

No. _____

In the Supreme Court of the United States



STATE OF NEW MEXICO,
Petitioner,
v.
SAMUEL NEAL,
Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

RAÚL TORREZ
Attorney General
ALETHEIA V.P. ALLEN
Solicitor General
VAN SNOW
Dep. Solicitor General
Counsel of Record
New Mexico Department of
Justice
201 Third Street NW
Suite 300
Albuquerque, NM 87102
aallen@nmdoj.gov
505-717-3500

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Counsel for Petitioner

QUESTION PRESENTED

The Double Jeopardy Clause of the Fifth Amendment provides that “No person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb[.]”

The question presented is:

When determining whether two crimes are the same offense, should a court consider:

- a) Only the abstract statutory elements of the crime and other traditional indicia of legislative intent, as held by the Second, Ninth, and Eleventh Circuits;
- b) The elements as charged in the indictment, as held by the Sixth and Eighth Circuits as well as the Texas Court of Criminal Appeals and the Connecticut Supreme Court; or
- c) The evidence, argument, and jury instructions at trial, as held by the New Mexico Supreme Court?

LIST OF PARTIES

Petitioner is the State of New Mexico.

Defendant is Samuel Neal. He was the respondent in the Supreme Court of New Mexico, and the defendant-appellant in the New Mexico Court of Appeals.

LIST OF PROCEEDINGS

Supreme Court of New Mexico, No. S-1-SC-40407, *State v. Neal*, opinion April 6, 2026 (reversing one count and reinstating another).

Court of Appeals of New Mexico, No. A-1-CA-40205, *State v. Neal*, opinion April 24, 2024 (reversing two counts).

Eighth Judicial District Court, No. D-809-CR-2019-00270, *State v. Neal*, order September 21, 2021 (sentencing).

TABLE OF CONTENTS

QUESTION PRESENTED	i
LIST OF PARTIES	ii
LIST OF PROCEEDINGS	iii
TABLE OF CONTENTS	iv
APPENDIX TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI.....	1
PRIOR OPINIONS AND ORDERS.....	2
JURISDICTION.....	2
PROVISIONS INVOLVED.....	2
STATEMENT.....	2
I. Legal Background	4
II. Factual Background and Procedural History	12
REASONS FOR GRANTING THE PETITION	16
I. There is an Entrenched Conflict Over How <i>Blockburger</i> Operates.....	17
A. The Three Approaches.....	17
B. New Mexico’s Approach is Wrong	20
II. This Case is a Good Vehicle	26
CONCLUSION.....	28

APPENDIX TABLE OF CONTENTS

Appendix A: Opinion of the Supreme Court of the State of New Mexico (April 6, 2026)	1a
Appendix B: Opinion of the Court of Appeals of the State of New Mexico (April 24, 2024)	42a
Appendix C: Judgment and Sentence of the New Mexico District Court, Eighth Judicial District (Sept. 21, 2021)	64a
Appendix D: Provisions Involved	71a

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alabama v. Smith</i> , 490 U.S. 794 (1989)	4
<i>Bigon v. State</i> , 252 S.W.3d 360 (Tex. Crim. App. 2008)	18
<i>Blockburger v. United States</i> , 284 U.S. 299 (1932)	1, 4
<i>Brown v. Ohio</i> , 432 U.S. 161 (1977)	5
<i>Ex Parte Benson</i> , 459 S.W.3d 67 (Tex. Crim. App. 2015)	18
<i>Glossip v. Oklahoma</i> , 604 U.S. 226 (2025)	26
<i>Grady v. Corbin</i> , 495 U.S. 508 (1990)	4, 7, 24
<i>Herron v. State</i> , 1991-NMSC-012, 805 P.2d 624	9
<i>Illinois v. Vitale</i> , 447 U.S. 410 (1980)	6-7, 22-23, 28
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	26-27
<i>Missouri v. Hunter</i> , 459 U.S. 359 (1983)	5, 22, 28
<i>North Carolina v. Pierce</i> , 395 U.S. 711 (1969)	4

<i>Pandelli v. United States</i> , 635 F.2d 533 (6th Cir. 1980)	10, 18
<i>State v. Begaye</i> , 2023-NMSC-015, 533 P.3d 1057	11, 25
<i>State v. Breit</i> , 1996-NMSC-067, 930 P.2d 792	27
<i>State v. Dominguez</i> , 2014-NMCA-064, 327 P.3d 1092	24
<i>State v. Gutierrez</i> , 2011-NMSC-024, 258 P.3d 1024	9, 11, 27
<i>State v. Jackson</i> , 2020-NMCA-034, 468 P.3d 901	24
<i>State v. Lynch</i> , 2003-NMSC-020, 74 P.3d 73	27
<i>State v. Miles</i> , 160 A.3d 23 (N.J. 2017)	23, 25
<i>State v. Montoya</i> , 2013-NMSC-020, 306 P.3d 426	10
<i>State v. Nunez</i> , 2000-NMSC-013, 2 P.3d 264	27
<i>State v. Phillips</i> , 2024-NMSC-009, 548 P.3d 51	9
<i>State v. Porter</i> , 2020-NMSC-020, 476 P.3d 1201	9-10, 12, 27
<i>State v. Swick</i> , 2012-NMSC-018, 279 P.3d 747	10, 12
<i>State v. Tinsley</i> , 264 A.3d 560 (Conn. 2021)	18

<i>Swafford v. State</i> , 1991-NMSC-043, 810 P.2d 1223	8, 25
<i>United States v. Adams</i> , 1 F.3d 1566 (11th Cir. 1993)	17
<i>United States v. Bob</i> , 577 F.3d 1366 (11th Cir. 2009)	18, 23
<i>United States v. Dixon</i> , 509 U.S. 688 (1993)	1, 4, 7-8, 19, 24
<i>United States v. Felix</i> , 503 U.S. 378 (1992)	7
<i>United States v. Fraza</i> , 106 F.3d 1050 (1st Cir. 1997)	18
<i>United States v. Gamboa</i> , 439 F.3d 796 (8th Cir. 2006)	17, 23
<i>United States v. Kimbrew</i> , 406 F.3d 1149 (9th Cir. 2005)	23
<i>United States v. McLaughlin</i> , 164 F.3d 1 (D.C. Cir. 1998)	23
<i>United States v. Mier-Garces</i> , 967 F.3d 1003 (10th Cir. 2020)	23
<i>United States v. Morris</i> , 99 F.3d 476 (1st Cir. 1996)	5
<i>United States v. Nash</i> , 115 F.3d 1431 (9th Cir. 1997)	18
<i>United States v. O'Brien</i> , 560 U.S. 218 (2010)	17
<i>United States v. Singleton</i> , 16 F.3d 1419 (5th Cir. 1994)	23

<i>Whalen v. United States</i> , 445 U.S. 684 (1980)	1, 5-6
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Statutes

N.M. STAT. ANN. § 30-4-1 (West 2003)	20
N.M. STAT. ANN. § 30-9-11 (West 2009)	21

Constitutional Provisions

U.S. Const. amend. V	12
N.M. Const. art. II, § 15	12

Other Authorities

Alex Tsiatsos, <i>Double Jeopardy Law and the Separation of Powers</i> , 109 W. Va. L. Rev. 527 (2007)	23-24
Wayne R. LaFave, 5 Crim. Proc. § 17.4(b) (4th ed.)	24

PETITION FOR WRIT OF CERTIORARI

When are two crimes really the same offense for the purposes of the Double Jeopardy Clause? From the late 1970s through the early 1990s, this Court developed a body of law to answer that question. But it never fully resolved the fundamental issue of what information a court should examine to make this determination.

Most courts examine only traditional indicia of legislative intent, principally the same-elements test from *Blockburger v. United States*, 284 U.S. 299 (1932). This approach ignores the allegations in the indictment and the evidence at trial. But in *United States v. Dixon*, 509 U.S. 688 (1993), this Court split over exactly how *Blockburger* should operate, with some justices favoring the abstract analysis and others inclined to consider more information.

Some courts, noticing the fracture in *Dixon* and relying on *Whalen v. United States*, 445 U.S. 684 (1980), examine the government's legal theory as articulated in the charging documents.

In a category by itself, New Mexico—while claiming to follow this Court's precedent—uses a uniquely complex, fact-intensive test that turns largely on the evidence and argument at trial.

The difference in approaches matters. Here, Neal kidnapped, beat, and raped M.A., a woman whom he had just met. The New Mexico Supreme Court concluded that the kidnapping and the rape were the same offense because it examined the evidence, arguments, and instructions at trial. Effectively, the Supreme Court held that Neal could be punished for either rape or kidnapping, but not both. But under either the abstract or charging

document approach, Neal certainly could have been punished for each crime.

The Double Jeopardy Clause cannot mean such vastly different things in different circuits or states. The State of New Mexico respectfully petitions for a writ of certiorari to review the judgment of the New Mexico Supreme Court.

PRIOR OPINIONS AND ORDERS

The New Mexico Supreme Court's opinion is available at 2026 WL 925643 and App.1a-41a. The New Mexico Court of Appeals' opinion is available at 2024 WL 1787765 and App. 42a-64a. The judgment and sentence entered by the New Mexico Eighth Judicial District Court is available at App. 65a-71a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a). This Petition seeks review of an April 6, 2026 opinion of the New Mexico Supreme Court. It was timely filed with the Clerk of this Court within 90 days after entry of that judgment.

PROVISIONS INVOLVED

Relevant provisions are reproduced in the Appendix. N.M. STAT. ANN. § 30-4-1 (West 2003) is reproduced at App. 71a. N.M. STAT. ANN. § 30-9-11 (West 2009) is reproduced at App. 72a-74a. The Fifth Amendment to the Constitution of the United States is reproduced at App. 75a.

STATEMENT

Neal kidnapped, beat, and raped M.A. On appeal, he argued that his convictions for aggravated

battery, criminal sexual penetration (CSP), and kidnapping were all the same offense for double jeopardy purposes. He prevailed in the New Mexico Court of Appeals. On certiorari, the New Mexico Supreme Court reinstated the aggravated battery conviction but agreed that CSP and kidnapping were the same offense. It reached this conclusion by looking primarily at the evidence, argument, and instructions at trial, examining legislative intent as an afterthought.

Applying its two-step framework, the New Mexico Supreme Court first presumed that the kidnapping and the CSP were based on the same conduct. To determine whether the legislature authorized multiple punishment, it examined the charging document, the evidence at trial, the prosecutor's closing argument, and the jury instructions to discern the prosecution's legal theory. Concluding that the state's theory was ambiguous and that the legislature had not clearly authorized multiple punishment under the circumstances, it held that Neal was placed twice in jeopardy. It emphasized that Neal could have been punished for both crimes if the state had presented a different case at trial.

The New Mexico Supreme Court claims that its unique approach is required by this Court's precedent and "honors the mandate of the double jeopardy clause contained within both the United States and New Mexico Constitutions[.]" App. 40a. Although New Mexico's approach is incorrect under any reading of this Court's precedent, its error exposes a question this Court has never definitively answered: when determining whether a defendant was convicted twice for the same offense, should a court look beyond abstract indicia of legislative intent?

I. Legal Background

1. This much is settled. The Double Jeopardy Clause of the Fifth Amendment has three functions: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 803 (1989). In the multiple punishment context, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Grady v. Corbin*, 495 U.S. 508, 516 (1990), *overruled on other grounds by Dixon*, 509 U.S. at 703.

The same-elements test from *Blockburger v. United States* is the primary tool to determine whether a legislature authorized multiple punishment. *See Dixon*, 509 U.S. at 696 (“In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the ‘same-elements’ test, the double jeopardy bar applies.”). Under *Blockburger*, “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 a fact which the other does not.” 284 U.S. at 304. If one crime is subsumed within another, “they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.” *Dixon*, 509 U.S. at 696. The *Blockburger* test “depends on statutory analysis, not on evidentiary comparisons.”

United States v. Morris, 99 F.3d 476, 479 (1st Cir. 1996).

The *Blockburger* test is not, however, the exclusive way to determine whether a legislature authorized multiple punishment. It is a canon of construction that yields a presumption either for or against multiple punishments, which may be rebutted by other indicia of legislative intent. See *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) (holding that an express authorization of multiple punishments controlled over the *Blockburger* test); *Garrett v. United States*, 471 U.S. 773, 779 (1985) (concluding that *Blockburger*'s presumption against multiple punishment was rebutted by statutory "language, structure, and legislative history").

2. Although the general contours of the test are well-established, this Court's precedent describing the operation of *Blockburger* has been inconsistent.

Most multiple punishment decisions applying *Blockburger* have only considered the elements of the charged crimes in the abstract, without reference to the allegations or evidence at trial. See, e.g., *Brown v. Ohio*, 432 U.S. 161, 166 (1977) ("This test emphasizes the elements of the two crimes. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." (quotation marks omitted)). However, three decisions contemplated a test with a broader scope.

In *Whalen*, this Court looked beyond the abstract statutory elements of two crimes to resolve a double jeopardy claim. Whalen was convicted in the District of Columbia of both rape and felony murder, with the rape serving as the predicate offense. 445 U.S. at 485. The two offenses satisfied the abstract

Blockburger test because the District of Columbia felony murder statute “d[id] not in all cases require proof of a rape”—a felony murder conviction could be predicated on five other crimes, including robbery, kidnapping, or arson. *Id.* at 693-94. This Court rejected the *Blockburger* presumption because, under the government’s legal theory, proving that the defendant committed rape was necessary to prove that he committed felony murder. *Id.* at 694. The Court treated the six alternative predicates for felony murder as if they were six separate statutes for the purposes of *Blockburger*. *See id.* It is unclear how exactly the Court identified the government’s legal theory: the dissent accused the majority of consulting the allegations in the indictment, a charge the majority denied. *See id.* at 710 (Rehnquist, J., dissenting); *id.* at 694 n.8 (“Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment.”). But the Court must have looked at something besides the abstract statutory elements of the crimes to identify which alternative the government relied upon.

Later that year, in *Illinois v. Vitale*, 447 U.S. 410 (1980), the Court reversed the Illinois Supreme Court, which had held that prosecuting a juvenile for vehicular homicide after he pled guilty to a traffic offense arising out of the same incident constituted double jeopardy. The Court remanded the case to the Illinois Supreme Court to determine whether the traffic offense always constituted a lesser-included offense of vehicular homicide. *See id.* at 418-19. In dicta, the Court mused that, if the state in fact relied on the traffic offense or “conduct necessarily

involving” it, the defendant would have a “substantial” double jeopardy claim. *Id.* at 420.

For a brief period in the early 1990s, this Court applied a “same conduct” test in addition to *Blockburger*, at least in the context of multiple prosecutions. In *Grady v. Corbin*, 495 U.S. 508, 510 (1990), this Court held “that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” This test necessarily looked beyond the abstract statutory elements of the charged crimes. But the Court quickly limited that holding in *United States v. Felix*, 503 U.S. 378 (1992), and overruled *Grady* a year later in *Dixon*.

The two defendants in *Dixon* violated court orders by committing new crimes. 509 U.S. at 691-93. Both were found to be in contempt of court and were separately charged for the new offenses. *See id.* at 691, 693. The majority in *Dixon* agreed that the same conduct test was flawed and reaffirmed the *Blockburger* test’s importance to the double jeopardy analysis. *See id.* at 703 (overruling *Grady* after concluding that “at least some of the counts at issue here are not barred by the *Blockburger* test”). But the majority fractured over how the *Blockburger* test actually functioned in that case.

Justices Scalia and Kennedy believed that two charges failed the *Blockburger* test because, under the government’s theory of the case, the new offenses were the basis for the finding of criminal contempt. Justices Rehnquist, O’Connor, and Thomas dissented in part, writing that the *Blockburger* analysis should focus on what the abstract elements of the statutes required.

See id. at 716-20 (Rehnquist, J., concurring in part and dissenting in part). Justices White, Souter, Stevens, and Blackmun doubted whether *Blockburger* should play a controlling role in the context of subsequent prosecutions. *See id.* at 735 (White, J., concurring in the judgment in part and dissenting in part); *id.* at 741 (Blackmun, J., concurring in part).

