IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40407

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

SAMUEL NEAL,

Defendant-Respondent.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

On Certiorari from the New Mexico Court of Appeals

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SUMMARY OF PROCEEDINGS

I. Introduction

Defendant kidnapped, beat, and raped M.A. The Court of Appeals, applying New Mexico's unique approach to double description claims, held that the beating was the same offense as the rape, which was in turn the same as the kidnapping.

Even though New Mexico's double description jurisprudence is based on federal law and shares the same foundational premises, it has greatly diverged from the federal analysis. The resulting test is complex, fact-intensive, and produces unjust results. This case highlights three weaknesses in the current approach. It places too much emphasis on a complex unitary conduct analysis, which is beset by numerous factors and presumptions. The modified *Blockburger* test has become a redundant, second unitary conduct analysis that fails to accurately gauge legislative intent. And in many cases, the current approach does not consider other, highly-relevant indicia of legislative intent.

This Court should return to the foundation of its double jeopardy jurisprudence and adopt the federal approach to double description claims. Applying that approach, Defendant could be punished for the

three distinct crimes he committed against M.A. Asking this Court to change its approach in an area of law and overrule precedent is not a step that the State takes lightly. But, as this case shows, New Mexico's unique approach to double description cases has become "so unworkable as to be intolerable[.]" *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 125 N.M. 721 (identifying circumstances in which this Court will overrule its precedent).

II. Facts and Procedural Background

A. Defendant attacks M.A.

On the night of June 30, 2019, M.A. arrived in Raton. **[3/30/21 CD G 9:17:20-32]** A recent graduate of Colorado State University, she had just finished an anthropology field school in Corpus Christi, Texas. **[*Id.* 9:09:26-38, 9:10:15-39]** She and four of her friends decided to drive from Texas back to Colorado. **[*Id.* 9:17:35-49]** They stopped in Raton for the night. **[*Id.* 9:10:40-9:11:05]**

After checking into a Best Western with her friend, M.A. called her mother. **[*Id.* 9:17:50-9:18:10, 9:18:30-39, 9:20:40-58]** Having sat all day in the car, she walked back and forth in the parking lot and a nearby sidewalk as they spoke. **[*Id.* 9:21:10-35]** She noticed Defendant sitting in

front of the Raton Visitor Center at a picnic table. **[*Id.* 9:21:38-47]** At some point, he walked over and asked M.A. what she was doing. **[*Id.* 9:21:50-59]**

M.A. told Defendant that she was on the phone and that she planned to return to her hotel after she finished. **[*Id.* 9:22:00-13]** He asked her if she wanted to "hang out." **[*Id.* 9:22:22-33]** She told him "no" multiple times. **[*Id.* 9:22:33-37]** To get him to leave, she told him that she would speak with him after she got off the phone. **[*Id.* 9:22:37-48]** He began to walk away, then turned around and introduced himself as "Sam." **[*Id.* 9:26:22-47]** They shook hands. **[*Id.* 9:26:47-50]**

After a while, Defendant approached M.A. again. **[*Id.* 9:27:02-11]** With a gesture, he asked if she was finished; she shook her head. **[*Id.* 9:27:11-30]** When he asked her where she wanted to go, she told him that she did not know. **[*Id.* 9:27:52-9:28:01]** He told her to follow him, which she did, still talking to her mother on the phone. **[*Id.*]**

M.A. thought that they would return to the picnic table, go somewhere (perhaps a bar) to meet people, or maybe "smoke a bowl." **[*Id.* 9:28:01-22]** In college, she had previously "gone with" people whom she had just met without incident. **[*Id.* 9:29:10-9:30:03]** She felt safe because

she was on the phone with her mother. **[*Id.* 9:30:03-27]** The area was also well-lit, and the street seemed busy**. [*Id.* 9:31:07-19]**

Defendant led her about a block away to the abandoned Colt Motel. **[*Id.* 9:30:38-50]** He climbed through a window and gestured for her to follow. **[*Id.* 9:31:30-41]** She shook her head. **[*Id.* 9:31:41-43]** She declined when he motioned again. **[*Id.* 9:31:43-46]** He climbed back out and gestured to her phone. **[*Id.* 9:31:46-56]** M.A., realizing that Defendant probably lived in the abandoned motel, became concerned that a bystander might see them standing outside and call the police. **[*Id.* 9:32:00-28]** If that happened, he would no longer be able to stay there and might get in trouble. **[*Id.*]** Remembering that she was still on the phone with her mother, she asked herself "[w]hat's the worst thing that could happen?" **[*Id.* 9:32:28-33]** She nodded and placed one foot on the windowsill; Defendant returned to the window. **[*Id.* 9:32:34-52]** He then grabbed her in a bear hug and pulled her inside. **[*Id.* 9:32:52-58]**

Defendant stepped between M.A. and the window, then pulled a covering over it. **[*Id.* 9:32:59-9:33:54]** Although it was dark, she could see that there was a "lot of trash" in the room and a mattress against one

wall. **[*Id.* 9:34:01-23]** The room smelled strangely, possibly like paint thinner. **[*Id.* 9:34:23-38]** She started to panic. **[*Id.* 9:34:10-13]**

Defendant tried to kiss M.A. **[*Id.* 9:34:49-50]** She said "no" and pushed him away. **[*Id.* 9:34:50-56]** He grabbed at the waistband of her shorts. **[*Id.* 9:35:01-05]** She said "no" again, pushed his hand away, and stepped backwards. **[*Id.* 9:35:34-48]** She looked around for an exit. **[*Id.* 9:35:58-9:36:04]** Although there was an interior door, she did not know where it led. **[*Id.* 9:36:04-16]** She tried to remember what street she was on so that she could tell her mother who, unaware of what was going on, was still talking on the phone. **[*Id.* 9:36:16-53]**

Defendant asked her if she wanted to "hook up[.]" **[*Id.* 9:36:55-9:37:03]** She told him: "No, that's not why I'm here. I want to leave." **[*Id.* 9:37:03-10]** M.A.'s mother asked her if she was ok; she responded "No, I'm not." **[*Id.* 9:37:10-17]** Her mother asked her where she was. **[*Id.* 9:37:25-32]** When M.A. started to respond, Defendant snatched the phone out of her hand, took off the case, and threw it on the ground. **[*Id.* 9:37:32-9:38:00]**

Defendant then grabbed M.A. and began to hit her in the head, mostly "around [her] eyes and temples." **[*Id.* 9:38:29-56]** She started to

scream for help, so he put his hand over her mouth; she bit him. **[*Id.* 9:43:20-38]** He continued to hit her and forced her to the floor. **[*Id.* 9:43:38-43]** Then he got behind her and started to strangle her. **[*Id.* 9:43:43-48]** She could not breathe and worried that she would lose consciousness. **[*Id.* 9:43:48-58]** During the struggle, he called her a "stupid bitch" and repeatedly told her to "chill out." **[*Id.* 9:44:01-14]**

