



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-39893

STATE OF NEW MEXICO

Plaintiff-Petitioner,

vs.

JACKIE SANCHEZ,

**A-1-CA-40438
D-307-CR-2018-00664**

Defendant-Respondent.

STATE'S APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
DOÑA ANA COUNTY,
HONORABLE DOUGLAS R. DRIGGERS, PRESIDING

**DEFENDANT-RESPONDENT'S ANSWER BRIEF
ON CERTIORARI TO THE COURT OF APPEALS**

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INTRODUCTION

The district court granted a directed verdict on a count of battery on a peace officer where the victim-officer did not testify at trial. The Court of Appeals dismissed the State's appeal of that ruling in *State v. Jackie Sanchez*, A-1-CA-40438, and this Court granted the State's petition for writ of certiorari, which raised one issue for review:

The Court of Appeals erred when it found that it did not have jurisdiction over the State's appeal from a directed verdict that was based *solely* on constitutional grounds.

[CP 1 (emphasis in original)]

This Court should quash its writ or otherwise affirm because the Court of Appeals correctly applied this Court's precedent to conclude the directed verdict ruling was an acquittal.

The State insists that the district court's directed verdict was a legal ruling on confrontation grounds based on the district court's stated concern about Respondent Jackie Sanchez's ability to cross-examine his accuser. However, that *concern* was not the court's *ruling*. Before the jury trial, District Court Judge Douglas Driggers warned the State that the battery charge was subject to directed verdict if the court finds insufficient evidence without the victim-officer's testimony. When the defense moved for directed verdict, counsel argued that the evidence presented lacked credibility and the battery

allegation was implausible. In context, the court's remarks about cross-examination signaled the court's credibility concerns. The court did not find a constitutional violation. The court did not exclude testimonial hearsay or rule that Mr. Sanchez's confrontation rights were violated by admitting un-confronted statements. Rather, Judge Driggers directed a verdict of acquittal, as explicitly documented in the Judgment and Sentence.

The Court of Appeals correctly applied *State v. Lizzol*, 2007-NMSC-024, 141 N.M. 705, and held the district court ruling was an acquittal. Even if the court granted a directed verdict based on a misapplication of the directed verdict standard, double jeopardy bars review of that ruling.

FACTUAL SUMMARY

By a superseding indictment in 2018, the State charged Jackie Sanchez with five charges, including Count 1: simple battery on a peace officer for kicking Doña Ana County Sheriff's Sergeant Jorge Frias. **[RP 38]** On April 11, 2022, the State filed a "final witness list" that did not include Sgt. Frias. **[RP 140]** The district court asked if the State planned to dismiss the charge involving Sgt. Frias and the State indicated its intent to rely on eyewitnesses to establish the battery against him. **[4/21/22, 8:10:55]** The court "put [the State] on notice, you're subject to directed verdict. ... We'll let you try your case and then I will determine whether a directed verdict is available."

[8:11:13] It clarified a directed verdict would issue “only on the count [for which] the court believes there’s insufficient evidence for the matter to be presented to the jury.” [8:11:57]

In opening statement, the State told the jury they would hear testimony that another officer saw Respondent Jackie Sanchez kick Sgt. Frias in the chest with “a Spartan kick” reminiscent of the movie *300*. [4/21/22, 10:51:59] The defense’s opening statement advised the jury that there would be no video footage of the “Spartan kick” and that they would not hear directly from Sgt. Frias because, “the alleged victim in this case, Officer [sic] Jorge Frias, didn't think it was important enough to be here.” [10:57:42] The defense emphasized, “All we’re going to have is, sometimes they call it the thin blue line, of other officers testifying for their comrade who, again, doesn’t think this case is important enough to be here. You will not hear from him.” [10:58:10] Defense counsel asked the jury to “think about the thin blue line. Officers are going to be supporting other officers in their testimony.” [10:59:26] Thus, the defense theory from minute one of trial was to attack the credibility of the allegations in light of Sgt. Frias’s absence.

