IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs. **S-1-SC-40308**

HEZEKIAH EAKER,

Defendant-Petitioner.

DEFENDANT-PETITIONER'S SUPPLEMENTAL BRIEF IN CHIEF

On Certiorari to the Twelfth Judicial District Court

BENNETT J. BAUR
Chief Public Defender

KIMBERLY CHAVEZ COOK
Appellate Defender

Mark A. Peralta-Silva
Assistant Appellate Defender
1422 Paseo de Peralta Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890

Attorneys for Hezekiah Eaker

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STATEMENT REGARDING RECORD CITATIONS

The district court proceedings in this case were audio-recorded using For The Record (FTR) Software. FTR CDs were reviewed using The Record Player and are cited by date and timestamp in the form **[mm/dd/yy CD hour:minute:second]**. Citations to the Record Proper, a continuously paginated record proper, are in the form **[RP page number]**. Citations to Mr. Eaker's brief in chief filed with the Court of Appeals is in the form **[COA BIC]**, citations to the State's answer brief is in the form **[COA AB]**, and citations to his reply brief in the form **[COA RB]**.

STATEMENT OF COMPLIANCE

The body of this brief in chief does not exceed the page limits (35 pages) set forth in Rule 12-318(F)(2) NMRA. As required by Rule 12-318(F)(3), counsel used Times New Roman, a proportionally-spaced type style. This brief was prepared using Microsoft Word, version 2016.

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NATURE OF THE CASE

This case presents the Court with the opportunity to clarify if a defendant is entitled to presentence confinement credit if a trial court nominally releases the defendant even though the defendant otherwise remains incarcerated on a parole violation. Our courts are sometimes tasked with considering whether a defendant is entitled to presentence confinement credit when the conduct leading to a second case results in incarceration on an existing sentence for which the defendant was on probation or parole.

Hezekiah Eaker experienced such a situation. In March 2019, he was on sex-offender parole when his parole officer found him in possession of sexual exploitation of children material. Because of this new criminal conduct, his parole officer arrested him and he was taken into custody. A week later he was arraigned in magistrate court for this new charge and the court ordered him released on a $5,000 unsecured appearance bond. However, at this time or shortly after, he was also confined in the Department of Corrections (DOC) for violating his parole based on these same allegations.

Hezekiah requested presentence confinement credit but the district court denied his request. In the Court of Appeals, he again argued for presentence confinement credit. The Court of Appeals, determined that this appeal is technically an appeal of a denial of habeas corpus because of the procedural history

of the case. The Court of Appeals did not address the merits of his argument and transferred the case to this Court. This Court has requested supplemental briefing addressing two questions which revolve around the nature of Hezekiah's bond in the second case and whether our recent "revamped pretrial release and detention rules" affect the analysis of whether he should receive credit.

Hezekiah addresses these questions in the following summary of facts and argument. In it, he notes the unique procedural history of this case, the history of our presentence confinement credit case law and argues he should receive credit because he was confined during the pendency of this case. Principally, he argues he should receive credit even though he was nominally "released" in this case because he was confined as a result of the conduct which led to this charges in this case. Additionally, he argues that to uphold a denial of credit because of nominal release in a second case risks gamesmanship, the creation of undesirable incentives, and the possibility of absurd results.

SUMMARY OF FACTS

Hezekiah commits a new crime while on parole

In 2019, Hezekiah Eaker was purportedly on sex-offender parole[1] for his convictions in D-1215-CR-2011-00393 (Case One). On March 28, 2019, Hezekiah

[1] The legality of this sex-offender parole in Case One is currently being litigated before this Court. Recently, the district court in D-1215-CR-2011-00393 granted Hezekiah's writ of habeas corpus because Hezekiah did not serve a day in the

Eaker's parole officer found him in possession of illicit child sexual exploitation material. This possession, along with allegations of testing positive for methamphetamine and failure to maintain proper conduct of "a law abiding citizen," constituted the basis for a subsequent parole violation. **[RP 214-17 Ex. A-3 (The parole violation report lists Hezekiah's parole as starting on December 2, 2016)]** He was arrested and held at the Otero County Detention Center.

About a week later, on April 5, 2019, the State filed a criminal complaint in magistrate court alleging a violation of Sexual Exploitation of Children under the age of 13, contrary to NMSA 1978, Section 30-6A-3(A) (2016). The magistrate court held a felony first appearance and released Hezekiah on an unsecured appearance bond of $5,000. **[RP 11-14, 19-20 (order setting conditions of release)]** Just over a month later on May 15, 2019, the State filed a grand jury indictment on the same charge of possession of illicit material contrary to Section

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Department of Corrections for a qualifying sex offense which would justify placing him on indeterminate sex-offender parole. *See* Order on Writ of Habeas Corpus, *State v. Eaker*, D-1215-CR-2011-00393 (12th Jud. Dist. Ct. Aug. 22, 2024). The district court ruled that Hezekiah "should not have been placed on a five to twenty parole period." *Id.* at 9. The State has appealed this decision to this Court and the case is currently being briefed. *See State v. Eaker*, S-1-SC-40604.

Hezekiah notes this to provide context to the unique circumstances of his cases and the presentence confinement credit issue here. Ultimately, and as explained in argument below, whether he was lawfully on sex-offender parole should not matter to resolution of this issue here because he was still confined while pending resolution of this case, Case Two.

30-6A-3(A). This appeal stems from these charges in this case and Hezekiah, at times, refers to this case as Case Two.