M.A. thought that she was going to die and "realized that he was going to rape" her. **[*Id.* 9:44:35-49]** She stopped struggling so that he would not kill her. **[*Id.* 9:44:51-55]** When she stopped, he moved her on to the mattress. **[*Id.* 9:47:00-11]** He started to kiss her. **[*Id.* 9:47:11-17]** He said, "I'm sorry I had to do that, but I really like you and it's my birthday." **[*Id.* 9:47:17-29]**

As he undressed her, she was "quietly saying 'no' and crying." **[*Id.* 9:47:30-49]** He performed oral sex on her. **[*Id.* 9:47:55-9:48:11]** As he prepared to penetrate her, she asked him if he had a condom. **[*Id.* 9:48:25-9:49:24]** He raped her without putting one on. **[*Id.* 9:49:55-9:50:08]**

At some point, Defendant began to lose his erection; M.A. was unsure if he ejaculated. **[*Id.* 9:51:28-40]** They were both quiet. **[*Id.***

9:51:41-45] Then they heard M.A.'s mother's voice from the phone. **[*Id.* 9:51:45-50]** Startled, Defendant got off of M.A. **[*Id.* 9:52:07-34]** She got up and started putting on her clothes. **[*Id.* 9:52:34-40]** When she tried to put her shirt on, he ripped it out of her hands and left with it through the interior door. **[*Id.* 9:52:45-9:53:15]**

M.A. retrieved her phone and put more clothing back on. **[*Id.* 9:53:22-45]** She then realized that she had to escape while she could and left through the window. **[*Id.* 9:53:50-56]** Outside, she finished putting her bra on. **[*Id.* 9:53:57-9:54:00]** She was only wearing her bra and shorts, without underwear. **[*Id.* 9:54:05-10]** On the phone, her mom was asking her questions, including: "Did someone take you?" **[*Id.* 9:54:40-58]** When she responded that someone had, her mother told her to find someone to call the police. **[*Id.* 9:54:58-9:55:03]**

M.A. ran across the street to a Domino's Pizza. **[*Id.* 9:55:03-07]** Although it was closed (it was now approximately 12:15 a.m.), there were still workers inside. **[*Id.* 9:55:07-15, 9:56:38-46]** She banged on the door and asked them to call 911. **[*Id.* 9:55:15-35]** A young woman working there gave M.A. a blanket to cover herself until the police arrived. **[*Id.* 9:56:16-28]**

The SANE examiner photographed M.A.'s visible injuries. She had a black eye and "goose eggs" on her head. **[*Id.* 10:06:05-18]**; **[St. Exs. 1-2]** Her neck was red where Defendant strangled her. **[3/30/21 CD G 10:06:18-22]**; **[St. Exs. 3, 5-6]** The examiner also found petechiae behind M.A.'s ear, which was consistent with strangulation or blunt force trauma. **[3/30/21 CD H 11:07:40-11:08:54]** There were injuries on her limbs, including a large bruise and scratches on her leg. **[St. Exs. 4, 7-11]** Her vaginal area was injured. **[St. Ex. 12]** A DNA analyst found Defendant's DNA in M.A.'s vagina, on her cervix, on the exterior of her vagina, and under her fingernails. **[St. Ex. 27]** Pubic hair combing revealed a partial match for Defendant's DNA. **[*Id.*]**

The jury convicted Defendant of first-degree kidnapping, second-degree criminal sexual penetration (CSP), aggravated battery resulting in great bodily harm, and interference with communications. **[2 RP 270-73]**

B. The Court of Appeals reverses two of Defendant's convictions.

On appeal, Defendant argued that his convictions for kidnapping, CSP, and aggravated battery constituted double jeopardy. He argued, based largely upon the presumption that this Court articulated in *State*

v. Foster, 1999-NMSC-007, 126 N.M. 646, *abrogated on other grounds by Kersey v. Hatch,* 2010-NMSC-020, 148 N.M. 381, that his conviction for kidnapping was the same offense as both his convictions for CSP and aggravated battery. The State responded that the *Foster* presumption did not apply. The State also argued that the conduct underlying the crimes was not the same, that the Legislature authorized multiple punishments, and that the Court of Appeals should overrule *State v. Serrato,* 2021-NMCA-027.

The Court of Appeals found a double jeopardy violation for different reasons, without giving the State a chance to respond. *See State v. Neal*, A-1-CA-40205, mem. op. ¶ 8 (N.M. Ct. App., April 24, 2024) (nonprecedential). The Court reasoned that the CSP and aggravated battery were the same offense. *Id.* ¶¶ 9-12. It then found that the CSP was the same offense as kidnapping. *Id.* ¶¶ 13-15. It vacated both the aggravated battery and CSP convictions because they carried shorter sentences than the kidnapping. *Id.* ¶ 16.

ARGUMENT

I. New Mexico Follows a Unique Approach to Double Description Cases.

New Mexico and federal double jeopardy jurisprudence share the same basic premises. Both recognize that the prohibition on double jeopardy has three aspects: "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." *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3 (quoting *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 803 (1989)). This case implicates the latter protection, and is what New Mexico courts call a double description case; the Court of Appeals held that Defendant's convictions under multiple statutes improperly punished him for the same offense. *See Swafford*, 1991-NMSC-043, ¶ 9 (describing double description cases).

In the multiple punishment context, this Court often speaks of the state and federal Double Jeopardy Clauses as a single entity offering identical protections. For example, in *State v. Begaye*, 2023-NMSC-015, ¶ 12, this Court cited both the Fifth Amendment and Article II, Section

15 of the New Mexico Constitution, then spoke of the protections offered by "*the* double jeopardy clause[.]" (Emphasis added). This Court has interpreted Article II, Section 15 somewhat more broadly than the Fifth Amendment in some contexts. *See State v. Breit*, 1996-NMSC-067, ¶ 32, 122 N.M. 655 (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, 129 N.M. 63 (prohibiting separate criminal and civil forfeiture actions); *State v. Lynch*, 2003-NMSC-020, ¶¶ 4-6, 134 N.M. 139 (barring a second trial on a greater offense than the one for which the defendant was initially convicted). But it has not interpreted Article II, Section 15 to provide more protection than the Fifth Amendment in double description cases. And there are no distinct state characteristics that would justify a departure—this Court has repeatedly referred to federal law throughout the development of its multiple punishment jurisprudence.

New Mexico courts, like their federal counterparts, recognize that, 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." *Swafford*, 1991-NMSC-043, ¶ 7 (quoting *Grady v. Corbin*, 495 U.S. 508, 516 (1990), *overruled by U.S. v. Dixon*, 509 U.S. 688, 703 (1993)). This Court, following the United States Supreme Court, has repeatedly recognized that "the sole limitation on multiple punishments is legislative intent[.]" *Id.* ¶ 25. *See also Begaye*, 2023-NMSC-015, ¶ 13 ("It is well established that the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.") (quotation marks omitted). *Swafford*, which established New Mexico's modern approach to multiple punishment cases, largely synthesized then-current federal precedent into a single test. *See* 1991-NMSC-043, ¶¶ 6-15, 26, 30 (analyzing and citing federal cases). And this Court altered the *Swafford* test in an effort "to be more in line with [the subsequent development of] United States Supreme Court precedent[.]" *State v. Porter*, 2020-NMSC-020, ¶ 18 (quotation marks omitted).

