



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

No. S-1-SC-41203

NICOLE CRUZ,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S ANSWER BRIEF

On Writ of Certiorari to the New Mexico Court of Appeals

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I. FACTS AND COURSE OF PROCEEDINGS

A. Nature of the Case

The Court of Appeals correctly applied two clear rules to this case. First, conviction for a nonexistent crime is per se fundamental error. Second, the direct remand rule is not applicable to this case because it only applies to reversals by the appellate court based on sufficiency of the evidence. The State asks this Court to disregard these clear rules because it is unhappy with the result in this case, which is the consequence of how the State prosecuted the case. This Court should decline the State's invitation. The Court of Appeals correctly applied both recent and long-standing precedent in reversing Ms. Cruz's conviction and remanding for retrial.

B. Summary of Facts and Procedural History

Nicole Cruz was charged with criminal sexual penetration in the second degree (CSPM-II)(child age 13-18). **[1 RP 1]** The State initially charged CSPM-II, perpetrated by use of force or coercion (child age 13-18), pursuant to NMSA 1978, Section 30-9-11(E)(1)(2009). **[1 RP 1]** The district court instructed the jury, however, pursuant to UJI 14-945 NMRA. **[2 RP 290, 315]** The use note for UJI 19-945 provides, "This instruction is only to be used in cases based on crimes that occurred before the 2007 amendment (July 1, 2007)." The State put forth the instruction, despite the alleged offense having occurred in 2020. Neither the district court nor defense counsel noticed the error. *See e.g.* **[CD 12/20/23, 10:30-10:39]**

The jury convicted Ms. Cruz of CSPM (position of authority). **[2 RP 338]** (finding Ms. Cruz guilty of CSPM-II “By Use of Coercion by Person of Authority.”)

The Court of Appeals reversed the conviction. It rejected the State’s argument that “fundamental error did not occur here because, as a lesser included offense, the jury was instructed on the elements of criminal sexual contact of a minor (CSCM) by a person in a position of authority and the jury necessarily found all the elements of CSCM when they returned their guilty verdict as to the CSPM.” *State v. Cruz*, A-1-CA-41999, ¶ 4 (N.M. Ct. App. Nov. 12, 2025) (non-precedential), *cert. granted*, *State v. Cruz*, 2026-NMCERT-001, 585 P.3d 492. This Court granted the State’s Petition for Writ of Certiorari on the following questions:

1. Whether a second degree conviction for CSPM (position of authority), under our CSP statute, should be considered a conviction for a “nonexistent” crime, when the conduct is still criminal under other statutes and was never meant to be decriminalized?
2. Whether *Figueroa*’s holding that CSPM (position of authority) does not satisfy the requirements of CSPM (force or coercion) conflicts with *Calderon*, under which the findings of lack of consent and involuntary penetration in CSPM (position of authority) instructions satisfy the requirements to convict for CSPM (force or coercion) by means of physical force?
3. Whether *Revels*, which limited direct remand to sufficiency cases, should bar the entry of judgment when the jury’s factual findings were sufficient to convict of an instructed lesser-included offense.

[State’s Petition for Writ of Certiorari, 2-3]

II. THE COURT OF APPEALS CORRECTLY REVERSED THE CONVICTION FOR A NONEXISTENT CRIME.

A. Conviction of a nonexistent crime is fundamental error.

The Court of Appeals correctly applied *State v. Figueroa*, 2020-NMCA-007, 457 P.3d 983, and held that “[i]t is fundamentally unfair, and thus per se fundamental error, to convict a criminal defendant of a nonexistent crime, regardless of whether the evidence would have been sufficient to prove a crime that the law does recognize.” *Cruz*, A-1-CA-41999, ¶ 4 (citing *Figueroa*, 2020-NMCA-007 ¶ 13). As further explained below, *Figueroa*’s holding is not an outlier—it is deeply rooted in New Mexico law.

The State admits that it “was error for the State to ignore the use note in the CSPM (position of authority) UJI instructing that it not be used for crimes occurring after 2007 and it was error not to instruct on the express elements of CSPM (force or coercion) in order to get a CSPM-II conviction.” **[BIC 2]** Despite this admission, the State seeks to avoid the consequences of its errors, arguing “there was no fundamental error because the jury’s findings constitute a valid sex crime with the same punishment of which defendant was on notice: CSCM (position of authority).” **[BIC 7]** The State does not explain how a conviction for an invalid theory of CSPM can be affirmed or how conviction on a lesser can be entered when the direct remand rule does not apply.

