IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v. S-1-SC-40407

SAMUEL B. NEAL

Defendant-Respondent.

DEFENDANT-RESPONDENT'S ANSWER BRIEF

On Certiorari from the New Mexico Court of Appeals

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STATEMENT REGARDING RECORD CITATIONS

The State's brief in chief (**BIC**) is cited by page number, e.g., **[BIC 4]**. There are two volumes of the record proper (**RP**), thus, it is cited by volume and bates stamp number, e.g., **[2 RP 288]**. The court proceedings were audio recorded with "For the Record" software and reviewed on a CD using "The Record Player"; they are cited by proceeding date and FTR timestamp, e.g., **[CD-10/9/18, 1:23:45]**. However, some audio hearings are labeled as A-P and are in different folders. These files do not play together in FTR even though some occur on the same date. These proceedings will be cited by letter designation, proceeding date, and FTR timestamp, e.g., **[CD-A-3/30/21, 1:23:45]**.

CERTIFICATE OF COMPLIANCE

The body of this brief exceeds the page limit set forth in Rule 12-318(F)(2) NMRA. Pursuant to Rules 12-318(F)(2) and (G), undersigned counsel states that counsel used Times New Roman, 14-point font, a proportionally-spaced type style / typeface and that this brief was prepared using Microsoft Word, version 2016. Pursuant to Rule 12-318(F)(3), undersigned counsel states that the body of this brief contains 10,568 words and, therefore, does not exceed the word limit of 11,000.

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NATURE OF THE CASE

It is the prosecution's duty to ensure that it does not violate a defendant's constitutional rights. The prosecution has broad discretion to determine whom to prosecute, which charges to file, and which proof it will present to the finder of fact to satisfy a conviction on the charged crimes. In its opinion, the Court of Appeals made clear the problem in this case: "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. Neal*, A-1-CA-40205, ¶¶ 13-15, mem. op. (N.M. Ct. App. Apr. 24, 2024) (non-precedential).

The prosecution chose to use the same proof to satisfy the elements of first-degree kidnapping, CSP II, and aggravated battery, which violated Samuel Neal's right to be free from double jeopardy. The prosecution possessed other facts it could have used to aggravate kidnapping to a first-degree felony, but simply chose not to use them.

The State, in retrospect, is distressed it did not prosecute the case against Mr. Neal differently, but appellate courts cannot retroactively change the prosecution's theory of the case on appeal. "The State cannot wait for an appeal to adequately separate Defendant's conduct to support each conviction; rather, the

State must do this work below to ensure that distinct conduct supports each charge tried." *State v. Reed*, 2022-NMCA-025, ¶ 27, 510 P.3d 1261.

Since the early 1990s, New Mexico prosecutors have been on notice that if they fail to sufficiently prove distinct acts to support separate offenses that a double jeopardy violation is likely to occur. Instead of educating prosecutors, the State seeks to overturn decades of double jeopardy jurisprudence in an effort to lower their burden and violate the rights of New Mexico citizens. Indeed, the State cites to several cases where the Courts have found double jeopardy violations based on the charging decisions of the prosecutors.

The State's arguments are flawed and their requested remedy is unnecessary. This Court should quash certiorari, affirm the Court of Appeals, or extend *State v. Frazier*, 2007-NMSC-032, 42 N.M. 120, to the kidnapping statute.

SUMMARY OF RELEVANT FACTS AND PROCEEDINGS[1]

It was nighttime when Michelle Anderson stopped in Raton, New Mexico, a town she did not know. **[CD-G-3/30/21, 9:10:15]** While outside on the phone with her mom, she agreed to follow Samuel Neal, someone who approached her outside her hotel, to an abandoned motel. **[CD-G-3/30/21,**

[1] Mr. Neal agrees with the facts as presented in the State's brief in chief, but takes this opportunity to highlight certain facts and provide facts regarding the State's legal theory of the case which was not included in the brief in chief.

9:27:48, 9:30:30] Ms. Anderson testified she thought they might go get high together. **[CD-J-3/30/21, 2:16:00]** For two months Mr. Neal lived in this abandoned motel room, which was dilapidated and full of trash. **[CD-J-3/30/21, 1:12:00, 1:26:40, 1:31:27, 1:47:50]** She followed Mr. Neal through a window, "I had one foot in the window sill, and then he kind of grabbed me in a bear hug and pulled me in through the window. And then he turned me so that he was between me and the window." **[CD-G-3/30/21, 9:32:50]**

She told him she did not want to have sex, and he began hitting her on the head. **[CD-G-3/30/21, 9:37:15-9:38:48]** Ms. Anderson testified that Mr. Neal put his hand in her mouth and she bit him, which caused him to hit her more and then strangle her from behind. **[CD-G-3/30/21, 9:43:20]** Ms. Anderson stopped struggling and testified that Mr. Neal moved her onto the mattress and began kissing her mouth, neck, and chest. **[CD-G-3/30/21, 9:47:00]** She testified that he performed oral sex on her and then penetrated her with his penis. **[CD-G-3/30/21, 9:47:53]**

In the Criminal Information, the State charged Mr. Neal with first-degree kidnapping, second-degree criminal sexual penetration ("CSP II"), and aggravated battery (great bodily harm).[2] Kidnapping is a second-degree felony,

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[2] There were other charges, but this brief only discusses the charges and convictions relevant to the double jeopardy issue.

unless the State proves an aggravating circumstance, then it is a first-degree felony. The State was not specific as to which act(s) aggravated the kidnapping to a first-degree felony, but simply stated in the charging document, "defendant did not voluntarily free Michelle Anderson in a safe place or the defendant inflicted physical injury or a sexual offense on Michelle Anderson." **[1 RP 1]**

As applicable to this case, to charge CSP as a second-degree felony, the State needed to prove there was personal injury to the victim—a battery. In the Criminal Information, the CSP II charge did not specify which battery caused the personal injury (the hitting or the strangling) that elevated the CSP to a second-degree felony. **[1 RP 2]** The aggravated battery, as charged in the Criminal Information, also did not specify which act caused great bodily harm (the hitting or the strangulation). **[1 RP 2]** As shown below, the lack of specificity continued throughout the trial, as neither the jury instructions nor the State's theory of the case specified which facts elevated kidnapping to a second-degree felony, CSP to a second-degree felony, or aggravated battery to a third-degree felony.

At trial, the State's jury instructions for first-degree kidnapping provided:

1. [Mr. Neal] took, restrained or confined Michelle Anderson 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. [Mr. Neal] intended to inflict physical injury or a sexual offense

on Michelle Anderson;

3. The restraint or confinement of Michelle Anderson was not slight, inconsequential, or merely incidental to the commission of another crime;

4. [Mr. Neal] **inflicted physical injury** upon Michelle Anderson or [Mr. Neal] **inflicted a sexual offense** upon Michelle Anderson during the course of the kidnapping; . . .

[1 RP 177 (emphasis added)**]** In closing the State proved this count to the jury by arguing:

> [T]he first element is that [Mr. Neal] took, restrained or confined our victim, Michelle, by pulling her into the motel room, which you hear 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 [Mr. Neal] had intended to inflict physical injury or a sexual offense on Michelle Anderson. You heard her testify, that's exactly what happened.
>
> Number three, that the restraint or confinement of our victim, Michelle Anderson, it wasn't slight, inconsequential or merely incidental to the commission of another crime.
>
> And four, that [Mr. Neal] **inflicted physical injury** upon Michelle Anderson **or** [Mr. Neal] **inflicted a sexual offense** upon Michelle Anderson during the course of the kidnapping. **You heard her testimony, and you saw the DNA results, no question**.

