

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-40308

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

HEZEKIAH EAKER,

Defendant-Petitioner.

DEFENDANT-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

On Certiorari to the Twelfth Judicial District Court

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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 Hezekiah's supplemental brief in chief filed with this Court is in the form **[Supplemental BIC]**, and the State's supplemental answer brief is in the form **[Supplemental AB]**.

STATEMENT OF COMPLIANCE

The body of this reply brief does not exceed the page limits (15 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 Word for Office 365.

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REPLY ARGUMENT

Hezekiah Eaker takes this opportunity to respond to the State's supplemental answer brief. He relies on the facts, arguments, and authorities set out in his supplemental brief in chief for all issues not discussed below.

As the briefing here illustrates, this area of the law desperately needs clarification. On one hand, the State proposes that Hezekiah should be denied credit because he was nominally released on bond in Case Two¹. **[Supplemental AB 13-29]** On the other hand, Hezekiah has made the case that he is entitled to credit because he was otherwise confined for the conduct that gave rise to the charges and conviction in Case Two. **[Supplemental BIC 8-32]** Put another way, Hezekiah should receive credit because his confinement was related to Case Two, despite the district court's nominal release. **[Id.]**

To resolve this confusion, Hezekiah suggested in his supplemental brief in chief and again suggests here, that this Court focus the inquiry not on whether he was specifically ordered confined for this case, but whether the charges in this case triggered and caused his confinement. **[See Supplemental BIC 22 (suggesting this Court omit the third prong from the test)]** This standard is a reframing of the three-prong test used in many cases over the years. *See e.g., State v. Ramzy,*

¹ Hezekiah refers to this case as "Case Two" because he was charged for the crimes in this case while on parole in D-1215-CR-2011-00393. He refers to the 2011 case as "Case One".

1982-NMCA-113, ¶ 11, 98 N.M. 436; *see also State v. Romero*, 2002-NMCA-106, ¶ 11, 132 N.M. 745. This standard harmonizes our case law and recognizes the unique considerations posed by cases such as Hezekiah’s, where he was on parole in one case but then committed criminal acts which led to his confinement, and those criminal acts became the basis for this case, Case Two.

In support of his argument, he makes three points in response to the State’s argument. First, the State’s focus on whether he was “also confined” in Case Two overlooks the unique circumstances of his case. Second, Hezekiah’s conduct leading to the charges in Case Two triggered and caused his confinement. And third, the State’s proposed application of the three-prong test creates an absurd result.

Reply Point 1: The State’s focus on whether a defendant was “also confined” in a second case promotes the use of a legal fiction that overlooks the practical realities in this case.

This Court is understandably concerned with whether the district court’s nominal release in Case Two should deprive Hezekiah of presentence confinement credit. Order, *State v. Eaker*, S-1-SC-40308 at 2 (May 10, 2024). As Hezekiah explained in his supplemental brief in chief, the answer should not turn on whether he was out on bond or bond was set because he was, for all intents and purposes, confined because of his conduct which led to charges and conviction in Case Two.

[Supplemental BIC 10-34]

Our three-prong test requires three things: “(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. *State v. Herrera*, 2024-NMCA-025, ¶ 23 (citing *Ramzy*, 1982-NMCA-113, ¶ 11). The State does not dispute that the first prong was met. The State does dispute that Hezekiah met the second prong and he addresses this argument below. **[See *infra* Reply Point 2]** Finally, the State focuses the bulk of its argument on the third prong, arguing that the unsecured appearance bond does not show Hezekiah was “also confined” in Case Two. **[Supplemental AB 1, 13-30]**

While the State’s argument has a basis in our court’s articulation of the standard, *see Herrera*, 2024-NMCA-025, ¶ 23, it rests on a legal fiction that is divorced from the practical reality of Hezekiah’s situation. Undoubtedly, an unsecured appearance bond is functionally equivalent to a court’s order releasing Hezekiah on his own recognizance. **[Supplemental AB 24 (citing Rule 5-401(B) NMRA)]** But again, the practical force of this point runs up against the reality that Hezekiah was not, in fact, out. He was being held on a parole retake. **[See Supplemental BIC 2-4 (explaining Hezekiah was arrested for the parole violation and conduct leading to charges in this case and he was transferred from county jail to prison either in either April or May 2019)]**