The State argues that “the only thing the CSPM (position of authority) jury instruction added to this case was the additional hur[d]le for the State to overcome to proving that [Ms. Cruz] penetrated C.L. rather than simply touching her.” **[BIC 10]** The State concludes that there is no need for a retrial because the jury already found the necessary elements of CSCM (position of authority) beyond a reasonable doubt. The State asserts “[t]he only reason the jury did not return a verdict on CSCM (position of authority) was because they found [Ms. Cruz] guilty of what they were instructed was the greater offense, CSPM.” **[BIC 11]**

In making this argument, the State relies on *State v. Ferran-Sandoval*, 2024-NMCA-066, ¶ 18, 556 P.3d. 594, **[BIC 10]**, where the Court evaluated a jury instruction given in a child abuse case where the defendant was not the child’s parent. The instruction contained all the elements under the statute and instructed on a valid crime. The instruction omitted the terms “parent” or “guardian” and the defense argued these terms would have informed the jury about what it means to have “accepted responsibility” for a child. *Ferran-Sandoval*, 2024-NMCA-066, ¶ 12. The Court concluded that the jury instruction impermissibly *narrowed* the scope of criminal liability and that the deficiency in the instruction was not fundamental error because it “arose in a nonessential element.” *Id.* ¶ 18 (emphasis in original). It is in this context the Court found that the conviction was “not fundamentally unfair because the State had to prove an element beyond the scope of the statute to convict

Defendant.” *Id. Ferran-Sandoval* has nothing to do with conviction of a nonexistent crime and its holding does not apply to this case.

As *Figueroa* explained, “[a] conviction for ‘position of authority’ CSPM-II based on conduct occurring after the 2007 amendment of Section 30-9-11 is a legal nullity.” 2020-NMCA-007, ¶ 14. *Figueroa* concluded that “[i]t was a miscarriage of justice to convict Defendant of “position of authority” CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred.” *Id.* This holding is rooted in New Mexico law. As support, *Figueroa* cited to *Campos v. Bravo*, 2007-NMSC-021, ¶ 19, 141 N.M. 80: “Because a conviction violating the collateral-felony doctrine is a legal nullity, it would be fundamental error to uphold such a conviction.” *Id.*

New Mexico has repeatedly applied the principle that a conviction for a nonexistent crime cannot stand over the years. *See generally, e.g., State v. Johnson*, 1985-NMCA-074, ¶¶ 23-24, 103 N.M. 364 (recognizing it is fundamental error for a defendant to be convicted of a nonexistent crime); *State v. Baca*, 1997-NMSC-059, ¶ 51, 124 N.M. 333, *abrogated on other grounds by State v. Revels*, 2025-NMSC-021, ¶ 51, 572 P.3d 974 (holding “conspiracy to commit depraved-mind murder was not valid” and reversing conviction); *State v. Mascarenas*, 2000-NMSC-017, ¶¶ 13, 31-33, 129 N.M. 230 (reversing and allowing retrial where sufficient evidence supported conviction on the jury instructions given even though

there was “a distinct possibility” the defendant was convicted of a crime that “does not exist in New Mexico”); *State v. Maestas*, 2007-NMSC-001, ¶ 26, 140 N.M. 836 (“We hold that just as a conviction for a nonexistent crime constitutes fundamental error, a conviction for a crime that does not exist as to a particular defendant is also fundamental error.”); *State v. Mailman*, 2010-NMSC-036, ¶ 11, 148 N.M. 702 (recognizing a conviction which fails to come within the statutory definition of the crime violates due process because a jury might rely on a legally inadequate theory); *State v. Arrendondo*, 2012-NMSC-013, ¶ 20, 278 P.3d 517 (raising an unpreserved issue *sua sponte* pursuant to an appellate court’s duty “to protect a party’s fundamental rights” and recognizing “a responsibility to question *sua sponte* a conviction for a nonexistent crime”); *State v. Marquez*, 2016-NMSC-025, ¶¶ 11-25, 52, 376 P.3d 815 (reversing first-degree murder conviction because shooting at or from a motor vehicle is not a collateral felony for felony murder); *State v. Leong*, 2017-NMCA-070, ¶ 10, 404 P.3d 9 (reversing based on legally inadequate theory of guilt); *State v. Prieto-Lozoya*, 2021-NMCA-019, ¶ 25, 488 P.3d 715 (recognizing that it is fundamental error to convict a defendant of a crime that does not exist and thus, it is similarly fundamental error to convict a defendant under a state statute that is preempted); *State v. Revels*, 2025-NMSC-021, ¶ 16, 572 P.3d 974 (a conviction that violates the collateral-felony doctrine is “a legal nullity” and therefore fundamental error); *State v. Jones*, 2025-NMSC-049, ¶¶ 11-42, 580 P.3d 216

