IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40308

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

HEZEKIAH EAKER,

Defendant-Petitioner.

STATE OF NEW MEXICO'S SUPPLEMENTAL ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

STATE STATUTES AND RULES

OUT OF STATE CASES

CITATIONS TO THE RECORD

Citations to the record proper are in the form **[RP].** Citations to the audio transcript of proceedings are the form **[Date CD Hour:Minute:Second].** Recordings were prepared using For The Record software.

INTRODUCTION

Defendant was on community release while serving parole for rape when he was caught with an abundance of pornographic images and videos—many of babies and children—on a prohibited phone, in breach of his parole conditions. He violated two other conditions of parole, as well, and was arrested and re-confined for the parole violations. He was later charged with new offenses, convicted for the same, and sentenced.

Before sentencing on the new charges (Case Two), Defendant was released on an unsecured bond in that case. He was, however, held in confinement in his parole retake (Case One).

The issue before the Court is whether he is entitled to presentence confinement credit in Case Two, in addition to the presentence confinement credit applied to Case One.

Defendant is not entitled to presentence credit because, although he was confined in Case One, he was released on an unsecured bond and therefore was not also confined in Case Two. This Court should therefore affirm the district court.

SUMMARY OF PROCEEDINGS

Case One: In 2011, Defendant raped his sister and was convicted of third degree Criminal Sexual Penetration (CSP) and Incest. *D-1215-CR-2011-00393.* He received a conditional discharge, but after violating probation, it was revoked, and he was sentenced to five years' incarceration and an indeterminate parole term of five-to-twenty years for the CSP conviction. He was, at that time, awarded 183 days presentence confinement.

After completing the basic sentence, Defendant served a portion of his parole sentence but was released prematurely by the district court. *Id.* The State appealed that decision, which is now pending before this Court. *S-1-SC-40604.*

On March 28, 2019, before his premature release, Defendant was on community parole when two parole officers made an authorized but unscheduled field visit to Defendant's home. They found in Defendant's possession two prohibited cell phones in violation of Defendant's conditions of parole, and on one, "a graphic porn video that looked to be in pause mode...[a] phone history [that] showed hundreds of videos and websites that pertained to specific anal rape and elderly rape videos...[and] an album in the pictures gallery that contained tons of female children ranging from

babies to preteens posing in a graphic matter. There were pictures of babies and preteen females that were being raped by adults and pictures of babies that were placed in inappropriate positions." **[RP 212]** The Parole Board's findings list even more disturbing details, including evidence that Defendant was stalking several "females" online. **[*Id.* 215]** Additionally, Defendant's urine sample was positive for methamphetamine. **[*Id.* 217]**

Defendant was found to have violated three parole conditions: One, failing to follow orders of the New Mexico Sex Offender Behavioral Contract; two, use or possession of drugs; and three, failure to demean oneself as a law-abiding citizen. **[RP 216]** The violations resulted in immediate arrest and retake by the Parole Board, and Defendant was re-confined on Case One. *D-1215-CR-2011-00393.*

The Parole Board noted that "[a]s of [04/01/2019] [Defendant] ha[d] not yet been formally charged with any new offenses." **[RP 216]**

Case Two: Because some of Defendant's parole violations were also crimes, the State charged Defendant with sexual exploitation of children. *D-1215-CR-2019-00268.* Defendant was released on a five-thousand-dollar unsecured bond in the new case (Case Two) but remained confined in the parole retake (Case One). Defendant pled guilty, **[RP 166-173]** and was

sentenced. The district court ran Defendant's sentence in Case Two consecutively to Case One. He was awarded no presentence confinement credit. **[*Id.* 178]**

Defendant moved the district court to "correct" the sentence, claiming that under *French*, 2021-NMCA-052, he was entitled to 881 days presentence confinement credit for the time he was confined on parole retake, Case One, while awaiting sentencing on Case Two. **[*Id.* 189-191]**

The district court denied Defendant's motion to award presentence confinement credit, citing four reasons for the denial: (1) the parole retake was an independent act taken by the Adult Probation and Parole Department; (2) while Defendant was in fact confined during the subject period on a parole retake in Case One, he had been released on bond in Case Two; (3) Case Two was ordered to run consecutively to Case One; (4) *French,* 2021-NMCA-052, is inapplicable in these circumstances; and (5) granting such credit would constitute an equal protection violation by rewarding a defendant convicted of two crimes with less time served than another defendant, convicted of only one crime. **[RP 226-229]**