The reality that Hezekiah was confined because of his conduct leading to charges in this case challenges the State’s assertion that awarding him credit gives him some advantage over another similarly situated defendant. The State makes a similar argument to the one accepted by the district court that awarding Hezekiah presentence confinement credit for this case would “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.” **[Supplemental AB 8]** However, this argument fails to account for an important detail, that Hezekiah was on parole when he committed the crime for which he was charged in this Case.

If a defendant not on parole supervision committed the same crime as Hezekiah—possession of sexual exploitation of children material (SECM)—but was otherwise released on an unsecured appearance bond, then that hypothetical defendant would be *actually* out of custody on the unsecured appearance bond. Hezekiah, though nominally released, was *actually* held because his new crime constituted a parole violation. To say that Hezekiah reserves some undue award because he was also on parole overlooks the practical realities of his situation in favor of an analogy that is not equivalent. If Hezekiah was not on parole, then his unsecured appearance bond would have been meaningful and there would be no basis for his request for presentence confinement credit. But that was not his experience.

Moreover, neither the district court nor the State explain how Hezekiah would serve less time overall by getting credit here than a defendant only convicted of possession of SECM but otherwise released. Any credit Hezekiah would receive would have only applied² after he finished his parole in the earlier case and thus, he would not necessarily serve less time than a defendant only convicted of possession of SECM.

The State is correct that our cases appear inconsistent³ in how the third prong of the test is applied. **[Supplemental AB 14-16]** This is likely the case

² Hezekiah notes this point is only meaningful if this Court reverses the habeas court's order finding indeterminate sex-offender parole in Case One did not attach. *See* Order on Writ of Habeas Corpus, *State v. Eaker*, D-1215-CR-2011-00393 (12th Jud. Dist. Ct. Aug. 22, 2024); *see also* *State v. Eaker*, S-1-SC-40604. The unique circumstances of his case further illustrate how these arguments that other similar defendants would not benefit are not appropriate analogies here.

³ In making this point, the State cites *State v. Araujo*, A-1-CA-35514, mem. op. (N.M. Ct. App. Jan. 30, 2017) (nonprecedential), a nonprecedential Court of Appeals decision. **[See Supplemental AB 15-16]** Hezekiah explained in his brief in chief why *Araujo* does not apply here. **[See Supplemental BIC 16 n.5]**

Hezekiah does recognize that this Court in *Stewart v. State*, 1991-NMSC-095, ¶ 4, 112 N.M. 653, stated that in that defendant's case "presentence confinement period ends when parole is revoked, because petitioner then is confined pursuant to the prior conviction." However, the *Stewart* Court did not apply the three-prong test, did not find whether the charges for which the defendant sought credit triggered and caused the confinement in the parole retake, nor did it distinguish *Ramzy*. The Court of Appeals in *State v. Irvin*, 1992-NMCA-121, ¶¶ 6-8, 114 N.M. 597, *abrogated on other grounds by* *State v. French*, 2021-NMCA-052, ¶ 9 n.2, distinguished *Stewart* from a similar situation considering the propriety of awarding presentence confinement credit to a defendant who picks up new charges while on parole. The *Irvin* Court disagreed with the *Stewart* Court's conclusion and pointed to the recognition of an appropriate credit award to a codefendant in *State v. Facticeau*, 1990-NMSC-040, ¶ 4, 109 N.M. 748, who

because most cases involving disputes around presentence confinement credit center on two pending cases, not a situation like here where a defendant picks up new charges while on post-sentence supervision in an earlier, already sentenced case.

