IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v. **No. S-1-SC-39893**

JACKIE SANCHEZ,

Defendant-Respondent.

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS
Appeal from the Third Judicial District Court
Doña Ana County, New Mexico
The Honorable Douglas R. Driggers, District Judge

PLAINTIFF-PETITIONER'S BRIEF IN CHIEF

RAÚL TORREZ
Attorney General

TERESA RYAN
Assistant Attorney General

Attorneys for Plaintiff-Petitioner
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4060
tryan@nmag.gov

Table of Contents

Citations to the Record

Citations to the record proper are in the following form: **[RP (pg.) (¶)]**. Where appropriate, a short-form citation is used: **[*Id.* (pg.) (¶)]**.

References to the digitally recorded audio compact disc of the proceedings below are cited, at first occurrence, in a full-form citation indicating the date of recording followed by "CD" and the time of the passage. For example, January 2, 2023, counter 12:34:56 to 12:34:57 is cited as **[1-2-23 CD 12:34:56–57]**. Where appropriate, a short-form citation is used—e.g., **[*Id.* 12:34:56–57]**.

Table of Authorities

New Mexico Cases

Federal Cases

Statute

Secondary Sources

Introduction

Whether the government may appeal the outcome of a criminal trial depends on whether there was an acquittal—i.e., a factual determination of innocence—given that to re-try the defendant would invite double jeopardy. If the outcome was something less than acquittal, however, the appeal may ensue.

That is the case here, where the ruling at issue, the grant of Defendant's motion for a directed verdict on the battery upon a peace officer charge, constituted a procedural dismissal. The grant did not result from a weighing of the evidence, but rather from something altogether different: the victim's absence from trial and the district court's view that that circumstance precluded a conviction on the charge. Our caselaw makes clear that this type of law-based ruling is not an acquittal.

This case presents an opportunity to rectify the conflict between the district court's ruling and this Court's precedent. Resolving it will help delineate when a dismissal in a criminal case terminates the proceedings in favor of the defendant, and when it does not.

Summary of Proceedings

Defendant was involved in a road-rage incident, arrested, and brought to the police station. **[RP 10–11]** There, as officers were trying to restrain him, he became combative and kicked one of them, Sergeant Jorge Frias, in the chest. **[RP 11–12]**

Defendant was charged with battery upon a peace officer under NMSA 1978, Section 30-22-24 (1971), among other crimes. **[RP 38]**

Leading up to trial, the presiding judge signaled his inclination to issue a directed verdict on the charge. The State had submitted a final witness list that did not include Sergeant Frias. **[RP 140–42]** The judge noticed the absence and asked the prosecutor if it meant the State intended to dismiss the Section 30-22-24 battery charge. **[4-21-22 CD 8:09:19–8:10:54]** The prosecutor answered no, explaining that there were at least two other eyewitnesses to the crime who could establish Defendant's guilt. **[*Id.*]** The judge then put the prosecutor on notice that the charge was subject to a directed verdict. **[*Id.*]** When the prosecutor asked for clarification, the judge offered, "[I'll] let you try your case, and then I will determine whether directed verdict is available"; he shortly thereafter added that the directed verdict would be "only on the count that the court believes there's insufficient evidence for the matter to be presented to the jury." **[*Id.*]**

Midway through trial, the judge confirmed his intent to issue a directed verdict on the charge due to Sergeant Frias's absence. Following the testimony of another sergeant who described the kick, but before two other officers testified to it, the judge said he was "going to dismiss the case involving [Sergeant] Frias" and that he believed he made it clear earlier that if Sergeant Frias was not available to testify, "then the evidence in reference to that charge will, a directed verdict will

issue." **[*Id.* 11:00:32–44, 11:08:47–11:09:18, 2:53:20–33, 3:15:29–34, 11:33:39–59]** He went on, "Period. Is that clear? . . . I'm not going to allow this . . . charge to go forward. I haven't heard anything that would change my mind." **[*Id.* 11:33:59–11:34:20]**

When the prosecutor pushed back with, "The elements do not require the victim's presence," the judge responded, "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.'" **[*Id.* 11:34:20–42]** He went on, "You can argue all you want. I've pretty well decided what I'm going to do." **[*Id.* 11:34:47–53]**

Ultimately, the judge followed through with his intention.