3. In the absence of a definitive statement from this Court about what information a court should consider as part of the *Blockburger* analysis, New Mexico has developed a uniquely complex multiple punishment test. Buckle up—this will get confusing.

The New Mexico Supreme Court adopted its modern approach to what it calls “double description” cases in *Swafford v. State*, 1991-NMSC-043, 810 P.2d 1223. Drawing heavily on this Court’s precedent, the Supreme Court created a two-step process for resolving such claims. *See id.* ¶¶ 6-15, 25 (discussing federal precedent and adopting a test based upon it). First, a reviewing court must determine whether the conduct underlying two crimes was the same, or unitary. *Id.* ¶ 25. If it was, the court must then ask whether the legislature authorized multiple punishments. *Id.* ¶¶ 25, 30. In the absence of an express legislative authorization, a reviewing court compares the two statutes using the *Blockburger* test. *Id.* ¶ 30. If one crime is subsumed within another, the defendant cannot be punished for both. *Id.* If both crimes are distinct, the reviewing court must consider additional indicia of legislative intent. *Id.* ¶ 31. The *Swafford* Court expressly departed from this Court’s jurisprudence only in its treatment of the rule of lenity. *See id.* ¶ 34 & n.8.

To determine whether the conduct underlying two crimes was unitary, New Mexico courts apply

eight factors and a rebuttal presumption to the evidence at trial and the jury instructions. *See State v. Phillips*, 2024-NMSC-009, ¶¶ 12, 38, 548 P.3d 51 (identifying the *Herron* factors and stating that they apply in the double description analysis); *Herron v. State*, 1991-NMSC-012, ¶ 15, 805 P.2d 624 (deriving the factors). Plus, reviewing courts should ask whether one crime was completed before the other and whether the force used to commit the crimes was distinct. *See Phillips*, 2024-NMSC-009, ¶ 38. “[I]f it reasonably can be said that the conduct is unitary, then [a reviewing court] must conclude that the conduct was unitary.” *Id.* (quoting *State v. Porter*, 2020-NMSC-020, ¶ 12, 476 P.3d 1201).

To add further complexity: if the jury instructions for a crime identify alternative factual bases for conviction, courts presume that the jury relied on the factual basis that would raise a double jeopardy concern with another conviction. *See id.* ¶ 40 (explaining the *Foster* presumption). This presumption may be rebutted by “sufficient facts in the record to support distinct conduct which would defeat a double jeopardy claim.” *Id.* ¶ 41 (quotation marks omitted). The presumption is “the lens through which the Court views the *Herron* factors.” App. 11a.

In *State v. Gutierrez*, 2011-NMSC-024, ¶ 58, 258 P.3d 1024, the New Mexico Supreme Court adopted a “modified” *Blockburger* test to determine whether the legislature authorized multiple punishment. The Court claimed *Whalen*, as well as a Sixth Circuit case from 1980, “demand[ed]” such an approach. *Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. This modified test authorized courts to examine the charging documents as part of the *Blockburger* analysis when reviewing either a statute with

alternative theories of liability or one employing “vague and unspecific” language, such as “thing of value.” *Id.* ¶ 59 (quotation marks omitted). Even with this modification, courts were expected to analyze the statutes “*without examining the facts in detail.*” *Id.* ¶ 58 (quoting *Pandelli v. United States*, 635 F.2d 533, 538 (6th Cir. 1980)).

Despite this admonition, the Court quickly began doing exactly that. In *State v. Swick* and *State v. Montoya*, the New Mexico Supreme Court considered the argument and evidence at trial as part of the modified *Blockburger* analysis. See 2012-NMSC-018, ¶¶ 25-27, 279 P.3d 747 (considering argument and evidence); 2013-NMSC-020, ¶ 49, 306 P.3d 426 (“[A] complete double jeopardy analysis may require looking beyond facial statutory language to the actual legal theory in the particular case by considering such resources as the evidence. . . .”). By 2020, it was settled that state courts must consider the evidence at trial as well as the state’s closing arguments to determine whether the legislature authorized multiple punishment. *Porter*, 2020-NMSC-020, ¶ 19 (“If the state’s legal theory cannot be ascertained using the charging documents and jury instructions, we also review testimony, opening arguments, and closing arguments to establish whether the same evidence supported a defendant’s convictions under both statutes.”).

In *State v. Begaye*, the Court went one step further: when using the modified *Blockburger* test to determine whether the legislature authorized multiple punishment, “the focus in ascertaining the state’s theory in any particular case is not simply whether the elements differ, but whether the same evidence, that is, the same underlying conduct, is used

to support both charges.” 2023-NMSC-015, ¶ 28, 533 P.3d 1057.

Until recently, the Court did not consider other indicia of legislative intent if the modified *Blockburger* test suggested that one crime was contained within another: “[w]hen th[at] Court determines that one offense is subsumed within the other, the inquiry is over.” *Id.* ¶ 35 (quoting *Gutierrez*, 2011-NMSC-024, ¶ 56). *But see* App. 22a-25a (considering other canons of construction after running modified *Blockburger*).

To summarize: a New Mexico court resolving a double description challenge must first determine whether the conduct underlying two crimes was the same by applying roughly eight factors and a rebuttable presumption. If the conduct can reasonably be said to be the same, the analysis proceeds to the legislative intent step. If the legislature did not expressly authorize multiple punishments, then—even though the reviewing court has already determined that the conduct underlying two convictions was the same—the court must examine the charging documents, jury instructions, evidence, and arguments at trial to determine whether the same underlying conduct supported two convictions. Only after that analysis may a court ask if the legislature “clearly indicate[d]” a preference for multiple punishments. App. 14a-15a.

Despite this radical departure from federal law, the New Mexico Supreme Court claims to have based its test on this Court’s precedent and the Fifth Amendment. *Swafford* was a near-wholesale adoption of contemporary federal law. The Court adopted the modified *Blockburger* test in *Gutierrez* because it believed that *Whalen* “demanded” that approach. In 2020, the Court reflected that it had modified the test

“to be more in line with [the subsequent development of] United States Supreme Court precedent[.]” *Porter*, 2020-NMSC-020, ¶ 18 (quoting *Swick*, 2012-NMSC-018, ¶ 21). And in the case below, the Court “conclude[d] the current test honors the mandate of the double jeopardy clause contained within both the United States and New Mexico Constitutions—that no person shall ‘be twice put in jeopardy’ for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15.”

II. Factual Background and Procedural History

1. M.A., a recent graduate of Colorado State University, had just finished an anthropology field school in Corpus Christi, Texas. She and four of her friends decided to drive from Texas back to Colorado. They stopped in Raton, New Mexico for the night.

While M.A. was talking to her mother on the phone in the motel parking lot, Neal approached M.A. and introduced himself. He repeatedly tried to talk to her, and she eventually agreed to follow him. M.A. thought that might go somewhere like a bar or smoke marijuana. In college, she had previously gone with people whom she had just met without incident. She felt safe because she was on the phone with her mother. The area was also well lit, and the street seemed busy.

Neal lured M.A. to the abandoned Colt Motel, pulled her inside through a window, and stopped her from leaving. Once inside, he tried to initiate sex. When M.A. refused, he grabbed her cell phone, tried to break it, and started to beat her. M.A. fought back, but Neal started to choke her and forced her to the ground. She stopped resisting so that he would not kill

her. He told her: “I’m sorry I had to do that, but I really like you and it’s my birthday.” He dragged her to a mattress, performed oral sex on her, and raped her without a condom.

M.A. managed to escape because her mother, who had remained on the phone the entire time, made a noise which started Neal. He got off of M.A. and left the room through an interior door.

M.A. threw on her bra and shorts, jumped out the window, and ran to a nearby Domino’s Pizza. Although it was closed (it was now approximately 12:15 a.m.), there were still workers inside. She banged on the door and asked them to call 911. A young woman working there gave M.A. a blanket to cover herself until the police arrived.

A sexual assault nurse examiner photographed M.A.’s visible injuries. She had a black eye and “goose eggs” on her head. Her neck was red where Neal had strangled her. The examiner also found petechiae behind M.A.’s ear, which was consistent with strangulation or blunt force trauma. There were injuries on her limbs, including a large bruise and scratches on her leg. Her vaginal area was injured. Defendant’s DNA was in M.A.’s vagina, on her cervix, on her vulva, and under her fingernails. Pubic hair combing revealed a partial match for Defendant’s DNA.

A jury convicted Neal of first-degree kidnapping, second-degree CSP, aggravated battery resulting in great bodily harm, and interference with communications.

2. Neal appealed, arguing that his convictions for kidnapping, aggravated battery, and CSP were all the same offense. The state responded that the conduct

underlying the crimes was not the same and that the legislature authorized multiple punishments.

The New Mexico Court of Appeals found a double jeopardy violation for different reasons than Neal advanced, without giving the State a chance to respond. *See* App. 49a. The Court reasoned that the CSP and aggravated battery were the same offense. *Id.* at 49a-52a. It then found that the CSP was the same offense as kidnapping. *Id.* at 52a-55a. It vacated both the aggravated battery and CSP convictions because they carried shorter sentences than the kidnapping. *Id.* at 55a-56a. The Court “emphasize[d] that [its] double jeopardy holding in the present case is the result of the necessary inferences arising from the jury instructions and the [s]tate’s presentation to the jury. The same facts may have resulted in a different constellation of charges or arguments that may have supported separate crimes.” *Id.* at 56a.

The state petitioned for certiorari, asking the New Mexico Supreme Court to reconsider its approach to examining double description claims. The Court granted certiorari but declined to change its test.

The Court began by attempting to identify “the [s]tate’s theory of the case as presented at trial.” *Id.* at 12a. It started with the criminal information, but the Court apparently did not glean much from that document. *See id.* at 12a-13a. Then, it examined the jury instructions and the prosecutor’s closing argument. *See id.* at 13a-15a. In light of the trial record, it concluded that “the [s]tate presented myriad legal and factual alternatives to the jury and then, to establish each element of first-degree kidnapping, the [s]tate simply pointed to the entirety of the facts or testimony.” *Id.* at 14a-15a.

The Court concluded that the kidnapping and CSP convictions were based upon the same conduct. *Id.* at 17a-20a. Because the jury instructions allowed the jury to convict of first-degree kidnapping under two theories (that Neal either inflicted a bodily injury on M.A. or inflicted a sexual offense), the Court presumed that the jury relied on the sexual offense alternative because that would raise double jeopardy concerns. *See id.* at 17a-20a.

The Court then turned to whether the legislature authorized punishment for both CSP and kidnapping. In the absence of express legislative authorization, it examined “the elements of the offense” in light of the state’s legal theory, which in turn required an examination of the “statutory language, charging documents, and jury instructions used at trial.” *Id.* at 20a. The Court also considered the prosecutor’s closing argument and the jury instructions. *Id.* at 21a-22a.

Apparently based upon the state’s concession that the CSP charge would be subsumed within first-degree kidnapping if the jury relied as a matter of fact on the sexual offense alternative, the Court did not compare the elements of the two statutes against each other, treating CSP as a lesser-included offense of kidnapping predicated upon the infliction of a sexual offense. *See id.* at 18a-19a, 22a-26a.

The Court then examined other indicia of legislative intent, but only to see if there was anything “clearly indicat[ing] that the Legislature intended to punish CSP II and kidnapping separately when the state limits its argument to a single sexual offense.” *Id.* at 22a-23a. Concluding that the legislature’s intent on that narrow question was ambiguous, the

Court held that the Double Jeopardy Clause barred multiple punishment. *Id.* at 25a-26a.

Finally, the Court discussed how the state could have avoided a double jeopardy violation by presenting the case at trial differently. *See id.* at 27a-28a. If the state had only offered a physical injury theory of kidnapping to the jury, Neal could have been punished for both of his offenses. *See id.* at 28a. It cited other cases in which it had reprimanded prosecutors for not trying cases differently. *See id.* at 27a-28a. It blamed the result in the case not on the New Mexico Legislature's intent, or "this Court's allegedly unwieldy double jeopardy test," but instead on "the [s]tate's trial strategy." *Id.* at 28a.

The Court held that convicting Neal for both aggravated battery and kidnapping did not constitute double jeopardy. After spending ten paragraphs applying the eight-or-so unitary conduct factors, it concluded that the conduct underlying the offenses was not the same. *See id.* at 28a-38a. It did not reach the issue of legislative intent to punish. Finally, the Court rejected the [s]tate's request for a new double jeopardy test. *See id.* at 38a-40a.

REASONS FOR GRANTING THE PETITION

When resolving multiple punishment claims, some courts only examine abstract indicia of legislative intent. Others consider the allegations in the charging documents. New Mexico looks to the evidence and argument at trial in addition to the jury instructions. Because of this split, the protections of the Double Jeopardy Clause vary in different parts of the country. This Court should grant certiorari to unify how courts interpret the Fifth Amendment.

Because the decision below rested on the Fifth Amendment and a misapplication of this Court's precedent, there are no adequate and independent state grounds supporting the decision.

I. There Is an Entrenched Conflict Over How *Blockburger* Operates.

The New Mexico Supreme Court's decision worsened an existing split over how to interpret *Whalen* and *Dixon*. In the Sixth and Eighth Circuits, as well as Connecticut and Texas, courts will consider the manner in which offenses are pled in charging documents to determine which elements should be used in the *Blockburger* test. In contrast, the Second, Ninth, and Eleventh Circuits examine only the abstract elements of the statutes in question. Standing alone, New Mexico considers the charging documents, the evidence and argument at trial, as well as the jury instructions.

A. The Three Approaches. Start with jurisdictions which consider the charging document. According to the Eighth Circuit: "[A] proper analysis of a double jeopardy claim requires us to examine not only the statutory provisions at issue, but also the specific charges brought against the defendant in the indictment." *United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006), *abrogated on other grounds by United States v. O'Brien*, 560 U.S. 218, 235 (2010). Similarly, the Eleventh Circuit held (at least in the context of successive prosecutions) that "the *Blockburger* test is to be applied to the statutory elements *underlying each indictment, or count*," although it disclaimed any reliance on allegations in the indictment "that go beyond the statutory elements." *United States v. Adams*, 1 F.3d 1566, 1574

(11th Cir. 1993). The Sixth Circuit “look[s] to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.” *Pandelli*, 635 F.2d at 533.

Texas follows the “cognate-pleadings approach, which entails comparing the elements of the greater offense as pleaded to the statutory elements of the lesser offense.” *Ex Parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015). *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008) (“But in Texas, when resolving whether two crimes are the same for double-jeopardy purposes, we focus on the elements alleged in the charging instrument.”). Sweeping more broadly, the Connecticut Supreme Court looks to the “statutes, charging instruments, and bill of particulars,” but does not examine the evidence at trial. *State v. Tinsley*, 264 A.3d 560, 569 (Conn. 2021) (quoting *State v. Porter*, 182 A.3d 625, 630 (Conn. 2018)).

In contrast, the Ninth and Eleventh Circuits have expressly declined to consider the charging documents for the *Blockburger* test. *See United States v. Nash*, 115 F.3d 1431, 1437 (9th Cir. 1997) (“[W]e agree with the First Circuit that in evaluating the question we should look to the elements of the offenses alone, rather than the way they are charged in the indictment, as in *Seda*.”); *United States v. Bob*, 577 F.3d 1366, 1373 (11th Cir. 2009) (stating that this Court’s *Blockburger* precedent “requires that we look to the statutory elements, not the way the offenses are charged in the indictment.”). The First Circuit followed similar reasoning in *United States v. Fraza*, 106 F.3d 1050 (1st Cir. 1997). To determine whether knowingly making false statements to a federally

insured lending institution and bank fraud were the same offense, the Court looked to the two statutes in the abstract. *See id.* at 1053. Then, the Court rejected the defendant's argument that it had to examine the government's legal theory under *Whalen*. *See id.* at 1054.

Dixon shows why the difference in these approaches can be critically important. Justices Scalia and Kennedy concluded that the defendants there could not be prosecuted for two new crimes that they had committed. *See* 509 U.S. at 697-700. To reach that conclusion, they departed from the abstract statutory elements of the offenses. The District of Columbia criminal contempt statute provided that "[a] person who has been conditionally released ... and who has violated a condition of release shall be subject to ... prosecution for contempt of court." *Id.* at 697 (quotation marks omitted). The justices reasoned that a defendant could not violate the statute until a court had put him on conditions of release. *See id.* They therefore "incorporated" the release orders that were entered in the defendants' cases into the statutory elements of criminal contempt. *See id.* Because the release orders expressly named the new offenses, those crimes were subsumed within criminal contempt. *See id.* at 697-98, 700.