(concluding a portal is not a structure and vacating aggravated burglary and felony murder convictions and applying *Revels* to allow retrial on a legally adequate predicate felony); Cf. *State v. Office of Pub. Def. on Behalf of Yazzie*, 2025-NMSC-027, ¶ 38, 578 P.3d 1033 (holding “a defendant cannot enter a plea to a nonexistent crime.”) The law in New Mexico is clear that a conviction for a nonexistent offense constitutes fundamental error and requires reversal.

The State argues that even “[i]f this Court concludes that CSPM (position of authority) is a ‘nonexistent’ crime it still does not render the conviction void.” [BIC 11] The State’s primary authority for this statement is *People v. Melton*, 667 N.E.2d 1371 (Ill. App. Ct. 1996), which held that “[a]lthough the statute cited in the charging documents was no longer in effect, the criminal offense of child endangerment was still embodied in the Criminal Code. Accordingly, defendants’ claim that they were convicted of a nonexistent crime is without merit.” Later cases from Illinois recognize the charging “instrument thus failed to state an offense because the statute under which each was charged and prosecuted was not in effect when the alleged offenses occurred. Accordingly, defendants’ convictions for predatory criminal sexual assault of a child cannot stand.” *People v. Tellez-Valencia*, 723 N.E.2d 223, 225 (Ill. 1999). In any event, Illinois law is inapplicable to this case. Instead, New Mexico law has long held that conviction for a nonexistent crime is a legal nullity and results in fundamental error.

The State does not ask this Court to overturn *Figueroa* or any of the other cases applying the same principle. See *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 33-34, 125 N.M. 721 (discussing the importance of stare decisis and the “special justification” necessary to depart from prior precedent). It is well-established under New Mexico precedent that conviction for a nonexistent crime is a legal nullity. Ms. Cruz was convicted of CSPM (position of authority) which is no longer a crime and therefore is a legal nullity. The Court of Appeals correctly recognized the conviction is per se fundamental error and must be reversed. *Cruz*, A-1-CA-41999, ¶ 4. The State has not presented any principled justification for why *Figueroa* does not apply.

Although not clearly articulated by the State, there are two exceptions to the general rule where “the omission of an essential element does not amount to fundamental error.” *State v. Sivils*, 2023-NMCA-080, ¶ 11, 538 P.3d 126; see *State v. Ocon*, 2021-NMCA-032, ¶¶ 9-12, 493 P.3d 448. “The first exception applies when the jury implicitly finds that the state has proven the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19. “This occurs when the jury makes a specific finding that—in the context of the facts and circumstances of the case—necessarily includes a finding of the omitted element.” *Sivils*, 2023-NMCA-080, ¶ 19.

“The second exception only applies when ‘the jury’s verdict, considered together with the given instructions and the parties’ legal and factual presentations,

leaves no doubt that the jury would have found the omitted element if properly instructed. ” *Sivils*, 2023-NMCA-080, ¶ 21 (emphasis omitted) (quoting *Ocon*, 2021-NMCA-032, ¶ 11). The “second exception is narrow and will support affirmance only when ‘proof of the omitted element is so strong that no rational jury could have failed to find that element’ and, even if the evidence is that strong, the missing element was not ‘disputed’ or ‘in issue’ at trial.” *Sivils*, 2023-NMCA-080, ¶ 21 (quoting *Ocon*, 2021-NMCA-032, ¶ 12).

The State has not convincingly explained how either of these exceptions apply to this case. Perhaps because neither exception applies. The jury was instructed on an entirely different crime, not just a missing element. Moreover, the State has not offered any principled reason why this Court should depart from current New Mexico law that recognizes that a conviction for a nonexistent crime is “per se fundamental error.” *Figueroa*, 2020-NMCA-007, ¶ 13 (“It is fundamentally unfair, and thus per se fundamental error, to convict a criminal defendant of a nonexistent crime, regardless of whether the evidence would have been sufficient to prove a crime that the law does recognize.”); *Maestas*, 2007-NMSC-001, ¶ 9 (“It is fundamental error to convict a defendant of a crime that does not exist.”).