Defendant's counsel moved for a directed verdict on the battery charge, arguing it was warranted because of the absence of both Sergeant Frias's testimony and any documentary, medical, or photographic proof. **[*Id.* 3:46:14–3:47:18]** He further argued that the evidence of the kick was "difficult to believe" and that the testifying officers' accounts could not be credited because the officers were "biased to protect their own." **[*Id.*]**

In response, the prosecutor outlined reasons the directed-verdict standard was not met, and he cited authority for the proposition that a conviction for a crime

against a person can stand even when the victim does not testify to it. **[*Id.* 3:49:47–3:50:53]** He went on: "Finally, your honor, there is no court rule, there is no statute, there is no case stating that the victim of a crime must testify for the state to meet the elements. The elements are simply there. There's nothing, I know of no law, that says that. And, your honor, I implore the court to follow the law and to find that we have met the elements of this offense." **[*Id.* 3:50:54–3:51:15]**

Defense counsel countered the State's "no law" contention: he argued the cases cited by the State were distinguishable, in that the crimes in those cases were different from the crime alleged here. **[*Id.* 3:51:27–37]**

The judge then ruled he would take the battery charge from the jury, offering the following on his decision.

> I advised counsel at the pretrial conference and advised [the prosecutor] 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*[1] 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 he's, he or she, has been battered, he's got something else he wants to do, you 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 witness, a critical witness, to wit the victim, the alleged victim, of the crime.

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

> 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, herself, then that would be sufficient, and the defendant would be denied the right to confront and cross-examine the accuser who's 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 . . . . So ordered. **[*Id.* 3:51:47–3:53:59]**

The judge gave no written explanation for the ruling. **[RP 198]**

The State challenged the ruling in the Court of Appeals. **[RP 201–07]** It argued as a preliminary matter that the appeal was not barred by double jeopardy, in that the ruling did not constitute an acquittal.[2]

The Court of Appeals was not convinced. It questioned its jurisdiction to decide the case on the merits, given the potential double jeopardy implications of its review.[3] After ordering limited briefing on the propriety of the appeal, the court ultimately dismissed it, having apparently concluded that the ruling amounted to an acquittal precluding review.[4]

---

[2] Docketing Statement, *State v. Sanchez*, A-1-CA-40438 (N.M. Ct. App. Jun. 13, 2022), 2–3.

[3] Order for Briefing, *State v. Sanchez*, A-1-CA-40438 (N.M. Ct. App. Dec. 27, 2022), 2-5 ¶¶ 4–8.

[4] Order Dismissing Appeal, *State v. Sanchez*, A-1-CA-40438 (N.M. Ct. App. Apr. 3, 2023), 24 ¶¶ 4–9.

The State petitioned this Court for a writ of certiorari to the Court of Appeals, which was granted.[5] This Court then ordered the State to brief the question presented in the State's petition: whether the Court of Appeals erred when it found that it lacked jurisdiction over the appeal.[6]

Argument

The district court ruling is reviewable because it was not an acquittal. The Court of Appeals thus has jurisdiction to hear the case. That court's conclusions to the contrary—conclusions resolving issues of double jeopardy and jurisdiction—are subject to de novo review. *See, e.g.*, *State v. Baca*, 2015-NMSC-021, ¶ 25; *City of Las Cruces v. Sanchez*, 2007-NMSC-042, ¶ 7, 142 N.M. 243.

1. The nature of the ruling terminating the proceedings, as either an acquittal or a procedural dismissal, dictates whether double jeopardy is implicated and, in turn, whether the state may appeal the ruling.

Fundamentally, a verdict of acquittal, no matter how erroneous, is unreviewable, since reversing it would expose the defendant to reprosecution in violation of the federal and state constitutions' prohibitions on double jeopardy. *Baca*, 2015-NMSC-021, ¶¶ 20, 21, 34; *State v. Roybal*, 2006-NMCA-043, ¶ 20,

---

[5] State of New Mexico's Petition for Writ of Certiorari To the New Mexico Court of Appeals, *State v. Sanchez*, S-1-SC-39893 (N.M. Apr. 28, 2023); Order, *State v. Sanchez*, S-1-SC-39893 (N.M. Jul. 21, 2023).