While the record is clear that Hezekiah had been in custody from his arrest on March 28, 2019 until his felony first appearance on April 5, 2019, it is unclear from this record when he was taken into custody by DOC. The Habeas Order in Case One states he was imprisoned on April 11, 2019. *See* Order on Writ of Habeas Corpus, *State v. Eaker*, D-1215-CR-2011-00393 at 4, ¶ 11 (12th Jud. Dist. Ct. Aug. 22, 2024) ("Habeas Order in Case One") (district court in Case One also noted Hezekiah's parole was revoked on May 15, 2019). Hezekiah asks that this Court take judicial notice of this fact. *See Spear v. McDermott*, 1996-NMCA-048, ¶ 16, 121 N.M. 609 (taking judicial notice of tribal court's orders and documents). At the very least, the record in this case demonstrates Hezekiah was in the custody of DOC on May 20, 2019, because the district court filed an order of transport requesting the Otero County Sheriff or Detention Administrator transport Hezekiah from DOC. **[RP 26]** Hezekiah remained in DOC custody through the plea in this case, Case Two. **[*See* RP 41, 46, 54, 61, 101, 111, 160, 163 (orders of transport)]**

On July 20, 2021, over two years since his arrest, Hezekiah pled to the one count of possession of sexual exploitation of children material in Case Two, including a finding that a child depicted in the material was under the age of

thirteen. **[RP 167-177; *see* log notes for 7/20/21 CD 12:32:21[2]]** The district court sentenced him to twelve years and did not award him any presentence confinement credit. **[RP 178-186 (stating "0 Days.")]**

Nevertheless, a few months later in November 2021, defense counsel filed a motion to correct sentence, arguing Hezekiah was entitled to credit based on the Court of Appeals' recent decision in *State v. French*, 2021-NMCA-052, 495 P.3d 1198. **[RP 189-93; *see also id.* 198-221 (amended motion with documents showing the conduct in Case Two formed the parole violation in Case One)]** The district court held a hearing taking argument from the parties and denied the motion in July 2022. **[RP 228-29 (State's response); 7/13/22 CD 1:41:42-46:06]**

Court of Appeals Proceedings and Transfer to this Court

Hezekiah appealed the district court's denial of presentence confinement credit to the Court of Appeals. In his brief in chief, he presented two arguments, (1) that he was entitled to presentence confinement credit under NMSA 1978, Section 31-20-12, and (2) that he was illegally sentenced to indeterminate sex-offender probation and parole when his conviction is not a qualifying offense.

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[2] Undersigned counsel notes that the audio for the July 20, 2021 plea and sentencing hearing is inaudible. The Court Services Manager for the Twelfth Judicial District Court filed an Affidavit of Nonrecording with the log notes accompanying the audio compact disk in this case. In the Affidavit, the Manager notes "that due to technical issues and/or human error no audio recording was created for the hearing occurring in the above entitled cause on 7/20/2021."

[COA BIC] The State filed an answer brief disagreeing with the first argument but conceding that Hezekiah's conviction did not qualify for sex-offender parole.

[COA AB]

However, the motion to correct sentence, which is the matter Hezekiah was appealing from, was untimely filed. The Court of Appeals recognized this and correctly construed the motion to correct as a petition for writ of habeas corpus. *See* Order Transferring to the New Mexico Supreme Court, *State v. Eaker*, A-1-CA-40709 at 1-5 (N.M. Ct. App. Mar. 1, 2024) ("Transfer Order"). Accordingly, the Court of Appeals acknowledged it had no subject matter jurisdiction over such an appeal and issued an order transferring this matter to this Court. *Id.* at 6-7.

This Court considered the Court of Appeals' transfer order and issued its own order accepting transfer. Order, *State v. Eaker*, S-1-SC-40308 (May 10, 2024) (considering the transfer under Rule 12-606 NMRA) ("Order Accepting Transfer"). In its Order Accepting Transfer, this Court specified it considered the brief in chief filed in the Court of Appeals to constitute a petition for writ of certiorari to review the denial of habeas corpus, the State's answer brief as a response to the petition, and the reply brief to be a reply to the response. *Id.* at 1-2. This Court granted the petition under Rule 12-501 NMRA on all issues presented and issued a writ of certiorari to the Twelfth Judicial District Court. *Id.*

Additionally, this Court requested the parties submit supplemental briefing[3] on the following questions related to the presentence confinement credit issue:

> (1) In determining Petitioner's entitlement to presentence confinement credit in district court cause numbered D-1215-CR-2019-00268 (Case Two), is the proper inquiry whether Defendant "remained out on bond before sentencing" in Case Two, or whether "bond was set" in Case Two? *State v. Romero*, 2002-NMCA-106, ¶¶ 9, 11, 132 N.M. 745, 55 P.3d 441. In other words, was Petitioner's nominal release in Case Two while he remained confined in D-1215-CR-2011-00393 (Case One) sufficient to deny him an award of presentence confinement credit?
>
> (2) What role, if any, should New Mexico's revamped pretrial release and detention rules play in resolving Question One?

Order, *State v. Eaker*, S-1-SC-40308 at 2 (May 10, 2024). Hezekiah now presents this argument addressing these two questions and requesting that this Court hold he should have received presentence confinement credit.

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[3] While granting the petition on all issues briefed, this Court did not order supplemental briefing on the issue of whether the district court sentenced Mr. Eaker to an illegal sentence by sentencing him to indeterminate sex-offender probation and parole. Specifically, he was convicted of possession of sexual exploitation of children material contrary to § 30-6A-3(A), a fourth degree felony, which is not included as a qualifying offense for sex-offender parole, NMSA 1978, § 31-21-10.1(A), (I) (2007), or as a qualifying sex offense for sex-offender probation, NMSA 1978, § 31-20-5.2(A), (F) (2003). He presented this argument in his briefs below. **[COA BIC 14-17; COA RB 7-8]** The State conceded the argument as to sex-offender parole. **[COA AB 7-8]** Although Hezekiah does not present this argument in this supplemental brief, he asks this Court to rule on it in any opinion it issues deciding the issues in this case.

ARGUMENT

I. Section 31-20-12 gives defendants credit for time spent incarcerated during the pendency of this case and the district court's nominal release on an unsecured bond should not thwart a grant of credit.