Under *Ocon*, where the jury has been misinstructed on the proper crime under the properly charged statutory provision, the appellate court will determine whether the missing elements meet one of the two exceptions outlined above. For example,

in *Ocon*, the defendant was charged with aggravated assault upon a peace officer, but the instruction erroneously failed to inform the jury that it was also required to find the defendant used a deadly weapon and that his conduct was unlawful. 2021-NMCA-032, ¶ 6. The Court found the omission of the deadly weapon element was not fundamental error because the jury made other findings: walked towards the officer with a knife and make a stabbing motion and that the officer placing the officer in an objectively reasonable fear for his bodily integrity or personal safety. The Court held these findings amounted to a finding that the defendant used the knife as a weapon. *Id.* ¶ 15. The Court concluded that “[g]iven the unchallenged facts developed at trial, we conclude that, in light of the findings that the jury did make, the jury undoubtedly would have found, if properly instructed, that the knife was capable of causing death or great bodily harm and that Defendant acted unlawfully.” *Id.* ¶ 20.

However, when the jury is instructed on the wrong statutory subsection, the result is different. In *Ocon*, 2021-NMCA-032, ¶ 25, the Court agreed with the State’s concession that there was fundamental error “on the ground that the jury convicted Defendant of a crime that the State had not charged.” In *Ocon*, the defendant was charged with violation NMSA 1978, Section 30-22-1, which provides for alternative means of committing resisting, evading, or obstructing an officer. *Id.* ¶ 26 (citing *State v. Jimenez*, 2017-NMCA-039, ¶ 26, 392 P.3d 668).

Similar to the error in this case, the State charged the defendant under a different statutory provision. In *Ocon*, the State charged Subsection D (“resisting or abusing”) an officer but used the UJI that corresponded with Subsection C (“willfully refusing to bring a vehicle to a stop”) of the statute. “As a result, the jury was not instructed on the ‘resisting or abusing’ elements of Section 30-22-1(D) that differentiate the offense from the other forms of resisting, evading, or obstructing an officer.” *Id.* ¶ 27. The Court found the conviction resulted in fundamental error, without applying the two exceptions related to a missing element, and reversed and remanded for a new trial. *Id.* ¶¶ 27, 32.

Ocon is instructive because it differentiates the required analysis between when a jury instruction error results in fundamental error and when it does not. *See generally id.* ¶¶ 7-20 (analyzing Supreme Court precedent on missing elements). The takeaway from *Ocon* is that when the jury is instructed on the wrong statutory subsection, as happened here, the conviction results in fundamental error. The error in this case is even clearer than the error in *Ocon*, because the statutory subsection the jury was instructed on in this case has been repealed. This is consistent with long-standing New Mexico law that a conviction for a nonexistent crime is fundamental error. When the jury is instructed on the correct statutory provision, but an element is missing, the Court applies the *Ocon*-exceptions to determine whether the missing element results in fundamental error.

The State in this case ultimately asserts that “the jury’s findings should be upheld because our legislature meant to criminalize the conduct the jury found [Ms. Cruz] guilty of. CSPM (position of authority) satisfies the requirements for CSCM (position of authority.)” **[BIC 14]** It is unclear what the State is asking this Court to do. The conviction for CSPM is based on a legally invalid theory—a statutory provision that no longer exists. That conviction certainly cannot be affirmed. The only other remedy potentially available is direct remand for entry of CSCM (position of authority), but as discussed below, that remedy is inapplicable to this case. *See Subsection C, infra*. The State has not identified a legal path to its desired outcome.

B. The jury did not properly convict Ms. Cruz of second-degree CSPM.

Although the State concedes that the jury was improperly instructed on CSPM (position of authority), the State asks this Court to affirm the conviction for CSPM based on force or coercion despite the fact that the jury was not instructed on that theory and that is not the theory the conviction is based on. The State asserts that that “affirmance would be aligned with legislative intent, given that the elements of second-degree CSPM were satisfied here.” **[BIC 14]**