[6] Order, *State v. Sanchez*, S-1-SC-39893 (N.M. Jul. 21, 2023); State of New Mexico's Petition for Writ of Certiorari to the New Mexico Court of Appeals, *State v. Sanchez*, S-1-SC-39893 (N.M. Apr. 28, 2023), 1.

139 N.M. 341. This notion is rooted in the right of the accused to endure but one judgment of guilt or innocence on a given charge. *See Baca*, 2015-NMSC-021, ¶ 20. The right exists to temper the degree to which the government, in its attempt to secure a conviction, may "wear down" the defendant; subject him to "embarrassment, expense and ordeal"; cause him "to live in a continuing state of anxiety and insecurity"; and "enhance[e] the possibility that even though innocent he may be found guilty." *Id.*

At the same time, a second prosecution is not necessarily foreclosed where the judgment of guilt or innocence has yet to pass—i.e., there is no true acquittal. *See id.* ¶¶ 22, 34. When procedure-oriented reasons underlie the termination of proceedings, the state might still challenge that ruling on appeal. *See id.* ¶ 22. This is all the more true where the defendant sought the dismissal, *see id.* ¶¶ 1, 41, given that it was at the defendant's urging that the matter was taken from the jury. *See United States v. Scott*, 437 U.S. 82, 98–100 (1978). This is the situation described in *Scott*, a situation in which "the Government [is] quite willing to continue with its production of evidence to show the defendant guilty . . . , but the defendant elect[s] to seek termination of the trial on grounds unrelated to guilt or innocence." 437 U.S. at 96. Such a defendant:

> chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against

> him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. [*Id.*]

The question of appealability (a question intertwined with that of double jeopardy) thus turns on whether the termination of the proceedings is by acquittal—resulting in a permanent ending to the case—or procedural dismissal, resulting in the possibility of retrial. *See Baca*, 2015-NMSC-021, ¶ 23; 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.3(a) (4th ed. 2022).

An acquittal is a ruling resolving some or all of the factual elements of the crime in the defendant's favor, whereas a procedural dismissal is "unrelated to factual guilt or innocence" and springs from a legal judgment. *Baca*, 2015-NMSC-021, ¶ 23 (quoting *Evans v. Michigan*, 568 U.S. 313, 318–19 (2013)); *see State v. Lizzol*, 2007-NMSC-024, ¶ 7, 141 N.M. 705. One example of such a judgment is where it is concluded that the defendant, though guilty, cannot be punished due to a problem with the indictment. *See Baca*, 2015-NMSC-021, ¶ 23. Another is where a strictly venue-based determination attends the dismissal. *See Roybal*, 2006-NMCA-043, ¶¶ 20–21.

In deciding whether a given ruling is an acquittal or a procedural dismissal, neither the name the trial court gives it nor the form of the court's action is relevant. *Id.* ¶¶ 30, 32–33. What matters is the substance of the ruling—its legal effect. *Id.* ¶¶ 32–33, 42. This is seen in *City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶¶ 11, 16, 18, where the trial court did not explicitly rule on the motion for a

directed verdict or style its ruling an acquittal, but nonetheless implicitly weighed the evidence in the defendant's favor. It is also seen in *Baca*, where this Court decided that, despite the lower court judge's characterization of the dismissal as an acquittal, the dismissal was actually effected on procedural grounds. 2015-NMSC-021, ¶¶ 10, 40.

Sometimes the termination of proceedings incorporates both a legal judgment and a weighing of the evidence; in these cases, the factfinding aspect of the ruling renders it an acquittal. This is seen in, e.g., *Marquez*, 2012-NMSC-031, ¶ 16, and *Lizzol*, 2007-NMSC-024, ¶ 24. In each case, the trial court suppressed some of the state's evidence; considered the remaining evidence; and ultimately found innocence. *See Marquez*, 2012-NMSC-031, ¶¶ 10–11; *Lizzol*, 2007-NMSC-024, ¶ 24. Notably, *Marquez* and *Lizzol* also establish that even gross error in the dismissal ruling's underlying conclusions—one legal, the other factual—cannot alter the result of acquittal. *Marquez*, 2012-NMSC-031, ¶ 15; *Lizzol*, 2007-NMSC-024, ¶ 7.

2. The ruling here was not an acquittal, but rather a procedural dismissal based on a legal judgment: the court did not resolve any of the factual elements of the crime.

The dismissal in this case was not an acquittal. It was based on the district court's legal judgment alone—that is, not on any weighing of the evidence. This is apparent from the timing and substance of the presiding judge's remarks.