Testimony

In addition to evidence of the other charges, Doña Ana County Sheriff's Sergeant Gabe Sanchez, Deputy Nathan Jimmerson, and Deputy Carlos

Enriquez testified that they saw Jackie Sanchez kick Sgt. Frias in the chest during the arrest and booking process. [4/21/22, 11:08:30-09:13 (Sanchez), 2:53:13, 3:03:24 (Jimmerson), 3:15:17, 3:25:06 (Enriquez)]

After the officers had arrested Jackie for other charges, he began resisting the officers' search incident to arrest. [4/21/22, 11:18:58-19:36] In response, Sgt. Gabe Sanchez struck Jackie in the stomach with his knee.

[11:12:07, 11:22:05] Sgt. Sanchez testified that Jackie subsequently kicked Sgt. Frias. [11:12:14, 11:24:20 (testifying Jackie's kick came after he was kned in the stomach)] Sgt. Sanchez testified that Jackie kicked Sgt. Frias like "a Spartan kick from *300*, just straight kicked him in the chest."¹ [11:09:07]

On cross-examination, the defense asked Sgt. Sanchez to demonstrate the alleged "Spartan" kick against Frias. [11:23:13] Sgt. Sanchez acknowledged his demonstration kick only reached about waist height, but testified that when Jackie did it, he kicked Frias in the chest. [11:23:43, *see also* 11:29:10]

As to other elements of the charge, the State had to prove an actual threat to safety or a meaningful challenge to authority. *See State v. Padilla*,

¹ *See* Wikipedia: *300 (film)* (describing an "American epic historical action film" that won the MTV Movie Award for "Best Fight"), *available at* [https://en.wikipedia.org/wiki/300_\(film\)](https://en.wikipedia.org/wiki/300_(film)). Presumably, Sgt. Sanchez was referencing this scene: YouTube, "This is Sparta kick," *available at* <https://www.youtube.com/watch?v=wzqXggZU3eE>.

1997-NMSC-022, ¶ 6, 123 N.M. 216; UJI 14-2211 NMRA (Element 5). Sgt. Sanchez generally discussed the importance of maintaining authority over a scene. [4/21/22, 11:10:22] Deputy Jimmerson was unable to directly testify that the kick was a “meaningful challenge” to Frias’s authority, but testified generally that it puts people in danger when someone does not follow lawful commands. [2:54:27-55:05] Deputy Enriquez testified that Sgt. Frias’s authority was challenged. [3:16:37]

Defense counsel asked Sgt. Sanchez about the “thin blue line,” and Sgt. Sanchez agreed with defense counsel that, “officers will sometimes support their brothers in blue.” [4/21/22, 11:25:12] The defense also elicited testimony that Sgt. Frias was later fired from the force for reasons unrelated to this case. [11:19:44-20:45, 11:28:18-29:09 (Sanchez), 3:01:26 (Jimmerson)]

Arguments of Counsel

After Sgt. Sanchez’s testimony, outside the presence of the jury, defense counsel questioned the State’s disclosure of Sgt. Frias’s firing under *Giglio v. United States*, 450 U.S. 150 (1972), arguing, “I don’t know if there was material on why he was let go from the force, but I believe that would’ve been very relevant.” [4/21/22, 11:33:12] The State responded that, “*Giglio* applies to witnesses testifying and he’s not testifying.” [11:34:15] The district court

indicated that the *Giglio* objection was not at issue because the court intended to dismiss the charge involving Sgt. Frias. [11:34:24] The court explained that, since he was not present to testify, “a directed verdict will issue.”

[11:34:48] The State asked to reserve argument on the directed verdict.

[11:35:04] The following exchange occurred:

Court: I gave you that option before, but when **you didn't follow *Giglio*, that's one issue**. But that's not an issue in this case because I'm not going to allow this charge to go forward. I haven't heard anything that would—

Prosecutor: Yes, your Honor. We believe the elements don't require the victim. ... Our position is that the elements do not require the victim's presence or a subjective testimony.

Court: I understand that, but that would be true in every case where there was **a witness that chose not to show up as an alleged victim**. If you had somebody else observe something, then you could say, "Well, we don't need the victim because we have these people having observed what occurred."

Prosecutor: Yes, Your Honor. I've obtained a conviction against a domestic violence perpetrator when the victim was not present.

Court: Well, you can argue all you want. I've pretty well decided what I'm going to do, but you can continue to object and make a record if you'd like.