A. Preservation and standard of review.

As noted before the Court of Appeals, it is unclear if this argument is one that must be preserved or if it is an argument about an illegal sentence and therefore preservation is not required. **[COA BIC 5]**

Under Rule 12-321(A) NMRA, an issue is preserved if a ruling is fairly invoked by the trial court. Mr. Eaker preserved this issue for appellate review by moving to correct his sentence twice, and presenting oral argument at the July 13, 2022 hearing. **[RP 189-193, 198-221; *see* 7/13/22 CD]** Further, the district court ruled on the motion denying Mr. Eaker presentence confinement credit. **[RP 228-230]**

Alternatively, this argument may be considered one about an illegal sentence. If so, then preservation is not required. "This Court may consider illegal sentences and double jeopardy violations for the first time on appeal." *State v. May*, 2010-NMCA-071, ¶ 6, 148 N.M. 854 (citing *State v. Shay*, 2004-NMCA-077, ¶ 6, 136 N.M. 8).

Lastly, the standard of review here is *de novo*.

> The sentencing issue in this case, however, is not merely an issue of discretion. We are required to construe Section 31-20-12 in order to

> determine whether Defendant had a right to presentence credit. Thus, we review the case de novo.

Romero, 2002-NMCA-106, ¶ 6 (citations omitted).

B. A brief summary of the arguments thus far.

Before the Court of Appeals, Hezekiah argued he was entitled to presentence confinement credit under Section 31-20-12 because an award of credit is mandatory, he was confined pending resolution of Case Two, and this confinement related to the charges in Case Two. **[COA BIC 6-11]** He also argued that awarding credit would not violate the general rule that a defendant may not receive presentence confinement credit against two consecutive sentences because an award of presentence confinement credit would only apply to Case Two, since any time credited towards Case One is governed as a function of parole and the Earned Meritorious Deductions Act, NMSA 1978, § 33-2-34 (2015). **[COA BIC 11-13]**

The State argued Hezekiah was properly denied credit because he was on bond in Case Two. **[COA AB 3-5]** The State also argued Hezekiah had waived this argument through his plea agreement, which the State argued "necessarily includes" an objection to the failure to award presentence confinement credits. **[COA AB 5-7]** The State did not dispute that the conduct which was the subject of Case Two related to the confinement in Case One. **[*See* COA AB 3-7]**

C. The proper inquiry is not whether Hezekiah was out on bond or bond was set, but rather whether his conduct in Case Two resulted in confinement even if that confinement was ostensibly only tied to Case One.

1. The three-prong test.

Section 31-20-12 provides the following:

> 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.

While this statute specifies a defendant is entitled to presentence confinement credit, it is not immediately apparent how this statute applies to multiple cases and multiple sentences. Over the years, our courts have recognized a few principles.

For instance, when a defendant receives consecutive sentences "the general rule is that presentence confinement credit will be granted only once against the aggregate of all the sentences." *State v. Herrera*, 2024-NMCA-025, ¶ 22, ¶ 22 n.1, 544 P.3d 260 (referring to cases in which this rule applies as "double credit" cases) (citing *Romero*, 2002-NMCA-106, ¶ 12, and *State v. Miranda*, 1989-NMCA-068, ¶ 11, 108 N.M. 789). But, there is an exception "where, under limited circumstances, a defendant may acquire presentence confinement credit while simultaneously serving a prior sentence." *Herrera*, 2024-NMCA-025, ¶ 22 (citing *State v. Ramzy*, 1982-NMCA-113, ¶ 11, 98 N.M. 436, and *Romero*, 2002-NMCA-106, ¶ 13); *see also Herrera*, 2024-NMCA-025, ¶ 23 ("The exception springs from our

recognition that a defendant's confinement may relate to charges in more than one case."). "When there is a sufficient connection between case two and the confinement at issue, presentence confinement credit is required, even though the time is also counted toward the sentence in case one." *Herrera*, 2024-NMCA-025, ¶ 23 (citing *State v. Facteau*, 1990-NMSC-040, ¶ 5, 109 N.M. 748, and *State v. Orona*, 1982-NMCA-143, ¶ 5, 98 N.M. 668); *see also State v. Barrios*, 1993-NMCA-138, ¶ 5, 116 N.M. 580 (noting "it is not necessary that the confinement in question relate exclusively to the charges against which a defendant seeks credit.").

To assist in determining whether this exception applies to two cases, our courts have created a three-prong test:

> (1) the defendant was not confined in either case;
>
> (2) the charges in case two triggered and caused confinement in case one; and
>
> (3) the defendant was also confined [in] case two.

Herrera, 2024-NMCA-025, ¶ 23 (citing *Ramzy*, 1982-NMCA-113, ¶ 11). Here, there is no dispute regarding the first two prongs. Hezekiah was not confined in either case in March 2019, he was out on parole in Case One. **[RP 206-10 Ex. A-2.2, A-2.3 (his parole officer visited him at his home)]** Further, his conduct and charges in Case Two triggered and caused confinement in Case One. **[RP 214-18 Ex. A-3]** The district court in Case One also recognized this in the Habeas Order in Case One:

> Mr. Eaker's parole was revoked for conduct that was later charged in Case No. D-1215-CR-2019-268 (Case Two) as one count of Sexual Exploitation of Children (Possession), contrary to [] Section 30-6A-3(A).

See Order on Writ of Habeas Corpus, *State v. Eaker*, D-1215-CR-2011-00393, at 4, ¶ 12 (12th Jud. Dist. Ct. Aug. 22, 2024). Thus, the dispute here centers on the third prong, and whether Hezekiah "was also confined" in Case Two.