Hezekiah notes that there appear to be at least three types of presentence confinement cases that our courts have encountered. First are cases in which a defendant has either multiple pending cases or charges which are then resolved, and the defendant seeks presentence confinement credit for each case or charge. *See, e.g., Romero*, 2002-NMCA-106, ¶¶ 2-5, 10-13 (noting defendant sought credit for a second case which was pending during disposition of the first case). Second, and a variation of the first type of cases, are cases in which a defendant seeks credit for time spent in custody for multiple pending charges but the case for which credit is sought did not trigger confinement. *See, e.g., Herrera*, 2024-NMCA-025, ¶¶ 19-21, 25-28 (noting the defendant was seeking presentence confinement credit for time in custody following sentencing in an earlier case and the instant case did not trigger the confinement). Third are cases in which a defendant is out on some form

received 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.” *Stewart* would also appear to conflict with *French*, because it would suggest the rule is that a defendant does not receive credit for time spent on a parole or probation violation which was caused by new charges for which the defendant seeks credit.

of post-sentence supervision and the defendant picks up new charges which cause confinement in the already sentenced first case. *See, e.g., Ramzy*, 1982-NMCA-113 (considering whether a defendant was entitled to credit for a case in which he picked up the charges while out on an appeal bond in a prior case); *see also French*, 2021-NMCA-052, ¶ 13 (holding a defendant was entitled to credit when he picked up new charges while on probation, the State sought to revoke probation based on the conduct resulting in the new charges, and the defendant was held on the probation violation).

Hezekiah offers this chart as an illustration of these categories of cases:

Variations of multiple cases implicating presentence confinement question		
Two cases pending and resolved simultaneously or close in time. No credit typically applied unless district court runs cases concurrently. <i>See Romero</i> .	One case was pending, then defendant picks up new charges, but the new charges did not cause the confinement in the first case. No credit awarded because defendant cannot show second case caused confinement. <i>See Herrera</i> .	Defendant picks up new charges while out on release in a previous case. This release could be on an appeal bond, probation, or parole. Defendant is entitled to credit if he can show the second case caused the confinement. <i>See Ramzy and French</i> .

What these situations illustrate and confirm is the Court of Appeals’ recent delineation of “double credit” and “dual credit” cases. *Herrera*, 2024-NMCA-025, ¶ 22 n.1. Dual credit cases recognize situations in which a district court can run

two sentences concurrently and thus any qualifying presentence confinement credit is applied to both cases. *Id.* Double credit cases prohibit the application of credit to two cases because doing so would not only award a defendant picking up charges but also amount to a multiplication of credit, which our cases have held is not authorized by statute. *Id.*

Hezekiah's case arguably falls outside these two scenarios because he was out in the community on parole when he picked up the charges leading to this case. The *Ramzy* Court dealt with a similar situation because the defendant in that case was on an appeal bond when he picked up the new charges which resulted in his confinement. 1982-NMCA-113, ¶¶ 8, 11. As the Court of Appeals in *Romero* recognized, the issue in these cases is not "whether to 'double count' days of presentence confinement credit, but rather whether the defendant would be given credit for both time that was part of the regular sentence in the prior case and time for the presentence credit in the subsequent case". 2002-NMCA-106, ¶ 13 (citing *State v. Miranda*, 1989-NMCA-068, ¶ 11, 108 N.M. 789).

This matters because unlike cases like *Romero*, *Herrera*, and *Miranda*, Hezekiah could only receive presentence confinement credit for this case, Case Two. Any credit he received in Case One came about because of his time on parole by virtue of NMSA 1978, Section 31-21-14. Moreover, such time served in DOC in Case One was post-sentence confinement credit and could not be counted as

presentence confinement credit under NMSA 1978, Section 31-20-12. To the extent the State asserts that Hezekiah received presentence confinement credit in Case One, that is incorrect. **[Supplemental AB 1 (“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.”); see also Supplemental AB 10 (suggesting Hezekiah already “received confinement credit” for Case One)]**

Reply Point 2: A presentence confinement credit award requires that the charges in the second case triggered and caused the confinement. Hezekiah’s case meets this requirement.