[11:35:07-36:00 (Emphasis added.))] Thereafter, Deputies Jimmerson and Enriquez testified.

After the State rested, the defense moved for a directed verdict on Count 1, battery against Sgt. Frias. Counsel noted Sgt. Frias's absence and argued, “I

find it **difficult to believe** that somebody could lift their leg up to kick somebody in the chest.” [4/21/22, 3:46:18, 3:46:29 (Emphasis added.)] Counsel noted a lack of corroborating physical evidence “that he [Frias] was ever struck” [3:46:37], and argued, “I believe the officers’ testimony would be **biased to protect their own**. I did get one of the officers to talk about the ‘thin blue line.’ So I believe their testimony could potentially be biased.” [3:46:52 (Emphasis added.)]

The State responded that, “We had three officers give sworn testimony that they saw him kick him. We also had sworn testimony from officers saying that they saw the footprint on him.” [4/21/22, 3:48:29] Identifying the State’s theory on Element 5 as a “meaningful challenge to authority,” the State argued that, “Just using common sense, a kick to someone’s chest would challenge the authority of an officer,” and also cited officer testimony that it did challenge Frias’s authority. [3:49:08] The State separately argued that victim testimony is not *required* as a matter of law. [3:49:49] (citing *State v. Whiting*, A-1-CA-27117, 2009 WL 6669511, at *4-5 (N.M. Ct. App. May 19, 2009) (non-precedential) (citing *State v. Hamilton*, 2000-NMCA-063, ¶ 20, 129 N.M. 321 (stating that a single witness’s testimony can be sufficient to support a jury’s verdict)). The State emphasized that a victim of a crime need not

testify for the State to meet its burden. [3:50:54] The defense responded by reiterating that Sgt. Frias had been fired. [3:51:27]

Judge Driggers's full oral ruling stated:

I advised counsel at the pretrial conference and advised [the prosecutor] Mr. Rosten that the alleged victim, especially one that is battery on a peace officer, requires the testimony of that victim. You chose not to call that witness and failed to comply with the *Giglio* requirements regarding that officer's prior misconduct. And that was a choice made by the State. As I stated earlier, if the court adopts **your theory that a law enforcement officer need not bother to show up and testify if or she has been battered, he had something else he wants to do, we just have a fellow officer who witnessed the alleged incident to come in**, and then the defendant would be denied his right to confront and cross-examine the critical witness, to wit the victim, or alleged victim of the crime.

So **for a number of standards and reasons**, the court believes it is following the law and the absurd arguments to the contrary would upend justice. With your theory, the victim of any crime would not have to appear and testify. If it were witnessed by someone other than the victim itself, or herself, then that would be sufficient **and** defendant would be denied the right to confront and cross-examine the accuser who is obviously the alleged victim.

The motion for directed verdict on count one of the superseding grand jury indictment, battery upon a peace officer, is granted.

[3:51:47-53:57 (Emphasis added.)] The State asked to respond "to the confrontation clause issue" but the court denied the request, indicating "The court has heard enough." [3:54:00]

The jury convicted Jackie Sanchez of two misdemeanors and the court filed a Judgment and Sentence indicating that Count 1 was resolved by “directed verdict.” [RP 183-84, 197-98] Indeed, the court’s oral ruling, the trial record form filed in the record proper, and the Judgment and Sentence itself, unambiguously describe a directed verdict on Count 1. [3:53:45 (“The motion for directed verdict on count one of the superseding grand jury indictment, battery upon a peace officer, is granted.”); RP 179, 198 (trial record and J&S indicating “directed verdict” as outcome for Count 1)]

The State appealed the district court’s directed verdict on Count 1, arguing it was not an acquittal but was a “dismissal for constitutional reasons and ‘trial error.’” [DS 3] The Court of Appeals ordered the parties to brief appellate jurisdiction; specifically, the nature of the ruling and whether it constituted an acquittal. [Ct. App. Ord. (Dec. 7, 2022)]

After briefing, the Court of Appeals dismissed because “the district court’s decision was an evidentiary ruling where it determined that without the testimony of the victim officer, there was insufficient evidence to support the charge because Defendant could not confront his accuser.” [Ct. App. Dismissal Ord. ¶ 7] (citing *Lizzol*, 2007-NMSC-024, ¶ 12 (“Rulings in a defendant’s favor **based on factual findings resulting from erroneous**

evidentiary rulings or erroneous interpretations of governing legal principles **are acquittals.**”) (text only)) (emphasis added).