[CD-M-3/30/21, 4:53:17-4:55:30 (emphasis added)**]**

The State's jury instruction for CSP II provided:

1. [Mr. Neal] caused Michelle Anderson to engage in sexual

intercourse;

2. [Mr. Neal] caused the insertion of a penis into the vagina of Michelle Anderson **through the use of physical force** or physical violence;

3. [Mr. Neal's] acts **resulted in bruising** in the leg area, of the eye, and **of the throat** of Michelle Anderson; . . .

[1 RP 179 (emphasis added)**]** In closing the State proved this count to the jury by arguing:

> This is the criminal sexual penetration, and for these, the four elements are that the defendant caused Michelle Anderson 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 Michelle Anderson 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 Michelle Anderson.

[CD-M-3/30/21, 4:57:37]

The State's jury instruction for aggravated battery provided:

1. [Mr. Neal] touched or applied force to Michelle Anderson by **striking her with his fists <u>and</u> strangling her**;

2. [Mr. Neal] intended to injure Michelle Anderson;

3. [Mr. Neal] acted in a way that would likely result in death or great bodily harm to Michelle Anderson; . . .

[1 RP 182 (emphasis added)**]** In closing the State proved this count to the jury by arguing:

> [T]he four elements here were that the defendant pressure applied force to Michelle Anderson by striking her with his fist **<u>and</u>**

> **strangling her**. The defendant intended to injure Michelle Anderson. The defendant acted in a way that would likely result in death or great bodily harm to Michelle Anderson.

[CD-M-3/30/21, 4:59:00]

The Court of Appeals found that the first-degree kidnapping subsumed the CSP II because the element elevating the kidnapping to a first-degree felony required proof of a sexual offense and only one sexual offense was instructed. *Neal*, A-1-CA-40205, ¶¶ 13-15. Although that same element also included "inflicted physical injury"—a battery, the Court found that it could not have been the aggravated battery because that Count did not require proof of an injury. *Id.* ¶ 11. Additionally, the jury could have convicted of CSP II based on the same strangulation that formed the basis for the aggravated battery, so the CSP II subsumed the battery. *Id.* ¶¶ 9-12.

In other words, the CSP II could not be proven without the aggravated battery, and the first-degree kidnapping could not be proven without the CSP II. Both the CSP II and aggravated battery were subsumed by a greater felony, and were based on the same use of force, so the Court of Appeals vacated both convictions, as they violated principles of double jeopardy. *Id.* ¶¶ 16-17.

ARGUMENT

I. THIS COURT SHOULD QUASH CERTIORARI BECAUSE THE STATE FAILED TO ANALYZE STARE DECISIS. REGARDLESS, ANALYZING STARE DECISIS DOES NOT SUPPORT OVERTURNING DOUBLE JEOPARDY JURISPRUDENCE.

Before overturning precedent, this Court considers "1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification." *State v. Riley*, 2010-NMSC-005, ¶ 34, 147 N.M. 557, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, ¶ 34, 306 P.3d 426. "[W]hen one of the aforementioned circumstances *convincingly demonstrates* that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." *State v. Pieri*, 2009-NMSC-019, ¶ 21, 146 N.M. 155 (cleaned up).

Although the State overtly complains about unjust results and alleges our double jeopardy analysis "has become 'so unworkable as to be intolerable,'" **[BIC 1-2]** the State conducts no analysis as to why changing New Mexico's law satisfies the above factors. As this Court did in *Riley*, it should decline to depart from New Mexico precedent on principle, and because the State failed to

conduct a full *stare decisis* analysis. *See Riley*, 2010-NMSC-005, ¶ 35 ("[Appellant] does not offer, nor do we find, any reason to depart from our precedent regarding this issue."); *see also Montoya*, 2013-NMSC-020, ¶ 39 (stating that unlike in *Riley*, because the issue of *stare decisis* was "squarely raised, briefed, and argued . . . [w]e therefore must conduct the jurisprudential analysis"). However, even if this Court reaches the merits of this issue, this situation does not meet the high burden required by *Riley*. *See Riley*, 2010-NMSC-005, ¶ 34 ("We honor the principle of stare decisis and are reluctant to overturn precedent because it promotes stability of the law, fairness in assuring that like cases are treated similarly, and judicial economy.").

First, this Court's double jeopardy precedent is not so unworkable as to be intolerable, as argued below. The State's complaint largely reflects prosecutors' failure to consider or apply this Court's double jeopardy precedent in practice, rather than problems with the precedent itself. The State complains about this Court's double jeopardy analysis in many cases where the prosecution below has failed to apply the law even remotely.[3] The courts have consistently been

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[3] *See e.g.*, *State v. Reed*, 2022-NMCA-025, ¶ 19, *cert denied*, S-1-SC-39187 (Feb. 24, 2022) (analyzing the State's theory of the case which was vague and unspecific, and provided multiple alternatives); *State v. Reed*, S-1-SC-39187, Cross-Petition for a Writ of Certiorari (filed Jan. 21, 2022) and Response to Cross-Petition (filed Mar. 11, 2022); *State v. Dent*, No. A-1-CA-40313 (N.M. Ct. App. Sept. 19, 2024) (non-precedential); *State v. Dent*, No. S-1-SC-40620,

clear that it is the job of the prosecution to present the jury with a non-unitary basis for each charge. *See State v. Lorenzo*, 2024-NMSC-003, ¶ 11, 545 P.3d 1156 (noting that "had the State 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"). In several cases, trial prosecutors have failed to sufficiently separate charges, and sometimes actively encourage the jury to rely on the same conduct to support multiple charges, *See, e.g., State v. Silvas*, 2015-NMSC-006, ¶¶ 18-19, 343 P.3d 616 (confirming that conduct was unitary based on the jury instructions, in which the state "directed the jury to the same act for both crimes . . . as the basis to convict for both crimes"). Here, the State did not attempt to separate the kidnapping from the CSP II from the aggravated battery in either its charging documents, jury instructions, or closing argument to the jury. The problem is not that this Court's precedent is unworkable, but that trial prosecutors have not attempted to follow it.

Petition for Writ of Certiorari (filed Oct. 21, 2024); *State v. Serrato*, 2021-NMCA-027, 493 P.3d 383, *cert. denied* (May 4, 2020); *State v. Serrato*, S-1-SC-38204, Petition for Writ of Certiorari (filed Mar. 18, 2020); *State v. Autrey*, No. A-1-CA-38116 (N.M. Ct. App. Apr. 12, 2022) (non-precedential), *cert. denied*, 2022-NMCERT-008, ¶ 14, 547 P.3d 49, and *cert. granted*, 2022-NMCERT-012, ¶ 14, 547 P.3d 67, *cert. quashed*, 2024-NMCERT-002, ¶ 14, 546 P.3d 1289; *State v. Autrey*, No. S-1-SC-39383, Petition for Writ of Certiorari (filed May 9, 2022).

Second, for the same reason as the first factor, the State could not have relied on prior double jeopardy precedent to its detriment because prosecutors are not considering precedent in practice. As the Court of Appeals noted, "[t]he same facts may have resulted in a different constellation of charges or arguments that may have supported separate crimes." *Neal*, A-1-CA-40205, ¶ 17. Thus, had the State considered this Court's double jeopardy precedent when charging this case, it is likely the State would have sustained more convictions without violating principles of double jeopardy.

Third, using the modified *Blockburger* test is not "a remnant of abandoned doctrine." Our three foundational cases, *State v. Swafford*, 1991-NMSC-043, 112 N.M. 3, *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, and *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, continue to guide our double jeopardy analysis, and each case, as discussed below, complies with federal law, which has also not been abandoned. Of note, there have been several double-description cases over the last decade and the opinions do not suggest that the modified *Blockburger* test is outdated. *See, e.g., State v. Phillips*, 2024-NMSC-009, 548 P.3d 51; *Lorenzo*, 2024-NMSC-003; *State v. Porter*, 2020-NMSC-020, 476 P.3d 1201. If anything, the test is recent enough that the Court of Appeals is still getting used to it. *See, e.g.*, *State v. Begaye*, 2023-NMSC-015, ¶ 22, 533 P.3d 1057; *Porter*, 2020-NMSC-020, ¶ 6. For the same reasons, the fourth *Riley* factor is inapplicable.