Hezekiah observes that this requirement in the third prong has not been explained in detail. Part of this may stem from the fact that the origin of this test arises from the unique facts in *Ramzy*, where the Court of Appeals held a defendant was entitled to presentence confinement credit for time spent incarcerated after revocation of an appeal bond. 1982-NMCA-113. The defendant was out on an appeal bond in his first case when he picked up the charges creating his second case. *Id.* ¶¶ 3-4. He was arrested for the second case and released after posting bond in that case. *Id.* ¶ 4. But then, his appeal bond was revoked because of the charges in the second case, and he "was immediately incarcerated to begin the service of his sentence in" the first case. *Id.* ¶ 5. Around this time, he was also arraigned in district court in the second case and bond was "raised" to an amount he could not meet. *Id.*

In arriving at its holding, the *Ramzy* Court noted credit should be given towards "any sentence," and that "[t]he language of the statute is mandatory." 1982-NMCA-113, ¶ 8. The *Ramzy* Court also highlighted that the defendant was

not confined when he committed the acts creating the second case and the second case "triggered and caused the revocation of the appeal bond" in the first case. *Id.* ¶ 11; *see also id.* ¶¶ 9-10 (considering *People v. Simpson*, 174 Cal. Rptr. 790, 791-93 (Cal. Ct. App. 1981) (holding a defendant was entitled to presentence confinement credit under a similar California statute for time spent incarcerated both on a revoked parole term and the new case)). The Court then noted that the defendant "was unable to meet the high bond required in" the second case, and noted the defendant's "incarceration and confinement…was undoubtedly partly, if not totally, caused by" the charges in the second case. *Ramzy*, 1982-NMCA-113, ¶ 11. Thus, because of this connection between the second case and his confinement, the defendant was entitled to presentence confinement credit "even though he was at the same time in custody due to the revocation of the appeal bond." *Id.*

It appears that because the defendant in *Ramzy* was on bond he could not afford to post in his second case, subsequent cases have considered this to be the third prong. For instance, in *Orona*, 1982-NMCA-143, ¶ 5, the Court of Appeals noted that in *Ramzy* the decisive factor was whether "confinement was actually related" to the charges for which credit is sought and described the third element of the test as whether "3) bond was set in Case Two". Similarly, in *Facteau*, 1990-NMSC-040, ¶ 7, this Court observed:

> *Orona* distinguishes *Ramzy* and sets out a three-part test for determining if presentence credit is appropriate: 1) Was defendant

> confined in either case? 2) Did the second charge trigger the incarceration (such as the bond revocation in *Ramzy*)? and 3) Was bond set for the escape?

Neither case dealt with this third element because in both cases the defendant was already confined at the time he picked up the new charges[4].

Similarly, in *Romero*, 2002-NMCA-106, ¶ 11, the Court of Appeals articulated the third prong as "(3) whether bond was set in the case related to the sentence." However, *Romero*, turned on the fact that the defendant was confined on two pending, pretrial cases and when the district court sentenced the cases consecutively, it would have been inappropriate for the defendant to have received "double credit" against both sentences and so the Court affirmed the denial in the second case. *Id.* ¶¶ 7-13 (construing § 31-20-12 and considering then-existing case law). Put another way, the *Romero* Court considered *Facteau*, *Orona*, and *Ramzy* to be factually distinct because the defendant "had not already been sentenced when he was confined on subsequent charges." *Id.* ¶ 13.

It is this third prong that this Court has asked the parties to address.

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[4] While not at issue here, counsel notes that there appears to be another general rule (or corollary) in our jurisprudence in which a defendant is not entitled to presentence confinement credit if he is either (1) confined at the time he picks up new charges, *see e.g. Facteau*, 1990-NMSC-040; or (2) cannot show that his confinement is "actually related" to the charges in the case in which he has sought credit. *See Herrera*, 2024-NMCA-025, ¶¶ 27-28 (discussing the second *Ramzy* prong and noting the "causal relationship is lacking in this case."); *see also State v. Wood*, 2022-NMCA-009, ¶¶ 30-31, 504 P.3d 579.

2. Hezekiah was confined because of the new charges.

In its Order Accepting Transfer, this Court asked the parties to answer whether the "proper inquiry" is if "Defendant 'remained out on bond before sentencing' in Case Two, or whether 'bond was set' in Case Two?" Order, *State v. Eaker*, S-1-SC-40308, at 2 (May 10, 2024). Or, put another way, "was [Hezekiah's] nominal release in Case Two while he remained confined in [Case One] sufficient to deny him an award of presentence confinement credit?" *Id.* The answer to these two questions is that it does not matter whether Hezekiah "remained out on bond before sentencing" or "bond was set," and his nominal release was not sufficient to deny him credit, because his confinement was actually related to the charges in Case Two. As the Court of Appeals explained in *Ramzy*, "the decisive factor in allowing credit for pre-sentence confinement in a case is whether the confinement was actually related to the charges of that particular case. It is not necessary that the confinement be related exclusively to the charges in question." 1982-NMCA-113, ¶ 8. The focus on bond, or nominal release, does not change the fact that Hezekiah was not out in the community, but remained confined in a facility during the pendency of Case Two. **[RP 19-20 (order setting conditions of release listed as one condition that Hezekiah abide by "all conditions set by the court and by pretrial services *upon release*" (emphasis added))]**

It is not clear that any published case has turned on bond status[5]. In *Romero*, the Court of Appeals noted the defendant "remained out on bond" in the first case when he picked up the charges in the second case which resulted in confinement. 2002-NMCA-106, ¶¶ 1, 9 (noting to allow for "double credit" would "allow Defendant to benefit from committing multiple crimes and also place Defendant in a better position than a defendant who remained out on bond before sentencing.").