Defendant filed Notice of Appeal on August 1, 2022, **[*Id.* 231]** then filed his first brief in the Court of Appeals (COA). The issue was fully briefed in

that Court. *State v. Eaker*, A-1-CA-40709. But the case was eventually transferred on jurisdictional grounds via an order from the COA, after that Court construed Defendant's Amended Motion to Correct Sentence as a petition for writ of habeas corpus. *See Id.* March 1, 2024 Order Transferring to the New Mexico Supreme Court.

This Court accepted transfer in a May 10, 2024 Order. It ordered that the initial brief in chief would be treated as a petition for writ of certiorari; the initial answer brief as a response to the petition; and the initial reply brief as a reply to the response. This Court further ordered supplemental briefing, limited to two specific questions:

> 1) In determining Petitioner's entitlement to presentence confinement credit in the district court cause numbered D-1215-CR-2019-00268 (Case Two) is the proper inquiry whether Defendant "remained out on bond before sentencing" or whether "bond was set" in Case Two? *See State. v. Romero,* 2002-NMCA-106, ¶¶ 9, 11, In other words, was Defendant's nominal release in Case Two while he remained confined in D-1215-CR-2011-000393 (Case One) sufficient to deny him an award of presentence confinement credit [in Case Two]; and
>
> 2) What role, if any, should New Mexico's revamped pretrial release and detention rules play in resolving Question One?

[5/10/24 Order]

1) The proper inquiry must lead the Court to know whether Defendant was *only* confined on Case One during the overlapping confinement period, or if he was "also confined" on Case Two. Because, if he was not also confined on Case Two, the subject confinement period was insufficiently related to the conviction and sentencing in that case to award presentencing confinement credit.

Therefore, respectfully, the proper inquiry is whether the bond indicated Defendant was either "also confined," or released, in Case Two.

Or "in other words" (to the Court's secondary phrasing), the answer is yes: Defendant's "nominal" release was sufficient to deny presentence confinement credit in Case Two because the issuance of an unsecured bond constituted a release in that case under the provisions of Rule 5-401 (B) NMRA. Therefore, he was not "also confined," on Case Two and, as the district court ruled, not entitled to presentence confinement credit.

2) Our revised pretrial release and detention rules are insignificant to resolving Question One because an unsecured bond, like release on one's own recognizance, is not reliant on a defendant's financial ability to post bond.

Because the district court did not err by denying Defendant presentence confinement credit, this Court should affirm.

ARGUMENT

Whether Defendant has a right to presentence confinement credit requires application of NMSA 1978, Section 31-20-12 (1977) and is therefore reviewed *de novo*. *State v. Romero*, 2002-NMCA-106, ¶ 6, 132 N.M. 745.

I. *State v. Romero*

A. To award Defendant presentence confinement credit in Case Two would improperly reward him for committing multiple crimes.

As a preliminary matter, in its formulation of Question One, this Court cited *Romero*, 2002-NMCA-106, pointing specifically to paragraphs 9 and 11. **[5/10/24 Order]**

In paragraph 9, the *Romero* court observed that "[i]f we were to interpret the statute strictly, to [the d]efendant's benefit, we would allow [the d]efendant to benefit from committing multiple crimes and also place [the d]efendant in a better position than a defendant who remained out on bond before sentencing. Such a result would contradict the purpose of Section 31-20-12, and we will not adopt it." *Id.* ¶ 9. This Court raises an important issue by highlighting this inferred question.

In this case, Defendant was released on bond in Case Two yet remained confined because of the parole retake in Case One. To award him presentence confinement credit in Case two, for time he would have been free *but for* the parole retake in Case One, would put him in a better position than a defendant who had committed the same crimes and received the same sentence, but had not additionally violated parole. Granting such credit would unjustly reward Defendant for additionally violating parole, an absurd result the *Romero* Court warned against. *See id.* ¶ 8-9 (noting that the court will not "construe a statute in a manner that is contrary to the intent of the legislature or in a manner that would lead to absurd or unreasonable results," such that the defendant would "benefit from committing multiple crimes and also place Defendant in a better position than a defendant who remained out on bond before sentencing").