This Court should quash certiorari.

II. THE FEDERAL DOUBLE JEOPARDY ANALYSIS DOES NOT ONLY UTILIZE A STRICT *BLOCKBURGER* ANSLYSIS.

In 1873, the Supreme Court stated, "there has never been any doubt of [double jeopardy's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." *Ex parte Lange*, 85 U.S. 163, 168 (1873); *see also Gore v. United States*, 357 U.S. 386, 392 (1958) (referring to double jeopardy as a "historical safeguard"). There are two types of double jeopardy cases: unit of prosecution and double description. The United States Supreme Court recognized unit of prosecution cases in 1915, but upheld six convictions, under the same statute, for tearing and cutting six mail bags because Congress had intended punishment for each act of damage to "any mail bag." *Ebeling v. Morgan*, 237 U.S. 625 (1915).

In 1932, the Supreme Court recognized double description cases, and held that if one offense requires proof of a fact the other offense does not, then there is no double jeopardy violation. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This is well known as "the *Blockburger* test," and is utilized to try to determine the legislature's intent. "[T]he test is *whether the facts offered* in support of one [offense] would sustain a conviction of the other. If either information requires the proof of facts to support a conviction which the other does not, the

offenses are not the same and a plea of double jeopardy is unavailing." *Owens v. Abram*, 1954-NMSC-096, ¶ 5, 58 N.M. 682.

Legislative intent as to cumulative punishment is of the utmost importance. "[W]hile the double jeopardy clause does not limit what punishment the legislature may impose, it does require that if the legislature desires cumulative punishment it must make its intention clear." *Westbury v. Krenke*, 112 F. Supp. 2d 803, 811 (E.D. Wis. 2000). For example, in *Missouri v. Hunter*, the Court found clear legislative intent to allow multiple punishments in the Missouri statute: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." 459 U.S. 359, 362 (1983) (quoting MO.STAT.APP. § 559.225 (Vernon 1979)). A clear intention by the legislature is important because "[i]f a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980).

The federal courts first look at whether the crimes were committed during the "same act or transaction" or, in other words, during a "single course of

conduct." *See Blockburger*, 284 U.S. at 304 (referring to "the same act or transaction"); *United States v. Felix*, 503 U.S. 378, 389 (1992) (referring to a "single course of conduct"). If it is determined that the crimes were committed during the same transaction, federal courts then apply *Blockburger* and analyze the elements. *Blockburger*, 284 U.S. at 304.

In 1975, the Supreme Court stated, "[i]f 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** . . . ." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975) (emphasis added). This illustrates that the Supreme Court has recognized a possible need to further analyze the proof used to convict in cases with "substantial overlap in the proof." The Supreme Court has characterized the *Blockburger* test as a canon of construction used to decipher legislative intent, not a constitutional rule. *Whalen,* 445 U.S. at 691. "The *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

In addition to the *Blockburger* test that examines the elements of an offense in deciphering legislative intent, the federal courts also analyze the "social evils." *See United States v. Woodward*, 469 U.S. 105, 109 (1985) (discussing whether

currency reporting and false statement statutes sought to protect from separate evils). If the intent of the legislature cannot be reasonably determined, federal courts apply the rule of lenity and assume the legislature did not seek to impose multiple punishments. *See Jeffers v. United States*, 432 U.S. 137, 156 (1977). Further insight can be drawn from later Supreme Court cases.

In 1980, the Supreme Court decided *Whalen v. United States*, which was a case where the defendant was convicted of felony murder and rape. 445 U.S. at 686. The Court found that rape and the killing of a person in the commission of a rape are separate offenses, and neither statute indicated whether the legislature intended for multiple punishments. *Id.* at 690. However, the Court found the convictions violated double jeopardy because "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id.* 693-694. The Supreme Court later stated that its "result in *Whalen* turned on the fact that the Court saw no 'clear indication of contrary legislative intent.'" *Hunter*, 459 U.S. at 367. The Sixth Circuit recognized *Whalen* as a departure from a strict *Blockburger* analysis for statutes written with many alternatives. *Pandelli v. United States*, 635 F.2d 533, 537 (6th Cir. 1980). "Had the Court applied the *Blockburger* test to the statutes as they stood, it would have found that they created distinct offenses, because each statute required an

element that the other did not." *Id.* The Supreme Court modified the *Blockburger* analysis because of how statutory construction evidenced legislative intent.

The same year, in *Illinois v. Vitale,* 447 U.S. 410 (1980), the Supreme Court extended its holding in *Whalen* when analyzing an involuntary murder statute, which criminalized "reckless" homicide. *Pandelli*, 635 F.2d at 537-538. The Supreme Court acknowledged that the involuntary murder statute was not written in the alternative, but homed in on the statutory language of "reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm," which was a required element. *Id.* at 538; *Vitale,* 447 U.S. at 416-417. The other statute in question was "failing to reduce speed," which required proof "that the defendant drove carelessly and failed to reduce speed to avoid the collision." *Vitale,* 447 U.S. at 416. The question was whether Illinois could prosecute the manslaughter conviction having already sustained a conviction for failing to reduce speed. *Id* at 413-414.

The Court found that "if in the pending manslaughter prosecution Illinois relies on and a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, *Vitale* would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* Thus, because the elements of the crimes themselves were not specific as to which proof the State would offer to support a conviction, the Supreme Court

instructed the Illinois courts to ensure the prosecution would not be using the same proof in a subsequent prosecution to convict the defendant of manslaughter. *Id. Pandelli* summarized:

> The [Supreme] Court states in each opinion, however, that the *Blockburger* test in its modified form still "focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial," *Vitale*, 100 S.Ct. at 2265, or "the facts alleged in a particular indictment." *Whalen*, 100 S.Ct. at 1439 (emphasis added). Courts have always looked to the law the indictment claims the defendant violated. If they did not do so, they would not know even what statutes are at issue under the *Blockburger* rule. **What the reviewing court must do now in applying *Blockburger* is go further and look 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.

Id. (emphasis added).

Later, in *Grady v. Corbin*, the Supreme Court reviewed the facts in the State's bill of particulars and concluded that a successive prosecution was barred because the State, which had already secured a conviction, planned to use the same facts in the second trial that it had already used in the first. *Grady v. Corbin*, 495 U.S. 508, 523 (1990), *overruled by United States v. Dixon*, 509 U.S. 688 (1993). *Dixon* overruled *Grady*, stating that a "same conduct" test "contradicted an unbroken line of decisions, contained less than accurate historical analysis, and has produced confusion," and was "unworkable or badly reasoned." *Dixon*, 509 U.S. at 689. "The legislative history rather clearly confirms that Congress

intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code." *Whalen*, 445 U.S. at 692. Thus, the "same conduct" test was "unworkable or badly reasoned" as applied to federal law because Congress drafted its statutes knowing that the federal courts would apply *Blockburger*. *Id.*