Despite this shared foundation and lineage, New Mexico's approach to analyzing double description claims has drifted considerably. The result has been a constantly changing, unmanageably complex, and

highly fact-specific analysis that bears little resemblance to the federal framework.

A. The federal test.

"When the government charges a defendant under separate statutes for the same conduct, the test derived from *Blockburger v. United States* determines whether the crimes are the 'same offense' for double jeopardy purposes." *United States v. Leal*, 921 F.3d 951, 960 (10th Cir. 2019) (citation omitted). *Accord United States v. Mahdi*, 598 F.3d 883, 888-89 (D.C. Cir. 2010); *United States v. Morris*, 99 F.3d 476, 479 (1st Cir. 1996).

The *Blockburger* test is "not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent." *Swafford*, 1991-NMSC-043, ¶ 12. *Blockburger* examines the elements of the statutes a defendant was convicted of in the abstract—"the evidence and proof offered at trial are immaterial." *Id.* ¶ 10. *See also Morris*, 99 F.3d at 479 ("Thus, the *Blockburger* rule depends on statutory analysis, not on evidentiary comparisons."). If each statute that a defendant was convicted of requires proof of an element not required by another, then courts infer that "the defendant may be prosecuted

consecutively for them, even if the crimes arise out of the same conduct or nucleus of operative facts." *Id.* If instead one statute is entirely subsumed within the other, *Blockburger* raises a presumption that a legislature did not intend to authorize multiple punishment. *See Garrett v. United States*, 471 U.S. 773, 779 (1985) (discussing a negative *Blockburger* "presumption"). Federal courts recognize two wrinkles to the elemental *Blockburger* test.

First, because *Blockburger* is merely a tool to determine legislative intent, the presumption it raises for or against multiple punishment may be rebutted by indicia of contrary legislative intent. For example, if the legislature expressly authorizes cumulative punishments, that statement is controlling. *See Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment[.]"). Similarly, the "language, structure, and legislative history" of a statute may control

over a contrary presumption raised by the *Blockburger* test. *Garrett*, 471 U.S. at 779.[1]

Second, federal courts apply a slightly modified version of the *Blockburger* test when analyzing statutes with alternative theories of liability. For example, the government in *Whalen v. United States*, 445 U.S. 684, 685 (1980) charged the defendant with both rape and felony murder for "killing the same victim in the perpetration of rape." The two offenses satisfied the standard *Blockburger* test because the District of Columbia felony murder statute "d[id] not in all cases require proof of a rape" – in the abstract, a felony murder conviction could be predicated on five other crimes, including robbery, kidnapping, or arson. *Id.* at 693-94. The Supreme Court rejected that result because, under the government's legal theory, proving that the defendant committed rape was necessary

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[1] *Garrett*, like some other cases cited below, involved a subsequent prosecution instead of a double description claim. But this is a distinction without a difference in this context. *See State v. Gallegos*, 2011-NMSC-027, ¶ 41 n.2, 149 N.M. 704 ("[T]he U.S. Supreme Court has repeatedly noted that whether a defendant is subject to multiple punishments for the same offense does not depend upon whether the charges were brought at a single trial or a successive trial . . . We have often noted that the [Double Jeopardy] Clause serves the function of preventing both successive punishment and successive prosecution, but there is no authority . . . for the proposition that it has different meanings in the two contexts.") (quotation marks and citations omitted).

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.*

Following *Whalen*, federal courts applying *Blockburger* to statutes with alternative theories of liability examine the charging documents to determine which elements of the statute should be considered. For example, in *Pandelli v. United States*, 635 F.2d 533, 539 (6th Cir. 1980), the Sixth Circuit interpreted the Travel Act, which was "a multi-purpose statute written with alternative jurisdictional elements and identifying alternative wrongs." In light of the legal theory identified in the government's charging documents, the Court "eliminate[d] the inapplicable" substantive and jurisdictional elements, then compared the remaining elements to the other charged crime. *Id.* After performing the *Blockburger* analysis on the modified statutes, the Court determined that one offense was subsumed within another. *See id.* Importantly, however, the *Pandelli* court applied this modified *Blockburger* analysis "without examining the facts in detail." *Id.* at 538.

Federal courts generally only consider what happened at trial if they conclude that a legislature did not authorize multiple punishments

for the charged crimes. *See, e.g.*, *United States v. Schales*, 546 F.3d 965, 978-980 (9th Cir. 2008) (considering arguments at trial only after the government conceded that one offense was a lesser-included offense of the other, which would cause the statutes to fail *Blockburger*); *United States v. Faulds*, 612 F.3d 566, 570 (7th Cir. 2010) (considering the facts after noting precedent from other circuits establishing that one offense was included in the other). The facts become relevant because the *Blockburger* test applies only "where the same act or transaction constitutes a violation of two distinct statutory provisions." *Blockburger v. United States* 284 U.S. 299, 304 (1932).

Federal courts do not appear to apply any particular rigid criteria, factors, or presumptions when determining whether two convictions were based on the same act or transaction. *See Schales*, 546 F.3d at 978-980 (considering the indictment, jury instructions, and argument to establish that the convictions arose from the same conduct); *United States v. Overton*, 573 F.3d 679, 695-698 (9th Cir. 2009) (holding that convictions for receiving and possessing child pornography were based on distinct conduct because the trial court's factual findings showed that the two charges corresponded to at least some different images); *Faulds*, 612 F.3d

at 570 (finding that conduct was distinct because the defendant continued to possess contraband images after law enforcement downloaded some). Instead, the conduct underlying each conviction must truly be the same; even a partial factual overlap between two offenses is not enough. *See Overton*, 573 F.3d at 697 (finding that the conduct was not the same even though both convictions were based in part on the same images because one conviction was also based on possessing different images); *Faulds*, 612 F.3d at 570 ("The fact that [the defendant] continued to possess *those and other* images thereafter constitutes a separate crime.") (emphasis added).

Throughout this process, "[t]he defendant bears the burden of proving a claim of double jeopardy." *Rodriguez-Aguirre*, 73 F.3d 1023, 1025 (10th Cir. 1996).