The district court correctly came to the same conclusion: "Granting credit for time on parole retake in [Case One] to the sentence in [Case Two] would be a violation of equal protection for those defendants whom [*sic*] only had one sex offense conviction, in that it is possible that a hypothetical defendant with two sex offense convictions in two separate cases could,

conceivably, spend less time in prison than a person with one sex offense conviction, due to double credit." **[RP 229]**

In this respect, the *Romero* Court's observation should be taken to heart; Defendant should not be rewarded with presentence confinement credit for committing additional crimes while violating parole.

B. According to, but unlike *Romero*, the three-prong test is applicable, here, to determining whether the subject confinement period is related to Case Two.

As to the Court's second citation to *Romero*, 2002-NMCA-106, ¶ 11, the decisive question—whether presentence confinement is sufficiently related to one sentence when a defendant is involved in multiple judicial proceedings—is only sometimes determined by applying a widely used three-pronged test, discussed below.

The *Romero* Court did not apply the three-pronged test in that case, noting: "that [the d]efendant had not already been sentenced when he was confined on subsequent charges, [is] determinative...[and]...[t]he three factors of *Facteau* and *Orona* form the relevant inquiry only when a defendant has been involved in separate sentencing proceedings rather than a single sentencing proceeding." *Id.* (emphasis original).

Romero is distinguishable from the current case because, unlike in *Romero*, Defendant was sentenced separately in Case One and Case Two. Therefore, unlike *Romero*, the three-prong test is applicable to the current case.

II. Case Two is not sufficiently related to the subject confinement period to justify presentence confinement credit.

As Defendant notes, the general rule allows presentence confinement credit only once against the aggregate of consecutively ordered sentences. **[Supp. 10]** Under that rule, Defendant is not entitled to receive credit, because he was re-confined due to the parole violations on Case One and received confinement credit on that sentence.

And while there may be an exception to the rule when there is a "sufficient connection" between the second case and the confinement, although also counted toward the first case, **[*id.*, citing *State v. Herrera*, 2024-NMCA-025, ¶ 22, *et al.*)** there is no such connection in this case.

The governing statute, NMSA 1978 Section 31-20-12 (1977), states:

> A person held in official confinement *on* suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent

> in presentence confinement against any sentence finally imposed for that offense.

(Emphasis added.)

The plain language of the statute, thus, simply requires that an individual held in presentence confinement *on—i.e.*, because of—suspicion or charges of a felony is entitled to credit against a sentence stemming from the same felony. "When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Rivera*, 2004-NMSC-001, ¶¶ 10-11, 134 N.M. 768, (citation omitted).

Defendant was confined at the subject time for parole violations in Case One and the resulting retake. That his confinement correlated with "pending resolution" **[Supp. 9]**[1] of Case Two does not mean he was confined because of those charges. The confinement period in question was not "on," *i.e.*, because of, the illegal acts for which Defendant was convicted in Case Two.

"However, applying the plain meaning rule is not always as simple as the statement of that rule may imply." *Rivera*, 2004-NMSC-001, ¶¶ 10-11. Because some of the parole violations were criminal acts that resulted in

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[1] Citations to Defendant's Supplemental Brief in Chief will appear as **[Supp.__]**.

new charges, and while he was confined for the parole retake (Case One) he was also awaiting sentencing in Case Two, Defendant argues that for the time he was confined on the parole retake, he should also be credited for presentence confinement in Case Two. **[*See* generally Supp.]**

Returning to the text in Section 31-20-12, the question, then, turns on the meaning of the word "on." Our courts have determined that it means there is a sufficient relationship between the confinement and the charge on which the conviction is based. *See French*, 2021-NMCA-052, ¶ 11 ("Section 31-20-12 does not afford the district court discretion in awarding presentence confinement credit....as long as the presentence confinement is related to the charge on which the conviction is based") (internal quotation marks and citation omitted).

In sum, the three-pronged test should serve to determine whether Case Two is sufficiently related to the confinement to justify awarding presentence confinement credit—*i.e.*, dual credit—under Section 31-20-12.