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[5] Hezekiah recognizes that there is at least one unpublished decision from the Court of Appeals that apparently denied presentence confinement credit because of bond status. *See State v. Araujo*, A-1-CA-35514, mem. op. (N.M. Ct. App. Jan. 30, 2017) (nonprecedential). Hezekiah notes that as an unpublished case of the Court of Appeals, *Araujo* does not have precedential weight, and at most persuasive value. *See* Rule 12-405(A) NMRA ("disposition by order, decision or memorandum opinion does not mean that the case is considered unimportant. It does mean that the disposition is not precedent. Non-precedential dispositions may be cited for any persuasive value and may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion."); *see also Winrock Inn Co. v. Prudential Ins. Co. of America*, 1996-NMCA-113, ¶ 27, 122 N.M. 562 (stating, "Unpublished decisions are not meant to be used as precedent; they are written solely for the benefit of the parties"). While *Araujo* does not exist as precedent, it also has little to no persuasive value because it is factually distinct from Hezekiah's case.

In *Araujo*, the State appealed an award of credit it considered excessive because the defendant had been released on an unsecured appearance bond in a second case, while otherwise being held on an unrelated probation violation. A-1-CA-35514, mem. op. ¶ 2. The opinion did not apply the three-prong test. *See generally Araujo*, A-1-CA-35514, mem. op. The Court's Calendar Notice proposing summary reversal, however, applied the test. In its application, the Court explained that neither prong one or two were met, because after the defendant was released on the probation matter, he had to turn himself in on the charges in the second case, and the second case "did not trigger the incarceration." Notice Proposed Summary Disposition, *State v. Araujo*, A-1-CA-35514, at 2-5 (N.M. Ct. App. Aug. 1, 2016). Thus, Hezekiah asks this Court to exclude *Araujo* from its consideration of the issue here.

Moreover, cases have used "bond was set" language in the articulation of the third prong, but it is unclear that it means anything other than that a court actually set bond. *See Facteau*, 1990-NMSC-040, ¶ 7; *Romero*, 2002-NMCA-106, ¶ 11; *Orona*, 1982-NMCA-143, ¶ 5. In fact, in *Ramzy*, the defendant was confined for the revocation of the appeal bond in the first case, and bond was set in the second case which he could not afford. 1982-NMCA-113, ¶¶ 4-5, 11. The Court noted he was unable "to meet the high bond required" in the second case, but the Court did not opine that if he could have met it, he would not be entitled to credit. *Id.* ¶ 11. The defendant would likely have remained incarcerated to serve the time in the first case. Ultimately, the *Ramzy* Court established the rule that if "[t]here is sufficient connection" between the second case and the confinement, then credit is warranted. *Id.* ¶ 11.

The other formulation of the Court's question, whether nominal release should deny credit, raises an interesting question. This question appears similar to the Court of Appeals' observation in its Transfer Order, that another case, *French*, 2021-NMCA-052,

> in its application of the three-part test, appears to have diverged from this precedent with respect to the third factor—concluding that Mr. French was entitled to presentence confinement credit in case two, even though he was not confined in that case.

Order Transferring to the New Mexico Supreme Court, *State v. Eaker*, A-1-CA-40709 at 3 n.1 (N.M. Ct. App. Mar. 1, 2024); *see also French*, 2021-NMCA-052,

¶¶ 5, 13. However, *French* only diverges insofar as it is the only case in which a defendant was nominally released in the second case. In *French*, the defendant was out serving probation on two unrelated cases. 2021-NMCA-052, ¶¶ 2-7. Before picking up the new charges, the State had sought to revoke probation in one case because the defendant had failed to report and submit reports as required. *Id.* ¶ 4. The district court issued a bench warrant with a no bond hold. *Id.* Thus, when the defendant committed the acts which resulted in the new charges, he was held. *Id.* Afterwards, the State amended the probation revocation petition in the one case to include defendant's conduct resulting in the new charges. *Id.* At defendant's arraignment for the new charges, the district court released defendant "on his own recognizance," but the order also noted he was to be held because of the probation violations in the other two cases. *Id.* ¶ 5. The district court "stated the effect of the order would deny [d]efendant presentence confinement" in the new case. *Id.* The defendant's probation was later revoked, and in at least one of the cases, the basis was his conduct resulting in the new charges. *Id.* ¶ 6. A jury convicted defendant of the new charges. *Id.* The district court only granted defendant presentence confinement credit for the time spent between his arrest and arraignment, and after conviction and sentencing in the new case. *Id.* ¶ 7.

Nonetheless, the Court of Appeals held the defendant was entitled to presentence confinement credit. The Court noted "Section 31-20-12 does not

afford the district court discretion in awarding presentence confinement credit." *French*, 2021-NMCA-052, ¶ 9 (citing *Romero*, 2002-NMCA-106, ¶¶ 6-7); *see also Miranda*, 1989-NMCA-068, ¶ 7 ("This statute has been interpreted to mean that credit is required as long as the presentence confinement is related to the charge on which the conviction is based."). The Court noted the relevant starting point was whether the defendant's confinement was "actually related" to the new charges and to determine this applied the three-prong test outlined above. *French*, 2021-NMCA-052, ¶¶ 10-11 (quoting *Romero*, 2002-NMCA-106, ¶ 11, in defining the third prong: "(3) whether bond was set in the case related to the sentence."). The Court then turned to *Ramzy* and outlined the facts in that case, noting the defendant was out on an appeal bond in his first case and picked up charges in a second case, and those subsequent charges resulted in his appeal bond being revoked and confinement. *French*, 2021-NMCA-052, ¶ 12 (detailing *Ramzy*, 1982-NMCA-113, ¶¶ 4-5, 11). Using *Ramzy*, as a guide, the *French* Court determined the defendant met the test and was entitled to credit. The Court noted the defendant (1) "was not originally confined when he acquired the charges in the instant case," and (2) "[t]he charges in the instant case triggered [d]efendant's confinement." 2021-NMCA-052, ¶ 13 (specifying defendant was on probation when he picked up the new charges, the State sought to revoke probation based on the conduct resulting in these new charges, and defendant was held on this probation violation).