B. Other state approaches.

Most states follow the federal approach by placing the elemental *Blockburger* test at the heart of their double jeopardy analysis. *See State v. Miles*, 229 N.J. 83, 94, 160 A.3d 23 (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."). The precise size of this majority is unclear; the *Miles* court provided a non-exhaustive list of 27 *Blockburger* jurisdictions, *see* 229 N.J. at 94-95, while Alex Tsiatsos counted 42. 109 W. Va. L. Rev. 527 app. B at 564-69.[2]

Some state legislatures have enacted statutes to govern double jeopardy challenges. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-1-408 (West 2000); Fla. Stat. Ann. § 775.021 (West 2014). These statutes generally appear to use an elemental *Blockburger* analysis as their base. *See* Fla. Stat. Ann. § 775.021(4)(a) ("For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other

[2] This discussion is not intended to provide a comprehensive 50-state survey, but instead to provide a general sense of double jeopardy approaches in other jurisdictions.

does not, without regard to the accusatory pleading or the proof adduced at trial."); Colo. Rev. Stat. Ann. § 18-1-408(1)(a), (5)(a) (forbidding multiple punishment when one offense may be "established by proof of the same or less than all the facts required to establish the commission of the offense charged"). The statutes then expand or contract the *Blockburger* analysis to account for particular offenses. For example, Colorado bars multiple punishment when "[o]ne offense consists only of an attempt to commit the other." Colo. Rev. Stat. Ann. § 18-1-408(1)(b). Similarly, the Model Penal Code, upon which Colorado apparently based its statute, uses a *Blockburger* analysis as its base. *See* Model Penal Code § 1.07(1)(a), (4)(a).

A few states used to consider the facts at trial as part of a double jeopardy analysis, but have since moved away from that practice. Beginning in 1980, New Jersey courts applied both a "same-evidence test and the same-elements test in double jeopardy determinations. A finding that offenses met *either* test resulted in double jeopardy protection for the defendant." *Miles*, 229 N.J. at 86. In 2017, the New Jersey Supreme Court abrogated the same-evidence test, "returning to the *Blockburger* same-elements test as the sole test for determining what

constitutes the 'same offense' for purposes of double jeopardy." *Id.* Similarly, Indiana used to consider both the statutory elements of the charged crimes as well as the "actual evidence" introduced at trial when determining whether two offenses were the same under the state constitution. *Wadle v. State*, 151 N.E.3d 227, 235, 239-40 (Ind. 2020). The Supreme Court of Indiana, recognizing that that approach had proved "largely untenable," adopted an approach similar to that used by federal courts. *See id.* at 235, 248-50. *See also People v. Nutt*, 469 Mich. 565, 568, 677 N.W.2d 1 (2004) (rejecting a "same transaction" test in favor of a same elements test).

A small number of states pay more regard to the facts introduced at trial when determining whether a second prosecution is barred after a first conviction or acquittal. *See State v. Gazda*, 318 Mont. 516, 519-20, 82 P.3d 20 (2003); *State v. Brown*, 262 Or. 422, 453, 457-58, 497 P.2d 1191 (1972) (en banc). Alaska takes a unique approach that considers the law, facts, and differences in the defendant's intent or conduct. *Whitton v. State*, 479 P.2d 302, 312 (Alask. 1970).

C. New Mexico's approach.

New Mexico follows an apparently unique and fact-intensive double description analysis. A reviewing court must first determine whether the conduct underlying two convictions was unitary, or "the same[.]" *Swafford*, 1991-NMSC-043, ¶ 25. To make this determination, the court must apply the six factors derived from *Herron v. State*, 1991-NMSC-012, 111 N.M. 357 to the evidence introduced at trial in light of the jury instructions, considering: "(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." *State v. Phillips*, 2024-NMSC-009, ¶¶ 12, 38. The court also should consider whether the defendant accomplished the crime using separate forces, and whether he completed one crime before the other. *Id.* ¶ 38.

If the jury instructions identified alternative theories of liability, the court should also decide whether the presumption from *State v. Foster*, 1999-NMSC-007, 126 N.M. 646 applies, and, if so, whether the evidence introduced at trial established that the crimes were sufficiently distinct as to rebut that presumption. *See Phillips*, 2024-NMSC-009, ¶¶

40-47 (discussing the analysis). The standard for establishing that the conduct was unitary is somewhat different from the standard for determining whether the *Foster* presumption was rebutted: the former asks whether the conduct could "reasonably be said" to be the same, *id.* ¶ 38, while the latter asks whether there were "sufficient facts in the record to support distinct conduct[.]" *Id.* ¶ 41 (quotations omitted). If this analysis indicates that the conduct underlying each conviction was distinct, the analysis stops. *Swafford*, 1991-NMSC-043, ¶ 28.

If the conduct was unitary, the reviewing court must next determine whether the Legislature intended to authorize multiple punishments. *Id.* ¶ 30. It first asks whether the statutes expressly authorize multiple punishment; if they do, the analysis stops. *Id.* If they do not (which is usually the case), the reviewing court must then determine which version of the *Blockburger* test to apply. The federal, elements-only version of the test applies by default. *Id.* But, if the statutes involved allow for alternative theories of liability or use "vague and uncertain" language, the reviewing court must instead apply the modified *Blockburger* test. *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 58-59, 150 N.M. 232.

The modified *Blockburger* test contains several steps. First, the reviewing court attempts to discern the State's legal theory from the charging documents and jury instructions. *Porter*, 2020-NMSC-020, ¶ 19. It does so without examining the facts introduced at trial. *Gutierrez*, 2011-NMSC-024, ¶ 58. The court then compares the relevant elements of the two statutes to determine whether one is fully subsumed within the other. *See id.*

But if the State's legal theory is not clear from the charging documents and jury instructions, the reviewing court must then consider the testimony at trial and closing arguments. *Porter*, 2020-NMSC-020, ¶ 19. The court then compares the relevant elements of the two statutes. *Id.* ¶ 20.

Recently, however, this Court stated that the "focus" on this step is not simply whether the elements differ, but whether the State relied on the same conduct to establish each offense. *Begaye*, 2023-NMSC-015, ¶ 28. The Court of Appeals has noted that the post-*Begaye* modified *Blockburger* test "bears remarkable similarity to the unitary conduct inquiry[.]" *State v. Vasquez*, 2024-NMCA-020, ¶ 24. If the statutes fail

the modified *Blockburger* test, the inquiry is over. *Swafford*, 1991-NMSC-043, ¶ 30. If they do not, the analysis continues. *Id.* ¶ 31.

In the final step, a reviewing court asks whether other indicia of legislative intent can rebut the presumption of multiple punishment. *Id.* The court can consider any cannon of construction, such as weighing the quantum of punishment of each offense, determining the social evils against which each statute was aimed, and resorting to the rule of lenity. *Id.* ¶¶ 31-34.

II. This Case Shows Why New Mexico Should Return to the Federal Standard.

As this Court has recognized, "[d]ouble jeopardy jurisprudence in New Mexico is a tangled and often laborious analysis. It should be [the] Court's goal to simplify rather than complicate it." *Phillips*, 2024-NMSC-009, ¶ 13. New Mexico's complex, fact-specific double description inquiry has lost sight of "the sole limitation on multiple punishments," *Swafford*, 1991-NMSC-043, ¶ 25—legislative intent. This case illustrates three flaws in New Mexico's approach.