III. The three-prong test to determine sufficient relationship.

"To determine whether there is enough of a connection to warrant dual credit, our courts apply a three-part test drawn from our analysis in

Ramzy, 1982-NMCA-113, ¶ 11[.]...[T]he three prongs are: (1) the defendant was not confined in either case; (2) the charges in case two triggered and caused the confinement in case one, and (3) the defendant was *also confined* [in] case two." *State v. Herrera*, 2024-NMCA-025 , ¶ 23 (internal citations omitted, emphasis added). *See also State v. Miranda*, 1989-NMCA-068 ¶ 12 (analyzing whether the defendant was also confined on the Case 2 charges"). The State agrees with Defendant that it is the third prong that is at issue here. **[Supp. 11]**

A. The third prong is not satisfied because the court sets a bond in a secondary case; the defendant must be "also confined" in that case to be awarded presentence confinement.

While *Herrera* and *Miranda* phrase the third prong as whether defendant was "also confined" in case two, it is elsewhere phrased as whether a bond was set in the second case. *See, eg., French,* 2021-NMCA-052, (listing the third prong as "whether bond was set in the case related to the sentence"); *Facteau*, 1990-NMSC-040, ¶ 7, 109 N.M. 748, (asking "[w]as bond set for the [second case]?"); *State v. Orona*, 1982-NMCA-143, ¶ 6 (referencing in the third prong that no bond was set). This Court's first question, too, points to this means of identifying and analyzing the third prong. **[5/10/24 Order]**

Such parallel/interchangeable use of "also confined" and "whether bond was set" suggests that the setting of a bond means the defendant was "also confined" in that case. But that conclusion is illogical and belies the meaning and purpose of Rule 5-401 NMRA and Section 31-20-12.

Bonds are governed by Rule 5-401 and are considered a condition of release. They are set to "ensure the appearance of the defendant as required and the safety of any other person and the community." *Id.* (C). The purpose of an unsecured bond, as Defendant was issued, is to allow an eligible defendant to be released, *i.e.*, unconfined, prior to sentencing. ("Any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be ordered released pending trial on the defendant's personal recognizance or on the execution of an unsecured appearance bond in an amount set by the court." *Id.* (B)).

And the purpose of Section 31-20-12 is to provide confinement credit for any period of presentence confinement. *Id.* ("A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.")

Therefore, as provided in Rule 5-401(B), if released on an unsecured bond, as was Defendant, or "on the defendant's personal recognizance," there can inherently be no presentence confinement from which to apply credit under Section 31-20-12.

Accordingly, the setting of a bond does not establish that a defendant is "also confined" on that case. Instead, an unsecured bond, as was issued on Case Two (or, in another circumstance, release on the defendant's own recognizance) must mean the opposite: that a defendant—and *this* Defendant—was released, *i.e.* unconfined on that case, and therefore inherently ineligible to receive pre-confinement credit against the related sentence.

Case law, further, demonstrates no consistent relationship between the third prong and a bond, or to Section 31-20-12 or Rule 5-401. As Defendant points out, no published case has turned on whether a bond was set. **[Supp. 16]** However, like in this case, in *State v. Araujo,* A-1-CA-35514, mem. op. (N.M. Ct. App. Jan. 30, 2017) (non-precedential), the defendant was released "only" on case two, on an unsecured five-thousand-dollar appearance bond. *Id.* ¶ 2. And the court held that "[t]o the extent that he was not held on [case two], even though he was in custody in relation to

a different case, he was not entitled to presentence confinement credit." *Id.* ¶ 4.

Therefore, *Araujo* supports the logical application of Rule 5-401(B) and Section 31-20-12 to this case: the issuance of an unsecured appearance bond means Defendant was released in Case Two, not confined, and therefore not entitled to presentence confinement credit.

Looking strictly at published cases in which a bond was a factor in whether presentence confinement credit was granted, there seems to be no consistent pattern to the relationship between the setting of a bond and whether presentence confinement credit was granted or denied.

In *State v. Facteau,* 1990-NMSC-040, ¶ 6, there was no bond set on case two, and presentence credit was denied.[2] The court, however found that none of the three prongs were met.

In *State v. Orona*, 1982-NMCA-113, ¶ 11, as well, the court found there was no bond, none of the three prongs were met, and credit was denied.