ARGUMENT

Summary: The district court did not dismiss Count 1 to remedy a constitutional violation, but found eyewitness testimony insufficient without Frias’s testimony *including* cross-examination. The Court of Appeals correctly dismissed, while inaccurately suggesting that the ruling stemmed from a confrontation violation. Because the district court found the testimony insufficient to meet the State’s burden of proof, the State could not appeal. This Court should quash its writ or otherwise dismiss the State’s appeal.

I. THE DIRECTED VERDICT RULING WAS AN ACQUITTAL.

The court’s oral ruling expressed concern that the defense was unable to cross-examine Frias. The court expressed dismay that Frias did “not bother to show up and testify,” and that the State instead called a “fellow officer who witnessed the alleged incident to come in and then the defendant would be denied his right to confront and cross-examine the witness, a critical witness, to wit the victim.” [**See Ct. App. Dismissal Ord. ¶ 5** (quoting district court, *see 4/21/22, 3:52:28*)] Reading the record in its totality, in the context of pretrial remarks and the defense arguments in favor of a directed verdict, any confrontation concern the court had merely served to confirm its concerns

about the weight of the evidence presented. In other words, cross-examination was *part of* the evidence the court felt was necessary to prove the charge. Because the district court ruled on the weight of the evidence, the State cannot appeal and the Court of Appeals properly dismissed.

A. Relevant Authority.

A double jeopardy issue is a constitutional question of law, which is reviewed de novo. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

This Court's opinion in *State v. Lizzol*, 2007-NMSC-024, 141 N.M. 705, provides the analytical framework for appellate jurisdiction in this case. *Lizzol* identified the following guiding principles:

- The Court lacked appellate jurisdiction where the “ruling was an acquittal since it was ‘made on the basis of evidence adduced at the trial.’” *Lizzol*, 2007-NMSC-024, ¶ 8 (quoting *United States v. Sisson*, 399 U.S. 267, 288, 308 (1970)). In *Sisson*, a military tribunal determination regarding compliance with the Vietnam draft, in which the court “arrested the judgment” based on its belief of the defendant’s account. *Sisson*, 399 U.S. at 277-78.
- The test for whether a trial court’s ruling constitutes an acquittal is “whether the ruling of the judge, **whatever its label**, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *United States v. Martin Linen Supply*, 430 U.S. 564, 571 (1977) (quoted at *Lizzol*, 2007-NMSC-024, ¶ 9) (emphasis added).
- Double jeopardy does not bar retrial when a *defendant* successfully challenges their conviction on grounds other than sufficiency. *Burks v. United States*, 437 U.S. 1 (1978) (cited at *Lizzol*, 2007-NMSC-024, ¶ 10).

- A judgment for acquittal predicated on an *erroneous* ruling excluding government evidence is still an acquittal barring appellate review of the error. *Sanabria v. United States*, 437 U.S. 54, 58-59, 68-69 (1978) (cited at *Lizzol*, 2007-NMSC-024, ¶ 11).
- A mid-trial dismissal based on prejudice from pre-indictment delay was not an acquittal because it was a “legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation.” *United States v. Scott*, 437 U.S. 82, 84, 98 (1978) (cited at *Lizzol*, 2007-NMSC-024, ¶ 12). *Scott* distinguished rulings for the defense “based on factual findings resulting from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,” which are acquittals. *Id.* at 98 (cleaned up).

Based on these principles, *Lizzol* harmonized the relevant authority and held:

(1) the State is barred from appealing when a defendant is acquitted by the trial court no matter how egregiously erroneous the trial court’s ruling; (2) whether a defendant was acquitted does not depend on the trial court’s characterization of its ruling; (3) an acquittal results when, after making an erroneous evidentiary ruling, the trial court concludes that the evidence is insufficient to proceed; (4) **an acquittal does not result when, notwithstanding the defendant’s possible culpability, the trial court determines the defendant’s prosecution is constitutionally or statutorily prohibited;** (5) a defendant may not be retried after the conviction is set aside because of insufficient evidence; (6) a defendant may be retried if the conviction was set aside because of trial error, including the situation when the trial court wrongly admitted incriminating evidence or wrongly excluded exculpatory evidence.