In contrast, Justices Rehnquist, O'Connor, and Thomas would have found that "none of the criminal prosecutions in th[at] case were barred under *Blockburger*." *Id.* at 713 (Rehnquist, J., concurring in part and dissenting in part). The justices reached that conclusion through an abstract analysis: "*Blockburger*'s same-elements test requires us to focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in

the ordinary sense.” *Id.* at 714. Because the “generic crime of contempt of court” had different elements from the new offenses, the crimes would all satisfy *Blockburger. Id.*

So, the difference between the abstract analysis and the charging document approach can make a real difference in determining a defendant’s criminal exposure. New Mexico’s approach, which focuses on the facts, arguments, and jury instructions presented at trial, represents an even more drastic departure from either approach.

B. New Mexico’s Approach is Wrong.

If New Mexico followed either the charging document or abstract statutory approach, its reasoning below should have looked something like this.

Begin with the elements of the crimes. In New Mexico, kidnapping is “the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent: (1) that the victim be held for ransom; (2) that the victim be held as a hostage or shield and confined against his will; (3) that the victim be held to service against the victim’s will; or (4) to inflict death, physical injury or a sexual offense on the victim.” N.M. STAT. ANN. § 30-4-1(A) (West 2003). Kidnapping is a first-degree felony, “except that [a defendant] is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.” *Id.* § 30-4-1(B).

A CSP is “the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of

the genital or anal openings of another, whether or not there is any emission.” *Id.* § 30-9-11(A) (West 2009). A CSP may constitute anything from a fourth- to a first-degree felony, depending upon how the perpetrator accomplished the penetration and the status of the victim. *See id.* § 30-9-11(C) through (G).

Under the abstract statutory approach, the State would prevail at this point in the analysis. Each crime requires an element that the other does not: kidnapping requires proof that a defendant took, transported, restrained, or confined the victim: CSP does not. CSP requires proof of a penetration; kidnapping does not.

Examining the charging document would not change this result. The state alleged that Neal committed first-degree kidnapping because he took, restrained, transported, or confined M.A. with the intent to inflict death, physical injury, or a sexual offense. It further alleged that he either did not voluntarily free M.A., inflicted a physical injury, or inflicted a sexual offense. These allegations essentially repeated all of the statutory elements with M.A.’s name added. The charging document shed some more light on the state’s theory of CSP: it alleged that Neal committed a second-degree criminal sexual penetration under § 30-9-11(E)(3) by using force or coercion resulting in personal injury to M.A.

Although consulting the charging document would help clarify which elements were at issue in Neal’s case, the two crimes would still pass the *Blockburger* test. Kidnapping again requires proof that a defendant took, transported, restrained, or confined the victim, while second-degree CSP requires proof of a penetration and that the victim suffered personal injury. True, one of the three bases for

elevating a second-degree kidnapping to a first-degree kidnapping is that the defendant inflicted a sexual offense upon the victim. But the state did not specify in its charging document that it was relying on this theory, and second-degree CSP is not “always a necessary element” of first-degree kidnapping. *See Vitale*, 447 U.S. at 419-20 (1980).

Under either approach, the *Blockburger* test would return a presumption that the legislature authorized punishment under each statute. In the absence of any other contrary indicia of legislative intent, Neal’s convictions for kidnapping and CSP would not violate the Fifth Amendment even if they truly did arise out of the same act or transaction.

The New Mexico Supreme Court’s opinion below bore no resemblance to this analysis. Its focus on the state’s theory at trial to the near-exclusion of legislative intent fundamentally conflicts with this Court’s interpretation of the Fifth Amendment.

Although state high courts may interpret their own statutes, this Court has not hesitated to step in when a state’s application of the Fifth Amendment goes too far afield. In *Hunter*, the Missouri Court of Appeals, relying on state precedent, held that convictions for armed criminal action and first-degree robbery violated the Fifth Amendment. 459 U.S. at 362-63. Although this Court deferred to the construction that Missouri courts gave to Missouri law, it was not “bound by the by the Missouri Supreme Court’s legal conclusion that these two statutes violate the Double Jeopardy Clause[.]” *Id.* at 368. This Court reached a different conclusion from the Missouri courts because it the Missouri Legislature expressly authorized multiple punishment. *Id.* at 368-69. In *Vitale*, this Court rejected the Illinois Supreme

Court’s double jeopardy reasoning. *See* 447 U.S. at 418-19. It then remanded the case back to the Illinois Supreme Court to determine whether one crime was a lesser-included offense of the other. *See id.* at 419-20.

Regardless of how they interpret *Whalen* or *Dixon*, the federal circuits agree that what happened at trial is not relevant to determining a legislature’s intent to punish. *See United States v. Singleton*, 16 F.3d 1419, 1422 (5th Cir. 1994) (“The *Blockburger* inquiry focuses on the statutory elements of the offenses, not on their application to the facts of the specific case before the court.”); *Gamboa*, 439 F.3d at 809 (“We have recognized that the *Blockburger* test focuses on the statutory elements of the offenses, rather than the evidence presented at trial.” (internal quotation marks and citation omitted)); *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005) (“The *Blockburger* test focuses on the statutory elements of each offense, not on the actual evidence presented at trial.”); *United States v. Mier-Garces*, 967 F.3d 1003, 1021 (10th Cir. 2020) (“[T]he *Blockburger* test focuses on statutory elements—not facts or evidence[.]”); *Bob*, 577 F.3d at 1372 (“Our analysis focuses on the proof necessary to establish the statutory elements of each offense, not the actual evidence presented at trial.”); *United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998) (“The application of the [*Blockburger*] test focuses on the statutory elements of the offense, not on the proof offered in a given case.”).

State high courts, or at least a healthy majority of them, agree. *See State v. Miles*, 160 A.3d 23, 30 (N.J. 2017) (“Since *Dixon*, the majority of states have similarly ruled that the *Blockburger* same-elements test sets forth the proper test for determining whether two charges are the same offense”); Alex Tsiatsos,

Double Jeopardy Law and the Separation of Powers, 109 W. Va. L. Rev. 527, 531 (2007) (“[M]ost states follow [the] Blockburger analysis for their own double jeopardy provisions.”); Wayne R. LaFave, 5 Crim. Proc. § 17.4(b) (4th ed.) (“Although most states have interpreted their constitutions and statutes to demand no more than *Blockburger’s* presumption of legislative intent based on a comparison on the abstract elements of the offense, some states continue to determine ‘same offense’ using the allegations in the charging instrument.”).

This makes sense. In the multiple punishment context, the Fifth Amendment “does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Grady*, 495 U.S. at 516, *overruled on other grounds by Dixon*, 509 U.S. at 703. Instead of putting the critical question of legislative intent front and center, New Mexico looks to the facts at trial, closing arguments, jury instructions, and charging documents. Legislative intent plays only a secondary role. So, New Mexico’s approach mistakes the key question.

The New Mexico test turns on how a prosecutor presents the case to the jury. But how an executive branch official argues a particular case sheds no light on whether the legislature authorized multiple punishments under particular criminal statutes.

New Mexico’s approach leads to inconsistent results. Sometimes, convictions for first-degree kidnapping predicated on a single sexual offense do not constitute double jeopardy. *See State v. Jackson*, 2020-NMCA-034, ¶¶ 37-41, 468 P.3d 901; *State v. Dominguez*, 2014-NMCA-064, ¶ 10, 327 P.3d 1092. Other times, including this case, it does.

This Court’s double jeopardy analysis can be effortlessly applied before trial: a reviewing court can quickly determine whether bringing a defendant to trial on multiple counts would violate the Fifth Amendment. This serves the Double Jeopardy Clause by sparing defendants from needless trials. In contrast, New Mexico courts cannot resolve a multiple punishment issue until *after* trial at the very earliest. *See Miles*, 160 A.3d at 31 (discussing the “noteworthy” advantages of the federal approach compared to New Jersey’s prior “same-evidence” test).

Moreover, if the “focus” of New Mexico’s test is “whether the same evidence, that is, the same underlying conduct, is used to support both charges,” *see Begaye*, 2023-NMSC-015, ¶ 28, then New Mexico’s two-step inquiry is redundant and internally inconsistent. To reach the question of legislative intent, a New Mexico court must have already determined that the conduct underlying the two crimes was unitary, or the same. *See Swafford*, 1991-NMSC-043, ¶ 28 (“Otherwise, if the conduct is separate and distinct, inquiry is at an end.”). Asking whether the conduct was the same twice in a row—once in the unitary conduct prong, and again in the legislative intent prong—is redundant at best. And it collapses the two-step *Swafford* test into a single question: did the State rely on any of the same evidence at trial to prove both offenses?

So New Mexico’s approach is not just inconsistent and overly complex: it misses the point almost entirely. Prosecutors and defendants deserve to know before trial whether two charges will constitute double jeopardy. And New Mexico courts must follow the intent of the New Mexico Legislature. A post-hoc analysis that turns on how a prosecutor

presents a case does not further the interests the Double Jeopardy Clause protects.

II. This Case is a Good Vehicle.

Below, the parties expressly crossed swords over whether New Mexico should keep its unique analysis or whether it should follow the federal test. The New Mexico Supreme Court decided to adhere to its misguided approach. *See* Appx. at 24a-25a. So, New Mexico courts will follow that approach until told otherwise. The conflict between New Mexico’s interpretation and how the rest of the country reads the Fifth Amendment is clear and firmly entrenched. This case is a clean vehicle for this Court to once and for all determine what the *Blockburger* test considers.

State high courts have the final say over what state law means, so this Court will not review a decision that rests on “adequate and independent state grounds[.]” *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). “A state ground of decision is independent only when it does not depend on a federal holding and also is not intertwined with questions of federal law.” *Glossip v. Oklahoma*, 604 U.S. 226, 242-43 (2025) (citations omitted). This Court will “find that [it] ha[s] jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground.” *Long*, 463 U.S. at 1044.

The decision below was based on a misinterpretation of federal law. For one, it did not contain a “plain statement” that it rested on state law grounds. Instead, the New Mexico Supreme Court expressly cited the Fifth Amendment. Although New Mexico has developed its own approach to double jeopardy claims, its doctrine rests on a misreading of

federal cases. The New Mexico Supreme Court adopted its modified *Blockburger* analysis in 2011 because it believed that *Whalen* and a Sixth Circuit case required that approach. *See Gutierrez*, 2011-NMSC-024, ¶ 58. The Court modified its older double jeopardy approach “to be more in line with [the subsequent development of] United States Supreme Court precedent[.]” *Porter*, 2020-NMSC-020, ¶ 18. The “most reasonable explanation” of the result below is that the New Mexico Supreme Court “decided the case the way it did because it believed that federal law required it to do so.” *Long*, 463 U.S. at 1032-33.

True, the New Mexico Supreme Court also cited the New Mexico Constitution’s analogue to the Double Jeopardy Clause. But although New Mexico has interpreted its state analogue to provide greater protections in other contexts, it has not done so in the multiple punishment sphere. *See State v. Breit*, 1996-NMSC-067, ¶ 32, 930 P.2d 792 (adopting a “narrow expansion of the federal standard” for determining when a second trial is barred after governmental misconduct causes a mistrial); *State v. Nunez*, 2000-NMSC-013, ¶¶ 16-18, 2 P.3d 264 (prohibiting separate criminal and civil forfeiture actions); *State v. Lynch*, 2003-NMSC-020, ¶¶ 4-6, 74 P.3d 73 (barring a second trial on a greater offense than the one for which the defendant was initially convicted). The state made this point below. Instead of quarreling with that proposition, the Court cited the New Mexico Constitution and the Fifth Amendment in the same breath. So this case did not rest on an independent state constitutional grounds.

Although state high courts may interpret their own statutes, this Court has not hesitated to step in when a state’s application of the Fifth Amendment

goes too far afield. In *Hunter*, the Missouri Court of Appeals, relying on state precedent, held that convictions for armed criminal action and first-degree robbery violated the Fifth Amendment. 459 U.S. at 362-63. Although this Court deferred to the construction that Missouri courts gave to Missouri law, it was not “bound by the by the Missouri Supreme Court’s legal conclusion that these two statutes violate the Double Jeopardy Clause[.]” *Id.* at 368. This Court reached a different conclusion from the Missouri courts because the Missouri Legislature expressly authorized multiple punishment. *Id.* at 368-69. In *Vitale*, this Court rejected the Illinois Supreme Court’s double jeopardy reasoning. *See* 447 U.S. at 418-19. It then remanded the case back to the Illinois Supreme Court to determine whether one crime was a lesser-included offense of the other. *See id.* at 419-20. Moreover, this case is about the process courts must follow to address double jeopardy challenges. It will not require this Court to displace the New Mexico Supreme Court’s interpretation of state statutes.

New Mexico’s approach is clearly wrong. But to identify the right approach, this Court must answer the question left open by *Dixon*: what, if anything, should a court consider beyond the abstract statutory elements of the crimes in question? So, this case is an ideal vehicle to determine how the *Blockburger* test works.

CONCLUSION

The protections of the Fifth Amendment should not vary by circuit or by state. Today, the Double Jeopardy Clause means something very different in New Mexico than it does in other states. The New Mexico Supreme Court has refused to bring its

analysis in line with this Court's jurisprudence. This Court should grant a writ of certiorari to restore harmony to the Double Jeopardy Clause.

Respectfully submitted,

RAÚL TORREZ

Attorney General

ALETHEIA V.P. ALLEN

Solicitor General

VAN SNOW

Dep. Solicitor General

Counsel of Record

New Mexico Department
of Justice

201 Third Street NW

Suite 300

Albuquerque, NM 87102

aallen@nmdoj.gov

505-717-3500

July 6, 2026

Counsel for Petitioner

APPENDIX

Table of Contents

	Page
Appendix A	
Opinion of the Supreme Court of the State of New Mexico (April 6, 2026)	1a
Appendix B	
Opinion of the Court of Appeals of the State of New Mexico (April 24, 2024)	42a
Appendix C	
Judgment and Sentence of the New Mexico District Court, Eighth Judicial District (Sept. 21, 2021)	64a
Appendix D	
Provisions involved: N.M. STAT. ANN. §§ 30-4-1, 30-9-11; U.S. CONST. amend V	71a

APPENDIX A

Supreme Court of New Mexico

STATE of New Mexico, Plaintiff-Petitioner,

v.

Samuel NEAL, Defendant-Respondent.

NO. S-1-SC-40407

|

Filing Date: April 6, 2026

ORIGINAL PROCEEDING ON CERTIORARI,

Melissa A. Kennelly, District Judge

Attorneys and Law Firms

Raúl Torrez, Attorney General, Van Snow,
Deputy Solicitor General, Santa Fe, NM for
Petitioner

Bennett J. Baur, Chief Public Defender,
Kimberly Chavez Cook, Appellate Defender,
Joelle N. Gonzales, Assistant Appellate
Defender, Santa Fe, NM for Respondent

OPINION

VARGAS, Justice

{1} Prosecutors are called upon to make myriad strategic decisions when planning the prosecution of a criminal defendant. Among these decisions are determinations of the

charges to bring and the legal theories on which those charges are based. This case demonstrates the tension felt by prosecutors between the desire to ensure a conviction on the most serious charge and the objective of securing convictions on multiple lesser charges without violating double jeopardy. Here, the State chose to present the jury with multiple factual and legal alternatives to support a general verdict of guilt on the most serious charge, apparently prioritizing that conviction over multiple valid convictions using discreet theories for each offense. While the State is entitled to elect such a trial strategy, that choice may, as in this case, implicate double jeopardy. At trial, the State obtained convictions in Defendant Samuel Neal's case on first-degree kidnapping, second-degree criminal sexual penetration (CSP II), and aggravated battery.