What *French* illustrates is that it is appropriate to grant presentence confinement credit when a defendant is nominally released on a second case. Notably, the *French* Court did not analyze the third prong or reference the district court's order releasing the defendant on his own recognizance[6]. *See French*, 2021-NMCA-052, ¶¶ 11-13. The Court likely did this because it does not, or should not, matter whether a defendant is nominally released because an award of presentence confinement credit is not a matter of discretion. *See also Facteau*, 1990-NMSC-040, ¶ 4 (noting a codefendant was entitled to credit because he "was not incarcerated at the time of the escape, but out on parole. He was then arrested and served time as a direct result of the escape charges."). As noted by the *French* Court, "Section 31-20-12 does not afford the district court discretion in awarding presentence confinement credit." 2021-NMCA-052, ¶ 9. To allow a district court, like the one in *French*, to nominally release someone on bond, or on their own recognizance, to otherwise defeat an award of presentence confinement credit misconstrues Section 31-20-12 by allowing discretion to award credit when a

[6] However, the defendant did present argument related to this fact. Specifically, the defendant argued that "[t]he New Mexico Constitution did not require [him] to be ordered 'released' or denied presentence confinement when he was in fact held in custody." *French*, 2021-NMCA-052, ¶ 16 n.5. While the State did not contest the issue, the Court did not address the argument because, in its view, the argument was not adequately briefed. *Id.* Nevertheless, the Court stated: "an analysis of this issue does not impact the result of this Court's holding, we decline to address this issue further."

defendant is otherwise confined. *See French*, 2021-NMCA-052, ¶ 5 (noting the district court ordered defendant released on his own recognizance and the court "stated that the effect of the order would deny [d]efendant presentence confinement in the instant case beginning that day."). Such a result also creates the possibility that gamesmanship may occur by nominally releasing a defendant, even though the defendant is otherwise being held in order to deny an award of credit.

Moreover, this is unlike those instances in which a trial court properly exercises its discretion to sentence a defendant with multiple pretrial charges or cases consecutively or concurrently to determine the effect of the presentence confinement credit. In instances in which a court sentences a defendant's multiple pretrial charges or cases consecutively, then "double credit" is not allowed. *See Romero*, 2002-NMCA-106, ¶¶ 13-14 (noting our law "does not require a multiplication of days of presentence credit); *Miranda*, 1989-NMCA-068, ¶ 11 (noting when an offender received consecutive sentences not involving a prior adjudication then presentence confinement credit is applied towards the "aggregate of all sentences"). In contrast, a court may run cases and charges concurrently, and thereby allow credit towards each charge or case. *See Miranda*, 1989-NMCA-068, ¶ 11 (observing "an offender sentenced to concurrent terms in effect receives credit against each sentence"). This appears to be one of the few places in our presentence confinement credit case law in which discretion is allowed. And this is

likely because the award itself is not discretionary, in deciding whether to run a sentence concurrent or consecutive a court is not deciding whether to award credit but how that credit will apply to those sentences. Of course, this consideration of our case law does not apply here since if any presentence confinement credit is awarded it can only be applied to Case Two; Hezekiah received credit for his parole in DOC which cannot be considered presentence.

There is no dispute here that Hezekiah was confined during the time he was otherwise on an unsecured appearance bond. From his arrest through his sentencing in this case he was confined. Like the defendants in *French* and *Ramzy*, he was confined because his conduct resulting in new charges caused and triggered confinement in an existing sentence for which he was out in the community. In this way, Hezekiah suggests this Court reframe the three-prong test to instead focus only on the first two prongs: (1) whether the defendant was originally confined, and (2) whether the charges related to the sentence triggered the confinement. He asks that this Court conclude that nominal release is not enough to deny an award of presentence confinement credit. He now turns to this Court's second question.

3. The recent changes to our pretrial release and detention rules should not affect the analysis here.

In 2016, New Mexico voters elected to amend Article II, Section 13 of the New Mexico Constitution to prohibit detaining individuals solely because of an inability to post "a money or property bond," when the individual is otherwise not

dangerous or a flight risk. 2016 S.J.R. 1, 52 Leg., 2nd Sess. (N.M. 2016); N.M. Const. art. II, § 13; *see also* N.M. Const. art. II, § 13 (permitting detention of a defendant if the State can prove on "clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."). This amendment came after this Court's decision in *State v. Brown*, 2014-NMSC-038, ¶ 53, 338 P.3d 1276, in which this Court held that the state Constitution does not "permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." This constitutional amendment led to several amendments to our pretrial release rules. *See* Rule 5-401 NMRA (amended five times since 2014); *see also* Rule 6-401 NMRA (similar rule for Magistrate Courts). Notably, under the 2017 amendment to Rule 5-401(B), defendants were generally entitled to pretrial release upon their "personal recognizance or upon the execution of an unsecured appearance bond." To impose a secured bond, a court would have had to make "written findings of particularized reasons," to justify a bond necessary to secure a defendant's appearance. Rule 5-401(B), (E), (F)(2).

Here, practically speaking, the magistrate court and district court below had no reason to do anything other than set Hezekiah on an unsecured appearance bond because he was otherwise incarcerated on the parole retake. In other words, there was no concern that Hezekiah was a flight risk because he was in the custody of DOC. Moreover, the State had no reason to seek pretrial detention because

Hezekiah was already detained, albeit in Case One. *See* Rule 5-409 NMRA (detailing procedure for pretrial detention). Thus, while the magistrate court properly applied our recent pretrial detention and release rules by nominally releasing Hezekiah, he was still confined.

This Court has asked the parties to brief "[w]hat role, if any" rules like Rule 5-401 and Rule 5-409 NMRA should "play in resolving" the nominal release question. Order, *State v. Eaker*, S-1-SC-40308 at 2 (May 10, 2024). Under *French* and *Ramzy*, as argued above, the focus should be on the first two prongs, which suggests these rules play no role. This is because if a defendant was out in the community on an appeal bond, probation, or parole and then picks up new charges which result in his confinement on the first case, then he should get credit. *See French*, 2021-NMCA-052, ¶¶ 9-13; *see Ramzy*, 1982-NMCA-113. If a court detains him for the new charges in a second case, then he is undoubtedly confined in that case too, but it does not necessarily change the fact he would otherwise be confined.