A. First flaw: the unitary conduct inquiry.

There are several problems with the current unitary conduct analysis. First, because it is the initial step in the *Swafford* analysis,

courts must examine the entire trial record at the outset of every double jeopardy claim. This distracts from what should be the primary focus: determining whether the Legislature authorized punishment under each statute.

Second, the unitary conduct inquiry is too complex. Courts must apply the six *Herron* factors, plus at least two more, to determine whether the conduct underlying two convictions was the same. Courts must also apply the *Foster* presumption if the jury instructions provided for alternative theories of liability. This requires the court to evaluate the facts under each alternative to determine whether one would violate double jeopardy. But even that does not end the inquiry, because the *Foster* presumption may in turn be rebutted by proof that the conduct underlying the two crimes was distinct. *See Phillips*, 2024-NMSC-009, ¶¶ 40-41. So, before a reviewing court begins to analyze the Legislature's intent, it might have to carefully consider the facts three times – once to evaluate each alternative if *Foster* applies, and then again to determine if the *Foster* presumption was rebutted.

Third, the standard for finding unitary conduct is too low, so conduct may be found to be the same for double jeopardy purposes when

it really was distinct. *Swafford* was in part to blame for this: it stated that the first step of a double description inquiry is satisfied "if it reasonably can be said that the conduct is unitary." 1991-NMSC-043, ¶ 28. A closer reading of *Swafford*, however, shows that this Court meant that conduct must really be identical to be the "same."

The *Swafford* Court considered two double description challenges: the defendant was convicted of CSP and incest on the one hand, and CSP and aggravated assault with the intent to commit a rape on the other. *Id.* ¶¶ 35, 38. The Court correctly held that the conduct underlying the incest and CSP convictions was the same because both sex crimes were based upon the same acts of penetration against the same victim at the same place and time. *Id.* ¶¶ 3, 35. But it held that the conduct underlying the CSP and the assault with intent to commit CSP were not the same despite substantial factual overlap between the two crimes: "the victim testified at trial that Swafford bound her to the bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault." *Id.* ¶ 38. Although it was a closer call, the Court found that the conduct underlying each crime was not unitary. *Id.* This suggests that unitary conduct was always meant to require a

showing that the conduct was actually identical, not simply that the crimes overlapped somewhat.

Over time, as happened here, courts have held that conduct was unitary when it really was meaningfully distinct. In this case, Defendant inflicted three separate harms on M.A.: he deprived her of her liberty by preventing her from leaving. He beat and choked her, leaving her bruised and fearing death. And then he raped her. Even the Court of Appeals here recognized that "[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, mem. op. ¶ 17. But the complex and easy-to-satisfy unitary conduct analysis still led the Court of Appeals down the wrong path.

Remarkably, the Court concluded that "*[n]o* indicia of distinctness separate[d] the evidence offered to satisfy the aggravated battery and the evidence required to satisfy the CSP[.]" *Id.* ¶ 9 (emphasis added). It concluded that the two crimes were based on "the same acts[.]" *Id.* But this was not accurate.

To convict Defendant of CSP, the jury had to find that "1. [D]efendant caused [M.A.] to engage in sexual intercourse; 2. [D]efendant

caused the insertion of a penis into the vagina of [M.A.] through the use of physical force and physical violence; 3. [D]efendant's acts resulted in brusing in the leg area, of the eye, and of the throat of [M.A.]." *Id.* ¶ 8. To convict Defendant of aggravated battery, the jury had to find that "1. Defendant touched or applied force to [M.A.] by striking her with her fists and strangling her; 2. Defendant intended to injure [M.A.]; [and] 3. Defendant acted in a way that would likely result in death or great bodily harm to [M.A.]." *Id.*

The Court of Appeals concluded that each crime was the same because the State proved the injury elements of each crime with the same evidence. *See id.* ¶ 9 ("These injuries were the same injuries caused by the same striking and 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."). Although this was true, the Court of Appeals apparently ignored the most obvious difference between the crimes: the rape. Defendant accomplished the unlawful penetration by distinct acts from the beating and inflicted meaningfully different harms on M.A. That the evidence proving the

aggravated battery formed *part* of the factual predicate for the CSP did not make the crimes *the same*; a part of a thing is not the whole.

The Court of Appeals committed a similar error by concluding that the first-degree kidnapping and CSP were based on the same conduct. The Court of Appeals, applying the *Foster* presumption, concluded that the jury relied on the "sexual offense" alternative to enhance the second degree kidnapping to a first-degree offense. *Id.* ¶ 13. The Court never considered whether the *Foster* presumption could be rebutted. *See id.* Declining the State's request to overrule *Serrato*, the Court found that the conduct underlying the CSP and the kidnapping was the same because the CSP formed the "sexual offense" element of first-degree kidnapping. *See id.* ¶ 13 ("Because the State does not argue that some sexual offense other than the penetration supported the first-degree kidnaping . . . the conduct underlying the kidnapping and the CSP convictions was the same and therefore unitary.").

Again, this conclusion ignored the other facts that were used to prove the crimes. To establish the kidnapping, the State had to show that 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." *Id.* ¶ 8. The jury specifically found that "the restraint or confinement of [M.A.] was not slight, inconsequential, *or merely incidental to the commission of another crime*[.]" *Id.* (emphasis added). So, the jury found that Defendant separately and meaningfully violated M.A.'s liberty interest. The Court of Appeals' analysis entirely ignored this fact and found that the crimes were the same because of a partial overlap in evidence.

Because of this artificially low standard, the Court of Appeals found that three crimes were the same. This sort of outcome is not unusual, especially in the context of serious sex crimes. *See, e.g.*, *Serrato*, 2021-NMCA-027, ¶¶ 2-6, 22-27 (concluding that a kidnapping and criminal sexual contact of a minor were based on the same conduct when the defendant pulled the victim out of her window, took her across the street into another house, led her into his bedroom, barricaded the door, and then touched her breast); *State v. Dent*, A-1-CA-40313, mem. op. ¶¶ 2-14, 21-22 (N.M. Ct. App. Sept. 19, 2024) (nonprecedential) (holding that a kidnapping based on a *two-day* confinement in which "Defendant confined, beat, and sexually assaulted his ex-girlfriend, leaving her with bruises, a broken nose, broken ribs, and a collapsed lung" was the "same"

as a CSP conviction under *Serrato*); *State v. Autrey*, A-1-CA-38116, mem. op. ¶¶ 3, 11 (N.M. Ct. App. April 12, 2022) (nonprecedential) (same for when the defendant grabbed the victim, threw her into a Christmas tree, slammed the front door on her hand, dragged her into the bedroom, beat and spit on her, bound her arms, laid with her in the dark, and then raped her).