{2} The State asserts that the Court of Appeals erred in vacating two of Defendant's three convictions on double jeopardy grounds. We affirm the Court of Appeals' conclusion that double jeopardy bars Defendant's conviction for CSP II because the State effectively presented CSP II as the base sexual offense to elevate kidnapping from second- to first-degree kidnapping. The State did not present the jury with any other sexual offenses that would support more than one conviction, and thus the conviction for the base offense must be vacated. As for aggravated battery, the Court of Appeals erred in vacating Defendant's conviction

without analyzing whether it conflicted with kidnapping—the lone remaining conviction after CSP II was vacated. Conducting that analysis here, we conclude that Defendant's convictions for kidnapping and aggravated battery do not violate double jeopardy because the jury could have reasonably inferred independent factual bases for each offense. Finally, the State invites this Court to abandon its double jeopardy approach, asserting that it is so unworkable that it has become intolerable. We disagree and decline to take the drastic step of overruling decades of our own precedent when—as illustrated below—the State might have obtained multiple convictions under our current approach without violating double jeopardy had it pled and tried the case differently.

I. BACKGROUND

A. Facts

{3} On June 30, 2019, Michelle Anderson (Victim) arrived in Raton, New Mexico. Victim was traveling home to Colorado from Texas where she recently finished her college field studies. Victim and a college classmate stopped at a hotel for the night. After checking in to the hotel, Victim spoke on the phone with her mother outside the hotel, walking back and forth along the street and sidewalk.

{4} During the phone call, Defendant approached Victim and asked her to “hang out.” She declined multiple times. To get Defendant to leave her alone, she told Defendant she

would come find him after her phone call. Sometime later, Defendant again approached Victim and she agreed to follow him. Defendant led her to an abandoned motel, climbed through a window, and eventually convinced her to follow. After Victim placed one foot on the windowsill, Defendant grabbed Victim “in a bear hug” and pulled her through the window. Defendant assaulted and strangled Victim. Eventually, unable to breathe, Victim stopped struggling out of fear she was going to die. Defendant moved Victim to a mattress and sexually assaulted her, resulting in injuries to her vaginal area. These facts are largely undisputed. Additional facts are included as necessary to examine whether Defendant's double jeopardy rights were violated at his subsequent trial and sentencing.

B. Procedural History

{5} Defendant was charged and ultimately convicted, in relevant part, of first-degree kidnapping, contrary to NMSA 1978, § 30-4-1 (2003); CSP II, contrary to NMSA 1978, § 30-9-11(E)(3) (2009); and aggravated battery, contrary to NMSA 1978, § 30-3-5(A), (C) (1969). He received a sentence of approximately thirty years—eighteen years for kidnapping, nine years for CSP II, and three years for aggravated battery. Of particular relevance here, Defendant was convicted of first-degree kidnapping under a general verdict, based on a jury instruction that allowed a conviction under multiple legal alternatives. Defendant appealed, and the Court of Appeals, relying on

a novel analytical approach that we address in detail below, vacated his CSP II and aggravated battery convictions on double jeopardy grounds in a memorandum opinion. *See State v. Neal*, A-1-CA-40205, mem. op. ¶¶ 8, 26, 2024 WL 1787765 (N.M. Ct. App. Apr. 24, 2024) (nonprecedential).

{6} We granted the State's cross-petition for certiorari,¹ which raised two questions: (1) “Whether the Court of Appeals violated precedent by vacating a conviction without a double jeopardy violation and applying the wrong standard for judging unitary conduct,” and (2) “Whether this Court should reconsider its approach to examining double description claims.”

II. DISCUSSION

{7} As a threshold matter, we agree with the State that the Court of Appeals erred by vacating both of Defendant's lesser convictions due to its novel and ultimately flawed analysis. We next consider whether our current approach to double jeopardy is unworkable under the facts of this case and conclude by examining whether this Court should abandon or modify its approach to double jeopardy.

A. Double Jeopardy

¹ Defendant petitioned for certiorari, which this Court denied. Order, *State v. Neal*, S-1-SC-40205 (N.M. May 22, 2024).

1. Court of Appeals' flawed analysis

{8} Before the Court of Appeals, Defendant argued that his kidnapping conviction subsumed his convictions of CSP II and aggravated battery under double jeopardy principles. *Neal*, A-1-CA-40205, mem. op. ¶ 8, 2024 WL 1787765. The Court of Appeals ultimately vacated Defendant's CSP II and aggravated battery convictions. *Id.* ¶ 26. It did so, however, via a novel analytical approach that neither party argued. Rather than examining whether kidnapping—as the conviction with the longest sentence—resulted in a double jeopardy violation as to either or both of the crimes with shorter sentences, the Court of Appeals instead concluded first that the CSP II conviction subsumed the *aggravated battery* conviction. *Id.* ¶ 12. It then separately concluded that the kidnapping conviction subsumed the CSP II conviction. *Id.* ¶ 15. The State rightly asserts that the Court of Appeals ultimately vacated Defendant's aggravated battery conviction without ever analyzing or considering whether it violated double jeopardy as compared with kidnapping, the only charge that was not vacated.

{9} The State's assertion of error on this point is primarily structural rather than focused on the factual analysis contained within the Court of Appeals' memorandum opinion. The State contends that, when the Court of Appeals vacated the CSP II conviction, it should have “reinstated the aggravated battery conviction, because there would no longer be a conflicting

CSP [II] conviction.” This argument is overly simplistic. However, we agree that the Court of Appeals vacated Defendant's aggravated battery conviction “without analyzing whether the battery was the same as the kidnapping,” the only charge that was not vacated. And, as the State recognizes, it had no opportunity to argue under, or respond to, the approach employed by the Court of Appeals as it was not argued by either party. Defendant does little to defend the structure of the Court of Appeals’ analysis, instead primarily asserting that the result would be the same if the Court of Appeals *had* analyzed whether kidnapping subsumed aggravated battery. In support of this argument, Defendant refers this Court to his papers filed before the Court of Appeals, where he argued that kidnapping subsumed aggravated battery. In effect, Defendant suggests that the Court of Appeals would have vacated his aggravated battery conviction *if it had* analyzed whether kidnapping subsumed aggravated battery.

{10} On this structural point, we agree with the State. Where an appellate court is confronted with the argument that a greater crime requires the vacatur of more than one lesser conviction, it must compare each lesser crime against the most severe conviction, as that is the offense that will not be vacated on double jeopardy grounds. *See State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426 (explaining that the conviction with the longest sentence stands when there is a double jeopardy violation).

Because the offense with the longest sentence will always remain, appellate courts compare it with each lesser crime that might be subsumed by the conviction with the longest sentence, rather than comparing the lesser crimes against each other, as the Court of Appeals did here. *See, e.g., State v. Sena*, 2020-NMSC-011, ¶ 56, 470 P.3d 227 (comparing the most severe conviction (criminal sexual penetration) with aggravated burglary and then with criminal sexual contact); *State v. Foster*, 1999-NMSC-007, ¶¶ 30, 37, 126 N.M. 646, 974 P.2d 140 (comparing felony murder first with the lesser conviction of aggravated kidnapping before proceeding to consider felony murder and armed robbery), *abrogated on other grounds by, Kersey v. Hatch*, 2010-NMSC-020, ¶¶ 9, 17, 148 N.M. 381, 237 P.3d 683; *State v. Serrato*, 2021-NMCA-027, ¶¶ 13, 21, 493 P.3d 383 (examining kidnapping and enticement of a child before proceeding to examine kidnapping and Criminal Sexual Contact of a Minor); *State v. Reed*, 2022-NMCA-025, ¶¶ 19, 23, 28, 510 P.3d 1261 (applying the same structure).

{11} The Court of Appeals did not cite any authority to support its approach, and it vacated Defendant's aggravated battery conviction without explicitly considering whether aggravated battery was subsumed by the kidnapping conviction. As a result, we agree with the State that the Court of Appeals' analysis is flawed because the Court of Appeals vacated a conviction without addressing whether that conviction violated double

jeopardy by conflicting with the sole remaining conviction. Indeed, double jeopardy only prevents a defendant from being “twice put in jeopardy” for the same offense, and a defendant is not twice put in jeopardy if the conviction (here, aggravated battery) only conflicts with a vacated offense. U.S. Const. amend. V; N.M. Const. art. II, § 15.

{12} Finally, even though the Court of Appeals did not assess whether kidnapping subsumed aggravated battery, we clarify that it likewise would have been improper for the Court of Appeals to automatically “reinstate[] the aggravated battery conviction” after vacating the CSP II conviction, as the State argues. Rather, the Court of Appeals should have proceeded to consider whether aggravated battery conflicted with the sole remaining charge—kidnapping. And, because double jeopardy is a question of law that is squarely before this Court, we proceed with a complete double jeopardy analysis.

2. Proper double-description analysis

{13} The State argues that the Court of Appeals erred by vacating Defendant's CSP II and aggravated battery charges. Double jeopardy “is a constitutional question of law” subject to de novo review. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747. “Among its protections, the double jeopardy clause protects a defendant against multiple punishments for the same offense.” *State v. Gonzales*, 2007-NMSC-059, ¶¶ 10-11, 143 N.M. 25, 172 P.3d 162. Where, as

here, a “defendant is charged with violation of multiple statutes for the same conduct” in what are referred to as double-description cases, we “must determine whether the [L]egislature intended to authorize multiple punishments for the same offense.” *Id.* ¶ 11. The Court applies a two-step test in double-description cases to determine whether a defendant's rights were violated. *Sena*, 2020-NMSC-011, ¶ 45, 470 P.3d 227.

{14} The first step asks “whether the *conduct* underlying the offenses is unitary, i.e., whether the same conduct violates multiple statutes.” *Id.* (emphasis added) (brackets, internal quotation marks, and citation omitted). We set out the factors to determine whether an act is unitary or distinct in *Herron v. State*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624.

{15} When, as here, a jury returns a guilty verdict based on a jury instruction with alternative bases for conviction, this Court applies the “*Foster* presumption” to determine whether the conduct is unitary with the conduct underlying the other offense. *See Sena*, 2020-NMSC-011, ¶ 54, 470 P.3d 227. Because a jury is “ ‘not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law,’ ” the *Foster* presumption provides “ ‘that a conviction under a general verdict requires reversal if the jury is instructed on an alternative basis for the conviction that would result in double jeopardy, and the record does not disclose whether the

jury relied on this legally inadequate alternative.’ ” *Kersey*, 2010-NMSC-020, ¶ 12, 148 N.M. 381, 237 P.3d 683 (quoting *Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140). The genesis of the *Foster* presumption is derived from *State v. Olguin*, where we recognized that “a conviction under a general verdict must be reversed if one of the alternative bases of conviction is *legally inadequate*,” but that United States Supreme Court precedent “does not require a guilty verdict to be set aside if an alternative basis of conviction is only *factually inadequate* to support a conviction.” 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731 (emphasis added); see *Foster*, 1999-NMSC-007, ¶¶ 27-28, 126 N.M. 646, 974 P.2d 140 (relying on this principle in *Olguin* to establish the *Foster* presumption in the double jeopardy context).

{16} In other words, if the *Herron* factors are the tools used to discern whether the conduct itself is unitary, the *Foster* presumption is the lens through which the Court views the *Herron* factors. See *State v. Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51 (explaining that the Court applies the “*Herron* factors in the double description analysis to determine whether a defendant's acts are unitary or distinct”). The *Foster* presumption provides guidance in discerning which legal theories to compare when the state relies on a general verdict with general jury instructions without presenting a clear legal theory for the conviction by general verdict. If the relevant conduct is unitary, we

“proceed to the second part, which focuses on the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses.” *Sena*, 2020-NMSC-011, ¶ 45, 470 P.3d 227 (internal quotation marks and citation omitted).

3. The State's theory is ascertained through its charging documents, jury instructions, and closing argument

{17} To determine whether Defendant's double jeopardy rights were violated, we must understand the State's theory of the case as presented at trial. *See State v. Porter*, 2020-NMSC-020, ¶ 19, 476 P.3d 1201 (explaining that the Court will examine the charging documents and jury instructions and, if necessary, opening and closing arguments to ascertain what the state's theory is). Here, the Criminal Information charged Defendant with first-degree kidnapping, CSP II, and aggravated battery. New Mexico's kidnapping statute provides the state with a number of alternative bases if it wishes to elevate the kidnapping charge from a second-degree felony to a first-degree felony. *See* § 30-4-1(B). The alternatives generally contemplate whether a victim was voluntarily freed in a safe place, whether the victim was physically injured, or whether a “sexual offense” was inflicted upon the victim. *Id.* The State's Criminal Information listed all three theories in the alternative, without specifying which theory it intended to pursue to support first-degree kidnapping: “[D]efendant did not voluntarily

free [Victim] in a safe place *or* [D]efendant inflicted physical injury *or* a sexual offense.” At trial, the State's kidnapping jury instructions similarly provided two of these alternatives for the jury to convict:

1. [Defendant] took, restrained or confined [Victim] by force by pulling her into the motel room or pulling her away from the window and choking her or holding her down on the mattress;
2. [Defendant] intended to inflict physical injury *or* a sexual offense on [Victim];
3. The restraint or confinement of [Victim] was not slight, inconsequential, or merely incidental to the commission of another crime;
4. [Defendant] inflicted physical injury upon [Victim] *or* the [D]efendant inflicted a sexual offense upon [Victim] during the course of the kidnapping;
5. This happened in New Mexico on or about the 1st day of July, 2019.

(Emphasis added.) The State's theory of kidnapping as presented to the jury through its closing was likewise open to multiple interpretations:

[T]he first element is that [Defendant] took, restrained or confined our Victim ... by pulling her into the motel room, which you heard happened, pulling her away from the window, which you heard happened, choking her or holding her down on the mattress, which you heard that happened.

Number two, that [Defendant] had intended to inflict physical injury or a sexual offense on [Victim]. You heard her testify, that's exactly what happened.

Number three, that the restraint or confinement of our Victim, ... it wasn't slight, inconsequential or merely incidental to the commission of another crime.

And four, that [Defendant] inflicted physical injury upon [Victim] *or* [Defendant] inflicted a sexual offense upon [Victim] during the course of the kidnapping. You heard her testimony, and you saw the DNA results, no question.

Put simply, the State presented myriad legal and factual alternatives to the jury and then, to establish each element of first-degree

kidnapping, the State simply pointed to the entirety of the facts or testimony.

{18} Moving to CSP II, the jury instructions provided:

1. [Defendant] caused [Victim] to engage in sexual intercourse;
2. [Defendant] caused the insertion of a penis into the vagina of [Victim] through the use of physical force or physical violence;
3. [Defendant's] acts resulted in bruising in the leg area, of the eye, and of the throat of [Victim];
4. This happened in New Mexico on or about the 1st day of July, 2019.

In closing, the State argued:

This is the criminal sexual penetration, and for these, the ... elements are that the Defendant caused [Victim] to engage in sexual intercourse. You've heard testimony, and we have the DNA. Defendant caused the insertion of a penis into the vagina of [Victim] for the use of physical force or physical violence. We saw the bruising, the marks, the strangulation, the black eye. The Defendant's act resulted in

bruising in the leg area, of the eye
and the throat of [Victim].

Finally, the aggravated battery instruction
provided:

1. [Defendant] touched or
applied force to [Victim] by
striking her with his fists and
strangling her;
2. [Defendant] intended to injure
[Victim];
3. [Defendant] acted in a way
that would likely result in death
or great bodily harm to [Victim];
4. This happened in New Mexico
on or about the 1st day of July,
2019.

In closing, the State provided the following with
respect to aggravated battery:

[T]he ... elements here were that
the [D]efendant ... applied force
to [Victim] by striking her with
his fist and strangling her. The
[D]efendant intended to injure
[Victim]. The [D]efendant acted
in a way that would likely result
in death or great bodily harm to
[Victim].

Having outlined the State's presentation at
trial, we proceed to consider whether
Defendant's double jeopardy rights were

violated when he was convicted of first-degree kidnapping and CSP II.