This argument is a veiled attempt at asking this Court to re-write the statute. *Martinez v. Sedillo*, 2005-NMCA-029, ¶ 7, 137 N.M. 103 (“We will not rewrite a statute.”). The legislature specifically removed CSPM “position of authority” from the statute. Generally, in reviewing statutory amendments, this Court assumes “that

the Legislature is well informed and aware of existing statutory and common law.” *State v. Thompson*, 2022-NMSC-023, ¶ 18, 521 P.3d 64. The legislature made the specific changes to the statute in order to change the law. *Blackwood & Nichols Co. v. N.M. Tax’n & Revenue Dep’t*, 1998-NMCA-113, ¶ 15, 125 N.M. 576 (holding that the deletion of a provision and rewriting of other provisions materially changed the law). The State asserts “the legislative intent was to make ‘force or coercion’ the path to a CSPM conviction” and that “it would be contrary to legislative intent to characterize one of these former paths as ‘nonexistent.’” [BIC 21] The State’s interpretation would require this Court to ignore established concepts of statutory interpretation.

Consideration of the criminal sexual contact of a minor statute is illustrative. The CSCM (age 13-18) statute provides, in relevant part, that it is a second-degree felony for a person in a position of authority to commit CSCM or if the perpetrator used force or coercion which resulted in personal injury or used force or coercion and was aided and abetted by one or more persons. **NMSA 1978, § 30-9-13 (C)(2)(a-c) (2003)**. CSCM in the fourth degree is all criminal sexual contact not defined in Subsection C, of a child 13-18 perpetrated with force or coercion. **NMSA 1978, § 30-9-13 (D)**. Thus, the CSCM statute differentiates “position of authority” and “force or coercion,” which further substantiates that the legislature did not intend to

conflate them. The State's approach would result in conflating concepts the Legislature considers distinct.

This Court “will construe the entire statute as a whole so that all the provisions will be considered in relation to one another.” *Regents of Univ. of New Mexico v. New Mexico Fed’n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401. Therefore, when a term is defined in one statute, it has the same meaning when it appears in a different statute. The State's approach would give rise to “force or coercion” having one meaning for CSCM (and not including “position of authority”) and a different meaning for CSPM, which is contrary to how this Court interprets statutes. *See, e.g., Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26, 309 P.3d 1047 (applying the “fundamental rule of statutory construction that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent” (omission, internal quotation marks, and citation omitted)).

To read the statute in the manner the State requests would result in a violation of the separation of powers doctrine. “The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty.” *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 31, 120 N.M. 562; *see also Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 1994-NMSC-096, ¶ 42, 118 N.M. 470 (“ ‘The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very

definition of tyranny.’” (quoting The Federalist No. 47 (James Madison)). “We have recognized the distinct and proper roles of the legislative and executive branches, respectively, as making law and executing law.” *Amdor v. Grisham*, 2025-NMSC-024, ¶ 82, 578 P.3d 971. “[O]nly the legislative branch is constitutionally established to create substantive law.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343. As this Court recently recognized, “the Legislature’s constitutional power and prerogative includes the right to determine what the law shall be, to create substantive law, and to make public policy.” *Amdor*, 2025-NMSC-024, ¶ 104 (internal quotation marks and citations omitted). The Legislature changed the statute to remove CSPM (position of authority). This Court cannot read that language back into the statute.

The Legislature provided a definition of “force or coercion” and it does not include position of authority. “When a term is . . . defined in a statute” there is no need to construe the term, because the Legislature has expressly defined it. *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177. Only “[w]hen a term is not defined in a statute [do] we ... construe it, giving those words their ordinary meaning absent clear and express legislative intention to the contrary.” *Id.* (internal quotation marks omitted). The statute is clear: CSPM (position of authority) is no longer a valid theory. CSPM-II must be charged and instructed as force or coercion. This Court explained that it is not the Court’s role to “question the wisdom, policy or justness

of legislation enacted by our legislature.” *Maestas*, 2007-NMSC-001, ¶ 25. “If legislative oversight was the cause of an error or omission in a statute, then it is left for the Legislature, not the courts, to correct the mistake.” *State v. Montano*, 2024-NMSC-019, ¶ 21, 557 P.3d 86. “The constitutional separation of powers doctrine demands no less.” *Id.* ¶ 28 (citing N.M. Const. art. III, § 1).

Attempting to salvage the conviction for a crime repealed by the Legislature, the State further argues that “[w]here the legislature still clearly contemplates this sort of conduct as criminal under CSPM (force or coercion) and the elements the jury found are virtually identical to a cognizable crime in our statutes, it is clear that was an error in jury instructions, not a conviction for a ‘nonexistent’ crime.” [BIC 15] The Court of Appeals properly rejected a similar argument in *Figueroa*. In *Figueroa*, the State presented the Court of Appeals with a “newly-discovered” theory for affirmance: that the evidence established force or coercion because the victim was asleep. The Court rejected this argument and noted that both the state and federal constitutions “prohibit this Court from affirming a criminal conviction under a legal theory different than that on which the case was tried.” *Figueroa*, 2020-NMCA-007, ¶ 15.