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[2] The *Facteau* decision distinguished a "codefendant" who had received presentence confinement credit, but had been on parole, rather than incarcerated at the time of the arrest. The court stated the unidentified codefendant was "arrested and served time as a direct result of the escape charges." *Facteau,* 1990-NMSC-040, ¶ 4. This brief, offhanded dicta lacks sufficient detail and legal analysis by which to meaningfully compare the instant case.

Thus, in both *Facteau* and *Orona*, in contrast to *Araujo* and the logical application of Rule 5-401 (B) and Section 31-20-12, the absence of a bond inscrutably appears to contribute to the courts' determination that the defendant was *not* "also confined" in case two.

But in *Stewart v. State*, 1991-NMSC-095, 112 N.M. 653, the petitioner alleged he "did not meet the conditions of bail set by the court and was confined at all times between his arrest and sentencing." *Id.* ¶ 2. Yet this Court held that "[p]etitioner, of course, should not receive double credit. The presentence confinement period ends when parole is revoked, because petitioner then is confined pursuant to the prior conviction." *Id.* ¶ 4.

Bail, like bond, is a condition and means for presentence release. If the petitioner in *Stewart* did not meet this condition, to deny him presentence confinement credit appears contrary to the logical conclusion that if a defendant is not released under the meaning of Rule 5-401 (B), *i.e.*, because he was confined, he should receive presentence confinement credit under Section 31-20-12.

And again, in *State v. Irvin*, 1992-NMCA-121, ¶ 7, there was a bond, and the Court granted presentence confinement credit. The Court dismissed the *Stewart* Court's clear pronouncement that "Petitioner, of course, should

not receive double credit. The presentence confinement period ends when parole is revoked, because petitioner then is confined pursuant to the prior conviction." *Stewart*, 1991-NMSC-095,¶ 4.

The *Irvin* court stated, "[w]e think this statement means that the presentence confinement in this case ended because additional sentences had been imposed to run consecutively to the initial sentence...[and w]e think the statement...from *Stewart* is limited to the facts of that case." *Id.* (citation omitted).

The *Irvin* holding, however, is itself very fact specific, and crucially distinguishable from the present case. The defendant in *Irvin* was simultaneously released on both parole *and* on bond on case two when he was re-confined for violating parole. And his parole violations were specifically based, retroactively, on case one charges. *Id.* ¶ 2.

In the instant case, Defendant was free on parole; re-confined for violating parole conditions; charged because some of the parole violations were crimes; then released on an unsecured bond on the new charges.

Further, the *Irvin* Court's "thought" that *Stewart* only meant that presentencing confinement ended because additional sentences were consecutively imposed, *id.* ¶ 7, even if true, does not abrogate *Stewart*'s

conclusion that the "presentence confinement period ends when parole is revoked, because petitioner then is confined pursuant to the prior conviction." *Stewart*, 1991-NMSC-095, ¶ 2. Both statements can be—and are—simultaneously true. *See* NMSA 1978 § 31-18-21(B) (1977) ("Any person, who commits a crime while...[on] parole, and who is convicted and sentenced therefor, shall serve the sentence consecutive to the remainder of the term, including remaining parole time, under which he was released unless otherwise ordered by the court in sentencing for the new crime."). *See also State v. Miranda*, 1989-NMCA-068, ¶ 11 108 N.M. 789 (adopting most jurisdictions' position that an offender who receives consecutive sentences is entitled to presentence incarceration credit only once against the aggregate of all the sentences, while an offender sentenced to concurrent terms in effect receives credit against each sentence).

In *State v. Ramzy*, 1982-NMCA-113, the defendant had appealed a burglary and assault conviction (case one) and was free on an appeal bond when he was arrested and confined for the charges in case two. He posted bond on case two and was released again. *Id.* ¶ 4. But soon thereafter, the appeal bond in case one was revoked—specifically because of the case two charges. Upon the appeal bond's revocation, defendant was immediately

incarcerated to begin service of his case one sentence. Then, much like in *Stewart,* 1991-NMSC-095, ¶ 2, his case two bond was raised to a level "he apparently could not post." *Ramzy*, 1982-NMCA-113, ¶ 5.

But unlike *Stewart*, the *Ramzy* court found that all three prongs had been met and granted presentence confinement credit. *Id.* ¶ 11.