4. First-degree kidnapping and CSP II

a. Unitary conduct

{19} With respect to whether Defendant's conviction of first-degree kidnapping subsumes his conviction of CSP II, the Court of Appeals' analysis is sound. To start, we agree that the conduct supporting the two offenses was unitary. *See Neal*, A-1-CA-40205, mem. op. ¶¶ 13-14, 2024 WL 1787765. The jury in this case was presented with two alternative bases for convicting Defendant of kidnapping. The jury instructions required the jury to conclude *either* that Defendant intended to and did inflict a physical injury *or* a sexual offense during the kidnapping. Because the jury returned a guilty verdict that contains alternative legal bases for conviction, we apply the *Foster* presumption to determine whether the conduct was unitary with another offense. *See Sena*, 2020-NMSC-011, ¶ 54, 470 P.3d 227. If *either* alternative basis is legally inadequate, we must reverse. *See Kersey*, 2010-NMSC-020, ¶ 12, 148 N.M. 381, 237 P.3d 683; *Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140.

{20} In this case, the kidnapping sexual offense alternative and CSP II were necessarily based on the same conduct, rendering the latter conviction legally inadequate. The plain language of the kidnapping statute requires the infliction of a “sexual *offense*” for a first-degree felony, *see* § 30-4-1(A)(4) (emphasis added), and

the Legislature has created an entire article statutorily identifying sexual offenses. *See* NMSA 1978, §§ 30-9-1 to -21 (1963, as amended through 2019); *see also State v. Autrey*, A-1-CA-38116, mem. op. ¶¶ 10, 14, 2022 WL 1092814 (N.M. Ct. App. Apr. 12, 2022) (nonprecedential) (identifying cases recognizing that a separate sexual *offense* is required if the state wishes to pursue first-degree kidnapping on a theory of sexual offense). As the Court of Appeals recognized, “CSP II was the only sexual offense defined for the jury and the jury's view of the legal term ‘sexual offense’ would necessarily have been limited to the same force and penetration that was defined by the CSP II instruction given by the district court.” *Neal*, A-1-CA-40205, mem. op. ¶ 13, 2024 WL 1787765.

{21} The State does little to contest whether CSP II is subsumed under a sexual offense theory of kidnapping, instead arguing there would be no violation if the Court adopted a new test for determining whether a double jeopardy violation occurred.² Indeed, on the

² The State further asserts that the Court of Appeals erred in failing to apply the *Herron* factors. We disagree. First, the Court of Appeals did not apply the *Herron* factors in the kidnapping and CSP II analysis because it concluded that the State presented no other sexual offense; that is, the Court of Appeals did not have two offenses to compare under *Herron*. And although, as addressed below, the Court of Appeals did not need to compare the lesser charges (CSP II and aggravated battery) against each other, it did analyze “indicia of distinctness” for these two crimes. *Neal*, A-1-CA-40205,

unitary conduct prong of our double jeopardy analysis, the State agreed at oral argument that the elements of CSP II would be subsumed by kidnapping if the jury relied on a sexual offense, which was one of the two kidnapping theories the State presented to the jury. And the State does not identify a sexual offense distinct from the CSP II that would independently support kidnapping under a theory of sexual offense.³ Put plainly, under the State's theory, CSP II is the only sexual offense in this case that supports kidnapping in the first-degree. *See State v. Simmons*, 2018-NMCA-015, ¶ 26, 409 P.3d 1030 (“In specifically analyzing whether the conduct underlying kidnapping and CSP II-felony convictions is unitary, ... unitary conduct occurs when the prosecution bases its theory of kidnapping on the same force used to commit

mem. op. ¶ 9. It was not error for the Court of Appeals to examine indicia of distinctness without identifying the *Herron* factors by name; indeed, we applied the same approach in *Sena*, 2020-NMSC-011, ¶¶ 46, 50 (examining indicia of distinctness without mentioning the *Herron* factors by name).

³ On this point, we note that the record does contain other evidence of sexual conduct, but we are unable to consider this conduct as a separate basis to support a distinct sexual offense as the State never relied on it to charge a sexual offense. There is no way to discern whether the jury would have convicted on such a basis, and the parties do not present such an argument here. *See State v. Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156 (explaining that the state is bound by its theory presented below).

CSP II-felony even though there were alternative ways to charge the crime.” (brackets, internal quotation marks, and citation omitted)). As a result, the conduct was unitary.

b. Legislative intent

{22} When conduct is unitary, we proceed to examine “the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses.” *State v. Begaye*, 2023-NMSC-015, ¶ 13, 533 P.3d 1057 (internal quotation marks and citation omitted). The first step is always whether the statute itself authorizes multiple punishments; here, the kidnapping statute contains no such express authorization. *Id.* ¶ 21; § 30-4-1. As previously outlined, both the kidnapping statute and the jury instructions provide multiple legal alternatives. Under such a circumstance, we apply the modified *Blockburger* test to discern legislative intent. *Begaye*, 2023-NMSC-015, ¶ 22, 533 P.3d 1057 (discussing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). “The modified *Blockburger* analysis demands that we compare the elements of the offense, looking at the [s]tate's legal theory of how the statutes were violated. To ascertain the state's legal theory, this Court review[s] the statutory language, charging documents, and jury instructions used at trial.” *Id.* ¶ 24 (internal quotation marks and citations omitted).

{23} The State's closing arguments, like the jury instructions, do not illuminate whether the State pursued a kidnapping conviction under a theory of physical injury *or* a sexual offense; nor do they clarify the factual alternatives contained within the instructions. *Id.* ¶ 24 (explaining that we will examine, in relevant part, closing arguments “to establish whether the same evidence supported a defendant's convictions under both statutes” when “the state's legal theory cannot be ascertained using the charging documents and jury instructions” (internal quotation marks and citation omitted)). For example, with respect to the second element (addressing intent to commit) and the fourth element (addressing actual infliction of a physical injury or sexual offense), the State asserted in closing:

Number two, that [Defendant] had intended to inflict physical injury *or* a sexual offense on [Victim]. You heard her testify, that's exactly what happened.

....

And four, that [Defendant] inflicted physical injury upon [Victim] *or* [Defendant] inflicted a sexual offense upon [Victim] during the course of the kidnapping. You heard her testimony, and you saw the DNA results, no question.

Put simply, even after examining closing arguments, the State's theory did not specify whether it sought a kidnapping conviction based on physical injury or on a sexual offense; instead, the State provided the jury with both options.

{24} Remaining canons of construction likewise do not clearly indicate that the Legislature intended to punish CSP II and kidnapping separately when the state limits its argument to a single sexual offense. See *Montoya*, 2013-NMSC-020, ¶ 32, 306 P.3d 426 (identifying other “traditional means of determining legislative intent: the language, history, and subject of the statutes,” including “identify[ing] the particular evil sought to be addressed by each offense” (internal quotation marks and citation omitted)). For example, to the extent any intent can be gleaned from the language, structure, and quantum of punishment, the Legislature seems to have established a relatively low bar to elevate kidnapping from a second- to a first-degree felony. The state merely has to prove *any* physical injury, or *any* sexual offense. Although the State charged and relied upon a very serious sexual offense in this case (CSP II) to prove first-degree kidnapping, in another case the state could rely upon criminal sexual contact, which is a much easier crime to prove. Defendant acknowledges as much, noting that the State's ability to combine a low-level sexual offense to elevate kidnapping from a nine-year sentence to “18 years of *mandatory* imprisonment” suggests that the

Legislature intended for the sexual offense to serve essentially as a base offense rather than an independent crime in cases where only one sexual offense is presented. The same could be said of the physical injury, where the quantum of punishment for second-degree kidnapping and physical injury (if charged as a separate offense such as simple battery) would be significantly less than eighteen years of mandatory imprisonment.

{25} With respect to the particular evil sought to be addressed by each offense, the State relies upon *State v. McGuire*, 1990-NMSC-067, ¶ 14, 110 N.M. 304, 795 P.2d 996, which provides that “criminal sexual penetration statutes and kidnapping statutes protect different social norms.” *McGuire*, however, operated under a previous version of the kidnapping statute, which did not require that the state prove a sexual offense, instead requiring the infliction of “great bodily harm.” See NMSA 1978, § 30-4-1(B) (1973, amended 2003); 1973 N.M. Laws, ch. 109, § 1. As a result, we cannot clearly discern that the social evils post-statutory amendment remain different in a case, as here, where the State presented first-degree kidnapping (under one alternative) on the basis of a sexual offense. That is, under the circumstances of this case, the Legislature specifically *incorporated* a sexual offense within the structure of the kidnapping statute, which allows for the additional punishment for the social evil of a sexual offense as part of the kidnapping conviction. Indeed, the finding of a

sexual offense is what doubles the quantum of punishment for kidnapping from nine years to eighteen. See § 30-4-1(B) (providing the distinction between first- and second-degree kidnapping); NMSA 1978, § 31-18-15(A) (stating that the basic sentence for a first-degree felony is eighteen years, whereas the basic sentence for a second-degree felony is nine years).

{26} The State suggests the Legislature approved of multiple punishments for kidnapping and the underlying sexual offense because, in amending the kidnapping statute, it intended to increase penalties for sex offenders, not decrease them. This is faulty reasoning. Even if the Legislature did intend to increase penalties for sex offenders, such a conclusion does not necessarily support that it specifically intended to authorize multiple punishments, and it certainly did not include any express language to that effect. The Legislature amended the language of the kidnapping statute so that the state no longer had to establish great bodily harm to obtain a first-degree kidnapping conviction. *Compare* § 30-4-1(B) (1973), *with* § 30-4-1(B) (2003). In that way, for kidnapping cases involving sexual offenses, the Legislature made it easier to obtain a first-degree conviction because the state did not need to prove a sexual offense that resulted in great bodily harm—an onerous standard that would not capture many sexual offenses. By amending the statute, the Legislature allowed the state to obtain first-

degree kidnapping convictions in cases where sexual offenses occurred, but there was no evidence of great bodily harm. This reading satisfies any apparent legislative intent to increase penalties for sex offenders *without* authorizing multiple punishments.

{27} The State separately suggests this analysis would result in absurdity because it would necessarily “make it impossible for a defendant to be convicted of both first-degree kidnapping and a sexual offense.” This argument misunderstands the Court's precedent. A conviction for both crimes is viable when the state is able to prove first-degree kidnapping under a theory of physical violence and CSP II as a separate sexual offense; or, when the evidence supports two sexual offenses and the state presents a theory that clearly uses one sexual offense as the predicate for first-degree kidnapping, and the other as a standalone offense of CSP II (or other sexual offense). Indeed, as explained below, the facts of this case, if charged more precisely, might have supported both convictions.

{28} In sum, even after examining all of the canons of construction to support multiple punishments in this case, ambiguity remains. Such ambiguity implicates the rule of lenity and supports a double jeopardy violation in this case. *Montoya*, 2013-NMSC-020, ¶ 51, 306 P.3d 426. As in *Montoya*, however, the ambiguity that results is simply a consequence of the State's charging decisions. *Id.* ¶ 52 (applying

the rule of lenity in part because the state chose “to impose double punishment for the killing of a single victim”). To illustrate, we offer one theory the State could have pursued to avoid double jeopardy. The State could have tried the kidnapping under a physical injury theory without providing a sexual assault alternative to the jury. Victim was brutally battered; she had a black eye and goose eggs on her head. She had neck injuries from the strangulation. These physical injuries occurred separate and apart from the sexual offense and were more than sufficient for a jury to convict Defendant of kidnapping in the first degree. If the State had pursued kidnapping under a theory of physical injury, it could have pursued CSP II as a standalone sexual offense.⁴ The Court of Appeals recognized this, stating that the kidnapping “physical injury alternative by itself does not create a double jeopardy problem” with respect to CSP II. *Neal*, A-1-CA-40205, mem. op. ¶ 13, 2024 WL 1787765.

⁴ If the State wished to obtain a conviction on aggravated battery as well, it could have presented that theory to the jury. But, the State would have had to clearly indicate which physical injuries it was relying on for kidnapping, and which it was independently relying on for aggravated battery. The State could have done so in the charging instruments, jury instructions, or closing argument.

See *Porter*, 2020-NMSC-020, ¶ 19 (explaining that we examine charging documents and jury instructions and, if necessary, opening and closing arguments to discern the state’s theory).

{29} There were undoubtedly other ways to avoid a double jeopardy violation in this case. Indeed, we have repeatedly offered guidance about how the state might try a case in a manner that does not implicate double jeopardy. *See State v. Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156 (“We note that, had the [s]tate opted for a different presentation at trial, it is possible that the jury could have decided that different uses of force satisfied the elements of each crime. For example ...”). *Lorenzo* was not the first time we have done so. *See, e.g., Porter*, 2020-NMSC-020, ¶ 14, 476 P.3d 1201 (explaining that one crime may have been considered completed before the other began if the state had prosecuted the case differently). The Court of Appeals expressed the same sentiment in this case and elsewhere. *Neal*, A-1-CA-40205, mem. op. ¶¶ 13-15, 17, 2024 WL 1787765 (“We emphasize that our double jeopardy holding in the present case is the result of the necessary inferences arising from the jury instructions and the State's presentation to the jury. The same facts may have resulted in a different constellation of charges or arguments that may have supported separate crimes.”); *State v. Dent*, A-1-CA-40313, mem. op. ¶¶ 23, 28, 2024 WL 4249933 (N.M. Ct. App. Sept. 19, 2024) (nonprecedential), *cert. denied*, 2024-NMCERT-011, 559 P.3d 1282 (S-1-SC-40619, Nov. 14, 2024) (explaining that vacating the defendant's CSP II conviction “is required given the [s]tate's election to pursue the kidnapping

charge on alternative theories,” when only presenting “one sexual offense” to the jury). Alternatively, the State could have utilized a special verdict form to affirmatively establish the theory the jury selected.

{30} It is not lost on us that trials are no simple endeavor and that abstract theorizing is unhelpful for the State's case on appeal. *See Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156 (explaining that the state is bound by its theory presented below); *id.* (“The [s]tate may not now argue in the abstract about what it could have asked the jury to decide.”) Nevertheless, it is necessary to establish that the State's double jeopardy concerns in this case do not arise from this Court's allegedly unwieldy double jeopardy test, addressed below, but rather from the State's trial strategy.

5. First-degree kidnapping and aggravated battery

{31} We next turn to the analysis that the Court of Appeals omitted. The first step of the test is, again, whether the conduct was unitary. Like the kidnapping and CSP II analysis above, we must apply the *Foster* presumption because the kidnapping jury instruction allowed the jury to conclude that Defendant intended to and did inflict a physical injury *or* a sexual offense during the kidnapping. Because the record in this case does not disclose which alternative the jury relied upon, or even if some jurors relied upon one theory and some on another, the *Foster* presumption requires reversal if either

alternative basis is legally inadequate. *See Kersey*, 2010-NMSC-020, ¶ 12, 148 N.M. 381, 237 P.3d 683; *Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140; *State v. Salazar*, 1997-NMSC-044, ¶¶ 32-42, 123 N.M. 778, 945 P.2d 996 (holding that jury unanimity is not required when alternative theories are presented to the jury). However, “*Foster* does not require a further presumption that the same conduct was then relied upon by the jury in convicting a defendant of each crime—particularly when the record indicates distinct crimes were committed. Thus, the *Foster* presumption can be rebutted by evidence that each crime was completed before the other crime occurred.” *Phillips*, 2024-NMSC-009, ¶ 40, 548 P.3d 51 (text only)⁵ (citation omitted).

{32} We examine kidnapping under the physical injury alternative, as the sexual offense alternative likely does not implicate double jeopardy when compared with aggravated battery; that is, aggravated battery can plainly be satisfied in this case without proving a sexual offense. But, unlike the kidnapping and the CSP II charge where the State only presented evidence of one sexual offense, the evidence supports multiple physical injuries. We therefore examine the six *Herron* factors

⁵ “(Text only)” indicates the omission of nonessential punctuation marks—including internal quotation marks, ellipses, and brackets—that are present in the text of the quoted source, leaving the quoted text otherwise unchanged.

through the lens of whether separate physical injuries or harm establish “whether a defendant's acts are unitary or distinct.” *Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51. As *Phillips* outlines, the *Herron* factors consider: “(1) temporal proximity of the acts, (2) location of the victim during each act, (3) the existence of intervening events, (4) the sequencing of the acts, (5) the defendant's intent as evidenced by his conduct and utterances, and (6) the number of victims.” *Phillips*, 2024-NMSC-009, ¶ 12, 548 P.3d 51; see *Herron*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624. We recently reaffirmed that “[n]one of these factors alone is a panacea,” instead recognizing that time and space may be determinative in some cases, but not in others. *Phillips*, 2024-NMSC-009, ¶ 13, 548 P.3d 51 (internal quotation marks and citation omitted). Therefore, we reiterated, an appellate court should consider every factor. *Id.* We examine the *Herron* factors through consideration of “the elements of the charged offenses, the facts presented at trial, and the instructions given to the jury.” *Phillips*, 2024-NMSC-009, ¶ 38, 548 P.3d 51 (internal quotation marks and citation omitted).