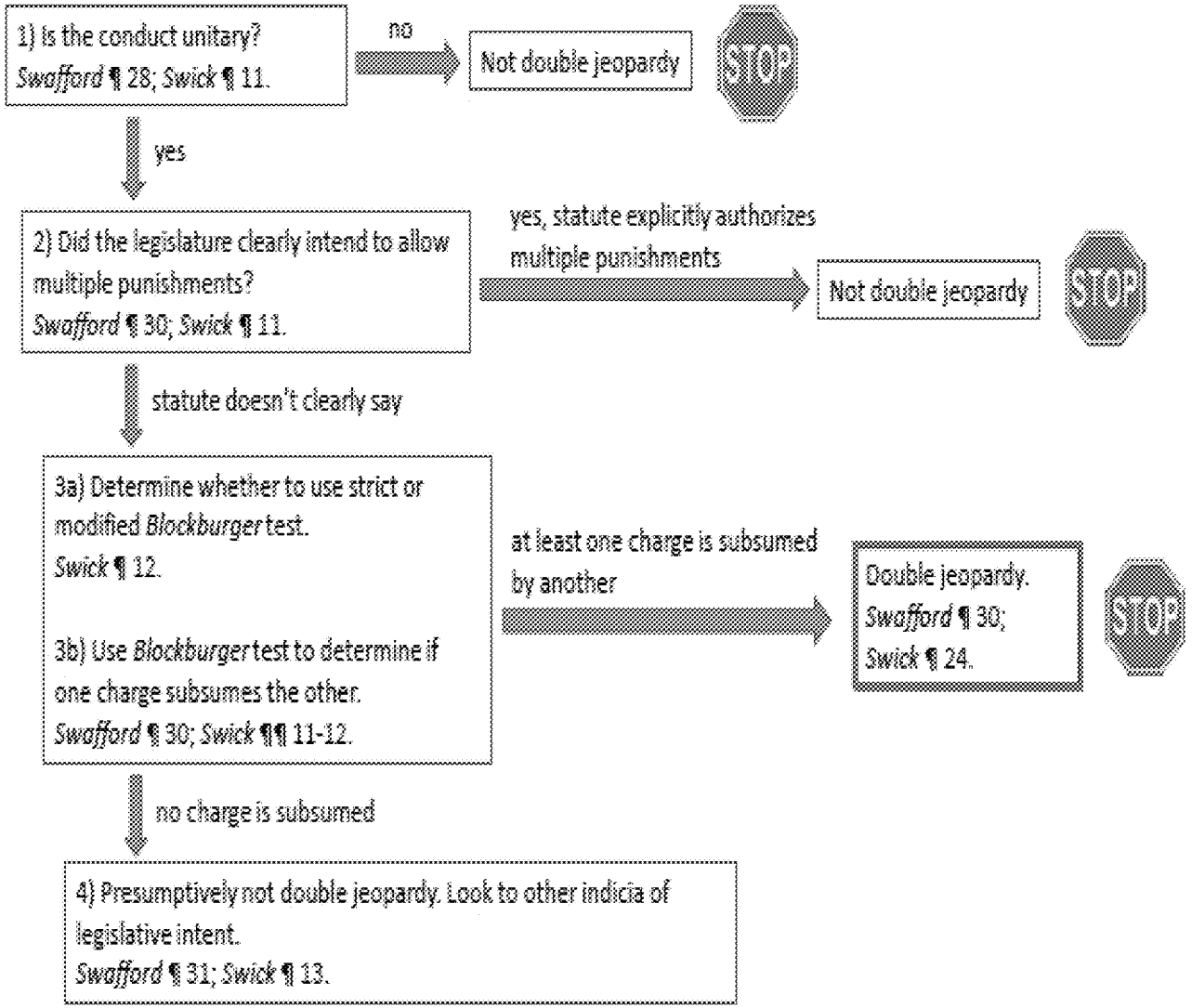
Some courts have expressed the opinion that *Dixon* overruled *Vitale* as *Grady*'s its antecedent. *See, e.g.*, *State v. Miles*, 128 A.3d 700, 709 (N.J. App. Div. 2015). However, *Grady's* ruling was based on the "same conduct," and *Vitale* merely suggested looking at the proof that supported the element, which on its face appeared to be an element describing the crime of failing to reduce speed to avoid a collision. *Grady*, 495 U.S. at 522-523; *Vitale*, 447 U.S. at 420-421. *Vitale* did not examine all the facts of the case like *Grady*, it looked at a specific element, the proof of which was unknown, but recognized that if that element was proven with the other conviction, it would violate double jeopardy. 447 U.S. at 420-421The spirit of *Vitale* can be found in New Mexico jurisprudence, as further explained below. "[A] prosecutor should not be allowed to defeat the constitutional protections afforded by the double jeopardy clause' by clever indictment drafting." *Swick*, 2012-NMSC-018, ¶ 25 (quoting *Gutierrez*, 2011-NMSC-024, ¶ 79.

III. NEW MEXICO COMPLIES WITH FEDERAL LAW, AND HAS ALSO MODIFIED ITS *BLOCKBURGER* ANALYSIS DUE TO STATUTORY INTERPRETATION.

The Double Jeopardy Clause prevents the sentencing court from prescribing greater punishment for the acts committed by the defendant than the legislature intended. *Swafford v. State*, 1991-NMSC-043, ¶ 7, 112 N.M. 3 (citations omitted). This Court recognizes both types of multiple punishment cases distinguished by the Supreme Court: unit of prosecution and double description. *Id.* ¶¶ 8-9. Unit of prosecution deals with multiple charges under one statute, and double-description is multiple charges under different statutes. *Id.* ¶ 8. Over the past seven decades, New Mexico has implemented many different double jeopardy analyses: the "same evidence" test; the "necessarily involved" test; the "necessarily included" test; the *DeMary* test; and the common-law merger doctrine. *Id.* ¶¶ 17-24. It is not easy to determine whether conduct is one act or more than one act and can be punished more than once.

In the early 1990s, because of the importance of legislative intent, and the fact that the legislature is not always explicit regarding multiple punishments, this Court developed a test to determine the legislature's intent. *Swafford*, 1991-NMSC-043, ¶ 25. Below is a diagram of New Mexico's double jeopardy test, which is known as the modified *Blockburger* test.

Analysis of a Double-Description Claim



As shown above, analyzing double jeopardy is a multi-step task. Its complexity, however, is not the fault of the test itself. All statutory interpretation is complex. "[D]etermining what the Legislature intended—or perhaps more accurately, what the Legislature most likely would have intended had it contemplated the potential overlap between particular statutes—is a task for which there is no simple test. The problem is exacerbated by the ever increasing number and complexity of criminal statutes." *Montoya,* 2013-NMSC-020, ¶ 33.

The first step is to determine whether the conduct underlying the offenses is unitary. *Swafford*, 1991-NMSC-043, ¶ 26. "Clearly, if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense." *Id.* This step is akin to "the same act or transaction" or "single course of conduct" inquiry in federal courts. *See Blockburger*, 284 U.S. at 304 (1932); *Felix*, 503 U.S. at 389 (recognizing a fine line between the "single transaction" test and *Grady*'s "same conduct" language). Federal law does not dictate how courts should analyze whether the course of conduct is the same act or all one incident, but this Court grappled with that question in *Herron v. State*, 1991-NMSC-012, ¶ 13, 111 N.M. 357.

In determining whether the acts in *Herron* were distinct, this Court looked at other jurisdictions, including Alaska, Arizona, Arkansas, Illinois, Missouri,

Tennessee, Wisconsin, and Wyoming, and came up with the following factors to consider: "(1) temporal proximity of penetrations (the greater the interval between acts the greater the likelihood of separate offenses); (2) location of the victim during each penetration (movement or repositioning of the victim between penetrations tends to show separate offenses); (3) existence of an intervening event; (4) sequencing of penetrations (serial penetrations of different orifices, as opposed to repeated penetrations of the same orifice, tend to establish separate offenses); (5) defendant's intent as evidenced by his conduct and utterances; and (6) number of victims (although not relevant here, multiple victims will likely give rise to multiple offenses)." *Herron*, 1991-NMSC-012, ¶ 15. Although *Herron*'s factors were derived in a unit of prosecution sexual offense case, these factors have since been applied to analyzing unitary conduct in other contexts. *See State v. Bernal*, 2006-NMSC-050, ¶ 16, 140 N.M. 644 ("The *Herron* unit-of-prosecution factors were cited in *Swafford*, a double-description case, and adopted as part of the double-description, unitary-conduct inquiry."); *Phillips*, 2024-NMSC-009, ¶ 11 (utilizing the *Herron* factors in a unit of prosecution analysis regarding multiple batteries). Today, courts all across the country utilize similar factors to determine whether conduct is unitary. *See State v. Stephens*, 203 So. 3d 134, 139 (Ala. Crim. App. 2016) (compiling cases).