As the Court of Appeals recognized in *Herrera*, “the second prong requires a cause-and-effect relationship whereby case two ‘triggers and causes’ the defendant’s confinement *in case one*.” 2024-NMCA-025, ¶ 27 (quoting *Ramzy*, 1982-NMCA-113, ¶ 11). This causal relationship ensures that a defendant gets credit for a case that is “actually related” to the confinement the defendant experiences. *See State v. Orona*, 1982-NMCA-143, ¶ 5, 98 N.M. 668. The State argues here that Hezekiah does not meet this requirement because the district court ran Case Two consecutive to Case One. **[Supplemental AB 10]** The State is wrong. As explained in the above point, and in the supplemental brief in chief, the general prohibition of dual credits, or an award of credit against consecutive cases, only applies to those situations where a defendant is seeking presentence

confinement credit for two cases. Here, there is only one case that qualifies for *presentence* confinement credit, that is Case Two.

Moreover, Hezekiah's confinement occurred because of the conduct leading to the charges and convictions in Case Two. The State does not dispute that Hezekiah violated his parole and law enforcement took him to prison for the conduct that gave rise to Case Two. **[Supplemental AB 11-12]** Instead, the State appears to argue that Hezekiah was “not confined because of” the Case Two charges, because “[t]he confinement period in question was not ‘on,’ *i.e.*, because of, the illegal acts for which Defendant was convicted in Case Two.” ***Id.* (citing § 31-20-12) (emphasis in original)** This assertion appears to conflate the second prong of the three-prong test with the third prong. *See Herrera*, 2024-NMCA-025, ¶ 23 (noting the second prong asks whether the charges in the second case triggered and caused the confinement in case one and the third prong asks whether the defendant was also confined in the second case). This is not the correct analysis of the second prong.

Instead, *Ramzy* and *Herrera* make clear that the question is whether the conduct in the second case caused and triggered the confinement in the first case. *Herrera*, 2024-NMCA-025, ¶¶ 23-28. The *Herrera* Court specified that “the second prong requires a cause-and-effect relationship whereby case two ‘triggers and causes’ the defendant’s confinement *in case one*.” *Id.* ¶ 27 (citing *Ramzy*,

1982-NMCA-113, ¶ 11) (*italics in original*). The State cites no authority to dispute this clarification of the second prong. Nor does the State explain how Hezekiah's confinement on the parole retake, Case One, was not caused by his conduct leading to charges in Case Two. It was only when his parole officer found him in possession of the material leading to the Case Two charges that Hezekiah was arrested and subsequently confined for violating his parole in Case One. This causal relationship meets the second prong of the test and shows that his confinement was actually related to the charges in this case.

Reply Point 3: The State does not address or resolve the absurdity from its and the district court's the strict application of the three-prong test.

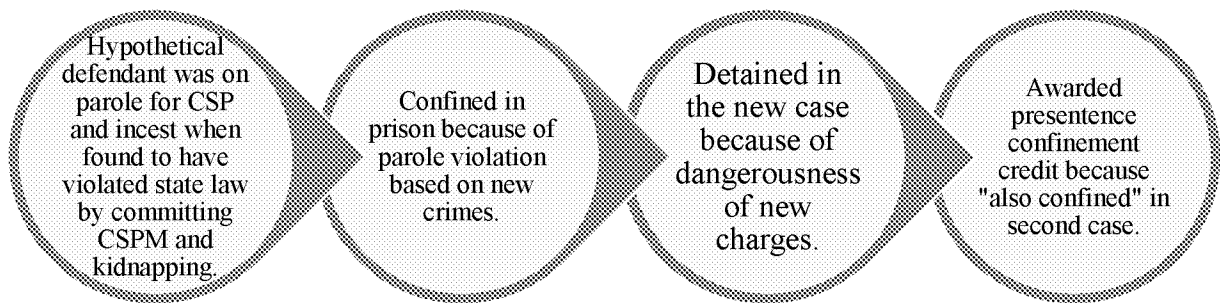
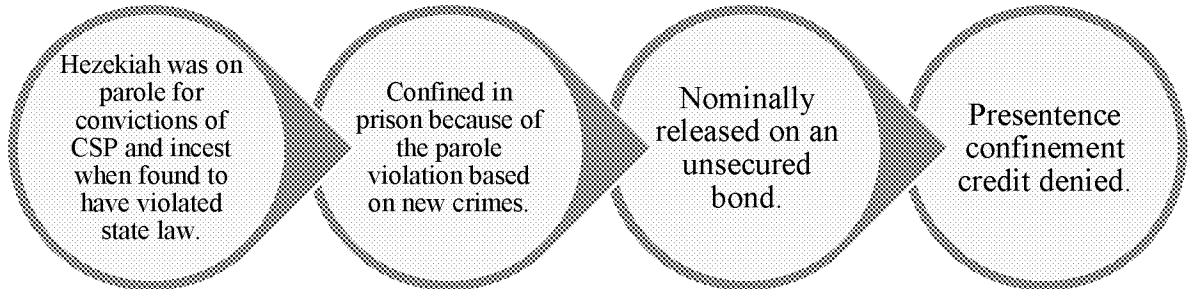
In his supplemental brief in chief, Hezekiah explained that denying him credit because he was nominally released, as the State argues here [**Supplemental AB 12-29**], leads to the possibility of absurd results. He noted that under a formulation of the three-prong test that requires a defendant to also be confined in the second case, or detained pretrial in the second case, then a more dangerous defendant would get credit but individuals like Mr. Eaker, who a court could nominally release would not. [**Supplemental BIC 29-32**]