Lizzol, 2007-NMSC-024, ¶ 15 (emphasis added).

While the State purports to argue that the fourth principle applies here

– that the court constitutionally barred prosecution notwithstanding

culpability – the State’s arguments *at most* describe an erroneous acquittal, which is not appealable under the first principle.

B. The District Court found the evidence insufficient without the alleged victim’s testimony, to include evidence elicited on cross-examination.

The district court made no confrontation ruling. Under the Confrontation Clause, a declarant’s testimonial statement is never admissible “unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The district court did not exclude or decline to consider Sgt. Frias’s testimonial allegations; his statements were never admitted. The State takes the district court’s comment about cross-examination out of context. The court expressed pretrial its desire to hear from Frias *to meet the State’s burden*, and the defense’s directed verdict argument attacked officer credibility, including that of the non-testifying accuser. Any confrontation concern the court expressed merely echoed its concerns about the quantity and quality of the evidence presented.

The defense affirmatively argued that the kick as described was “difficult to believe” and that the testifying officers were biased and testifying in accordance with a “thin blue line” “to protect their own.” [4/21/22, 3:46:52] The State emphasized that there was not a bright-line rule requiring

victim testimony. [3:49:49-51:09] The district court indicated that it would grant, and ultimately granted, a directed verdict *because the victim did not testify*. [11:35:07, 3:51:47-53:57]

The court did not find standalone legal error in the absence of cross-examination. It ruled that, “for a number of standards and reasons,” submitting the charge to the jury “would upend justice.” [4/21/22, 3:53:02] A fair reading of the court’s *entire* ruling is that Frias’s absence made the district court doubt the allegation itself. The court lambasted Frias for not “bothering” to show up – and where the State failed to comply with *Giglio*, the district court knew there was impeachment evidence unavailable to the jury. It was only in this context that cross-examination was mentioned or pertinent. The district court granted a directed verdict based on the weight of the evidence.

The State’s brief in chief characterizes the district court ruling as a confrontation ruling. [BIC 10] However, even the State’s own explanation of the ruling reveals the court ruled on the *requisite proof*. The State argues the district court ruled that, “the testimony of the victim of battery upon a peace officer was, as a matter of constitution-based confrontation law, **requisite to a conviction** for that crime.” [*Id.* (emphasis added).] The court ruled it was requisite, but not as a matter of confrontation law.

Indeed, the State also characterizes the ruling as one where, “because the victim in the charge did not testify, Defendant was **not guilty**, and dismissal was appropriate.” [**Id.** (emphasis added).] The State’s argument emphasizes the district court’s pretrial statements that “put the prosecutor on notice” regarding *directed verdict* specifically [**see BIC 2**], and statements that it was inclined to grant a directed verdict on the battery charge without Sgt. Frias’s testimony. [**BIC 2-3** (record citations omitted)] The State concludes that, “Having predetermined this outcome, the judge necessarily did not weigh the State’s other evidence of the crime.” [**BIC 10**] The conclusion is not supported by the record. If anything, the district court “predetermined” *the weight* of the evidence. The district court may have overstated the significance of an alleged victim’s testimony, but when placed in context with Judge Driggers’s other expressed concerns, it is clear that the ultimate ruling was not based exclusively on a confrontation concern.

1. *To the extent the district court applied a bright-line rule requiring testimony from a named victim, it was nevertheless a ruling on the weight of the evidence.*

To be sure, the directed verdict standard is deferential. However, if the court found the allegation completely unbelievable, it could have reasonably concluded that *no rational juror* could find proof beyond a reasonable doubt. *See State v. Sena*, 2008-NMSC-053, ¶ 10, 144 N.M. 821 (indicating that the

directed verdict standard is one of sufficient evidence, which includes asking whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”) (quoting *State v. Graham*, 2005-NMSC-004, ¶ 7, 137 N.M. 197).