The second part of the inquiry is whether the legislature intended to impose multiple punishments for the same offense. *Swafford*, 1991-NMSC-043, ¶ 30. In analyzing double description cases, this Court stated that, "if after a *Blockburger* element analysis, the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent." *Id.* ¶ 31; *cf. Hunter*, 459 U.S. at 367.

The modified *Blockburger* test was first discussed in *State v. Gutierrez*, 2011-NMSC-024. In *Gutierrez*, the defendant was convicted of "murder, aggravated burglary, armed robbery for stealing a car and car keys while armed with a deadly weapon, and unlawful taking of a motor vehicle." *Id.* ¶ 1. The defendant argued that his convictions for armed robbery with a deadly weapon and unlawful taking of a motor vehicle constituted double jeopardy, and he requested the court modify its *Blockburger* analysis. *Id.* ¶ 48. This Court found the conduct unitary because the defendant was "charged with taking Powell's 1996 Oldsmobile" under the unlawful taking of a motor vehicle and robbery statutes. *Id.* ¶ 54.

The Court recognized that "[i]f *Blockburger* is applied to the elements of the two offenses in the abstract, it appears that they are not identical because

proof of armed robbery, which may involve the theft of any type of property, will not always entail proof that an automobile was taken, a necessary element of unlawful taking of a motor vehicle." *Gutierrez*, 2011-NMSC-024, ¶ 58. When the State's legal theory of the case is "vague and unspecific," *Blockburger* must be modified to ascertain the State's legal theory. *Id.* ¶ 59. Thus, it was necessary to identify what fact the State's theory of the case proved "anything of value" as required under the armed robbery statute. *Id.*

In making this determination, this Court analyzed the Sixth Circuit's opinion in *Pandelli*, which discussed the Supreme Court's decisions in *Vitale* and *Whalen*. *Pandelli*, 635 F.2d at 535-538. "The Court's modification of the *Blockburger* test in its original, abstract form arises from a pervasive change in the criminal justice system noted by the Court in previous opinions—the increasing volume, complexity, vagueness and overlapping nature of criminal statutes." *Pandelli*, 635 F.2d at 538. The *Gutierrez* Court, thus, adopted the modified *Blockburger* analysis for "claims involving statutes that are 'vague and unspecific,' in addition to those that are 'written with many alternatives,'" and instructed New Mexico courts to "consider the prosecution's theory as expressed in the charging document and jury instruction." *Gutierrez*, 2011-NMSC-024, ¶¶ 48, 53 (quoting *Pandelli*, 635 F.2d at 538).

One year later, this Court answered whether lower courts can look beyond the charging documents and jury instructions, if those records do not express the State's theory of the case. This Court stated, "a prosecutor should not be allowed to defeat the constitutional protections afforded by the double jeopardy clause' by clever indictment drafting." *Swick*, 2012-NMSC-018, ¶ 25 (quoting *Gutierrez*, 2011-NMSC-024, ¶ 79). In *Swick*, the defendant burglarized, beat, and robbed a husband and wife. 2012-NMSC-018, ¶ 2. The Court of Appeals found that his "convictions for two counts of attempted murder and two counts of aggravated battery with a deadly weapon did not violate [] double jeopardy" and his "convictions for one count of aggravated burglary (deadly weapon) and two counts of aggravated burglary (battery) did not violate the double jeopardy prohibition." *Id.* ¶ 6.

The Court of Appeals reasoned that one burglary involved a deadly weapon and the other burglary involved battery, so both "addressed different social evils that required separate punishments—to deter criminals from using deadly weapons in burglaries versus to address actual physical injury to persons during burglaries." *Id.* ¶ 9. The Court of Appeals acknowledged that the same quantum of punishment is prescribed for each subsection, suggesting that

separate punishments may be inappropriate. *Swick*, 2012-NMSC-018, ¶ 9.[4] But the Court of Appeals still concluded that the Legislature intended multiple punishments. *Id.*

The indictment and jury instructions for first-degree attempted murder in *Swick* were silent as to the victim. *Id.* ¶ 22. They were carbon copy counts. A strict *Blockburger* analysis in *Swick* would have vacated one of the attempted murder counts—even though there were two different victims. Instead of vacating a murder conviction due to the prosecution's vague and unspecific jury instruction, this Court looked to other facts in the record to ascertain that there were two different victims. *Id.* The jury instructions for aggravated battery with a deadly weapon did name each victim. *Id.* ¶ 23.

This Court found that the two aggravated batteries were used to prove the vague element in the statute requiring proof that the defendant "began to do an act which constituted a substantial part of Murder" to prove the attempted murder charges. *Swick*, 2012-NMSC-018, ¶ 25. This holding is akin to that in *Vital*, 447 U.S. at 416. Although the elements are not the same, the aggravated batteries in *Swick* are lesser included offenses of attempted murder. To confirm

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[4] New Mexico added quantum of punishment as a canon of construction. *Swafford*, 1991-NMSC-043, ¶ 33.

this, this Court looked to the facts at trial and found that it was correct about State's legal theory.

> The State's legal theory at the outset of trial was that after Swick entered the Atencios' home, he "proceed[ed] to try [to] kill them." Moreover, the State proffered the same testimony to prove the aggravated batteries as it did to prove the attempted murders, which was that Swick beat, stabbed, and slashed Mr. and Mrs. Atencio after entering their home. Finally, the State, in its closing argument, after giving the elements of attempted murder, asked the jury, "[w]hy is this attempted murder and not just aggravated battery?" After a recitation of the same evidence that the State used to support the aggravated battery charge earlier in its closing, it concluded with "[t]his kind of excessive violence is supportive of an intent to kill."

Swick, 2012-NMSC-018, ¶ 26.

New Mexico's modified *Blockburger* analysis is not unreasonable, especially when the State is vague and unspecific in its charging documents and jury instructions. Our analysis aids practitioners in truly trying to determine the legislature's intent, rather than being "so mechanical that it is enough for two statutes to have different elements." *Id.* ¶ 21. Last year this Court again reiterated that "when the legal theory is still unclear based on the charging documents and jury instructions alone, 'we also review testimony, opening arguments, and closing arguments to establish whether the same evidence supported a defendant's convictions under both statutes.'" *Begaye*, 2023-NMSC-015, ¶ 18 (quoting *Porter*, 2020-NMSC-020, ¶ 19).

Further, the New Mexico legislature has relied upon this framework in drafting its statutes for nearly fourteen years, and there is no legitimate reason to upend this Court's well thought-out jurisprudence.

IV. UNDER THE MODIFIED *BLOCKBURGER* APPROACH, THE COURT OF APPEALS WAS CORRECT TO FIND A DOUBLE JEOPARDY VIOLATION.

Mr. Neal's convictions for kidnapping, CSP II, and aggravated battery violated his right to be free from double jeopardy. The Court of Appeals correctly applied the *Foster* presumption and the modified *Blockburger* test, and it vacated the CSP II and the aggravated battery to repair this constitutional violation.

When "jury instructions provide alternative bases for conviction of an offense, and the record is silent as to which alternative the jury relied on for its verdict, we apply the *Foster* presumption, which demands that we assume that the jury relied on the alternative that may violate the protection against double jeopardy." *Reed*, 2022-NMCA-025, ¶ 10; *see also State v. Sena*, 2020-NMSC-011, ¶ 47, 470 P.3d 227 (citing *State v. Foster*, 1999-NMSC-007, ¶ 28, 126 N.M. 646, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381). "[W]e cannot assume that jurors will know to avoid an alternative basis for reaching a guilty verdict that would result in a violation of the Double Jeopardy Clause." *Foster*, 1999-NMSC-007, ¶ 28. The jury instructions provided to Mr. Neal's jury contained "multiple factual and legal alternatives to find [Mr.