The Court explained an appellate court “cannot affirm a criminal conviction on the basis of a theory not presented to the jury[.]” *Id.* (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)); accord *McCormick v. United States*, 500 U.S.

257, 270 n.8 (1991) (“Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.”)) Identical to *Figueroa*, “[t]he given instructions informed the jury that it could only find Defendant guilty under a “position of authority” theory, and the jury did so. This Court cannot retroactively alter the basis for that verdict, applying the evidence adduced under a “position of authority” theory at trial to a [different] theory that Defendant was not tried on and the jury never considered.” 2020-NMCA-007, ¶ 16.

Again, without asking to overturn *Figueroa*, the State argues that under *State v. Calderon*, 2026-NMCA-026, ¶ 42, 585 P.3d 530 “the distinction between CSPM-II from CSPM-IV is that CSPM-IV occurs when the child willingly participates in the sexual act.” The State concludes that “[t]his reasoning is incompatible with *Figueroa*’s holding that ‘position of authority’ cannot satisfy ‘force or coercion’ and this can be accomplished without ‘force or coercion’ even though it includes a finding the victim was coerced.” [BIC 19-20] The State further argues that “[i]n many cases, all an adult needs to do is physically initiate a sexual act in order to wield this authority coercively. This necessarily includes a degree of physical force *causing* penetration and thus satisfying force or coercion.” [BIC 21] (emphasis in original) (citing NMSA 1978, § 30-9-10(A)(1); *State v. Apodaca*, 2025-NMSC-015, ¶ 37, 572 P.3d 913).

This argument ignores that under the statute, the jury is required to make the necessary findings of “force or coercion” that it did not make here. This finding is significant because it establishes a lack of consent. *See State v. Samora*, 2016-NMSC-031, ¶ 26, 387 P.3d 230 (“second-degree CSP [is] any sexual penetration of a child between the ages of thirteen and eighteen years old by the use of force or coercion. Under that form of CSP, if the prosecution has proved that force or coercion was used by the perpetrator, it has also necessarily proved that the act was non-consensual, and a separate finding of a lack of consent is not required.”)

The State’s reliance on *Calderon* and *Apodaca* is misplaced. *Apodaca* involved criminal sexual penetration charges based on an adult victim. The defense was that the victim consented to the sexual activity and the injuries were accidental. The victim’s level of intoxication was also highly contested. *Apodaca*, 2025-NMSC-015, ¶ 16-17. In *Apodaca*, the jury was instructed on “on two alternative theories of force or coercion. Specifically, the jury could find force or coercion if it determined that (1) he penetrated Victim when he knew or had reason to know that Victim was incapable of giving consent (Incapacity Theory) or (2) he penetrated Victim, who had the capacity to consent, when she did not consent (Express Non-Consent Theory).” 2025-NMSC-015, ¶ 16.

The issue on appeal in *Apodaca* “was whether Defendant was entitled to a mistake-of-fact instruction on Victim’s capacity to consent under the State’s Express

Non-Consent Theory.” *Id.* ¶ 34. This Court explained that that “the question is not whether the victim protested or physically resisted but rather whether the defendant was aware of, and consciously disregarded, a substantial and unjustifiable possibility that [the penetration] was being conducted without [the victim’s] consent.” *Id.* ¶ 37 (internal citation omitted). *Apodaca* requires more than penetration itself to prove force or coercion under the statute and it substantiates that these terms have carefully circumscribed definitions.¹ Ultimately, *Apodaca* held that the defendant was not entitled to a mistake of fact instruction “since the Express Non-Consent Theory presumed that Victim had the legal capacity to consent, Defendant’s awareness of Victim’s incapacity was not material to that theory.” *Id.* ¶ 42. This holding does not apply to this case where the jury was not instructed on force. *See State v. Cortez*, 2007-NMCA-054, ¶ 16, 141 N.M. 623 (“Cases are not precedent for issues not raised and decided.”).