The State emphasizes an “abundance of evidence of guilt” to suggest that the district court *could not have* found the weight of the evidence lacking. [BIC 10-11] Nevertheless, even if the district court erred by weighing credibility or failed to view the evidence in the light most favorable to the State, that ruling is still an acquittal. *Lizzol*, 2007-NMSC-024, ¶ 15 (first principle). Furthermore, a ruling that a victim must testify to prove a crime occurred is not based on a legal doctrine *unrelated to* culpability. It describes (correctly or incorrectly) the minimum proof required to meet the State’s burden.

Dismissal based on a “legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation” is not an acquittal. *See Scott*, 437 U.S. at 84, 98 (cited at *Lizzol*, 2007-NMSC-024, ¶ 12). But the fact that the court’s directed verdict might have been improper does not transform it into a legal determination divorced from the weight of the evidence. The district court did not believe the State could meet its factual burden without Sgt. Frias’s testimony. The State’s efforts to

deny that the court meant what it said are unavailing. [**See BIC 12-13** (arguing that the court’s multiple explicit statements regarding “sufficiency” do not relate to the weight of the evidence)]

The State labors to characterize the directed verdict as a “legal” ruling, rather than a weighing of evidence. The prototypical example of a legal ruling that is *not* an acquittal is a dismissal based on a speedy trial violation; a ruling that has no relationship to the evidence presented at trial, and for which the remedy is dismissal *notwithstanding* evidence of guilt. *See, e.g., Scott*, 437 U.S. at 98. Judge Driggers’s ruling bears no resemblance.

The State conflates the type of legal ruling at issue in *Scott* with a court’s obligation to evaluate the sufficiency of the evidence, which is a factual assessment under a legal standard. To ensure a conviction is legally sound, a reviewing court examines each essential element of the crimes charged and the evidence at trial “to ensure that a rational jury could have found the facts required for each element of the conviction beyond a reasonable doubt.” *State v. Dowling*, 2011-NMSC-016, ¶ 20, 150 N.M. 110 (alternations in original). “[A] reviewing court [must] distinguish between conclusions based on speculation and those based on inferences, a task that is not always straightforward.” *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (citation omitted). Thus, the State is correct that the court’s discussion with the prosecution about

whether Frias's testimony was *required* "can only be interpreted as legal" [**BIC 12**], but that does not mean the court did not weigh the evidence. Rather, the court was evaluating what was *legally required* to survive a directed verdict.

Despite the State's best efforts to label the ruling as "legal," the State actually argues that the court erred by concluding that the evidence could not be sufficient without Frias's testimony, including cross-examination. Even if the court incorrectly applied such a bright-line rule, it is a sufficiency rule. To require more evidence, even to wrongly require particular evidence, is a sufficiency ruling. Even if the district court misapplied the directed verdict standard by resolving credibility, an erroneous factual determination is not reviewable. *Lizzol*, 2007-NMSC-024, ¶ 15 ("the State is barred from appealing when a defendant is acquitted by the trial court no matter how egregiously erroneous the trial court's ruling").

2. *The directed verdict was not a confrontation ruling.*

The State relies on "the argument leading up to the ruling" to argue the ruling was "legal," while acknowledging that the defense argued the testifying officers "were biased and the kick was implausible." [**BIC 10**] These are "weight" arguments. The defense did not raise a confrontation challenge, so the "argument leading up to the ruling" does not aid the State's position.

Rather, by granting the motion, it is safe to infer that the court shared defense counsel’s concerns. Indeed, the State also omits the fact that the court was dissatisfied by testimony from a “fellow officer who witnessed the alleged incident” when Frias did “not bother to show up and testify if [] he or she has been battered.” [**See Ct. App. Dismissal Ord. ¶ 5** (quoting district court, *see 4/21/22, 3:52:28*)] The district court described Frias as “a critical witness.” [**Id.**] Thus, the court’s ruling echoed the fact-based arguments of defense counsel, establishing that the court *weighed* the testimony presented and found it lacking.