The judge laid bare his view of the charge from the outset, a view under which there could be no guilt absent the testimony of Sergeant Frias. The judge said—before all the evidence was presented—that he was "pretty well decided" he would not allow the charge to go forward were Sergeant Frias not to take the stand. In the judge's mind, 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.

The judge then applied this working principle at the close of the State's evidence to reach the only possible outcome under it: that because the victim in the charge did not testify, Defendant was not guilty, and dismissal was appropriate. Having predetermined this outcome, the judge necessarily did not weigh the State's other evidence of the crime. In other words, his ruling was not on the merits of culpability.

A. *The argument leading up to the ruling, along with the explanation for it, reveal its character as a judgment of law, not a resolution on the merits of guilt or innocence.*

Notably absent from the judge's remarks on the ruling was any suggestion it was on the merits of Defendant's culpability. While defense counsel tried to argue Defendant's innocence, the judge did not appear to accept the argument—and for good reason. Counsel contended the officer-witnesses were biased and the kick was implausible. Not only are these quintessentially matters for the jury alone to

resolve, but the evidence of the battery fell markedly below the standard for directed verdict—that standard being "whether the direct or circumstantial evidence admitted at trial, together with all reasonable inferences to be drawn therefrom, will sustain a finding of guilt beyond a reasonable doubt." *Baca*, 2015-NMSC-021, ¶ 31 (internal quotation marks and citation omitted); *see, e.g.*, *State v. Galindo*, 2018-NMSC-021, ¶ 24 (recognizing the jury's province to determine the credibility of witnesses and weigh the evidence). It is no wonder the judge did not refer to this purported bias or implausibility in explaining his ruling; with three officers testifying to the battery, the standard was far from met—particularly considering that the evidence was to be viewed in the light most favorable to the state. *See, e.g.*, *State v. Gilbert*, 1982-NMSC-137, ¶ 5, 99 N.M. 316. At bottom, this abundance of evidence of guilt shows that the ruling was a directed verdict in name only.

What did make its way into the judge's remarks on the ruling, in contrast, was his view on the legal question of whether victim testimony was requisite to a battery upon a peace officer conviction. Right before the ruling, the prosecutor tried to disabuse the judge of the notion that such a conviction was valid only if the victim of it testified, and defense counsel tried to rebut the argument. The judge seized on the prosecutor's assertions and rejected them, pointing out that the State's failure to call the victim as a witness was an infringement on Defendant's

confrontation rights. These statements can only be interpreted as a legal, as opposed to factual, determination, and they underscore that the ruling was not a true directed verdict of acquittal.

B. *Although two of the judge's comments might suggest the ruling was evidence-based, a closer look at them defeats the suggestion.*

Granted, the presiding judge twice referenced *sufficiency* in his commentary on the battery charge, but when viewed in context, these references do not imply that the ruling was the product of any evidence-weighing.

The first reference was in the judge's clarification before trial that his directed-verdict warning applied to "the count [for which] the court believes there's insufficient evidence . . . to be presented to the jury." While this comment might seem to anticipate a subsequent, merits-based judgment on the question of culpability, the judge's other comments, described above—together with the absence of any indication at the directed-verdict stage that he weighed any evidence—foreclose that theory.

Likewise not compelling is the judge's use of *sufficient* while elaborating on the ruling. He submitted that, "[i]f [the battery] were witnessed by someone other than the victim . . . , then [under the State's theory] that would be sufficient, and the defendant would be denied the right to confront and cross-examine the accuser who's obviously the alleged victim." In saying this, the court was not imparting his

view that the State's evidence was inadequate to prove guilt, but was rather using *sufficient* in the sense of *acceptable*.

C. *This case is distinguishable from* Lizzol, *which held there was an acquittal.*

The Court of Appeals reached its conclusion of acquittal by apparently pointing to the judge's second reference to sufficiency and then unsoundly analogizing this case to *Lizzol*,[7] which held that double jeopardy barred the state from pursuing an appeal. *See* 2007-NMSC-024, ¶ 6.