{33} The aggravated battery instructions in this case required the jury to conclude that Defendant “acted in a way that would likely result in death or great bodily harm.” Element one of the jury instruction was defined in a fairly specific and confined manner, only identifying two types of force supporting an injury: Defendant “touched or applied force to

[Victim] by striking her with his fists *and* strangling her.” Given how the aggravated battery instruction is crafted, two conclusions result. First, the instruction required both striking *and* strangling to satisfy the first element. Therefore, the crime of aggravated battery could not have been complete until the jury found that Victim was strangled, which the evidence suggests took place after Defendant struck her repeatedly. *See State v. Torres*, 2018-NMSC-013, ¶ 19, 413 P.3d 467 (“When determining whether a defendant’s conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed.” (internal quotation marks and citation omitted)). Second, because the State *only* relied upon the striking and strangling for aggravated battery, the physical injury for kidnapping had to result from the only physical injury that occurred aside from the striking and strangling—the injuries resulting from the sexual assault.

{34} Examining the *Herron* factors through these instructions and evidence, the first factor considers temporal proximity between the two crimes. Our reasoning in *Phillips* on this factor is instructive. In *Phillips*, the Court applied the *Herron* factors to examine whether a defendant’s convictions for aggravated battery with a handgun and manslaughter were sufficiently distinct. *Phillips*, 2024-NMSC-009, ¶¶ 46-47, 548 P.3d 51. We held the evidence supported a conclusion that “the battery was

completed before the manslaughter was committed” in relevant part because the “two acts were separated by approximately eighteen seconds” and there was an intervening event where the defendant left the room and returned with a different gun. *Id.* ¶ 45. In the unit-of-prosecution analysis, the *Phillips* Court applied the same *Herron* factors to conclude that multiple acts of battery were also distinct. *Id.* ¶ 47. In reaching its conclusion, the Court noted the interval of time between the batteries, recognizing that “there was an approximate two-minute break after both the first and second of the three successive batteries.” *Id.* ¶ 32.

{35} Our unit-of-prosecution analysis in *Phillips* is relevant here where we are confronted with the question of whether the physical harm between two crimes was distinct under *Herron*, a question that is substantively similar to examining whether there were two batteries. *Id.* ¶ 13 (reaffirming that “we are doing a substantially similar analysis when we conduct a unitary conduct inquiry in double description cases as when we conduct a unit-of-prosecution inquiry” (internal quotation marks and citation omitted)). Defendant acknowledges, and the State does not dispute, that the crimes in this case occurred over the span of approximately “10-22 minutes.” However, because there is little evidence identifying the precise amount of time that elapsed between the aggravated battery and the physical injury during the sexual assault

that supported the kidnapping, this factor is less revealing than the remaining factors. Nevertheless, given the evidence discussed below, we note it is unlikely the amount of time between the crimes here was less than the eighteen seconds in *Phillips*.

{36} The second *Herron* factor is the location of the victim. *See* 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624 (“[M]ovement or repositioning of the victim between [acts] tends to show separate offenses.”). Here, Victim testified that after the strangulation (the physical injury for purposes of the aggravated battery), which took place near the window of the motel room, Defendant moved her to a mattress in the same room. This movement weighs in favor of separate offenses. *See Phillips*, 2024-NMSC-009, ¶ 30, 548 P.3d 51 (recognizing that movement within the same room may support distinct conduct when a victim is confined by circumstances of the assault).

{37} The third and fourth factors assess the existence of intervening events and the sequencing of the crimes. *Herron*, 1991-NMSC-012, ¶ 15, 111 N.M. 357, 805 P.2d 624. We have previously found distinct conduct based on a struggle between the two crimes. In *Phillips*, this Court relied upon a brief struggle over a baseball bat as evidence of an intervening event between the two batteries that supported distinct conduct. 2024-NMSC-009, ¶ 23, 548 P.3d 51. Likewise, this Court has relied upon

circumstantial evidence of a struggle to support that intervening conduct bolstered the Court's conclusion of distinct offenses. *State v. DeGraff*, 2006-NMSC-011, ¶ 30, 139 N.M. 211, 131 P.3d 61 (“The fact[] that several weapons were used and that strands of [the d]efendant's hair were found in the victim's hands indicate an intervening struggle during which the victim defended himself. We conclude that the conduct in this case is not unitary, but consists of at least two distinct acts: the initial attack, completing the crime of aggravated burglary, and the later murder.”).

{38} Here, the evidence does not appear to indicate a struggle between the aggravated battery and kidnapping. But, critically, like *DeGraff*, there is evidence of intervening conduct. During the period between the initial striking and strangulation and the later sexual battery, Defendant said “I'm sorry I had to do that, but I really like you and it's my birthday.” Defendant began to take Victim's clothes off. Victim was saying “no” and began to cry. Defendant then took his clothes off; before he penetrated Victim, she asked Defendant if he had a condom. Therefore, while the type of intervening evidence is qualitatively different than the struggles in *Phillips* and *DeGraff*, the legal effect is the same: the crimes were separated by intervening events.

{39} The sequencing and intervening events evidence in this case are intertwined with the fifth factor—a defendant's intent as established

by his conduct and utterances. Of the six, this factor most strongly suggests that two distinct crimes occurred. First, Defendant's statement, "I'm sorry I *had* to do *that*, but I really like you and it's my birthday," indicates conduct in the past-tense, suggesting Defendant recognized that one series of events ended and another one was about to begin. Viewed through the lens of the charged crimes, Defendant's statement recognized that the first crime, aggravated battery, which was used as a means to subdue Victim, was complete. *See, e.g., DeGraff*, 2006-NMSC-011, ¶ 30, 139 N.M. 211, 131 P.3d 61 (explaining that "the initial use of force completed the crime of aggravated burglary," just as the initial use of force through striking and strangulation completed the crime of aggravated battery in this case). Second and distinct from the temporal aspect, Defendant's statement serves as evidence of a shift in intent or the nature of his actions. *See Phillips*, 2024-NMSC-009, ¶ 25, 548 P.3d 51 (relying upon a "clear change in intent between each attack"); *State v. Demongey*, 2008-NMCA-066, ¶ 15, 144 N.M. 333, 187 P.3d 679 (concluding the conduct was unitary in part because the Court saw "no indication of a change in [the d]efendant's intent or the nature of his actions"). In *Phillips*, the shift was clear as the defendant affirmatively expressed that he did not intend to kill anyone at the start of the first crime when he hit the victim with a bat; during the attack, however, he decided to "immobilize or kill" the victim. 2024-NMSC-009, ¶ 25, 548 P.3d 51. Nevertheless, Defendant's statement in this

case likewise indicates a change in Defendant's intent *and* the nature of his acts from subduing or immobilizing, “I'm sorry I *had to do that*,” to impending sexual battery, “I like you and it's my birthday.” Finally, as for the last factor, there is only one victim in this case, weighing in favor of unitary conduct.

{40} In sum, not every factor clearly weighs in favor of distinct offenses. But that is not required. In *Phillips*, for example, we rejected the defendant's request for a rebuttable presumption that, “[w]hen there is an incident that occurs in a short time in a single place, the [s]tate should generally be limited to proving one purely assaultive crime for each victim.” 2024-NMSC-009, ¶¶ 12-13, 548 P.3d 51. Instead, the *Phillips* Court affirmed multiple convictions because it concluded that four of the six factors weighed in favor of the conclusion that the “two attacks were distinct.” *Id.* ¶ 27. The amount of time and number of victims are the two factors that arguably weigh in favor of only one offense in this case. And the evidence of distinct conduct in this case is at the very least equal to, if not greater in degree, than the amount of evidence in *Herron* and *Foster*. See *Herron*, 1991-NMSC-012, ¶¶ 19-20, 111 N.M. 357, 805 P.2d 624 (affirming multiple convictions seemingly based only on the brief repositioning of the victim and penetration of a different orifice: “Two offenses were committed upon returning to the living room—one digital penetration of the vagina and, after repositioning the victim, one penile penetration

of the vagina. Those acts were sufficiently distinct”); *accord Foster*, 1999-NMSC-007, ¶¶ 31-34, 126 N.M. 646, 974 P.2d 140 (concluding that the convictions for aggravated kidnapping and murder that took place in the span of a few minutes were distinct because the defendant's “use of the glass ashtray to complete the crime of aggravated kidnapping [was] distinct from his use of the extension cord to strangle the victim to death”).

{41} On balance, we hold that the *Herron* factors support a conclusion that Defendant committed two distinct crimes—both under a theory of physical injury. Viewed through this lens, the jury would have had to find that Defendant committed aggravated battery with the intent to injure through striking and strangling Victim and that he did so “in a way that would likely result in death or great bodily harm.” Once he struck and strangled Victim with this intent, all of the elements were satisfied and the aggravated battery was complete. The movement, sequencing, intervening events, and Defendant's statements indicate a brief separation before Defendant initiated the next physical injury for purposes of the kidnapping conviction. While we recognize that the State was vague in its crafting of the kidnapping instruction, it provided a theory that encompasses such a series of events. Under the first kidnapping element, the jury had to find that “[D]efendant took, restrained or confined [Victim] by force by pulling her into the motel room or pulling her

away from the window and choking her *or holding her down on the mattress.*” It is this last alternative that provided the jury with a legally and factually viable theory to convict Defendant for both kidnapping and aggravated battery.

B. The State's Request for a New Double Jeopardy Test

{42} The State allocates the vast majority of its briefs to assert that this Court should overrule precedent and adopt a new approach to double jeopardy. Specifically, the State requests that the Court overrule *Swick* and *Montoya* and adopt a version of the “same” elements approach. The State alleges numerous flaws with the current approach: it is “complex, fact-intensive, and produces unjust results.” “It places too much emphasis on a complex unitary conduct analysis, which is beset by numerous factors and presumptions.” The current “standard for finding unitary conduct is too low.” The second step, often referred to as the modified *Blockburger* test, is redundant of the unitary conduct analysis and “fails to accurately gauge legislative intent.” Finally, the entire test fails to consider “highly-relevant indicia of legislative intent.”⁶

⁶ Defendant also requests a new rule in his answer brief, asserting that this Court should “extend *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, [164 P.3d 1,] to the kidnapping statute,” in effect applying the felony-murder rule to every kidnapping case. As both parties recognize, the Court of Appeals has rejected this

{43} The State argues that we should adopt a different test because a new test would allow “Defendant [to] be punished for the three distinct crimes he committed.” As we have described, however, the State could have obtained viable convictions under the current test if it had “opted for a different presentation at trial.” *Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156. This fatally undermines the State's sole basis for overturning precedent—that our approach is so unworkable that it has become intolerable. Nor does the State argue any of the remaining factors for overturning precedent. *See, e.g., Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 7, 133 N.M. 661, 68 P.3d 901 (identifying four questions that “*must be considered before* overturning precedent” (emphasis added) (internal quotation marks and citation omitted)). As a result, we conclude the State has failed to meet the substantial burden of demonstrating why the Court's precedent is so intolerable that it has become unworkable such that we should overrule precedent. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 11, 127 N.M. 654, 986 P.2d 450 (“Stare decisis ... lies at the very core of the judicial process of interpreting and announcing law. It promotes very important principles in the maintenance of a sound

argument on more than one occasion. As a result, Defendant was aware of this precedent and could have raised such a request in his own petition for certiorari. Failing to do so, we do not address it further.

judicial system: 1) stability of the law, 2) fairness in assuring that like cases are treated similarly, and 3) judicial economy.” (internal quotation marks and citation omitted)).⁷

{44} Furthermore, as Defendant recognizes, the prosecution controls how to structure each count and craft a trial strategy accordingly. And we reiterate that the Legislature is free at any time to authorize multiple punishments for a particular crime or series of crimes. Absent such express language, we conclude the current test honors the mandate of the double jeopardy clause contained within both the United States and New Mexico Constitutions—that no person shall “be twice put in jeopardy” for the same offense. U.S. Const. amend. V; N.M. Const. art. II, § 15.

III. CONCLUSION

{45} For the reasons outlined herein, we affirm in part and reverse in part. We affirm the Court of Appeals’ conclusion that double jeopardy bars Defendant’s conviction for CSP II because

⁷ The State’s more specific arguments, such as the assertion that the “standard for finding unitary conduct is too low,” are likewise undercut by this Court’s precedent. *See, e.g., Sena*, 2020-NMSC-011, ¶ 56 (upholding multiple convictions because the conduct was not unitary); *Phillips*, 2024-NMSC-009, ¶¶ 26-32 (upholding multiple convictions on grounds that the conduct was not unitary); *State v. Cardenas*, 2025-NMSC-020, ¶ 58, 572 P.3d 958 (affirming in relevant part because “the solicitation and conspiracy convictions were based on entirely distinct conduct”).

the State relied upon that lone sexual offense to obtain a conviction for first-degree kidnapping. However, the Court of Appeals erred in also vacating Defendant's aggravated battery conviction without analyzing whether it conflicted with the kidnapping charge that remained. Having conducted a complete analysis, we conclude that sufficient indicia of distinctness support upholding Defendant's aggravated battery conviction apart from kidnapping. Finally, we conclude the State failed to establish that our current double jeopardy approach is so unworkable as to be intolerable—especially in an area of law “for which there is no simple test.” *Montoya*, 2013-NMSC-020, ¶ 33, 306 P.3d 426. We remand to the district court for further proceedings consistent with this opinion.

{46} **IT IS SO ORDERED.**

WE CONCUR:

DAVID K. THOMSON, Chief Justice
MICHAEL E. VIGIL, Justice
C. SHANNON BACON, Justice
BRIANA H. ZAMORA, Justice

All Citations

--- P.3d ----, 2026 WL 925643

APPENDIX B

Court of Appeals of the State of New Mexico
STATE of New Mexico, Plaintiff-Appellee,
v.
Samuel NEAL, Defendant-Appellant.
No. A-1-CA-40205
|
Filed April 24, 2024

**APPEAL FROM THE DISTRICT COURT OF
COLFAX COUNTY, Melissa A. Kennelly,
District Court Judge**

Attorneys and Law Firms

Raúl Torrez, Attorney General Santa Fe, NM, Van
Snow, Assistant Attorney General, Albuquerque,
NM, for Appellee.

Bennett J. Baur, Chief Public Defender, Joelle N.
Gonzales, Assistant Appellate Defender, Santa Fe,
NM, for Appellant.

WRAY, Judge.

MEMORANDUM OPINION

{1} Defendant Samuel Neal was convicted of first-degree kidnapping, *see* NMSA 1978, § 30-4-1 (2003), second-degree criminal sexual penetration (CSP II), *see* NMSA 1978, § 30-9-11(E)(3) (2009), and third-degree aggravated battery inflicting great bodily harm, *see* NMSA 1978, § 30-3-5(A), (C) (1969).

Defendant appeals and raises issues regarding (1) double jeopardy, (2) instructional error, (3) prosecutorial misconduct, and (4) the sufficiency of the evidence. We conclude that Defendant's convictions violate double jeopardy and remand to the district court to vacate the convictions for CSP II and aggravated battery with great bodily harm, and resentence Defendant. Otherwise, we affirm.

DISCUSSION

{2} Victim, who was stopping for the night in New Mexico and taking a walk, encountered Defendant, who asked her to “hang out.” Victim followed Defendant to an abandoned motel, but when Victim hesitated to join Defendant inside the motel, he pulled her through a window into a room. When Victim rebuffed Defendant's sexual advances, he beat, strangled, and sexually assaulted her. Because this is a memorandum opinion prepared for the benefit of the parties, we provide only those additional facts that are necessary to resolve the issues raised on appeal. Further, because we conclude that the CSP II and aggravated battery convictions must be vacated on other grounds, we do not address the instructional error issue that relates only to the CSP II jury instruction. We begin with the double jeopardy arguments before addressing Defendant's remaining arguments—the sufficiency of the evidence and prosecutorial misconduct.

