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 REPLY BRIEF

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Citations to the Record

Citations to the record proper are in the following form: **[RP (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

Argument

The State stands behind the arguments it made in its brief in chief. It responds as follows to explain its disagreement with the resolution Defendant seeks and with particular points he makes.

1. Defendant's best arguments cannot overcome the reality that the ruling at issue was a procedural dismissal, not an acquittal.

As Defendant's arguments reveal, his success in this proceeding depends on making the ruling at issue seem sufficiency-based. To that end, Defendant collects and embellishes on every suggestion flowing from the trial judge's mouth that could conceivably be used to deem the ruling a true directed verdict, i.e., a factual determination of innocence.

Yet Defendant can only do so much toward that aim, given the other words of the trial judge. They are the more-pronounced of the judge's statements, and they reveal the true nature of his ruling as a Confrontation Clause-based procedural dismissal,[1] not an acquittal, based exclusively on the notions that: the crime victim's absence from the witness stand violates the accused's right to confrontation; the evidence of the crime has no bearing on that conclusion; and

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[1] That the confrontation right is a procedural one should not be doubted. In the United States Supreme Court's words: "[The Confrontation Clause] is a procedural rather than a substantive guarantee. It . . . reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004).

when the right is violated in this way, the charge cannot go forward. In the judge's words:

- "[I]f the court adopts your theory that a law enforcement officer need not . . . testify[,] . . . then the defendant would be denied his right to confront and cross-examine the witness[.]" **[4-21-22 CD 3:52:29–56]**

- "With your theory, the victim of any crime would not have to appear and testify. . . . [T]hen . . . the defendant would be denied the right to confront and cross-examine the accuser[.]" **[*Id.* 3:53:20–41]**

In repeatedly saying "testify," "right," "confront," "cross-examine," "witness," and "accuser" here and elsewhere, the judge was undeniably referencing the Sixth Amendment's Confrontation Clause, which both establishes the right of the accused in a criminal prosecution "to be confronted with the witnesses against him" and commands that "reliability [of the evidence] be assessed . . . by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.").

And then there is what the judge did not say: he did not deny that at the heart of the matter was, in the prosecutor's words, "[a] Confrontation Clause issue." **[*Id.* 3:53:41–3:54:05]** The judge effectively acknowledged it was just that when, instead of correcting the characterization, he rejected the prosecutor's request to continue argument on the so-named issue. **[*Id.*]**

Were all this communication, spoken and unspoken, not confirmation enough that the judge meant the ruling to be a confrontation-based procedural dismissal, he surely got his meaning across when he said, in general terms having nothing to do with the evidence in this case, "[T]he alleged victim [(presumably meaning "crime," not "victim")], especially one that is battery on a peace officer, requires the testimony of th[e] victim." **[*Id.* 3:51:56–3:52:07]** The same goes for his announcement that he would be dismissing the case because the victim, Sergeant Frias, was not available to testify. **[*Id.* 11:33:39–59]** Considering that statement together with his others, it is clear the judge said this not because Frias's testimony was needed for there to be enough evidence to bring the charge to the jury, but because of his preconceptions about the constitutional implications of Frias's unavailability.

Meanwhile, Defendant tries in vain to portray the ruling as having been tinged with the judge's personal assessment of Defendant's culpability. **[AB 10–11, 13, 14, 15, 16, 18, 19, 20, 21]** His assertions to that effect are, tellingly, not supported by any citation to the record. **[*Id.*]**

Perhaps even more problematic, accepting those assertions would require this Court to believe that the judge was improperly weighing in on the other officers' credibility and on how much significance to attribute to their testimony. This was a jury trial, after all—one in which the judge, had he done those things, would have

defied his own, oft-repeated instruction to the members of the jury that they "alone" are the judges of the witnesses' credibility and the weight to be given each witness's testimony. UJI 14-5020 NMRA; *accord State v. Candelaria*, 2019-NMSC-004, ¶ 45. **[RP 173]** All considered, the sounder presumption is that the weight of the evidence did not cross the judge's mind when he was deciding that the charge could not go forward absent the crime victim's presence on the witness stand. *Cf., e.g., In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 19, 121 N.M. 562 ("Where there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the lower court's judgment.").

Also worth ignoring is the stress Defendant places on the judge's having repeatedly called the ruling a "directed verdict." **[AB 14, 15, 21–22, 24, 25]** As even Defendant acknowledges, the ruling's judge-given label is irrelevant to the inquiry. *See, e.g., State v. Baca*, 2015-NMSC-021, ¶ 30 ("[O]ur double jeopardy precedents and those of the United States Supreme Court are in agreement that a trial court's own description of its ruling is not controlling."). **[AB 11, 19]** With that being the case, what defense counsel said or thought in relation to the ruling is all the more unworthy of consideration. **[AB 18–19, 20]**

2. Nor can *Baca* be convincingly distinguished from this case.

The two claims by Defendant about *Baca* that are not already addressed in the State's briefing can be easily dismissed.

To Defendant's point that *Baca* bears no resemblance to this case: several of the distinctions Defendant highlights are details of this case that, because of their peculiarity, no one could realistically expect to have also arisen in *Baca*. **[AB 23–24]** Putting those details aside, this case (as discussed in the brief in chief) is analogous to *Baca* in enough significant respects for it to reach the same outcome.

To Defendant's point that the brief in chief omits a citation to the record: the record indeed supports the State's claim. **[AB 24]** The statement in question is that the district court judge characterized the termination ruling as a dismissal, not an acquittal.[2] ***[Id.]*** On page two of the brief in chief is a quote, supported by a citation to the record, of the judge saying he was "going to dismiss the case involving [Sergeant] Frias." Meanwhile, on pages four and five of the brief in chief is a quote of the judge's explanation for his ruling; as can be seen from a review of that quote (and, for that matter, all other quotes attributed to the judge and recited in both parties' briefs), the judge never referred to the ruling as an acquittal.

[2] The State's inclusion of "when made" in its statement on page 15 of the brief in chief was intended to recognize that in *Baca*, the ruling at issue was originally called a dismissal, but then, two months later, renamed a directed verdict. *See* 2015-NMSC-021, ¶¶ 8, 10, 13, 39.

3. There is no ambiguity in the ruling.

In a tacit acknowledgement that the trial judge's ruling is not as plainly evidence-based as he first made it out to be, Defendant calls on this Court to resolve in his favor what he later reckons an ambiguity. But he does so unpersuasively, mainly because, as discussed above and in the brief in chief, no such ambiguity exists. In addition, Defendant's reliance on the authority he cites is unsound.

Defendant cites *State v. Phillips*, 2017-NMSC-019, ¶ 14, for the proposition that the trial court should have clarified the supposed ambiguity. **[AB 24]** But *Phillips* "addresses the procedure for determining whether a jury is deadlocked" and considers, as its "sole legal issue[,]" "whether the district court abused its discretion by determining that the jurors were hung on first-degree murder based on the jury poll." *Id.* ¶¶ 1, 14. That is not the issue here.

Defendant then cites the preservation rule from *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, to support his contention that the State should have invoked a confrontation ruling so that the nature of the ruling would be clear in the record. **[AB 25]** This makes no sense for a few reasons, primarily that the issue before this Court is not whether the State preserved its objection to the district court's ruling, but whether the court's ruling was an acquittal or a procedural dismissal. The preservation rule does not apply.

Conclusion

Given the weaknesses of Defendant's answers to the State's arguments, the State continues to ask 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,

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Certificate of Service

I certify that on October 30, 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.

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