Neal] guilty of each crime," which the Court of Appeals held, required application of the *Foster* presumption. *Neal*, A-1-CA-40205, ¶ 5. The *Foster* presumption is the analytical framework for determining unitary conduct—the first-step discussed above in New Mexico's double jeopardy analysis. *Sena*, 2020-NMSC-011, ¶ 47.

In its unitary conduct analysis, the Court of Appeals found that "[n]o indicia of distinctness separate[d] the evidence offered to satisfy aggravated battery and the evidence required to satisfy CSP II, which includes force as an element." *Neal*, A-1-CA-40205, ¶ 9. This problem is the factual alternative for both aggravated battery and CSP II that required striking and strangling as an element. *Id.* This satisfies the presumption that there is a double jeopardy violation. *Foster*, 1999-NMSC-007, ¶ 28 ("[W]e must presume 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.").

However, this presumption can be rebutted if the crimes are separated by both time and intervening events." *Sena*, 2020-NMSC-011, ¶ 56. Here, there was no evidence of any intervening event in this case. The State has not pointed to one and the Court of Appeals relied on evidence that the crimes lasted for only about 10-22 minutes. *Neal*, A-1-CA-40205, ¶ 7. There was also no period of time

between the crimes to establish non-unitary conduct. The Court of Appeals held that because the injuries necessary to prove the sexual assault and the battery "were the same acts, no indicia of distinctness can separate the crimes." Thus, aggravated battery and CSP II were unitary. *Neal*, A-1-CA-40205, ¶ 9.

This Court in *Swafford* determined that a CSP and an assault with intent to commit CSP were not unitary conduct by utilizing the *Herron* factors. 1991-NMSC-043, ¶ 38. This Court discussed unitary conduct and found that because the defendant "struck her several times," *then* "threatened her verbally **for a period of time**," *and then* sexually assaulted her, the crimes of assault with intent to commit rape and the actual rape were sufficiently distinct. 1991-NMSC-043, ¶ 38 (emphasis added). The State agrees with the result in *Swafford*, but not the result in this case. **[BIC 27]** Of note, however, the State does not correlate this Court's emphasis of "for a period of time" to the factors utilized to determine whether conduct is unitary. Instead, the State concludes that the *Swafford* decision was correct because the *conduct* was not identical. **[BIC 27-28]** This conclusion is inapposite to the language of Swafford, stating "if it *reasonably* can be said that the conduct is unitary." *Swafford*, 1991-NMSC-043, ¶ 28).

Next, the Court of Appeals analyzed legislative intent, which asks "whether the legislature intended to create separately punishable offenses." *State v. Baroz*, 2017-NMSC-030, ¶ 22, 404 P.3d 769. The chart below shows the

Court of Appeals' legislative intent analysis.

<table>
<tr><th>CSP II [1 RP 179]</th><th>Aggravated Battery [1 RP 182]</th></tr>
<tr><td>2. The defendant [sexually assaulted] Michelle Anderson through the use of physical force or physical violence.
[Subsumes →]</td><td>1. The defendant touched or applied force to Michelle Anderson by striking her with his fists and strangling her.</td></tr>
<tr><td rowspan="2">3. The defendant's acts resulted in bruising in the leg area, of the eye, and of the throat of Michelle Anderson.
[Subsumes →]</td><td>2. The defendant intended to injure Michelle Anderson.</td></tr>
<tr><td>3. The defendant acted in a way that would likely result in death or great bodily harm to Michelle Anderson.</td></tr>
</table>

These two CSP elements subsumed the elements of aggravated battery. The Court stated, "[T]he force applied to [Ms. Anderson] by striking or strangling to establish aggravated battery is the same force that caused the sexual penetration for CSP II." Similarly, the State utilized the strangulation to prove the third element of aggravated battery, and used the same strangulation to prove as the "use of physical force" required by CSP II that "resulted in bruising . . . of the throat of Michelle Anderson." *Neal*, A-1-CA-40205, ¶ 10.

Second, using the same type of analysis, the Court of Appeals looked at first-degree kidnapping and CSP II, determining that the crimes were unitary. *Neal*, A-1-CA-40205, ¶ 14. The second and fourth elements of first-degree kidnapping provided the jury with multiple alternatives, including inflicting a

physical injury or a sexual offense during the course of the kidnapping. Under *Foster*, the court found that the CSP II conviction would have resulted in a violation of double jeopardy. *Id.* ¶ 13. The court also explained that because the CSP II (count 2) was the only sexual offense that was defined for the jury, the sexual offense under the kidnapping instruction must have been proven by the CSP II. *Id.*

In its legislative intent analysis, the Court of Appeals found that the kidnapping jury instruction only broadly required a "sexual offense" and the State only argued one sexual offense to the jury that would satisfy that element—the CSP II. Thus, "the elements of CSP II—the only instructed and argued sexual offense—are subsumed entirely by the elements of first–degree kidnapping[.]" *Neal*, A-1-CA-40205, ¶ 15. The court held that the CSP II and the aggravated battery must be vacated. *Id.* ¶¶ 16-17. Aggravated battery was the base statute for CSP II, and CSP II was the base statute for first-degree kidnapping, in the same way that aggravated battery was the base statute for armed robbery in *Lorenzo*. *Lorenzo*, 2024-NMSC-003, ¶ 25 (Under the facts of this case, the aggravated battery, as a third-degree felony, functions as the "base statute" for the armed robbery."). This "Court has noted in the past that when 'one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the

legislature did not intend punishment under both statutes.'" *Lorenzo*, 2024-NMSC-003, ¶ 25 (quoting *Swafford*, 1991-NMSC-043, ¶ 33).

The conclusion in this case is a direct result the State's charging decisions and their theory of the case. Recently, this Court informed the State that "had the State 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." *Id.* ¶ 11. The same is true here.

This Court should affirm the Court of Appeals' analysis.

V. THE STATE'S ARGUMENT IS NOT REASONABLY SUPPORTED BY FEDERAL CASELAW.

The State complains that New Mexico double jeopardy law is "complex, fact-intensive, and produces unjust results." **[BIC 1]** It argues that New Mexico "should return to federal law and "follow the Supreme Courts of the United States, New Jersey, and Indiana." **[BIC 1, 46]** Regardless, not only does New Mexico comply with federal law, but as shown above, New Mexico double jeopardy law was derived from federal law. New Mexico's double jeopardy jurisprudence was not created in a vacuum.

A. While several other states agree with incorporating a unitary conduct analysis, the State thinks we should skip it.

The State argues that New Mexico has lost sight of legislative intent in its modified *Blockburger* analysis. **[BIC 25]** However, New Mexico's legislative

intent analysis seeks to get to the heart of the what the legislators actually intended, unlike a strict *Blockburger* approach. The first flaw, according to the State, is the unitary conduct inquiry. **[BIC 25]** It argues that it distracts from discerning legislative intent, is too complex, and that "the standard for finding unitary conduct is too low." **[BIC 26]**

The first step of determining unitary conduct does not deal with legislative intent. It determines whether the court even needs to determine the legislation's intent. *Lorenzo*, 2024-NMSC-003, ¶ 5 (stating that if the conduct is not unitary, however, double jeopardy does not apply and "the analysis is complete"). If the defendant punched the victim in the face, went next door to call for a cab, and then came back and stole the victim's car, there is no need to determine if the legislators intended two separate punishments. Regardless, this is neither a complex, nor a unique test to apply prior to determining legislative intent. The First Circuit examines "whether the crimes were different in place and time, whether there was common conduct linking the alleged offenses, whether the individuals involved in each offense were different, and whether the evidence used to prove the offenses differed." *United States v. Soto*, 799 F.3d 68, 86-87 (1st Cir.2015). The Eighth Circuit has held that "[f]actors relevant to the inquiry are: the time interval between the successive actions; the place where the actions occurred; the identity of the victim(s); the existence of an intervening act; the

similarity of the defendant's acts; and the defendant's intent at the time of his actions." *Velez v. Clarinda Correctional Facility*, 791 F.3d 831, 835 (8th Cir.2015). The Sixth Circuit, along with Kansas, Minnesota, New Hampshire, Massachusetts, Oregon, and Illinois, also conduct a similar analysis to determine "the same act or transaction." *See Stephens*, 203 So. 3d at 139.