I. Defendant's Convictions for CSP II and Aggravated Battery Violate Double Jeopardy Protections Under These Circumstances

{3} Before examining Defendant's specific arguments, we briefly review the law applicable to the double-description double jeopardy claims raised on appeal, followed by the evidence at trial and the jury instructions. *See State v. Lorenzo*, 2024-NMSC-003, ¶ 5, — P.3d — (citing U.S. Const. amend. V; N.M. Const. art. II, § 15 and describing double-description violations as those where “a single course of conduct results in multiple charges under separate criminal statutes”). We examine first “whether the conduct underlying the ... offenses is unitary,” and if it is, we then consider “whether the Legislature intended for the unitary conduct to be punished as separate offenses.” *Id.* (internal quotation marks and citation omitted); *see also Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223.

{4} To evaluate unitary conduct, we consider the statutory elements, as specifically set forth in the jury instructions, together with “indicia of distinctness,” *see, e.g., State v. Franco*, 2005-NMSC-013, ¶¶ 7-8, 137 N.M. 447, 112 P.3d 1104, in order “to identify the relevant conduct and consider whether the acts can be distinguished from each other.” *State v. Vasquez*, 2024-NMCA-020, ¶ 24, 542 P.3d 806. Conduct underlying the charged offenses is unitary if it is not sufficiently “separate and distinct” so that “the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses.” *Swafford*, 1991-NMSC-043, ¶¶ 28-29.

{5} As is apparent from the jury instructions outlined below, the jury in the present case was provided with multiple factual and legal alternatives to find

Defendant guilty of each crime. In this context, our Supreme Court applies a rebuttable presumption, colloquially called the *Foster* presumption. See *State v. Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140, *abrogated on other grounds as recognized in Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683. The *Foster* presumption applies when a jury instruction permits the jury to convict a defendant based on an alternative that would result in a double jeopardy violation, and “the record does not disclose whether the jury relied on this legally inadequate alternative.” *Foster*, 1999-NMSC-007, ¶ 28; see *State v. Sena*, 2020-NMSC-011, ¶ 54, 470 P.3d 227 (explaining the rebuttable presumption).

{6} If we determine that Defendant's conduct was unitary, we next consider “whether the Legislature intended for the unitary conduct to be punished as separate offenses.” *Lorenzo*, 2024-NMSC-003, ¶ 5. Where, as here, the applicable statutes do not explicitly authorize multiple punishments and can be violated in alternative ways, we employ a modified version of the test laid out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). See *State v. Gutierrez*, 2011-NMSC-024, ¶ 48, 150 N.M. 232, 258 P.3d 1024 (adopting a modified version of the *Blockburger* test for statutes that are vague and unspecific or may be proved in the alternative). To analyze the Legislature's intent, we consider “whether the statute, *as applied by the [s]tate in a given case*, overlaps with other criminal statutes so that the accused is being punished twice for the same offense.” *State v. Begaye*, 2023-NMSC-015, ¶ 22, 533 P.3d 1057 (internal quotation marks and citation omitted). Accordingly, we compare the elements of

the offenses, “looking at the [s]tate's legal theory of how the statutes were violated.” *Id.* ¶ 24 (internal quotation marks and citation omitted).

{7} With this as legal context, we turn to the evidence at trial and the jury instructions. In this case, Victim provided a description of what transpired during her ten-to-twenty-minute encounter with Defendant. Victim stated that once they were both in the motel room, Defendant started to kiss her, and she said, “No.” Defendant reached for Victim's shorts, and she said, “No.” Defendant asked Victim if she wanted to have sex with him, and she said, “No. That's not why I'm here.” After that, Defendant began to punch and choke Victim. Victim testified that when Defendant was choking her, she “thought [she] was going to die” and stopped struggling with him because she “realized he was going to rape” her and she “did not want to die” and was willing to do “anything [she] could to survive.” Victim therefore stopped struggling, and Defendant moved her to the mattress, started kissing her again, and said, “I'm sorry I had to do that, but I really like you and it's my birthday.” After that, Defendant removed both of their clothes, and performed oral sex and sexually penetrated Victim.

{8} In relevant part, the jury was instructed on first-degree kidnapping as follows:

For you to find [D]efendant guilty of first[-]degree kidnapping, as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant took, restrained or confined [Victim] by force by pulling her into the motel room or pulling her away from the window and choking her or holding her down on the mattress;
2. [D]efendant intended to inflict physical injury or a sexual offense on [Victim];
3. The restraint or confinement of [Victim] was not slight, inconsequential, or merely incidental to the commission of another crime;
4. [D]efendant inflicted physical injury upon [Victim] or [D]efendant inflicted a sexual offense upon [Victim] during the course of the kidnapping.

The CSP II instruction, in relevant part, stated:

For you to find [D]efendant guilty of [CSP II] causing personal injury as charged in Count 2, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant caused [Victim] to engage in sexual intercourse;
2. [D]efendant caused the insertion of a penis into the vagina of [Victim] through the use of physical force or physical violence;

3. [D]efendant's acts resulted in bruising in the leg area, of the eye, and of the throat of [Victim].

Aggravated battery with great bodily harm was the third relevant crime for the jury's consideration and was instructed as follows:

For you to find [D]efendant guilty of aggravated battery with great bodily harm as charged in Count 3, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant touched or applied force to [Victim] by striking her with his fists and strangling her;
2. [D]efendant intended to injure [Victim];
3. [D]efendant acted in a way that would likely result in death or great bodily harm to [Victim].

Defendant argues that the conviction for first-degree kidnapping subsumes both the convictions for CSP II and aggravated battery by applying different *Foster* presumptions to different elements of first-degree kidnapping. We conclude, however, that through the facts as presented at trial, the arguments, and the instructions, the State pointed to the same evidence in order to establish (1) the elements of CSP II and aggravated battery; and (2) the elements of CSP II

and first-degree kidnapping. *See State v. Bernal*, 2006-NMSC-050, ¶ 6, 140 N.M. 644, 146 P.3d 289 (“A double jeopardy claim is a question of law that we review de novo.”). We structure our analysis accordingly.

A. CSP II and Aggravated Battery

{9} No indicia of distinctness separate the evidence offered to satisfy aggravated battery and the evidence required to satisfy CSP II, which includes force as an element. Both instructions point to the striking and the strangling, and the jury could not consider the two offenses without also considering both the acts of striking and strangling Victim. The aggravated battery instruction refers directly to striking and strangling, and the CSP II instruction required both that (1) the penetration was caused by force or physical violence and (2) it resulted in “bruising in the leg area, of the eye, and of the throat of [Victim].” From the injuries identified in the CSP II jury instruction, we infer that the use of physical force or violence was the striking and the choking. The evidence offered at trial showed that Defendant’s choking of Victim resulted in bruising to her throat. Victim also testified that Defendant’s choking was so severe that she had difficulty breathing. These injuries were the injuries caused by the same striking and the strangling referenced in the aggravated battery instruction and the result of the same acts. Because these are the same acts, no indicia of distinctness can separate the crimes. *See Sena*, 2020-NMSC-011, ¶ 54; *State v. Phillips*, 2024-NMSC-009, ¶ 47, — P.3d ——. No evidence supported distinct conduct for the aggravated battery and CSP II convictions, and we therefore conclude

that the conduct underlying both offenses was unitary.

{10} We turn then to the legislative intent. Aggravated battery required findings that Defendant (1) touched or applied force to Victim by striking her with his fists and strangling her, (2) intended to injure Victim, and (3) acted in a way that would likely result in death or great bodily harm. In relevant part, the jury was instructed that CSP II required that Defendant use physical force or violence to cause sexual penetration and that the acts “resulted in bruising” to the leg, eye, and throat. The evidence presented by the State at trial shows that the elements of aggravated battery were subsumed into the elements of CSP II. *See Begaye*, 2023-NMSC-015, ¶ 22 (applying a modified *Blockburger* test). As we have set forth, Victim testified that Defendant punched and choked her and that when Defendant was choking her she “thought [she] was going to die” and stopped struggling with him because she “realized he was going to rape” her and she “did not want to die” and was willing to do “anything [she] could to survive.” Victim then stopped struggling, and Defendant sexually penetrated her. Thus, as we explained in the unitary conduct context, the force applied to Victim by striking or strangling to establish aggravated battery is the same force that caused the sexual penetration for CSP II. The intent to injure required for aggravated battery is the use of violence that is required in order to cause sexual penetration for CSP II. The first two elements of aggravated battery therefore are subsumed by the elements of CSP II.

{11} Aggravated battery, for its third element, required that Defendant acted in a way that would likely result in death or great bodily harm. The jury instructions defined great bodily harm as “an injury to a person which creates a high probability of death or results in serious disfigurement or results in loss of any member or organ of the body or results in permanent or prolonged impairment of the use of any member or organ of the body.” CSP II, for its second and third elements, required that Defendant use physical force or physical violence and that “[D]efendant's acts resulted in bruising in the leg area, of the eye, and of the throat of [Victim].” We acknowledge that aggravated battery, as it was charged in the present case, did not require the death or great bodily harm to result—only the likelihood of that type of injury. The act the State relied on to show that likelihood was strangling or choking—the same act that satisfied element two of CSP II. Based on the State's theory of the case, Defendant's act of choking Victim was likely to result in the death or great bodily harm required for aggravated battery and that same act of choking was also the use of physical force or violence required for CSP II that resulted in bruising to Victim's throat. While viewed in the abstract these elements might not appear to subsume, “as the State's case was presented to the jury,” the bruising Victim sustained was the result of an act of physical violence that was likely to result in death or great bodily harm. See *State v. Serrato*, 2021-NMCA-027, ¶ 32, 493 P.3d 383, *cert. denied* (S-1-SC-38204, May 4, 2020).

{12} Thus, the State could not prove CSP II, as it was instructed, without also proving aggravated battery,

as it was instructed. The elements of aggravated battery are therefore completely subsumed by the elements of CSP II, the inquiry is over, and the two convictions violate double jeopardy. *See Begaye*, 2023-NMSC-015, ¶¶ 35-36.

B. First-Degree Kidnapping and CSP II

{13} To analyze first-degree kidnapping and CSP II, we begin again with the unitary conduct question. The second and fourth elements of first-degree kidnapping required the jury to select either that Defendant intended to and did inflict a physical injury or a sexual offense during the course of the kidnapping. Because the instruction permitted the jury to select between two legal alternatives, we presume the jury selected the sexual offense alternative. *See Foster*, 1999-NMSC-007, ¶ 28. This is because the physical injury alternative by itself does not create a double jeopardy problem. The aggravated battery, as instructed in this case, did not require proof of an actual physical injury. As a result, the charged aggravated battery could not be the same conduct as any physical injury required to establish first-degree kidnapping. On the other hand, the CSP II was the only sexual offense defined for the jury and the jury's view of the legal term “sexual offense” would necessarily have been limited to the same force and penetration that was defined by the CSP II instruction given by the district court. *See Franco*, 2005-NMSC-013, ¶ 8; *see also State v. Autrey*, A-1-CA-38116, mem. op. ¶¶ 14-15 (N.M. Ct. App. Apr. 12, 2022) (nonprecedential), *cert. quashed* (S-1-SC-39383, Feb. 21, 2024).

{14} The State argues that the kidnapping and CSP II conduct was distinct because “Defendant completed the kidnapping when he restrained [V]ictim with the intent of inflicting a sexual offense.” In *Serrato*, however, this Court rejected the State's argument and held that “the elements of first-degree kidnapping were not satisfied until a sexual offense was committed.” 2021-NMCA-027, ¶ 26. The State contends that this language is contrary our Supreme Court's holdings as exemplified in *Sena*. We disagree, *see Sena*, 2020-NMSC-011, ¶ 35 (relying on the 1997 iteration of the first-degree kidnapping instruction that did not include as an element that the defendant actually inflicted a sexual offense), and decline the State's invitation to overrule *Serrato*. *Cf. Lorenzo*, 2024-NMSC-003, ¶ 10 (rejecting the state's argument that an armed robbery was complete with the threat of force, rather than when all of the elements were satisfied). Because the State does not argue that some sexual offense other than the penetration supported the first-degree kidnapping, we cannot conclude that the first-degree kidnapping was complete before the act of penetration. Accordingly, the conduct underlying the kidnapping and the CSP II convictions was the same and therefore unitary. *See Serrato*, 2021-NMCA-027, ¶ 27.

{15} Turning to legislative intent, again we consider the State's theory of the sexual offenses set forth in the charging documents, jury instructions, and arguments to the jury. *See State v. Porter*, 2020-NMSC-020, ¶ 19, 476 P.3d 1201. As we have noted, the charging documents and jury instructions refer broadly to first-degree kidnapping based on physical

injury or sexual offense and the State's legal theory of the case cannot be ascertained from these documents. In opening, the State recounted the attack, described the injuries, depicted the sexual penetration, and summarized, "That's what this trial is about—is to determine whether that was criminal sexual penetration." In closing, the State emphasized that the injuries demonstrated that the sex was not consensual by stating,

Consensual? We have a biting of a thumb, we got a black eye, we got strangulation, we got ... bruises and scratches all over the body, we got her running out not getting clothed and fingernail consistent with her story that there was struggle, there was a fight. Stop it there. Is that enough? No, it wasn't. "Sorry I had to do this, but I like you and it's my birthday." So we all know what happened next, she was raped.

The State pointed to no other sexual offense for the jury to rely on for the purposes of first-degree kidnapping. Based on these arguments, we conclude that as the State's case was presented to the jury, the CSP II, which included the elements of injury and penetration, was the sexual offense that formed the basis for the first-degree kidnapping conviction. As a result, the elements of CSP II—the only instructed and argued sexual offense—are subsumed entirely by the elements of first-degree kidnapping that required the jury to find that Defendant intended to and did

inflict a sexual offense, the inquiry is over, and the two convictions violate double jeopardy.

C. Double Jeopardy Mandates That Defendant's Convictions for Aggravated Battery and CSP II Be Vacated

{16} When “otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction[s] carrying the shorter sentence[s].” *State v. Montoya*, 2013-NMSC-020, ¶ 55, 306 P.3d 426. Because the convictions for CSP II and aggravated battery carry shorter sentences than first-degree kidnapping, we remand to the district court to vacate these lesser convictions, uphold the first-degree kidnapping conviction, and resentence Defendant accordingly. *Compare* § 30-4-1(B) (kidnapping in the first degree is a first-degree felony) *and* NMSA 1978, § 31-18-15(A) (2022) (the basic sentence for a first-degree felony is eighteen years imprisonment), *with* § 30-9-11(E) (criminal sexual penetration in the second degree is a second-degree felony) *and* § 31-18-15(A) (the basic sentence for a second-degree felony is nine years imprisonment); *compare also* § 30-9-11(E) *and* § 31-18-15(A), *with* § 30-3-5(C) (aggravated battery inflicting great bodily harm is a third-degree felony) *and* § 31-18-15(A) (the basic sentence for a third-degree felony is three years imprisonment).

{17} We emphasize that our double jeopardy holding in the present case is the result of the necessary inferences arising from the jury instructions and the State's presentation to the jury. The same facts may have resulted in a different constellation of charges or arguments that may have supported separate

crimes. *See Lorenzo*, 2024-NMSC-003, ¶ 11 (noting that “had the [s]tate opted for a different presentation at trial, it is possible that the jury could have decided that different uses of force satisfied the elements of each crime”). Our review, however, is confined to the record that was created. *See id.* (relying on the state's legal theory “as presented in its closing argument” and not an argument “in the abstract”). Because the elements of two of Defendant's three convictions subsume into other convictions, Defendant's right to be free from double jeopardy was violated. *See Begaye*, 2023-NMSC-015, ¶¶ 35-36.

II. Defendant's Remaining Arguments

{18} Defendant also broadly challenges the sufficiency of the evidence supporting the convictions and charges the State with prosecutorial misconduct.