Although a comparison could be drawn between the revocation of the appeal bond in *Ramzy* and the parole revocation in this case (as both led to the respective defendants' confinement in "case one") the legal differences are important: Parole is "part of the sentence of the convicted person in addition to the basic sentence imposed[.]" NMSA 1978 § 31-18-15(C) (2024). And, as the district court pointed out in this case, **[RP 229]** parole retake is enacted by the Parole Board, not the courts. NMSA 1978 § 31-21-14 (A) (1963). ("At any time during release on parole the board or the director may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of release[.]").

Appeal bonds, on the other hand, "have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals." NMSA 1978 § 31-11-1 (A) (1988); *see* Rule 5-402(C) NMRA ("After imposition of a judgment and sentence, the court, on motion

of the defendant, may establish conditions of release pending appeal or a motion for new trial.").

So, in this case, Defendant was already serving his Case One sentence when his parole violations caused him to be re-confined on that case. And it was not until later that Case Two charges were filed because some of the parole violations were crimes. In contrast, the case two charges in *Ramzy* caused the appeal bond's revocation and, thus, the commencement of the case one sentence.

And, problematically, the *Ramzy* court's reasoning was influenced by an out of state case, *People v. Simpson*, 120 Cal. App.3d 772, 174 Cal. Rptr. 790 (1981), which involved parole retake coinciding with confinement on new charges. *Ramzy*, 1982-NMCA-113, ¶¶ 9-10.

Simpson, aside from having no precedential value in this jurisdiction, involved no bond, and was otherwise factually and legally distinguishable from both *Ramzy* and the current case. *See Simpson*, 120 Cal. App.3d at 774 (("The trial court enhance[ed] [the defendant's] term because of his admitted prior felony conviction, while aggravating his base term because he was on parole for the same previous conviction when committing his present offense.").

Moreover, the *Simpson* majority only reluctantly granted presentence confinement: "[t]he eviscerating of deterrent effect for parole violation recommitments due to commission of new felonies[] is apparent...[and w]e...are frustrated by the apparent unfairness of negating the punishment recommitment following a parole revocation was intended to impose." *Id.* at 777.

And the decision was vigorously dissented. ("[A] defendant is not to be given credit for time spent in custody if during the same period he is already serving a term of incarceration...[t]here is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. *Id.* at 778 (emphasis original, internal quotations, citations, and alterations omitted)).

Perhaps most importantly, however, is the difference between the bond "raised to a level" the *Ramzy* defendant "apparently could not post," *Ramzy*, 1982-NMCA-113, ¶ 5, and the unsecured bond on which Defendant was released under Rule 5-401(B). And this distinction points to the Court's

second question regarding New Mexico's revised detention and release rules, discussed further herein, later. **[5/10/24 Order]**

If bond is set at a rate too high for a defendant to pay, as appears to have been the case in *Ramzy*, 1982-NMCA-113, ¶ 5, the defendant will be, by necessity, confined on the related case. That situation speaks directly to the purpose of Section 31-20-12: presentence confinement credit is meant to give some relief to persons who, because of an inability to obtain bail, are held in custody. *State v. Howard*, 1989-NMCA-029,¶ 11, 108 N.M. 560.

But release on an unsecured bond or under one's own recognizance under Rule 5-401(B), obviates that issue and poses no conflict with the purpose of Section 31-20-12.

Notably under our "revamped" detention and release rules, *Ramzy's* untenable bond level (and *Stewart's* unpostable bail, *Stewart,* 1991-NMSC-095, ¶ 2) would not have been allowed. One can only speculate as to the different outcome of those cases, had they occurred after the rules were changed.

Nonetheless, considering *Ramzy's* continued application to multiple-proceeding confinement cases like this one, the bond distinction is important: Defendant was not offered an unaffordable bond like in *Ramzy*;

he was issued an unsecured appearance bond, which is categorically the same as a release on his own recognizance under Rule 5-401(B).

As such, Defendant was released, *i.e.*, *not* "also confined," on Case Two, although still held on Case One. He is not entitled to presentence confinement on a case for which he was not confined. He is therefore not entitled to presentence confinement on a case for which he was not confined, and the district court's decision should be affirmed.