Even with its considerable complexity—6 or more factors and the rebuttable *Foster* presumption—the unitary conduct analysis still leads courts to conclude that crimes were based on the same conduct based only on a partial overlap in facts. That is contrary to what this Court intended in *Swafford*, and inconsistent with a defendant's burden of proving that the crimes for which he was convicted were the same offense.

This Court should avoid these many problems by subordinating factual considerations to the ultimate inquiry of determining legislative intent.

B. Second flaw: The modified Blockburger test leads to inconsistent results, does not focus on legislative intent, and is redundant.

Although this Court adopted the modified *Blockburger* test in an attempt to "to be more in line with [the subsequent development of] United States Supreme Court precedent," *Porter*, 2020-NMSC-020, ¶ 18

(quotation marks omitted), the test has diverged considerably and perniciously from federal precedent. As shown by this case, the modified *Blockburger* test has essentially become a second unitary conduct analysis. This approach fails to consider legislative intent, leads to inconsistent results, and makes the *Swafford* framework redundant.

This Court formally adopted the modified *Blockburger* test in *Gutierrez*, 2011-NMSC-024. The *Gutierrez* Court supported its case for a modified approach by citing two cases discussed above: *Whalen*, which stands for the proposition that courts should examine statutes written in the alternative by reference to the government's legal theory, and *Pandelli*, a 1980 Sixth Circuit case that interpreted *Whalen*. *See Gutierrez*, 2011-NMSC-024, ¶¶ 58-59. Courts applying *Whalen* only consider charging documents or jury instructions to select the applicable elements of the relevant statutes when performing the *Blockburger* analysis. *See Pandelli*, 635 P.2d at 535, 538 (discussing the role of the indictment in the post-*Whalen* analysis).

But *Pandelli* was clear: courts applying the *Whalen* modification must do so "without examining the facts in detail." *Id.* at 538. The *Gutierrez* court thought this limitation so important that it quoted that

portion of *Pandelli* with emphasis. *See* 2011-NMSC-024, ¶ 58. In his special concurrence in *Gutierrez*, Justice Bosson gave a prescient caution:

> As we open the door to future use of *Pandelli*, we must also ensure that its use is properly circumscribed. Looking beyond the indictment and jury instructions to the specific facts of the case would portend retreating from *Swafford* and returning to the fact-based, ad hoc double jeopardy adjudications that characterized our pre-*Swafford* cases. While it makes sense to allow a party to look at the specific language used in the indictment along with the jury instructions to analyze the state's "legal theory," *any factual inquiry beyond those two limited areas has not been sanctioned by this Court*.

Id. ¶ 78 (emphasis added).

Despite this warning, courts quickly began to consider the facts in the *Blockburger* test. In *State v. Swick*, without explaining why or citing precedent, this Court considered the facts and arguments at trial as part of its modified analysis. *See* 2012-NMSC-018, ¶ 26. The next year, in *State v. Montoya*, this Court cited *Swick* to show that courts should apply the modified analysis by "considering such resources as *the evidence*, the charging documents, and the jury instructions." 2013-NMSC-020, ¶ 49 (emphasis added). From that point, it was established that New Mexico courts consider the facts as part of a modified *Blockburger* analysis. *See Begaye*, 2023-NMSC-015, ¶ 18 (discussing the development of the rule). *Begaye* took this process one step further: it stated "that 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." *Id.* ¶ 28.

Here, the Court of Appeals, apparently taking its cue from *Begaye*, did not pause to analyze the elements of the relevant statutes under the jury instructions or indictment. Although it recited the elements of the charged crimes, it moved immediately into considering "the evidence presented by the State at trial[.]" *Neal*, A-1-CA-40205 mem. op. ¶¶ 10, 12. Unsurprisingly, because it had already concluded that the evidence underlying each crime was the same, *id.* ¶¶ 9, 13, the Court found that the state relied on the same conduct to prove each offense. *Id.* ¶¶ 10, 15. Because of this factual unity, the Court concluded that the Legislature did not intend to punish the crimes together. *Id.*

This case shows the flaws of the post-*Swick* modified *Blockburger* analysis. Instead of a special tool for statutory interpretation, the test now "bears remarkable similarity to the unitary conduct inquiry[.]" *Vasquez*, 2024-NMCA-020, ¶ 24. 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. As in this case, this

approach 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? And that question can only have one answer: to reach the modified *Blockburger* test at all, a court will have necessarily concluded that the State relied on the same conduct to establish both offenses. *See* 1991-NMSC-043, ¶ 28 (stating that the *Swafford* inquiry ends at the first step if the conduct was not the same). So, if the central question in the modified analysis is "whether the same evidence, that is, the same underlying conduct, is used to support both charges," *Begaye*, 2023-NMSC-015, ¶ 28, the State will always fail the second *Swafford* step. "The second part of [the *Swafford*] inquiry asks whether the legislature intended multiple punishments *for unitary conduct*." *Swafford*, 1991-NMSC-043, ¶ 30 (emphasis added). Asking whether the conduct really was unitary does nothing to answer this fundamental question.

Finally, this "fact-based, ad hoc" analysis, *see Gutierrez*, 2011-NMSC-024, ¶ 78 (Bosson, J., specially concurring), leads to inconsistent results that are difficult to predict. The current test focuses so much on the evidence introduced at trial, the State's argument in closing, and the phrasing of jury instructions that it is extremely difficult to predict in

advance whether the penalties for the charged crimes could constitutionally be imposed on a defendant. This makes it challenging for defendants to anticipate their likely exposure and for the State to charge defendants correctly. And similarly-situated defendants face sharply differing results. For example, the State can sometimes convict a defendant of first-degree kidnapping and a sexual offense. *See State v. Jackson*, 2020-NMCA-034, ¶¶ 37-41; *State v. Dominguez*, 2014-NMCA-064, ¶ 10. Other times, including this case, it cannot.

Finally, the *Blockburger* analysis has changed dramatically in a short period of time, starting with the elemental federal version before transforming to a modified form that still did not look to facts in detail before finally becoming a version that places the "focus" on the evidence at trial. These about-faces have left a confusing patchwork of contradictory precedent. *Compare Gutierrez*, 2011-NMSC-024, ¶ 58 ("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.*"), *with Begaye*, 2023-NMSC-015, ¶ 28 ("[T]he 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.").

This Court should overrule *Swick* and *Montoya* because, by opening the door to considering the facts introduced at trial when gauging the Legislature's intent to punish, they created an intolerably unworkable analysis. *See Trujillo*, 1998-NMSC-031, ¶ 34. It should clarify the test by returning it to its roots. Courts performing a *Blockburger* analysis should consider, at most, the charging documents and jury instructions to identify which elements of the statutes at issue should be compared.