A. The Evidence Supports Defendant's Convictions

{19} Our review of the record demonstrates that as the State points out, Victim's testimony established every element of each remaining conviction beyond a reasonable doubt and supported Defendant's convictions for first-degree kidnapping and interference with communications. *See State v. Jimenez*, 2017-NMCA-039, ¶ 23, 392 P.3d 668 (stating that in a sufficiency of the evidence challenge we review “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction” (internal quotation marks and citation omitted)); *cf. State v. Samora*, 2016-NMSC-031, ¶¶ 2,

34-35, 387 P.3d 230 (reviewing a challenge to similar charges and concluding that the victim's testimony was sufficient to support the defendant's convictions despite reversing on other grounds). We have already set forth the evidence supporting the kidnapping conviction, and otherwise, Victim testified that when Defendant heard a voice coming from her cell phone, Defendant took and threw the phone away. *See* NMSA 1978, § 30-12-1(D) (1979) (prohibiting “knowingly and without lawful authority ... preventing, obstructing or delaying the sending, transmitting, conveying or delivering in this state of any message, communication or report by or through telegraph or telephone”). Therefore, we reject Defendant's claim that there was insufficient evidence to support the convictions.

B. Defendant Does Not Establish Prosecutorial Misconduct

{20} Defendant also argues that the State committed prosecutorial misconduct during closing argument by improperly commenting on Defendant's prearrest flight and Defendant's decision not to testify at trial. “The Fifth Amendment protects a defendant's decision not to testify at trial from prosecutorial comment” as well as a defendant's “right to remain silent when taken into custody.” *State v. DeGraff*, 2006-NMSC-011, ¶¶ 8, 12, 139 N.M. 211, 131 P.3d 61 (internal quotation marks and citation omitted); *see* U.S. Const. amend. V. (“No person shall ... be compelled in any criminal case to be a witness against himself.”). This protection is violated when a prosecutor “asks the jury to draw an adverse conclusion from the defendant's failure to testify.” *DeGraff*, 2006-NMSC-011, ¶ 8. We review

prosecutorial comment on a defendant's silence de novo. *State v. Lobato-Rodriguez*, 2024-NMSC-014, ¶ 12, —P.3d ——. We first determine whether the statement was an improper comment on silence. *Id.* If it was not, our analysis concludes. If the statement *was* an improper comment on silence, we consider whether the State established that error was harmless (if it was preserved) or fundamental (if it was not). *DeGraff*, 2006-NMSC-011, ¶ 12. We examine each of the challenged statements in turn.

{21} Defendant first argues that the following statement during closing argument was an impermissible comment on Defendant's prearrest silence:

But what's also striking, we have the Defendant living here in this community, seen according to Officer Martinez, she thinks almost every day that summer. And this incident happened. Police respond, an investigation ensues and poof. Officer Martinez does not see this individual again she said until he's arrested in Colorado and brought back on this warrant. That's her testimony. Coincidence? That's what we call consciousness of guilt!

To the extent such statements could be regarded as a comment on prearrest “silence,” they may have encouraged the jury to convict Defendant on improper grounds, which would establish error. *See id.* ¶¶ 17, 23. Nevertheless, any error was unpreserved and is reviewed only to determine whether the error was fundamental. *Id.* ¶ 17. In *DeGraff*, similar comments on a defendant's prearrest absence were not fundamental error

because the Court discerned “a reasonable argument that the comments did not directly call on the jury to infer guilt from [the d]efendant's silence.” *Id.* ¶ 23. Similarly in the present case, these statements reasonably called on the jury to consider Defendant's sudden flight to show consciousness of guilt and to demonstrate inconsistency with the defense that Victim consented to sexual intercourse. *See State v. Baca*, 1990-NMCA-123, ¶ 30, 111 N.M. 270, 804 P.2d 1089 (“[E]vidence of defendant's flight ... is admissible as proof of a guilty conscience” and “proof of a tacit admission of guilt.”). As a result, any error does not rise to the level of fundamental error.

{22} Defendant also argues that other statements by the State in closing argument commented on Defendant's rather sudden decision not to testify. For context, we offer some additional background. *See DeGraff*, 2006-NMSC-011, ¶ 8 (“We evaluate the statement in context to determine the manifest intention that prompted the remarks as well as the natural and necessary impact upon the jury.” (internal quotation marks and citation omitted)). After Defendant declined to testify when called by his attorney, the district court instructed the jury that Defendant had no burden to present evidence, and the State requested guidance from the district court about how to address in closing Defendant's arguments during opening statements that the encounter was consensual. The district court allowed the State to remind the jury that counsel's argument is not evidence and to comment on the lack of evidence regarding consent. The district court warned the State to avoid mentioning that Defendant did not testify. The State proceeded with

closing argument, during which Defendant objected that the State was getting close to commenting on Defendant's silence. The district court overruled the objection and allowed the State to continue "so long as there is no direct commentary" regarding Defendant's failure to testify. The prosecutor again continued with argument and made the following challenged statements without further objection from Defendant:

Never at any point did you hear any evidence that our victim agreed to any of this. *What you did hear from our victim was, again not painting herself as some angel, knowing that there may be judgment passed. What did she say? She thought they were going to get high on marijuana. She's not painting herself as an angel or trying to hide her willingness to get high, go get drunk, do recreational drugs. Her story stayed consistent. Consistent. Let's hang out, let's drink, let's meet people.* Never during the course of this trial did you hear she consented to any type of sex or physical contact, ever. Never to have sex, never to be physically beaten, and never to being raped. Nothing that ever entered evidence in this trial.

On appeal, Defendant argues that this statement commented on his decision not to testify but omits the italicized language from his brief and relies on *State v. Costillo*, 2020-NMCA-051, 475 P.3d 803.

{23} Unlike in *Costillo*, however, the State's theory of the case here did not “suggestively and unabashedly” rest on Defendant's failure to proclaim his innocence. See *id.* ¶ 17 (concluding that the state's questions and arguments “proactively utilized [the d]efendant's invocation of his right to remain silent as an indicium of his guilt” and violated the right to remain silent that is protected by the Fifth Amendment). The State contends that “[t]he manifest intent of the prosecutor was to clarify what the evidence in the case actually showed” and “[t]he jury would not ‘naturally and necessarily’ take the reminder of what the evidence actually showed as a comment on Defendant's silence.” We agree. See *DeGraff*, 2006-NMSC-011, ¶ 8 (explaining that a prosecutor's statement is a comment on a defendant's protected silence if “the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent.” (internal quotation marks and citation omitted)). Viewing the prosecutor's comments in the context of the State's broader argument and the trial as a whole, we conclude that the comments at issue were not erroneous.

{24} Broadly, the State's remarks were a comment on Victim's testimony and the evidence presented regarding the nature of the encounter between Victim and Defendant. See *Jimenez*, 2017-NMCA-039, ¶ 76 (noting that to be permissible a prosecutor's statements must be based on the evidence and that a prosecutor may draw reasonable inferences therefrom). As the State points out, the

comments were a response to Defendant's arguments in opening. Defendant argued that the evidence would show that Victim consented to having sex with Defendant and referred to the following: (1) Victim followed Defendant to the motel; (2) Defendant had no documented injuries that would indicate Victim fought Defendant; (3) during a police interview, Victim admitted to "French kissing" Defendant; (4) Victim's bruises may have been older than the day of the assault; and (5) Victim's attitude during interviews after the assault was "cheery." Defendant denied in opening that the sex was not consensual and characterized the case as "he said, she said," but ultimately elected not to take the stand. The State did not reference Defendant's decision not to testify but instead responded to the lack of evidence supporting many of Defendant's statements during opening argument—evidence that would have been available from testimony apart from Defendant's. *See id.* (noting that a prosecutor's statements may be in response to the defendant's argument); *see also State v. Taylor*, 1986-NMCA-011, ¶ 25, 104 N.M. 88, 717 P.2d 64 ("Where the defendant 'opens the door' to comments by the prosecutor, such comments are invited and do not constitute reversible error, even if such comments are improper."); *State v. Smith*, 2001-NMSC-004, ¶¶ 39-40, 130 N.M. 117, 19 P.3d 254 (explaining that "under certain circumstances, defense counsel may 'open the door' during an opening statement to comments by the prosecutor during closing" (internal quotations marks and citation omitted)).

{25} The district court instructed the jury that (1) it was the State's burden to prove Defendant's guilt

beyond a reasonable doubt; (2) they “must not draw any inference of guilt from the fact that [D]efendant did not testify in this case”; and (3) “[w]hat is said [by the lawyers] in the arguments is not evidence.” We conclude that the district court properly exercised its discretion in controlling closing argument, and we presume that the jury followed the written instructions. *See Smith*, 2001-NMSC-004, ¶ 40. Therefore, in light of the broader context of trial, we conclude that the prosecutor's statements regarding consent do not constitute a comment on Defendant's protected silence and reject Defendant's claim that his conviction was “tainted” by prosecutorial misconduct. *See Jimenez*, 2017-NMCA-039, ¶ 78.

CONCLUSION

{26} For the reasons stated herein, we reverse and remand for the district court to vacate Defendant's convictions for CSP II and aggravated battery and resentence Defendant. Otherwise, we affirm.

{27} **IT IS SO ORDERED.**

WE CONCUR:

JENNIFER L. ATTREP, Chief Judge

MEGAN P. DUFFY, Judge

All Citations

Not Reported in Pac. Rptr., 2024 WL 1787765

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF COLFAX
EIGHTH JUDICIAL DISTRICT

State of New Mexico,
Plaintiff,

v.

Samuel Neal, No. D-809-CR-2019-00270
Defendant

DOB: 06/16/1985
SNN: 521-47-1312

JUDGMENT AND SENTENCE

This matter came before the Honorable Melissa A. Kennelly, District Court Judge on September 15, 2021. The State appeared and was represented by Darryl Bouchard, and the defendant refused to appear for sentencing but was represented by counsel Sarah Marie Montoya, who did appear for sentencing.

OFFENSES CHARGED/DISPOSITION/SENTENCE

Count: 1 – Kidnapping First Degree (Intent to Commit Sexual Offense), 30-4-1(A) & (B), a 1st Degree Felony

Date of Offense: July 01, 2019

Date of Conviction: March 31, 2021

Serious Violent Offense: YES

Disposition: Conviction – Jury Trial

It is adjudged that defendant is Guilty.

Sentence: The defendant is hereby sentenced to a period of 18 years; with credit of 714 days for pre-sentence confinement; for a total period of 16 years, 17 days to be served at New Mexico Department of Corrections. Period of incarceration is followed by an indeterminate term of Parole of at least 5 and no longer than 20 years. Defendant is ordered to pay fees of \$180.00.

Count: 2 – Criminal Sexual Penetration in the Second Degree (Results in Personal Injury), 30-9-11(E)(3), a 2nd Degree Felony

Date of Offense: July 01, 2019

Date of Conviction: March 31, 2021

Serious Violent Offense: YES

Disposition: Conviction – Jury Trial

It is adjudged that defendant is Guilty.

Sentence: The defendant is hereby sentenced to a period of 9 years to be served at New Mexico Department of Corrections. Period of incarceration is followed by an indeterminate term of Parole of at least 5 and up to the natural life of the defendant. Sentence is to run consecutive to Count(s) 1. Defendant is ordered to pay fees of \$5.00.

Count: 3 – Aggravated Battery (Great Bodily Harm), 30-3-5(C), a 3rd Degree Felony

Date of Offense: July 01, 2019

Date of Conviction: March 31, 2021

Serious Violent Offense: YES

Disposition: Conviction – Jury Trial

It is adjudged that defendant is Guilty.

Sentence: The defendant is hereby sentenced to a period of 3 years to be served at New Mexico Department of Corrections. Sentence is to run consecutive to Count(s) 2. Defendant is ordered to pay fees of \$5.00.

Count: 4 – Tampering with Evidence (Highest Crime a Capital, First or Second Degree Felony), 30-22-52, a 3rd Degree Felony

Date of Offense: July 01, 2019

Disposition: Directed Verdict

Count: 5 – Interference with Communications, 31-12-1 & 31-19-1, a Misdemeanor

Date of Offense: July 01, 2019

Date of Conviction: March 31, 2021

Serious Violent Offense: NO

Disposition: Conviction – Jury Trial

It is adjudged that defendant is Guilty.

Sentence: The defendant is hereby sentenced to a period of 364 days to be served at New Mexico Department of Corrections. Sentence is to run consecutive to Count(s) 3. Defendant is ordered to pay fees of \$5.00.

Count: 6 – Criminal Damage to Property (Under \$1000), 30-15-1 & 31-19-1, a Petty Misdemeanor

Date of Offense: July 01, 2019

Disposition: Directed Verdict

SENTENCE SPECIFICS

Pursuant to §33-2-34, NMSA 1978, the Court finds Count(s) 1, 2, and 3 to be serious violent offense(s). Therefore meritorious deduction shall not exceed up

to a maximum of four (4) days per month of time served.

Fine/Fees:

Total Fine:	\$0.00
Total Fees:	\$195.00

Itemized Fees:

\$20.00 Domestic Violence Treatment Fee

\$100.00 DNA Identification Fee

\$75.00 Crime Victims Reparation Fee

Total Suspended: \$0.00

Total Due: \$195.00

Sentencing Conditions:

-Defendant shall be evaluated for participation in the Sex Offender Treatment program at DOC and shall complete the program if accepted.

-Defendant shall be evaluated for participation in the RDAP program and shall complete the program if accepted.

-Defendant shall complete a high school equivalency program while at DOC if he has not graduated from high school.

-Defendant shall engage in a psychiatric evaluation and shall continue psychiatric care with a qualified psychiatric provider and follow all treatment recommendations while in DOC and on parole.

-Defendant shall participate in work assignments and/or vocational training opportunities as available at DOC.

-Defendant shall complete a course of Moral Reconations [sic] Therapy (MRT) while at DOC.

-Defendant shall participate in a re-reentry [sic] program, as available.

-Defendant shall pay restitution to be determined by DOC and/or Adult Probation and Parole.

-Upon release from prison:

-Defendant shall be evaluated for a sex offender treatment program and shall complete the program and follow recommended aftercare if accepted;

-Defendant shall receive highly structured and closely monitored supervision with frequent random drug and alcohol testing;

-Defendant shall engage in an outpatient substance abuse program, followed by regular participation in a peer support group such as AA/NA

-Defendant shall engage in psychiatric care with a qualified psychiatric provider and follow all treatment recommendations;

-Defendant shall remain gainfully employed or engaged in an educational program on a full time basis;

-Defendant shall be evaluated by the Veteran's Administration Veteran's Justice Outreach program to assist him with housing and accessing mental health services.

-Defendant shall register as a Sex Offender.

-Defendant shall provide a sample of biological material for DNA testing.

-Defendant shall not have contact with victim(s) or family(ies) of victim(s) or witness(es).

You may appeal this judgment and sentence to the court of appeals by filing a notice of appeal within thirty (30) days from the date of entry of this judgment and sentence. If you are unable to pay the costs of an appeal, you have the right to proceed with an appeal at the state's expense and at no cost to you.

All outstanding warrants issued in this case shall be and are hereby quashed.

All active bonds posted in this case shall be exonerated/released to the original payor unless otherwise ordered.

Defendant is immediately remanded to the custody of the Colfax County Sheriff or Detention Center/Jail to be transported to the New Mexico Department of Corrections/Central New Mexico Correctional Facility, reception and Diagnostic Center, P.O. Drawer 1328, 1522 Morris Road, Los Lunas, N.M. 87031-1328 (505) 865-1622.

SO ORDERED.

[Signature]
Melissa A. Kennelly, Judge

APPENDIX D

Provisions Involved

N.M. STAT. ANN. § 30-4-1 (West 2003) – Kidnapping

A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:

- (1) that the victim be held for ransom;
- (2) that the victim be held as a hostage or shield and confined against his will;
- (3) that the victim be held to service against the victim's will; or
- (4) to inflict death, physical injury or a sexual offense on the victim.

B. Whoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.

N.M. STAT. ANN. § 30-9-11 (West 2009) – Criminal Sexual Penetration

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.

D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

- (1) on a child under thirteen years of age; or
- (2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

- (1) by the use of force or coercion on a child thirteen to eighteen years of age;
- (2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
- (3) by the use of force or coercion that results in personal injury to the victim;
- (4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
- (5) in the commission of any other felony; or
- (6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act.

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

- (1) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or
- (2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.