He proffered the hypothetical of a defendant who had the same prior convictions in Case One as Hezekiah (incest and CSP), who was on parole for those convictions, and then later arrested for kidnapping and CSP, leading to a second case. Such a defendant would likely be detained under Rule 5-409 NMRA

for the second case. Under the State’s reading of the three-prong test, this more dangerous defendant would receive credit because (1) he was not confined prior to the conduct leading to the second case, (2) the charges in the second case triggered and caused confinement in the first case, and (3) the defendant was also confined in the second case. *See Herrera*, 2024-NMCA-025, ¶ 23 (citing *Ramzy*, 1982-NMCA-113, ¶ 11). The State does not argue that in situations like this, where a defendant is out on parole, or some other post-sentence supervision but not in custody, and then commits a new crime, the defendant is never entitled to presentence confinement credit for the second case. Instead, the State focuses its argument on whether a defendant is “also confined” in the second case.

[Supplemental AB 13-15]

This cannot be, as it would award more credit to dangerous defendants (who are otherwise similarly situated) than to less dangerous defendants who a court may not detain. Hezekiah offers the following charts to further illustrate the absurdity:



A prosecutor would likely, and arguably should, move for the detention of a defendant who has committed CSPM and kidnapping while on parole for other

sexual offenses.⁴ Hezekiah posed this hypothetical to illustrate the absurdity of denying credit because of a nominal release and the State failed to address or resolve this issue in its answer brief. It is not clear how the Legislature intended such a result in enacting Section 31-20-12. *See State v. Aaron*, 1985-NMCA-060, ¶¶ 8-9, 103 N.M. 138 (recognizing the absurdity of applying presentence confinement credit for each of defendant's numerous convictions). Hezekiah maintains this would be absurd and asks that this Court avoid this result by recognizing that a nominal release cannot thwart an award of presentence confinement when a defendant can otherwise show he was confined and his confinement was based on the charges in case for which he seeks credit.

CONCLUSION

For these reasons, and those provided in his brief in chief, Hezekiah asks that this Court reverse the district court's denial of presentence confinement credit in this case. He also asks that this Court hold the district court entered an illegal sentence in ordering indeterminate sex-offender probation and parole terms.

⁴ Rule 5-409 does not require or have any rebuttable presumptions for any crimes. However, in recent years, members of our Legislature have expressed an interest in creating rebuttable presumptions which would ostensibly make it easier to detain certain individuals because of a probable cause finding of certain offenses. *See, e.g.,* H.B. 509, 56th Leg., Reg. Sess. (N.M. 2023). First-degree and second-degree kidnapping, along with CSPM would be qualifying offenses for a rebuttable presumption. *See id.*

Respectfully submitted,

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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 Assistant Solicitor General Sarah M. Karni (skarni@nm DOJ.gov) at the NMDOJ this 3rd day of July, 2025.

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