Another interesting scenario would occur if a defendant was out in the community, picks up new charges, is not confined for a violation in the first case, but is then ordered to be held pretrial in the second case for the new charges. In such a situation, the *Ramzy* test does not need to be applied because the new

charges triggered and caused the confinement which had been ordered in the new case. In such a situation, the defendant would only get credit for the second case.

It is useful to consider how our revamped rules and current approach to bail would not have affected the analysis in *Ramzy*. The defendant in *Ramzy*, was out on an appeal bond when he was charged with new criminal conduct. 1982-NMCA-113, ¶¶ 3-4. He was arrested and incarcerated on these charges in the second case, but then released after he posted bond. *Id.* ¶ 4. Several weeks later his appeal bond in the first case was revoked because of the new charges, and he was "immediately incarcerated." *Id.* ¶ 5. The next day, he was arraigned in district court on the new charges in the second case and at this point, his bond in the second case was raised "to an amount which he apparently could not post." *Id.* ¶ 5. The district court granted defendant credit because he had been confined during the time he was incarcerated for the appeal bond revocation in the first case and sentencing in the second case. *Id.* ¶ 7.

The Court of Appeals affirmed the grant because defendant was not confined when the second case occurred, and the second case "triggered and caused the revocation of the appeal bond." *Ramzy*, 1982-NMCA-113, ¶ 11. The Court did note that the defendant "was unable to meet the high bond required" in the second case, but also stated his "incarceration and confinement for the period in question

was undoubtedly partly, if not totally, caused by" the charges in the second case. *Id.*

The Court also stated there was "sufficient connection" between the second case and the confinement "to warrant credit for such incarceration and confinement, even though he was at the same time in custody due to the revocation of the appeal bond," which implied the no bond hold was crucial. *Ramzy*, 1982-NMCA-113, ¶ 11. However, under our revamped pretrial release and detention rules, a defendant cannot be held because he cannot post bond. N.M. Const. art. II, § 13 ("A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond."). Thus, today, a defendant like the *Ramzy* defendant cannot be held in a case because they cannot post bond. *See Brown*, 2014-NMSC-038, ¶ 40 (noting that Rule 5-401 allowed courts to set "secured bonds" "if the court makes specific written findings demonstrating that nonfinancial release options "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

In *Ramzy*, the defendant was not released in the first case between the time his appeal bond was revoked and he was sentenced in the second case; in other words, even if he could not be held because of the high bond, and would have been

released under today's rules, he still would have been incarcerated on the appeal bond revocation. Moreover, the district court in *Ramzy* did not have a mechanism like Rule 5-409 to hold the defendant indefinitely in the second case for CSP; at most, the court could raise bond or set a secure bond under the then-existing Rule 5-401. Ultimately, the reasoning in *Ramzy* would have still supported an affirmance of the district court's credit award in such a situation.

Hezekiah also observes that in cases in which a defendant is ordered released but is otherwise confined, then the presentence confinement credit will depend on the duration of confinement in the first case. For example, if a defendant had just started 1-year parole and then picked up new charges, that defendant would likely be held on the parole violation. Say the defendant is nominally released in the second case, but held on the parole violation until that time is served. Once the defendant serves the parole sentence, the defendant's release in the second case would transform from being nominal to actual release and the defendant would no longer receive presentence confinement. This is not the case here since Hezekiah was held in DOC for the pendency of the adjudication of Case Two, but it is a fact pattern that can occur for some defendants.

This aside, because of policy concerns, our pretrial release and detention rules should not apply in such a way that they deny a defendant credit when he is held on a probation or parole violation but nominally released in a second case.

Specifically, there is the possibility for gamesmanship, the creation of undesirable incentives, and absurd results. As noted above, if a nominal release can be sufficient to deny an award of presentence confinement credit, then a prosecutor may seek to deny holding a defendant who may otherwise qualify for detention under Rule 5-409 to thwart an award knowing the defendant is already confined for a parole or probation violation. Similarly, a trial court could, in theory, release a defendant on his own recognizance or set an unsecured appearance bond if the court does not want the defendant to get credit. Alternatively, a court might feel bound to release the defendant under the rules even if it knows a defendant is otherwise being held and would otherwise be inclined to hold defendant in the second case. Put another way, even if a trial court was inclined to give a defendant credit but felt compelled to release the defendant because there was no basis to detain him, then the court would be hamstrung from awarding credit if nominal release is enough to deny an award of credit.

Denying credit here creates the possibility of adverse incentives. Our rules were amended since the constitutional amendment to prohibit the holding of a defendant because he cannot post a high bond, preferring release on the defendant's own recognizance or an unsecured appearance bond. Rule 5-401. The corollary to this rule is the fact that a defendant can be held pretrial if the State can show "by clear and convincing evidence that no release conditions will reasonably

protect the safety of any other person or the community." Rule 5-409. A rule stating that a defendant can be denied presentence confinement credit when the defendant is otherwise held for violating probation or parole conditions in an earlier case if the defendant is not detained or is nominally released creates an incentive to not seek detention or release a defendant. Such actions could create situations in which "dangerous" defendants are not held because the State or a trial court does not want such a defendant to receive presentence confinement credit, even though the defendant is otherwise confined.