C. Third flaw: the current test ignores highly relevant indicia of legislative intent.

New Mexico courts begin their legislative intent inquiry by asking whether the Legislature expressly authorized multiple punishment in the relevant statutes. *Swafford*, 1991-NMSC-043, ¶ 30. This tracks federal precedent. *See Hunter*, 459 U.S. at 368-69 (holding that an express statement controls over *Blockburger*). But New Mexico courts only sometimes consider other indicia of legislative intent besides a form of the *Blockburger* test. If the two offenses satisfy modified or elemental *Blockburger*, courts may consider other indicia of legislative intent,

including "the language, history, and subject of the statutes" and whether the offenses address different social evils. *Swafford*, 1991-NMSC-043, ¶¶ 31-32. But if the two offenses do not satisfy *Blockburger*, "the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both." *Id.* ¶ 30. The Court of Appeals followed that command here, and ended its legislative intent analysis after running the modified *Blockburger* test. *Neal*, A-1-CA-40205, mem. op. ¶¶ 12, 15.

This approach is contrary to federal law. The United States Supreme Court held in 1985—six years before *Swafford*—that the presumption generated by failing *Blockburger* "must of course yield to a plainly expressed contrary view on the part of Congress." *Garrett*, 471 U.S. at 779. And this "plainly expressed contrary view" can come not just in the form of express language, but also in "the language, structure, and legislative history" of the relevant statutes. *Id.* at 779. So, New Mexico courts follow *Hunter*, but not *Garrett*. There is no clear reason for this difference. *Swafford* cited *Garrett* without negative comment. *See* 1991-NMSC-043, ¶ 13. Although the *Swafford* Court expressly departed from the federal treatment of the rule of lenity, *see id.* ¶ 34 n.8, it did not say

that it intended to do so with *Garrett*. And the sentence in *Swafford* that announced the contrary rule was unsupported by legal authority. *See id.* ¶ 30. The best evidence that this Court did not intend to depart from *Garrett* came in *State v. Loza*, when this Court relied heavily on *Garrett*'s reasoning. *See generally* 2018-NMSC-034 (citing or mentioning *Garrett* 31 times).

Because the Court of Appeals here did not follow *Garrett*, it refused to consider highly-relevant indicia of legislative intent, including the legislative history of the statutes and the nature of the evils that the Legislature intended to combat with each offense. Had it considered that, the Court of Appeals would have reached a different conclusion.

The aggravated battery and CSP statutes protect different interests from distinct harms. "The aggravated battery statute is directed at preserving the integrity of a person's body against serious injury." *State v. Vallejos*, 2000-NMCA-075, ¶ 18, 129 N.M. 424. The CSP statute is not directed at preventing serious injury in general, but instead at preventing "unlawful intrusions into enumerated areas of the body." *State v. Marquez*, 2016-NMSC-025, ¶ 20. This is because the Legislature knows that "greater pain, embarrassment, psychological trauma, or

humiliation may result from contact with intimate body parts as compared to contact with other parts of the body." *Id.* (quotation marks omitted). "Unlawful contact with other areas of the body is generally punishable under other statutes"—such as the aggravated battery statute. *Id.* Because the statutes protect different interests, the Legislature approved of punishing a defendant for both beating and raping a single victim, regardless of the outcome of *Blockburger*.

Similarly, the Legislature approved of multiple punishments under the kidnapping and CSP statutes. Historically, kidnapping was a first-degree offense, unless the offender freed the victim "without having had great bodily harm inflicted[.]" NMSA 1953, § 40A-4-1(B) (1973). Both this Court and the Court of Appeals ruled "that criminal sexual penetration statutes and kidnapping statutes protect different social norms." *State v. McGuire*, 1990-NMSC-067, ¶ 14, 110 N.M. 304. And both courts often permitted convictions under both statutes. *See id.*

The Legislature added the "sexual offense" step-down language in 2003 as part of the "Omnibus Sex Offender Bill" that increased the penalties for sex offenses. *See generally* 2003 N.M. Laws, 1st Spec. Sess. The intent of the Legislature was to increase the penalties for sex

offenders, not decrease them. When it enacted the Omnibus Sex Offender Bill, the Legislature was aware of *McGuire* and knew that convictions for CSP and first-degree kidnaping could generally occur; it legislated against this common law background. *See Autovest, L.L.C. v. Agosto*, __-NMSC-__, ¶ 22 (S-1-SC-38834, Aug. 15, 2024) ("[W]e presume the [L]egislature is aware of existing law when it enacts legislation.") (quotation marks omitted). It would be strange to think that the Legislature, by enacting a bill to increase the penalties for sex crimes, intended to silently undo *McGuire* and make it impossible for a defendant to be convicted of both first-degree kidnapping and a sexual offense.

The contrary view would lead to absurd outcomes. *See State v. Montano*, __-NMSC-__, ¶¶ 11-21 (S-1-SC-39266, Jul. 25, 2024) (discussing the role of the absurdity doctrine in interpreting statutes). A defendant may be liable for first-degree kidnaping if he simply refuses to release his victim in a safe place. NMSA 1978, § 30-4-1(B) (2003) (stating that kidnaping is a first-degree felony unless the defendant "voluntarily frees the victim in a safe place *and* does not inflict physical injury or a sexual offense upon the victim"); UJI 14-403 NMRA (listing alternative means of committing first-degree kidnapping). As the dissent in *Serrato*

noted, the Court of Appeals' view that a defendant cannot be simultaneously sentenced for first-degree kidnapping and a sexual offense would lead to identical punishments for extremely different conduct:

> [A] defendant who kidnaps and subsequently inflicts even the slightest physical injury on the victim or a defendant who simply does not voluntarily release the victim in a safe place would receive *the exact same punishment as a defendant who kidnaps and violently rapes his victim*: Each would be guilty of only a single count of first-degree kidnapping.

2021-NMCA-027, ¶ 52 (Medina, J. dissenting) (emphasis added).

The Legislature intended to authorize multiple punishments for first-degree kidnapping and CSP, and for CSP and aggravated battery. The Court of Appeals reached the wrong conclusion because it was limited by a test that ignores important indicia of legislative intent. This Court should clarify that the presumption raised by *Blockburger* either for or against multiple punishment may be rebutted by other evidence of the Legislature's intent.

D. The burdens of New Mexico's double description approach outweigh its benefit.

This case shows the many downsides of the current approach to double description cases. The confusing, unwieldy analysis routinely

treats serious violent crimes as the same offense when they would not be so classified in most jurisdictions. And it ignores most indicia of legislative intent in favor of an approach that places great weight on the facts and argument of particular cases. The confusing patchwork of precedent routinely leads to errors and makes it difficult to predict what sentence a defendant will actually receive in a given case.

New Mexico's test does generate more pro-defendant results than does the majority approach. This is a point in its favor; commentators have criticized the federal approach for not protecting criminal defendants enough. *See, e.g.*, George C. Thomas III, The Double Jeopardy Clause and the Failure of the Common Law, 53 Tex. Tech L. Rev. 7 (2020) ("'Failure' is too strong, of course, but one does want a title that grabs the reader's attention. 'Inadequacy' is more accurate. . . The Supreme Court has, over the past 100 years, sucked the life out of the Double Jeopardy Clause."). But determining whether it is fair to punish a defendant under multiple statutes is ultimately a question for the Legislature. *See Begaye*, 2023-NMSC-015, ¶ 13 ("It is well established that the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.") (quotation marks

omitted). If the Legislature wanted to strike a more protective balance than most jurisdictions provide, it could simply enact a statute to that effect. Restoring the double description analysis to its baseline would allow the Legislature to make an informed decision as to the level of protection it wishes to offer criminal defendants.

