States, Supplemental Table S-3, 2004 Annual Report of the Director*, at 39 (80% of decisions of the United States Courts of Appeals are unpublished).

The New Mexico Court of Appeals' unpublished opinions are *de facto* published; its website posts unpublished opinions on a daily basis, which are freely available to attorneys and the public. *See* coa.nmcourts.gov/memorandum-opinions.aspx (visited October 3, 2019). For the month of September 2019, the New Mexico Court of Appeals posted thirty-nine memorandum opinions online.

In New Mexico appellate courts, unpublished opinions are frequently cited as persuasive authority. *See* New Mexico Rule of Appellate Procedure 12-405 (allowing citation of such opinions "for any persuasive value" and "under the doctrines of law of the case, claim preclusion, and issue preclusion"). The

Respondent---in its briefing in Petitioner Begay's case---cited an unpublished opinion. *See* State's Answer Brief, *State v. Begay*, No. A-1-CA-35964 at v, 35 (citing unpublished memorandum opinion).

Unpublished opinions often reverse the decision of the lower court and sometimes include a dissent or concurrence, refuting the idea that they only apply well-settled propositions of law. *See* Donald Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality*, 73 Judicature 307 (April/May 1990) (finding that many unpublished decisions are non-routine and present appellate judges with opportunities to exercise substantial discretion). The notion that unpublished opinions are treated as if they do not exist, are inaccessible to lawyers, or only involve well-established legal principles, is a legal fiction.

**3. Under Respondent's argument, there is no constitutional barrier to charging Petitioner Begay with fourteen offenses, facing fourteen separate trials, for conduct that is unitary.**

Respondent goes to great lengths to prove that *Blockburger v. United States*, 284 U.S. 299 (1932), is precedent that is routinely followed in cases involving multiple punishments. Resp. at 5-12. But that is not in dispute, and Respondent fails to articulate a cogent reason for allowing multiple punishments for a unitary act of wrongdoing. *See* Resp. *passim*. Respondent offers no justification for courts' ceding so much authority to the executive and legislative branches, allowing prosecutors free reign to charge individuals with any number of the "thousands of legislatively

enacted felony statutes," Susan R. Klein, *Double Jeopardy's Demise*, 88 Cal. L. Rev. 1001, 1027 (May 2000), and forcing individuals to defend against a hydra of charges arising from a single act of wrongdoing.

Under Respondent's argument, where there are multiple social interests and multiple victims, prosecutors may bring multiple criminal prosecutions, presumably one for each alleged victim or "social interest" implicated. Resp. 8-13. As applied to Petitioner Begay's case, there would be no constitutional barrier to a prosecutor bringing fourteen separate indictments against him, forcing him to face fourteen separate trials, even though his conduct was found to be unitary. *See* App. 25, ¶ 40.

Respondent does not address the confusion or inconsistency in Double Jeopardy cases that led Chief Justice Renhquist to describe it as a "Sargasso Sea," *Albernaz v. United States*, 450 U.S. 333, 334 (1981), and caused legal scholars to devise alternative tests, *see, e.g.* Michael S. Moore, Act and Crime (1993); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1814-15 (1997); Susanah M. Meade, *Double Jeopardy Proection--Illusion or Reality?*, 13 Ind. L. Rev. 863 (1980); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 Cal. L. Rev. 1027 (1995), *cited at* Pet. 12.

Instead, Respondent would have the courts continue to grant unfettered authority to legislatures and prosecutors, reifying their statutory description of offenses and placing no limits on prosecutors' charging

decisions. Resp. 12-13. Respondent urges this Court to let stand a doctrine under which there is no "constitutional basis to attempt to limit the charges that the prosecution can file in the first instance." Resp. 13. Respondent offers no explanation of how this can be squared with the Double Jeopardy Clause's protection against being "twice put in jeopardy of life or limb" for "the same offence." U.S. Const. Amend. V.

**4. Workable procedures can be devised for criminal prosecutions to ensure individuals are protected from multiple punishments for a single act.**

To give meaning to the protection of individual liberty from unfettered prosecutorial zeal, the Court should place side constraints on how many separate offenses a person may be forced to defend against where the conduct at issue is a "unitary" act. App. 25, ¶ 40.

A procedure for implementing this could follow the procedure suggested by the United States Court of Appeals for the Fourth Circuit in the context of multiple prosecutions. *See United States v. Ragins*, 840 F.2d, 1184, 1192 (4th Cir. 1988). Under this proposed procedure, the defendant has "the initial burden going forward" to put the double jeopardy claim in issue. *Id.* Once the defendant "has made a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden of establishing that there were two separate crimes shifts to the government." *Id.* Adapting this multiple prosecutions procedure to the multiple punishments context, a defendant would have the burden to showing

that the charging document presents multiple charges for a unitary act. At this juncture, the burden would shift to the prosecution to show there is a separate act of wrongdoing underlying each charge.