Further, denying credit because a defendant was nominally released creates the possibility of absurd results. *See State v. Montano*, 2024-NMSC-019, ¶¶ 11-21, 557 P.3d 86 (reviewing the absurdity doctrine as it has been discussed and applied in New Mexico and other jurisdictions, noting "the absurdity doctrine is not a tool that is used to interpret an ambiguous statute; it only applies to statutes that are clear and unambiguous," and when "properly invoked, the doctrine gives a judge the authority and power to avoid an absurd result," and such a result may occur when "the literal application of a statute…contradicts the values of rationality, reasonableness, and common sense"); *see also State v. Maestas*, 2007-NMSC-001, ¶ 22, 140 N.M. 836 ("If adherence to the plain meaning of a statute would lead to absurdity, we must reject that meaning and construe the statute according to the obvious intent of the legislature"). If the Court disagrees with Hezekiah's argument

and instead crafts a rule limiting presentence confinement credit to instances in which a defendant is detained in a new case while also being confined for a violation in an earlier case, then more dangerous defendants get the benefit of presentence confinement credit while less dangerous defendants would not. It is not clear our statute intends such a result. *See Romero*, 2002-NMCA-106, ¶ 8 (noting "since *Ramzy,* we have come to realize the absurd or unreasonable consequences that could result from a uniformly strict interpretation," which included multiplying credit which could "have the effect of rewarding a defendant for committing multiple crimes."); *see also Miranda*, 1989-NMCA-068, ¶ 11 ("Statutes giving credit for presentence confinement are designed to assure equal treatment of all defendants whether or not they are incarcerated prior to conviction."). A strict application of our traditional three-prong test in light of our recent changes to pretrial release and detention rules creates a possibility of absurd results as demonstrated by the following hypothetical.

Suppose a defendant has similar prior convictions as Hezekiah, and while on parole commits armed kidnapping and CSP. The defendant is then arrested. It is likely the defendant would be held pretrial under Rule 5-409 if the State sought detention because of the violent new charges. The defendant would also likely be held in DOC because he would have violated his parole in picking up the new charges. In this situation, this defendant would receive presentence confinement

credit because he was being held under Rule 5-409 in the second case. The absurdity lies in that the defendant and Hezekiah are otherwise similarly situated but Hezekiah would not receive credit because he did not commit a more dangerous crime that would likely necessitate his detention. *Cf. Miranda*, 1989-NMCA-068, ¶ 11 (reasoning that not providing multiple credit against consecutive charges or sentences is justified because to hold otherwise gives "an advantage to defendants incarcerated prior to trial and defeating the purpose of the statute"); *State v. Aarons*, 1985-NMCA-060, ¶¶ 9, 10 103 N.M. 138 (denying defendant 200 days of presentence confinement credit for each of his 26 convictions because it would result in no time served and create the undesirable result that "the more crimes a defendant is convicted of, the more credit he would receive for presentence confinement.").

Ultimately, it is not clear that our pretrial release and detention rules should play any role in the analysis of whether a defendant receives presentence confinement credit. Section 31-20-12 is focused on giving credit when a defendant is "held in official confinement on suspicion or charges of the commission of a felony." Whether a defendant is ordered released under Rule 5-401 or detained under Rule 5-409, should not matter if the defendant is otherwise confined in an earlier case during the pendency of the new case and the conduct resulting in the

new case caused and triggered the confinement In such a situation, a release order is theoretical, and a detention order is redundant.

4. At the very least, Hezekiah served time pretrial awaiting adjudication in this case which may not have been otherwise authorized by the parole retake.

To this point, Hezekiah has largely made his argument in general terms, attempting to make sense of case law that is surprisingly technical and difficult to harmonize. Even if this Court does not agree with his general statements of the law or his suggested reframing the test he offers above, he asks this Court grant him credit under the unique circumstances of his case.

Hezekiah's confinement here was based on his conduct in Case Two which resulted in the parole hold and violation in Case One. At the time he was arrested, March 28, 2019, DOC thought Hezekiah was lawfully on indeterminate, sex-offender parole. However, late last year, the Twelfth Judicial District Court granted Hezekiah's writ of habeas corpus challenging the lawfulness of his sex-offender parole. *State v. Eaker*, D-1215-CR-2011-00393 (12th Jud. Dist. Ct. Aug. 22, 2024). Specifically, he argued he did not serve a day in DOC for the qualifying sex offense, and thus he should have never been placed on indeterminate, sex-offender parole. *Id.* at 4, ¶ 14. The State has appealed this habeas order. He does not argue the merits of the order here, but notes this because if the habeas order in Case One

is affirmed by this Court then he should not have been confined in Case Two after the magistrate court nominally released him on the unsecured appearance bond.

If Hezekiah should have never been placed on indeterminate, sex-offender parole, then the magistrate court's release order would have had actual effect. That effect would have been that Hezekiah would have been out, in the community, while he waited adjudication in this case, Case Two. But, this is not what happened, even if the district court has now recognized the error with the habeas order. Instead, Hezekiah spent time awaiting adjudication in Case Two. He cannot get this time back but he can get credit as recognition that he was confined, that he was deprived of liberty by the parole hold in Case One. *Cf. Roberts v. State of Maine*, 48 F.3d 1287, 1292 (1st Cir. 1995) ("The liberty interest deprived by the state's actions in this case is Roberts' freedom from the mandatory two-day jail sentence imposed because of the refusal to take a blood/alcohol test.").

CONCLUSION

For the reasons provided above, Hezekiah respectfully asks this Court to conclude he should have received presentence confinement credit for the time he spent incarcerated awaiting adjudication in Case Two. Additionally, he respectfully asks this Court to hold that the district court entered an illegal sentence in ordering indeterminate sex-offender probation and parole terms.

Respectfully submitted,

BENNETT J. BAUR
Chief Public Defender

KIMBERLY CHAVEZ COOK
Appellate Defender

/s/ Mark A. Peralta-Silva
Mark A. Peralta-Silva
Assistant Appellate Defender
1422 Paseo de Peralta Bldg. 1
Santa Fe, NM 87501
(505) 395-2890

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Odyssey File & Serve system and thereby electronically served on opposing counsel at the New Mexico Department of Justice this 21st day of February, 2025.

/s/ Mark A. Peralta-Silva
Public Defender Department