The State's charging decision is the only factor that may make this analysis more painstaking than necessary. When the State provides the jury with alternative theories of liability in the jury instructions, appellate courts must evaluate the facts under both theories. *See Foster,* 1999-NMSC-007, ¶¶ 27-28. The State argues that this is part of the reason the analysis is too complex, but does not recognize that this problem only occurs because of its prosecutors' charging decisions.

As to the State's complaint that the "standard for finding unitary conduct is too low," **[BIC 26, 44]** the unitary conduct analysis has produced striking results in the State's favor. In recent cases, this Court has concluded that conduct was *not* unitary and has permitted multiple convictions, even though a strict *Blockburger* analysis on its own would have resulted in reversal. *See, e.g.*, *Phillips*, 2024-NMSC-009 (allowing for separate convictions of multiple batteries committed in one criminal event); *Sena*, 2020-NMSC-011. The State's suggestion of following New Jersey and Indiana would omit the unitary conduct

step entirely. As for its suggestion to follow United States Supreme Court precedent, the above analyses reveal that the Supreme Court does not instruct the lower courts as to how it should determine whether the acts are the same or within the same transaction. Moreover, the Sixth, Eighth, and First Circuits all employ a unitary conduct analysis.

Finally, the State argued that the low standard for unitary conduct was to blame for the result in this case, and alleged that this outcome has occurred in other cases: *State v. Serrato*, 2021-NMCA-027, 493 P.3d 383; *State v. Dent*, No. 40,313 (N.M. Ct. App. Sept 19, 2024); *State v. Autrey*, No. 38,116 (N.M. Ct. App. Apr. 12, 2022). **[BIC 31]** The results in these cases were also due to the vague charging decisions by the prosecution. To rectify this problem, instead of educating its prosecutors on how to properly develop its theory of the case, the State suggests skipping a unitary conduct analysis all together. As shown above, several other courts disagree as they utilize their own unitary conduct analysis.

B. The State misunderstands the results derived through the modified *Blockburger* test.

The State's characterization of this test being a "second unitary conduct analysis" is unfounded, but is understandable from the State's perspective, as it believes the unitary conduct analysis is a determination of "substantial factual overlap between the two crimes." **[BIC 27, 33]** Unitary conduct is not about overlap. As explained above, it's a determination of whether the crimes are

based on the same act or occurred during the same transaction. The modified *Blockburger* looks to the charging documents and jury instructions, as derived through the statutory language, and if those documents are vague or unspecific, the courts look to the State's legal theory of the case, as presented in its closing arguments. *Gutierrez*, 2011-NMSC-024, ¶ 59. This Court did not want our state's double jeopardy law to be a mechanical, thoughtless analysis. *See Swick*, 2012-NMSC-018, ¶ 21.

In its brief, the State discussed *Whalen* and *Pandelli,* and how those decisions informed the *Gutierrez* Court's ruling. **[BIC 33-34]** The State characterizes *Whalen*'s as a strict *Blockburger* analysis, and chooses not to recognize that *Whalen* modified the *Blockburger* analysis. **[BIC 33]** The *Pandelli* decision also looks another Supreme Court case that modified *Blockburger*—*Illinois v. Vitale*—which the State does not acknowledge. *Pandelli*, 635 F. 2d at 537-538. Regardless, the Sixth Circuit opined that

> The *Blockburger* test, as modified in *Whalen* and *Vitale*, comes into play only after other techniques of statutory construction have proved to be inconclusive. . . . To determine the congressional intent it is necessary to examine the statutory language and the legislative history, as well as to utilize other techniques of statutory construction. The Court reaches the *Blockburger* test only when those prior techniques of construction have failed to resolve the question of whether the legislature intends to allow cumulative punishments for violations of two statutes.

Pandelli, 635 F. 2d at 536. These cases evince even the Supreme Court straying away from a mechanical *Blockburger* analysis, if needed, in a particular type of case.

The *Vitale* Court noted that this modified *Blockburger* analysis "focuses on the **proof necessary to prove the statutory elements** of each offense, rather than on the actual evidence to be presented at trial." *Vitale*, 447 U.S. 410 (emphasis added). The Supreme Court's decision in *Vitale*, silences the State's remaining arguments because neither this Court, nor the Supreme Court requires an analysis of all the trial facts in detail. But, if a statute is vague and unspecific, and the charging documents and jury instructions do not adequately specify the facts it will use to prove each element, both courts will then turn its attention to "the proof necessary to prove the statutory elements of each offense." *Id.* Mr. Neal's case is just one example of the State's decision to prosecute a case broadly, later requiring appellate courts to look at the proof used to prove each count.

In Mr. Neal's charging documents, Count 1 is first-degree kidnapping, which is written in the alternative, like the statute in *Whalen*. **[1 RP 1]** The State did not choose one alternative, like in *Whalen*, but instead listed all of the possible alternatives: "defendant did not voluntarily free Michelle Anderson in a safe place or the defendant inflicted physical injury or a sexual offense on

Michelle Anderson[.]" **[1 RP 1]** Later, in its jury instructions, the prosecution instructed, as element 4, "The defendant inflicted physical injury upon Michelle Anderson or the defendant inflicted a sexual offense upon Michelle Anderson during the course of the kidnapping." **[1 RP 177]** Whether the State proved first-degree kidnapping with a battery or a sexual offense or both cannot be gleaned from the charging documents or jury instructions. Importantly, the State does not address how a court would ever sustain convictions for two charges whose elements, in the abstract, would fail the *Blockburger* test.

Through the modified *Blockburger* analysis, however, the Court of Appeals found that the proof used to satisfy the battery element in CSP II was the proof used to convict Mr. Neal of aggravated battery. *Neal*, A-1-CA-40205, ¶¶ 9-12. It also found that the same proof used to convict Mr. Neal of CSP II was the same proof used to satisfy the sexual offense element of first-degree kidnapping. *Id.* ¶¶ 13-15. Thus, the kidnapping subsumed the CSP II which subsumed the aggravated battery. The State's suggested remedy of vacating the aggravated battery conviction would also violate double jeopardy. **[BIC 49-50]** The Court of Appeals went a different route, but in Mr. Neal's Court of Appeals Brief, he argued that because of the *Foster* presumption, the first-degree kidnapping subsumed both the aggravated battery and CSP II because there was no way to know which alternative the jury convicted first-degree kidnapping under. *See*

State v. Neal, A-1-CA-40205, Brief in Chief, pgs. 8-15 (filed Nov. 8, 2022). This is another route that would also lead to vacating both convictions.

Finally, the State points to two cases for the proposition that "similarly-situated defendants face sharply differing results." **[BIC 37]** It argues that unlike Mr. Neal's case, the defendants' convictions for first-degree kidnapping and a sexual offense in these cases were upheld. **[BIC 37]** "In specifically analyzing whether the conduct underlying kidnapping and CSP II ... convictions is unitary, this Court has held that **unitary conduct occurs when the prosecution bases its theory of kidnapping on the same force used to commit CSP II** ... even though there were alternative ways to charge the crime." *State v. Jackson*, 2020-NMCA-034, ¶ 38, 468 P.3d 901 (quoting *State v. Simmons*, 2018-NMCA-015, ¶ 26, 409 P.3d 1030) (emphasis added). In *Jackson*, the State *did not* "base[] its theory of kidnapping on the same force used to commit CSP II." *Id.* The State in Mr. Neal's case did. In *State v. Dominguez*, 2014-NMCA-064, ¶ 5, 327 P.3d 1092, the statutes at issue were CSP II and kidnapping *in the second degree*, which did not require proof of a sexual offense. These cases do not support to the State's argument that New Mexico's double jeopardy analysis provides inconsistent results.