The State makes a similar argument under *Calderon*. In *Calderon*, the defendant was charged with CSP in the second degree by use of force or coercion on

¹ An amendment to the Uniform Jury Instructions is currently out for comment. It would create UJI 14-986 which would provide a definition for “physical force or violence” consistent with the Court’s “conscious” disregard language from *Apodaca*. *See PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS-CRIMINAL PROPOSAL 2026-043, UJI 14-986 (May 15, 2026)* available at <https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/2026/05/Proposal-2026-043-Physical-Force-or-Violence.pdf> (last accessed June 1, 2026).

a child 13-18 years of age. 2026-NMCA-026, ¶ 10. The jury was correctly instructed that it had to find the defendant “used physical force or physical violence.” *Id.* ¶ 12. The issue on appeal was whether there was sufficient evidence of force. The Court explained, “that force or coercion is conduct of the defendant that provides evidence of the elements of lack of consent and involuntary penetration of the victim without requiring resistance by the victim or physical violence by the defendant.” *Calderon*, 2026-NMCA-026, ¶ 25. “[T]he jury must find that the victim did not or could not legally consent *and* that *force or coercion* was used to overcome the victim’s unwillingness to engage in the act of penetration.” *Id.* ¶ 26 (emphasis in original). The Court ultimately held that “it is readily apparent *that the jury’s finding that ‘[Defendant] used physical force’* is supported by substantial evidence in the record at trial.” *Id.* ¶ 32 (emphasis added). Like *Apodaca*, the jury was instructed on and returned a finding on the use of force or coercion. *See Figueroa*, 2020-NMCA-007, ¶ 11 (“the jury’s finding here that Defendant ‘coerce[d]’ [child] thus cannot support Defendant’s conviction for CSPM-II.”). The jury did not make that finding here.

The State baldly asserts that “the crime was perpetrated *by* force or coercion.” [BIC 23] (emphasis in original) (citing *Calderon*, 2026-NMCA-026, ¶ 26). The State argues that “the jury instruction does require that the perpetrator *used* their position of authority, which is not mutually exclusive with ‘force or coercion,’ to coerce the victim.” [BIC 23-24] (emphasis in original). Despite no instruction on or

finding of force, the State asserts that “[i]f the facts of the case would require the jury to find that the way in which the perpetrator *used* their position was by beginning to physically assault the victim the jury’s findings implicitly included a finding that the crime was perpetrated by force or coercion paired with a position of authority.” **[BIC 24]**

Figueroa rejected this line of reasoning. It explained that under the statute there are five alternative definitions of “force or coercion.” These are 1) the use of physical force or violence; 2) the use of threats of physical violence or force; 3) the use of threats of physical punishment, kidnapping, extortion, or retaliation; 4) unconscious, incapacitated, or helpless victim; 5) by a psychotherapist. *Figueroa* held “these statutory definitions control; a jury may only find ‘force or coercion’ when the State proves one or more of them.” *Figueroa*, 2020-NMCA-007, ¶ 10. Specifically, *Figueroa* explained, “[t]he ordinary meaning of ‘coerce’ therefore has no bearing on whether CSPM has been perpetrated through ‘force or coercion’ insofar as it encompasses a range of conduct broader than those definitions.” *Id.*

The State argues without citation that “[p]osition of authority’ can satisfy ‘force or coercion’ if it is based on facts that necessitate a finding of ‘force or coercion’ in order for the jury to reach a guilty verdict.” **[BIC 26]** Contrary to the State’s argument, the jury did not make the necessary findings to uphold the conviction based on “force or coercion.” “It is impermissible to enter a ‘partial

directed verdict’ against a defendant because it is ‘the fundamental right of a criminal defendant to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt.’” *State v. Nick R.*, 2009-NMSC-050, ¶ 37, 147 N.M. 182 (quoting *State v. Orosco*, 1992-NMSC-006, ¶ 20, 113 N.M. 780 (determining that a trial court had not removed an essential element of an offense from a jury’s consideration in a sex offense prosecution)).

Moreover, *Figueroa* explained that coercion was not an isolated element in the jury instructions, instead, the jury was instructed it could convict only if it found that defendant had “used his position of authority to coerce” the child. *Figueroa* held the word coercion in that context has an entirely different meaning than “force or coercion.” *Id.* ¶ 11. *Figueroa* concluded that “none of the statutory definitions set out in Section 30-9-10 permit a finding of ‘force or coercion’ upon proof that a defendant has used ‘undue influence.’” *Id.* The State’s argument is addressed by *Figueroa*, which is based on a correct interpretation of the statute. The State has not asked this Court to overrule *Figueroa*.