The experiences of other jurisdictions are particularly instructive. In *Grady v. Corbin*, the United States Supreme Court expanded *Blockburger* in the context of subsequent prosecutions to consider whether the government relied on "the same conduct" to establish each offense. 495 U.S. at 521-22. The Court reversed course less than three years later and overruled *Grady* in *Dixon*, 509 U.S. 688. It determined that *Grady* was "wrong in principle" because it was "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id.* at 704, 709. The same-conduct test was also "unstable in application"—the Court had to recognize a "large exception" to it less than two years after adopting it. *Id.* at 709. The Supreme Court recognized that *Grady* "was a mistake." *Id.* at 711.

Similarly, New Jersey and Indiana used to apply a broader "same evidence" test. *See Miles*, 229 N.J. at 86; *Wadle*, 151 N.E.3d at 235. Both

courts abandoned or at least limited this inquiry in recent years in large part due to the difficulties involved with these doctrines. The *Miles* Court noted the "conundrums created by the same-evidence test," 229 N.J. at 96, and the *Wadle* Court bemoaned the "patchwork of conflicting precedent and inconsistent standards, [which] ultimately depriv[ed] the Indiana bench and bar of proper guidance in this area of the law." 151 N.E.3d at 235. Both courts recognized that other constitutional provisions, statutes, and rules provided appropriate safeguards to criminal defendants. *See Miles*, 229 N.J. at 97 ("Finally, protections abound for defendants, enshrined in our Constitution, court rules, and statutes[.]"); *Wadle*, 151 N.E.3d at 250-53 (discussing other constitutional protections).

This Court should follow the Supreme Courts of the United States, New Jersey, and Indiana and bring clarity to this area of the law by refocusing it on legislative intent rather than the facts introduced at trial.

III. This Court Should Reverse the Court of Appeals Under the Majority Approach.

Under the majority approach, Defendant was not punished multiple times for the same offense. The Court of Appeals erred when it

found that CSP and aggravated battery were the same offense, and erred again when it held that CSP and first-degree kidnapping were the same.

A. CSP and Aggravated Battery.

Defendant was convicted of CSP and aggravated battery. Both statutes, NMSA 1978, § 30-9-11 (2009) and § 30-3-5 (1969), allow for alternative theories of liability. So, under *Whalen* and *Pandelli*, this Court must examine the charging documents and jury instructions to determine which elements the State relied on. The State convicted Defendant of second-degree CSP under a force or coercion causing physical injury theory. **[RP 179]** To convict of that crime, a jury must find that a defendant 1) caused a person to engage in sexual intercourse, 2) by use of force or coercion, 3) resulting in personal injury. *See* **[*id.*]**; § 30-9-11(E)(3).

To prove aggravated battery under a great bodily harm theory, the State had to establish: 1) that Defendant touched or applied force to a person, 2) Defendant intended to injure that person, 3) Defendant acted in a manner whereby great bodily harm or death could be inflicted. *See* **[RP 182]**; § 30-3-5(A), (C). Each crime requires contains an element that the other does not—aggravated battery does not require proof of sexual

intercourse, and CSP does not require proof of the risk of great bodily harm or an intent to injure, so *Blockburger* creates a presumption that the Legislature authorized punishment under each statute.

This presumption would not be rebutted by another other indicia of legislative intent; as discussed above, the Legislature addressed different social harms with each statute. Because the Legislature authorized multiple punishment for these crimes, there is no need to inquire into the facts. Even if this Court did, it would find that the crimes were meaningfully distinct acts as discussed above.

B. Kidnapping and CSP.

The State pursued a first-degree kidnapping conviction based upon a theory of either the commission of a sexual offense or the infliction of bodily harm. **[RP 177]** To establish this offense, the State had to prove that Defendant took a person away by force with the intent to inflict physical injury or a sexual offense on her, and did not release her safely without inflicting either a physical injury or committing a sexual offense. *See* **[*id.*];** NMSA 1978, § 30-4-1(B) (2003). If the jury relied on the physical injury alternative, then there would be no double jeopardy problem: both kidnapping and CSP would have each required distinct

elements. If the jury instead relied on the sexual offense alternative, then the CSP would arguably have been subsumed, which would raise a presumption against multiple punishment. But this presumption would be rebutted by considering the other indicia of legislative intent discussed above that shows that the Legislature authorized punishments under both statutes.

Again, this Court would not need to consider the facts at trial because the Legislature authorized multiple punishments. But even if it did, the CSP and kidnapping were not based on the same facts as discussed above; even if the CSP formed part of the factual picture supporting the first-degree kidnaping conviction, Defendant meaningfully deprived M.A. of her liberty before raping her.

C. Regardless of the approach, the Court of Appeals erred by vacating both the aggravated battery and CSP convictions.

Even if this Court decides not to clarify the double description analysis, the Court of Appeals still misapplied precedent. It found that Defendant's convictions for aggravated battery and CSP were the same offense. *Neal*, A-1-CA-40205, mem. op. ¶ 12. Vacating the aggravated battery conviction as the lesser offense would be the proper remedy. *See State v. Montoya*, 2013-NMSC-020, ¶ 55 ("[W]here one of two otherwise

valid convictions must be vacated to avoid violation of double jeopardy protections, we must vacate the conviction carrying the shorter sentence."). The Court then concluded that the CSP conviction was the same as the kidnapping conviction. *Neal*, A-1-CA-40205, mem. op. ¶ 15. Vacating the CSP conviction as the lesser offense would again have been the appropriate remedy. But doing that should have reinstated the aggravated battery conviction, because there would no longer be a conflicting CSP conviction.

Instead of doing that, however, the Court of Appeals vacated both the CSP and aggravated battery convictions because they carried shorter sentences than the *kidnapping* conviction. *Id.* ¶ 16. So, the Court of Appeals concluded that aggravated battery was the same offense as kidnapping, even though it did not offer any analysis or authority to support that remarkable conclusion. *See id.* ¶¶ 9-12, 16. This Court should, at very least, reverse the Court of Appeals for improperly vacating two convictions.

CONCLUSION

The State respectfully requests that this Court adopt the federal approach to double description claims and affirm Defendant's convictions.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

The body of this brief complies with the limitations of Rule 12-318(F)(3) NMRA because it contains 10,143 words as calculated by Microsoft Word 365.

CERTIFICATE OF SERVICE

I certify that, on October 10, 2024, I filed a true and correct copy of the foregoing Brief in Chief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/ Van Snow
Deputy Solicitor General