This procedure would allow legislatures to continue their practice of creating new offenses, and defining them as they see fit. It would allow prosecutors to bring charges in accordance with their exercise of prosecutorial discretion. But it would restore to the courts the authority---and the duty---to place meaningful constitutional limits on how many criminal charges a person may be forced to defend against at trial where the conduct at issue is found to unitary.

Pre-trial litigation addressing the multiple or unitary nature of the conduct at issue would allow courts to do more than merely defer to legislative will and prosecutorial discretion. This procedure would honor Justice Douglas's vision of a restored Double Jeopardy Clause, true to its "great historic purpose to protect the citizen from more than one trial for the same act." *Gore v. United States*, 357 U.S. 386, 394 (1958) (Douglas, Black, JJ., dissenting).

**5. *Stare decisis* does not justify adherence to the "same elements" test.**

Respondent does not provide a cogent reason for adhering to the "same elements" test, which grants unfettered power to prosecutors to bring numerous charges against an individual even where the conduct at issue is unitary. Under Respondent's contentions, the judiciary would remain subservient to the executive and legislative branches in this context. *But 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.").

Respondent's principal argument in favor of *Blockburger* and the "same elements" test is that it is old precedent. Resp. 3-7. But, as Justice Ginsburg recently observed, *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 v. United States*, 587 U.S. ___ (June 17, 2019) (No. 17-646) (Ginsburg, J., concurring) at 7. There can be no dispute that a judge-made test that allows multiple punishments for a unitary criminal act implicates fundamental constitutional protections.

Respondent cited *United States v. Dixon*, 509 U.S. 688 (1993), in support of its contention that Petitioner Begay's case should not be reviewed by this Court. Resp. 6-7. But in *Dixon*, the Court noted that "[a]lthough *stare decisis* is the 'preferred course' in constitutional adjudication, 'when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent."'" 509 U.S. at 712 (quoting *Payne*, 501 U.S. at 827) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

The question is not whether *Blockburger* is precedent; that was never in dispute. The issue is whether it is sound.

For the reasons stated in the Petition and in this Reply, where conduct is unitary, the "same elements" test fails to give meaningful protection to individuals from governmental overreach, which manifests as multiple punishments, either in multiple prosecutions or multiple charges in a single case. To use Justice Thomas's term, *Blockburger* is "demonstrably erroneous," *Gamble*, 587 U.S. ___ (Thomas, J., concurring) at 2. "[A]dhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power." *Id.* at 9.

**6. The "same elements" test is ill-suited to modern criminal prosecutions.**

Although the administration of the criminal laws has changed dramatically since *Blockburger*, and even more since the Framers adopted the Double Jeopardy Clause, Respondent's argument fails to take into account this profound transformation. *See* Resp. *passim*. Respondent offers only its *ipse dixit* that this case has nothing to do with the proliferation of federal and state crimes. Resp. 12 (citing no authorities). The fact remains that legislatures continue to enact a "plethora of duplicative and overlapping criminal statutes," Klein, *supra*, at 1002-32, as seen in the prosecution of Petitioner Begay under fourteen separate counts for conduct that the New Mexico Court of Appeals found to be unitary. *See* App. 25, ¶ 40.

Although at the time of the Founding, judges typically defined crimes, *see* Morton J. Horwitz, *The Transformation of American Law*, *1780-1860*, at 9-16 (1977), in the present day, prosecutors may bring as many charges as they can find in the statute books.

Individuals are forced to defend against them, and may suffer multiple punishments for unitary conduct. *See* Klein*, supra*, at 1010.

Respondent's argument fails to take into account the fact that the federal code contains more than three thousand crimes, *see* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 980 & no.10 (1995), or the radical differences between what we now regard as offenses and what would have been familiar to the Framers. *See* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 341-44 (1956).

**7. Multiple victims do not authorize multiple punishments where the conduct is unitary.**

Respondent argues that where there are multiple victims, the only way to exact justice is to punish the individual multiple times, bringing a prosecution with multiple offenses. This argument is fraught with problems.

First, Respondent does not explain why there were fourteen separate charges arising from Petitioner Begay's unitary act, even though there was never any allegation that there were fourteen victims.