Finally, there is *French,* 2021-NMCA-052, which, upon its publication, and based on its unprecedented holding, spurred Defendant to move for the presentence confinement credit at issue. **[RP 198, 201]**

The pertinent findings in *French* are as follows: the defendant was serving two separate terms of probation ("PV-1" and "PV-2") when he was arrested and charged with new crimes. *French,* 2021-NMCA-052, ¶¶ 2-4. Having been re-confined for the parole violations, the issue became whether the defendant was entitled to presentence confinement credit for the overlapping confinement on the new charges. *Id.* ¶ 7.

PV-1 was eventually deemed inconsequential to the issue, but not PV-2. *Id.* ¶ 6. Thus, for our purposes, PV-2 is accurately identified as "case one,"

and the new charges, (which the *French* court called "the instant case," *id.* ¶ 4, *et seq.*) as "case two."

Importantly, the defendant was eventually released on his own recognizance on case two but held without bond on case one. *Id.* ¶ 5.

The court purportedly applied the three-pronged test from *Facteau*, 1990-NMSC-040, *Orona*, 1982-NMCA-143, and *Ramzy*, 1982-NMCA-113. *Id.* ¶¶ 11, 12. In such application, the court found all three prongs were met:

> [Prong #1:] [l]ike the defendant in *Ramzy*, [the d]efendant was not originally confined when he acquired the charges in the instant case. [Prong #2: t]he charges in the instant case triggered [the d]efendant's confinement [because the d]efendant was on probation for PV-2 when he acquired the charges in the instant case[.]... Finally, [prong #3: the d]efendant was held without bond for his probation violations in PV-2. We therefore conclude that [the d]efendant satisfies the *Facteau*/*Orona* test and is entitled to presentence confinement credit."

Id. ¶ 13.[4]

As discussed, the third prong is meant to determine whether the defendant was "also confined" in case two, which, if true, serves to prove he

[4] Note that the no-bond hold was on case one (PV-2), *not* on case two, (the "instant case"), suggesting that the Court, in applying the third prong, interchanged the usual/precedential association of a bond on case two with case one.

is entitled to presentence confinement credit for that case. But the *French* court did not find the defendant was "also confined" on case two. It found the opposite: that he was released on his own recognizance on case two. *Id.* ¶ 5. And yet the court concluded that defendant "satisfie[d] the *Facteau/Orona* test and [wa]s entitled to presentence confinement credit." *Id.* 13.

Thus, it appears that the *French* court misconstrued the third prong's precedential requirement that the defendant be "also confined" in case two. Our Court of Appeals noted this aberration in its **Order Transferring [this case] to the New Mexico Supreme Court:** "*French*, in its application of the three-part test, appears to have diverged from...precedent with respect to the third factor—concluding that [the defendant] was entitled to presentence confinement credit in case two, even though he was not confined in that case." *Id.* n. 1.

Because *French* inexplicably contradicts precedent and contravenes the purpose and meaning of Rule 5-401 and Section 31-20-12, this Court should abrogate it in part or whole. It was decided in error.

But even if not, as the district court found, *French* is distinguishable and therefore inapplicable to this case. **[RP 229]** The defendant in *French*

was serving a term of probation when the new charges arose, *French,* 2021-NMCA-052, ¶ 3, while Defendant was on parole.

Probation and parole are legally distinct conditions. *See* § 31-18-15(C) ("[P]arole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed[.]"); *see also* NMSA 1978 § 31-21-10 (E) (2023) ("Every person while on parole shall remain in the legal custody of the institution from which the person was released."); *cf.* NMSA 1978 § 31-20-5(A) (2003) ("When a person has been convicted of a crime for which a sentence of imprisonment is authorized and when the...court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the corrections department to furnish.").

Because parole is part of the original sentence while probation is not, and parole retakes are governed by the Parole Board, while probation re-confinements are under the courts' jurisdiction, *French* is distinguishable from the instant case.

French, 2021-NMCA-052 diverges from precedent and flouts the purpose and meaning of Rule 5-401 and Section 31-20-12. It is, further,

distinguishable from this case. Therefore, the Court should not apply its reasoning or holding to this case.