But a key distinction makes *Lizzol* inapt here. There, the trial judge suppressed the defendant's blood-alcohol test result and, considering what evidence remained, had "reasonable doubt" about the alleged DUI. *Id.* ¶¶ 2–4. Though the trial judge here also made such a constitution-based ruling of law, unlike in *Lizzol*, the judge here (as discussed above) did not then engage in any subsequent factfinding. *See id.* ¶ 24 (observing that the judge, "based on th[e suppression] ruling, made a factual finding that the [s]tate could not prove its case").

This Court has made clear that this distinction alters the result reached in *Lizzol*.

---

[7] Order Dismissing Appeal, *State v. Sanchez*, A-1-CA-40438 (N.M. Ct. App. Apr. 3, 2023), 2–3 ¶¶ 4–7.

D. *This case is analogous to* Baca*, which held there was no acquittal.*

In its likeness to this case, *Baca* buttresses the conclusion that Defendant was not acquitted. Like here, this Court in *Baca* was called on to decide whether the dismissal—a ruling termed a directed verdict—was indeed that. *See* 2015-NMSC-021, ¶¶ 2, 10. The answer was no. *See id.* ¶ 43.

The court in *Baca* reached that answer having considered two rulings underlying the dismissal of a DWI charge, both of which were urged by the defense: one based on the suppression of a key witness as a sanction for a procedural-rule violation, and the other based on the decision to abort the trial as a result of that suppression. *See id.* ¶¶ 3, 12–14, 17, 35.

The court swiftly concluded the first ruling, being strictly procedural, was "in no sense" a decision on the strength of the state's case. *Id.* ¶ 35 (internal quotation marks and citation omitted); *see id.* ¶ 38.

The second ruling, meanwhile, was a closer call, given its relatedness to the subject of evidence and culpability. *See id.* ¶¶ 36–39.

Ultimately, the court held that the second ruling, too, was not on the merits of culpability. *See id.* ¶¶ 38, 40. This was because of: the general lack of indication the trial court considered the evidence of guilt; the trial judge's apparent predisposition toward dismissal as a sanction—one, that is, that predated the

production of all the evidence; and the fact that the judge did not, at the time of the initial ruling, call it an acquittal. *See id.* ¶¶ 36–37, 39.

The circumstances here resemble those in *Baca* in that: (1) the defense called on the trial court to acquit due to insufficient evidence, and the court obliged, *see id.* ¶¶ 10, 42; (2) before hearing all the evidence, the judge made it clear he intended to dismiss the case; *see id.* ¶¶ 12, 36, 37; (3) there was no indication the judge deemed the evidence insufficient to prove guilt, *see id.* ¶ 36; and (4) the judge referred to the termination ruling (when made) as a dismissal, not an acquittal, *see id.* ¶¶ 8, 10, 13, 39.

While it could be argued that in *Baca*, unlike here, the prosecution had not finished presenting its evidence, thereby making it more likely the judge could not have engaged in any weighing of it, *see id.* ¶ 17—this case is enough like *Baca* that the same conclusion is justified. The fact that the trial in *Baca* was aborted only strengthened the court's holding; the absence of that detail would not have changed the outcome, because it was otherwise clear that the ruling at issue was not evidence-based. The same is true here.

At bottom, as it was with the defendant in *Baca*, the right of Defendant to a single determination of guilt or innocence will remain intact even if this appeal ensues. *See id.* ¶ 48.

Conclusion

This is not a case where the defendant will be made to endure more than one judgment of guilt or innocence on the charge in question. Instead it is one in which, were this appeal not allowed, "the public [will have] been deprived of its valued right to one complete opportunity to convict those who have violated its laws." *Id.* ¶ 22 (alteration, internal quotation marks, and citation omitted).

The State's ability to exercise this right by prosecuting Defendant on the battery charge should not be unfairly impeded. *See id.* ¶ 30. The State thus asks this Court to reverse the jurisdiction-based dismissal of its appeal and remand to the Court of Appeals to review the district court ruling on the merits.

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ Teresa Ryan
TERESA RYAN
Assistant Attorney General
New Mexico Office of the Attorney General
408 Galisteo Street
Santa Fe, New Mexico 87501
(505) 490-4060
tryan@nmag.gov

Certificate of Service

I certify that on September 14, 2023, I filed this document electronically through the Odyssey E-File & Serve System, which caused opposing counsel, Kimberly Chavez Cook, to be served electronically at kim.chavezcook@lopdnm.us.

/s/ Teresa Ryan
Assistant Attorney General