Second, Respondent states that under Petitioner Begay's argument only one charge could be brought if someone were to drive a car into a crowd, injuring five people. Resp. 12. This does not follow. Nothing in Petitioner Begay's view would preclude a legislature

from enacting statutes designed to punish crimes with multiple victims, such as mass shootings. Such statutes could also contain sentencing enhancements or judges could take into account multiple victims through sentencing factors, subject to the due process notice principles recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioner Begay does not contend that there should not be accountability for wrongdoing that impacts multiple victims. On the contrary, if the protection found in the Double Jeopardy Clause were given meaning in such cases, and balance was restored to the administration of criminal justice, prosecutors would be able to bring individuals to justice under statutes addressing such crimes.

Under a revitalized Double Jeopardy Clause, courts would have the authority to compel prosecutors, prior to trial, upon a sufficient showing by a defendant, to choose among various statutory options for prosecution. If an indictment alleges multiple charges arising from a unitary act, a defendant could raise a Double Jeopardy claim, showing that the conduct was unitary; the burden would shift to the prosecutor to show that the conduct is not unitary. If the trial court finds that conduct is unitary, then the prosecutor would choose one statute.

This approach gives meaning to the Double Jeopardy Clause in accordance with the spirit of the neighboring clauses in the Fifth Amendment---the takings clause, the right against compelled self-incrimination, and the right to indictment by grand jury. *See Costello v. United States*, 350 U.S. 359, 361-62 (1956); *Murphy v. Waterfront Com'n of New York*

*Harbor*, 378 U.S. 52, 55-63 (1964), *abrogated on other grounds in United States v. Balsys*, 524 U.S. 666 (1998); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001).

Under a restored Double Jeopardy Clause, individuals accused of crimes would face only a single charge where the charge arises from a unitary act. Prosecutors would hardly be left without tools to combat crime; on the contrary, they would have all the tools currently available to them, but they would be compelled to show that for each offense charged there is a separate act of criminal wrongdoing.

**8. Petitioner Begay's case implicates the fundamental right to due process of law.**

Contending that state appellate preservation requirements were not met, Respondent urges this Court to deny review of Petitioner Begay's Due Process claim. Resp. 13-14. But Respondent cites no authority for the proposition that review by this Court is predicated on preservation. Under long-established New Mexico procedure, an appellate court may address an issue that was not preserved in a lower court and was raised for the first time on appeal. *See* Rule 12-321(B) NMRA 2019 (unpreserved claims reviewable if they involve fundamental rights of a party). Insofar as it is beyond dispute that the right to due process is a fundamental right of a party, *see* U.S. Const. amend. V, Petitioner Begay's Due Process claim is reviewable.

**9. There is no doubt on this record that Petitioner Begay acted in self-defense.**

Respondent's attempt to side-step the fact that Petitioner Begay acted in self defense finds no support in the record. *See* Resp. 15-16. The trial court instructed the jury on self-defense. *See* Pet. 24-25. Under New Mexico law, a trial court will not instruct a jury on self-defense unless the defendant "present[s] evidence supporting every element of self-defense." *State v. Gonzales*, 2007-NMSC-059, ¶ 19; *State v. Denzel B.*, 2008-NMCA-118, ¶ 6.

Petitioner Begay presented, in the trial court, proof that the defendant was put in fear by an apparent danger of immediate bodily harm, that his actions resulted from that fear, and that he acted as a reasonable person would act under those circumstances. *See Denzel B.*, 2008-NMCA-118, ¶ 6.

Respondent could have cross-appealed on this issue in the New Mexico Court of Appeals, contending---as it appears to do in this Court---that there was insufficient evidence that Petitioner Begay acted in self-defense. But it did not do so.

If the jury had believed Petitioner Begay did not act in self-defense, then its not guilty verdicts on four counts of aggravated assault with a deadly weapon and four counts of shooting from a motor vehicle would be inexplicable. *See* App. 40-41. The evidence at trial showed that Petitioner Begay reasonably believed Trey Gomez was shooting at him, that Petitioner Begay shot at Trey Gomez, and that the shot missed Trey Gomez, causing injury to J.A.'s leg. There is no merit to

Respondent's baseless contention that Petitioner did not act in self-defense.

Respondent pins its attempt to prevent review of Petitioner Begay's conviction on its assertion that he is protesting an inconsistent verdict, which Respondent insists does not offend the Due Process Clause. Resp. 14-16. But Respondent does not explain how the dictates of *In re Winship*, 397 U.S. 358, 364 (1970), and *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979), can be met where there is no proof of the *mens rea* element required for a conviction of reckless child abuse.

## CONCLUSION

For these reasons, and the reasons set forth in the petition, Petitioner 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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