B. An unsecured bond indicates Defendant was "also confined" on case two.

As demonstrated, the third prong, as defined by whether a bond was set, has proven inconsistent and often illogical to evidencing whether a defendant was "also confined" on case two, and therefore entitled to presentence confinement credit.

The meaning and purpose of Rule 5-401 and Section 31-20-12 suggest that the third prong, as framed in *Herrera*, 2024-NMCA-025, ¶ 23 and *Miranda*, 1989-NMCA-068 ¶ 12, correctly asks whether the defendant was "also confined," in case two.[5]

Therefore, returning to the Court's first question, where a bond is issued, the correct inquiry is whether the bond indicates that Defendant was either released in Case Two, or "also confined" in it.

As discussed, Defendant was issued an unsecured bond in Case Two. Under Rule 5-401(B), and unsecured bond, categorically identical to release on one's

[5] To simply dismiss the third prong, as Defendant suggests, **[Supp. 22]** would erroneously eviscerate the test; the third prong asks the dispositive question at the heart of Section 31-20-12: whether Defendant was confined on Case Two.

own recognizance, means a defendant has been released in the applicable case. Defendant was therefore released on Case Two: in other words, he was not "also confined" in it. Because Defendant was not confined in Case Two, he is not entitled to presentence confinement credit under Section 31-20-12. The district court correctly concluded the same, and this Court should affirm that decision.

IV. New Mexico's revamped pretrial release and detention rules are insignificant to resolving Question One.

Because Defendant was released on an unsecured appearance bond, categorically equivalent to release on his own recognizance under Rule 5-401 (B), his financial ability to post bond played no part in whether he was released or remained confined. Therefore, the revamped release and detention rules play no significant role in determining whether he is entitled to presentence confinement credit.

Article II, Section 13 of the New Mexico Constitution, as amended in 2016, states:

> All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

> Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

Prior to the amendment,

> our nation's system of bail...ha[d] come to rely heavily on an accused person's ability to purchase a bail bond as the determining factor in releasing or detaining a person before a trial that would decide guilt or innocence. [This] resulted in a system lacking in rational justice, where clearly dangerous defendants or those who pose substantial flight risks have been able to buy their way out of jail, while large numbers of poorer, low-risk defendants [were] held in jail simply for lack of money, with substantial harm done to them, their families, and the taxpayers who bear the ultimate burden of housing, feeding, guarding, medicating, and caring for them.

State ex rel. Torrez v. Whitaker, 2018-NMSC-005, ¶ 33, 410 P.3d 201, 207 (internal citation and quotation marks omitted).

The amendment authorized the court to deny bail and detain dangerous defendants if, after a hearing, the court finds, by clear and convincing evidence, that no release conditions will ensure appearance as required or protect the community. The amendment also prevents the release of such dangerous defendants or those that are flight-risks just because they can post bail. And, importantly, defendants who are neither

dangerous nor at risk for flight cannot be detained merely because they cannot afford to post bail. N.M. Const. art. II, § 13.

So, under the new rules, courts still have the right and duty to assess every defendant for flight risk and danger to the community, and if appropriate, set "sufficient sureties," with a preclusion on "excessive" bail or fines to ensure appearance in court and community safety.

That the court released Defendant on an unsecured bond on Case Two indicates that he was assessed as low enough risk to go free, without posting collateral. And that under Rule 5-401 (B), an unsecured bond is categorized with a no-bond release on a defendant's own recognizance, indicates that such release is equivalently without concern for or reliance on a defendant's financial situation.

In sum, the revamped detention and release rules, based on the amendment to Article II, Section 13 of the New Mexico Constitution, do not change the fact that the unsecured bond Defendant was issued in Case Two deemed his confinement unrelated to that case.

By way of contrast, had the rules been revised before *Ramzy,* 1982-NMCA-113, the underlying facts and outcome of that case may have been different. Under the three-prong test, the *Ramzy* defendant was deemed

"also confined" in case two both because (at least in part), while there was a bond set, it was eventually raised to "an amount which he apparently could not post." *Id.* ¶ 5. Under the current rules, the defendant would have either been assessed as too risky for release, or his bond, if any, would have been set at a rate "sufficient" but not "excessive," under Article II, Section 13.

CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the district court's decision to deny Defendant presentence confinement credit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 13, 2025, I filed or caused to be 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.

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