While the State emphasizes the court’s comments regarding cross-examination, confrontation was not the basis of the ruling. The district court’s oral ruling indicated concern about finding sufficient evidence from the testimony of a “fellow officer” instead of a “the victim,” and *simultaneously noted* the defendant’s inability to cross-examine that accuser. [**See Dismissal Ord. ¶ 5; 4/21/22, 3:52:28**]

“What matters is not the words of the trial court—either written or oral, nor the trial court’s intent that the case be appealed. Instead, whether a defendant was acquitted depends on whether the trial court’s ruling, however labeled, correctly or incorrectly **resolved some or all of the factual elements** of the crime.” *Lizzol*, 2007-NMSC-024, ¶ 7 (emphasis added). No

one ever claimed that the testifying officers relayed Frias's testimonial statements; they did not. The court's oral ruling arose after the court remarked pretrial that not hearing from Frias could become an issue at directed verdict, flagging this as a potential sufficiency issue.

Reiterating the importance of cross-examination to test dubious allegations does not transform the directed verdict into a confrontation ruling. The district court did not find a confrontation violation because Sgt. Frias's testimonial statements were never admitted at trial. Because Frias's statements were *not* admitted, Frias's *absence* neither presented a confrontation problem, nor did the court dismiss the charge as a remedy therefor. Rather, the district court ruled that – without Frias's testimony, including cross-examination thereof – the State did not meet its burden.

The defense challenged the weight of the State's evidence and the district court ruled in response to defense arguments that the eyewitness testimony was not believable, including collateral attacks on Sgt. Frias's own credibility based on potential *Giglio* evidence that he was fired from the force. The defense arguments, which persuaded the district court, went to the reliability of the allegations. The State is simply incorrect that the district court “did not then engage in any subsequent factfinding.” [BIC 13] In relevant part, the district court found:

- that *Giglio* evidence of Frias’s firing was not properly disclosed (information implicating Frias’s credibility);
- that Frias’s absence affected the *weight* of the evidence presented and the credibility of the allegations themselves (expressing a judgment regarding the officer “not bother[ing] to show up”); and
- among other concerns about the State’s evidence, a concern that that the defense could not cross-examine Frias directly, discussing these concerns in terms of whether the eyewitness officer testimony was “*sufficient*” to carry the State’s burden.

[*See* 4/21/22, 3:51:47-53:57] The district court believed that Frias’s account *including cross-examination* was critical to proving guilt beyond a reasonable doubt. The reference to cross-examination was merely an aspect of the court’s dissatisfaction with the overall weight of the State’s evidence; one of the “number of standards and reasons” supporting the ruling. [3:53:02]

The district court granted a directed verdict based on the evidence presented and not presented. It warned the State that it was risking a directed verdict by not calling Frias, it told the State that it found the proof lacking without Frias’s testimony, it *granted* a directed verdict in response to defense counsel’s credibility arguments, and it labeled the verdict as a directed verdict in the Judgment and Sentence. This Court should not presume the district court made a confrontation ruling while consistently and repeatedly addressing the issue as a directed verdict.

A directed verdict is a basic component of any criminal trial to ensure that juries are not asked to deliberate on charges for which the State presented insufficient evidence *as a matter of law*. See LaFave, Wayne, Substantive Criminal Law, *Burden of proof; directed verdict: Directed verdict of acquittal*, 1 Subst. Crim. L. § 1.8(i) (3d ed., Oct. 2022 update) (“In most jurisdictions, the trial court has the power and duty, on the defendant's motion or even on its own motion, after the evidence on either side is closed, to direct a verdict for the defendant if the evidence is insufficient to support a conviction.”) (citations omitted). New Mexico law requires a court to independently review the State’s evidence before submitting it to the jury even when the defense does not move for a directed verdict. See Rule 5-607(E) NMRA (“[O]ut of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made”). There can be no doubt that the district court intended to direct an acquittal, as the only form of directed verdict in criminal law is a directed verdict of *acquittal*. See *supra* LaFave, 1 Subst. Crim. L. § 1.8(h), *No directed verdict of guilty* (“After the evidence is in, the trial court may not, on motion of the prosecution, direct a verdict of guilty, no matter how conclusive the evidence of guilt.”). Judge Driggers meant what he said when he granted a directed verdict and his characterizaion is entitled to deference.