Instead of attacking the law, the State should attempt to correct the application of the law by its prosecutors. Analyzing double jeopardy issues is

sometimes fact-intensive, but it is the prosecutor who determines how to charge each count. The prosecution can often avoid double jeopardy claims on appeal by specifying the factual basis for each charge, which ensures that the charges are not based on unitary conduct. *See State v. Estrada*, 2001-NMCA-034, ¶ 10, 130 N.M. 358 (discussing that the prosecutor has broad discretion of which charges to file and which proof it will present to the finder of fact to satisfy the charged crimes). The State complains about an issue that it has control over throughout the entire prosecution. A defendant cannot set up the facts so that he has a good double jeopardy argument on appeal.

C. Analyzing other indicia of legislative intent also does not support the State's argument.

In 2004, the New Mexico legislature replaced the words of the kidnapping statute from "great bodily harm" to "physical injury or a sexual offense." *Compare* NMSA 1978, § 30-4-1(B) (2003) *with* § 30-4-1(B) (2004). The State argues that in the 1990s, our courts permitted convictions under both the kidnapping and CSP statutes. **[BIC 40-41]** This makes sense since *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, was decided before the 2004 amendment. The State also notes that the 2004 amendment was part of the "Omniubus Sex Offender Bill" that increased the penalties for sex offenses. **[BIC 41]** This is also correct, but it still does not support a legislative intent of

punishing first-degree kidnapping and CSP when the element necessary to elevate kidnapping to a first-degree felony is a sexual offense.

The punishment for second-degree kidnapping is 9 years' imprisonment, however, if the prosecution chooses to aggravate it with a sexual offense, kidnapping is elevated to a first-degree felony which doubles the punishment to 18 years of *mandatory* imprisonment. *See* NMSA §§ 30-4-1(B), 31-18-15(A) (2024). This means that instead of sentencing a defendant to two second-degree felonies, which allow for suspended and partially suspended sentences, the State could choose to combine the two for 18 *mandatory* years. *See* NMSA 1978, § 31-20-3 (1985) (excluding first-degree felonies from deferred or suspended sentences, as well as civil commitment).

Importantly, however, the State can use any sexual offense to get this result. The prosecution could choose to aggravated with misdemeanor criminal sexual contact (CSC), which on its own would only allow for a sentence of up to 364 days' imprisonment. *See* NMSA 1978, §§ 30-9-12(D) (1993), 31-18-15(A). This quantum of punishment even accounts for the differing social evils each statute seeks to protect. The other indicia of legislative intent weighs in favor of finding that the legislature intended for a sexual offense to be subsumed by the first-degree kidnapping conviction to obtain a much higher penalty.

D. A "return to the federal analysis" would not assist this Court in determining this case.

New Mexico's kidnapping statute is not comparable to the federal statute. *Compare* NMSA 1978, § 30-4-1(B) (2003) *with* 18 U.S.C.A. § 1201 (2006). The New Mexico legislature provides that kidnapping is punishable as a second-degree felony, *unless* the kidnapper "voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim," then it is a first-degree felony. NMSA § 30-4-1(B). A second degree felony is nine years' imprisonment, which allows for suspended or partially suspended sentences, whereas a first-degree felony is a *mandatory* eighteen years' imprisonment. NMSA 1978, § 31-18-15(A). The federal statute does not contain this language, and federal penalties do not hinge on release in a safe place, infliction of injury, or infliction of a sex offense. *See* 18 U.S.C.A. § 1201. Section 1201(a) sets the punishment for kidnapping at "imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment." *Id.*

Under the federal statute, because kidnapping does not require proof of a predicate sexual offense, multiple punishments for kidnapping and CSP would not violate double jeopardy. Federal caselaw does not aid our courts in its determination in this case other than *Vitale* and *Whalen*.

VI. EXTENDING *STATE V. FRAZIER* TO DOUBLE JEOPARDY ISSUES INVOLVING FIRST-DEGREE KIDNAPPING WOULD RESOLVE THE STATE'S COMPLAINTS.

The State is overwhelmed and argues that double jeopardy jurisprudence it is "constantly changing, unmanageably complex, and highly fact-specific[.]" **[BIC 12-13]** In part, it seeks for this Court to clarify the double description analysis. **[BIC 49]** While, as explained above, New Mexico's analysis cannot mirror that of federal law, or even other states' analyses, due to how our statutes are written, this Court can apply a felony murder analysis to our kidnapping statute, which would give the State what it seeks in this case—a bright-line rule that would require little to no analysis. The more this Court can identify clear rules or strong presumptions in double jeopardy cases, the easier it is for lower courts and practitioners to apply the law without violating the rights of defendants.

The State approves of the double jeopardy analysis in *Whalen*, 445 U.S. 684, as interpreted by *Pandelli*, 635 F.2d 533 (6th Cir. 1980), which discussed how to sentence felony murder and its predicate felony. **[BIC 15-18, 33]** In *Whalen*, the defendant was convicted "of rape, and of killing the same victim in the perpetration of rape" and was consecutively sentenced for both. *Id.* at 685. The Supreme Court discussed that, in the District of Columbia, felony murder could be committed by "killing a human being in the course of any six specified

felonies." *Id.* at 686. This is akin to our kidnapping statute which allows for elevating kidnapping to a first-degree felony if the state proves a sexual offense or battery. Under a strict *Blockburger* analysis, felony murder and rape are not "the same offense," but the Court found it was necessary to prove the rape in order to convict of felony murder. *See id.* at 693-694. Thus, a conviction for both violated double jeopardy. *See id.* at 691-693 fns. 6-7.

State v. Frazier is the New Mexico equivalent of *Whalen*, where this Court ruled that a murder committed during the course of a felony (a kidnapping) was only punishable under the murder statute because the kidnapping was the predicate felony for the felony murder. *Frazier*, 2007-NMSC-032, ¶ 13, 35. The underlying felony serves to enhance a murder to a first degree felony without having to prove premeditation or depraved mind. *Id.* ¶ 26. Allowing a separate conviction for the predicate felony would punish a defendant more than had he committed the murder with a more culpable mental state. *Id.* The Court of Appeals has declined to apply *Frazier* to first-degree kidnapping cases. *State v. Sotelo*, 2013-NMCA-028, ¶¶ 24-27, 296 P.3d 1232; *Serrato*, 2021-NMCA-027, ¶ 24, fn. 2.

This Court should extend *Frazier* to first-degree kidnapping because there is a clear legislative intent that requires the jury to find either a battery or sexual offense was committed during the felony before convicting of first-degree

kidnapping. NMSA § 30-4-1(B). If the jury does not find this element, it would then move on to the second-degree kidnapping instruction, if instructed, which would not require such a finding. In this case, the State included both a sexual offense and a battery in the fourth element of its first-degree kidnapping instruction. **[1 RP 177]** However, the State did not need to utilize both the CSP and the battery to succeed on a first-degree kidnapping count. Regardless of the reason why it made this decision, it cannot be overlooked or changed now because it is upset about the constitutional consequences of their charging decisions. However, this Court could simplify the law for future prosecutions.

CONCLUSION

For the reasons stated above, Samuel Neal respectfully requests that this Court either quash certiorari, affirm the Court of Appeals' memorandum opinion, or extend State v. Frazier to the kidnapping statute, and for any further remedy this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served electronically to the NMDOJ, this 12th day of November 2024.

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