Furthermore, the State's comparison to *State v. Baca* is misplaced. [BIC 14-15 (citing *State v. Baca*, 2015-NMSC-021, 352 P.3d 1151)] *Baca* related to a magistrate court order dismissing a DWI case midtrial, before the State had even presented all of its evidence, due to the exclusion of a State's witness as a sanction for improperly re-filing previously dismissed charges. 2015-NMSC-021, ¶¶ 7, 12. In the initial order of dismissal, "fields for recording the magistrate's determination of guilty or not guilty ... were left completely blank and instead the order recited that the cause was 'dismissed with prejudice.'" *Id.* ¶ 8. Months after the State filed a de novo appeal in district court, the magistrate issued an amended order describing a "directed verdict" when the court found the State could not proceed without the excluded witness. *Id.* ¶ 10. The record revealed that the State had asked to voluntarily dismiss the case, but the magistrate found the defendant not guilty instead. *Id.* ¶¶ 11-13. The magistrate did so even though the State had other witnesses available that it never got the chance to present. *Id.* ¶ 15. The magistrate did not prepare the amended order himself. *Id.* ¶ 16. The district court struck the amended order "and declined to consider it, finding that the Amended Order was not a true correction of the record." *Id.* ¶ 17.

Baca bears no resemblance to this case. Here, the district court indicated a desire to hear from Frias directly, the State failed to disclose

evidence questioning Frias’s credibility, the defense moved for a directed verdict *after the State rested* based on arguments challenging the weight of the State’s evidence. The court shared concerns that Frias did not “bother to show up” and granted a “directed verdict,” documenting the ruling as a “directed verdict” on contemporaneous paperwork. The State’s brief argues that this case “resemble[s]” *Baca*, in part because “the judge referred to the termination ruling (when made) as a dismissal, not an acquittal.” [BIC 15] But the brief provides citations only to the *Baca* opinion and none to the record in this case. [Id.] The district court referred to the ruling in this case as a directed verdict, not a dismissal following exclusion of evidence as a sanction. The district court acquitted Jackie of battery on a peace officer.

C. Any ambiguity must resolve to protect Mr. Sanchez’s double jeopardy rights.

To the extent the nature of the court’s ruling is ambiguous, this Court should find that double jeopardy bars appellate review because “the trial court is under a nondiscretionary duty to clarify any ambiguity” around whether a verdict constitutes an acquittal. *See State v. Phillips*, 2017-NMSC-019, ¶ 14, 396 P.3d 153 (citations omitted)); *cf. State v. Davis*, 2003-NMSC-022, ¶ 14, 134 N.M. 172 (discussing the rule of lenity).

As the appellant, it was the State's obligation to invoke a confrontation ruling from the district court, and thus to clarify any ambiguity in the record around the ruling. *Cf. State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454 (internal quotation marks and citation omitted) (“In order to preserve an error for appeal, it is essential **that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors ...**”) (emphasis added). If, during directed verdict, the State believed that the court was excluding evidence on confrontation grounds or ordering the State to *produce* Sgt. Frias for cross-examination as a confrontation remedy, the State could have sought a continuance to secure his presence or a mistrial if they could not do so. Instead, the State argued that the evidence was sufficient without Frias's testimony. The State then “approved” the J&S designating Count 1 as a “directed verdict.” The record does not unambiguously support the State's arguments on appeal.

II. BECAUSE THE DISTRICT COURT ACQUITTED MR. SANCHEZ OF BATTERY, THE COURT OF APPEALS LACKED APPELLATE JURISDICTION TO REVIEW THAT RULING AND PROPERLY DISMISSED THE STATE'S APPEAL.

Even if the district court erred in granting a directed verdict, the ruling is unreviewable. The State may dispute whether the district court properly assessed credibility or properly weighed the State's evidence. However, “an

appellate court may not review an acquittal even if it was based on an egregiously erroneous foundation.” *Lizzol*, 2007-NMSC-024, ¶ 7 (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, Jackie Sanchez respectfully asks that this Court quash its writ of certiorari or otherwise affirm.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that this pleading was electronically filed via E-File & Serve this **16th** day of October, 2023, causing automatic e-service upon Teresa Ryan, tryan@nmag.gov, at the Attorney General’s Criminal Appeals Division.

//S// Kimberly Chavez Cook

Law Offices of the Public Defender