Based on the State’s chosen jury instruction, the jury convicted Ms. Cruz of CSPM (position of authority). The jury did not find the required statutory elements of “force or coercion.” The only findings the jury made relate to a repealed portion of the statute. This Court cannot read that language back into the statute when the Legislature specifically removed it. Additionally, the State is not permitted to simply

substitute in one element for another and ask that a conviction be affirmed for an entirely different crime under an entirely different theory. Compare *Ocon*, 2021-NMCA-032, ¶ 20 (finding no fundamental jury instruction error where jury instructed on correct statutory provision but missing an element) with *Ocon*, 2021-NMCA-032, ¶¶ 25-26 (finding fundamental error where jury was instructed on wrong subsection of the statute).

C. The direct-remand rule does not apply.

The State argues that even if there was fundamental error, this Court should remand for entry of CSCM (position of authority) because every principle underlying the direct remand rule articulated in *Revels*, applies to this case. [BIC 26] The State recognizes that, under *Revels*, the direct remand rule applies only when a conviction is reversed for insufficient evidence. [BIC 27] Regardless of the principles underlying the doctrine, this is a “threshold matter.” *Revels*, 2025-NMSC-021, ¶ 47 (“As a threshold matter, the direct-remand rule in New Mexico applies solely to cases involving an appellate reversal for insufficient evidence.”) The principles underlying the direct remand doctrine are of no help to the State here, because this case does not meet the “threshold matter” and therefore the direct remand rule does not apply.

Because *Revels* is clear, to reach its desired result, the State cites the stare decisis factors for overturning precedent and asserts “[t]o the extent any of these

factors may inform this Court’s decision to clarify or modify precedent, circumstances have changed since this Court held these principles could not be applied to a case of fundamental error. A fundamental error case has come along to which these principles apply, depriving that one conclusion of its original justification.” **[BIC 28]** This is a results-oriented argument and is not based on any stare decisis principle. This Court should reject the State’s request to “clarify or modify” precedent based only on the rationale that the State does not like the outcome in this case under this Court’s clearly stated rule.

The State argues that the jury necessarily found the elements of the lesser-included offense of CSCM (position of authority) were proven beyond a reasonable doubt. **[BIC 28]** *See also* **[BIC 29]** (“The direct-remand rule should permit a court to enter judgment for a lesser-included offense when the elements of that offense were found beyond a reasonable doubt, there is no genuine question of material fact to be resolved as to lesser-included offense, and the basis for reversal affected only the greater but not the lesser offense.”) This Court rejected the same argument by the State in *Revels*: “The State argues, inter alia, resentencing on the lesser included offense of second-degree murder is an available remedy because this Court can always remand for entry of judgment on second-degree murder in every case in which we vacate a felony murder conviction. *We reject these arguments* and clarify the law.” 2025-NMSC-021, ¶ 18 (emphasis added).

The State offers no principled reason why this Court should not apply the rule from *Revels* to this case. In *Revels*, the Court explained that under the jury instructions given, the State’s evidence established beyond a reasonable doubt all of the factual elements of felony murder presented to the jury. 2025-NMSC-021, ¶ 29. As in *Revels*, conviction for a nonexistent crime “is a legal error of the prosecution that results in a conviction by means of a flawed judicial process.” *Id.* ¶ 35 (internal citation and quotation marks omitted). This type of error requires reversal and allows retrial. *See id.* ¶ 36. The direct remand rule does not apply to this type of trial error. Instead, “the direct remand rule applies only to cases that are reversed on appeal for insufficient evidence.” *Id.* ¶ 40.

The Court recently applied the rule from *Revels* in *Jones*, where the Court agreed a portal is not a structure for purposes of the aggravated burglary statute and therefore the defendant was convicted of felony murder on the basis of a legally inadequate predicate felony. This Court held the direct remand rule did not apply and the State could retry the defendant on the same or lesser charge (if it can proceed on the basis of a legally adequate predicate felony). *Jones*, 2025-NMSC-049, ¶ 42. Like *Revels* and *Jones*, even where the jury necessarily found all of the elements of the lesser (since by convicting of felony murder the jury has necessarily found the elements of second-degree murder), this Court rejected application of the direct remand rule. The fact that the State does not want this result is not a sufficient basis

to overturn both recent and longstanding precedent applying the direct remand rule in New Mexico. Under this Court’s recent precedent, the direct remand rule does not apply.

D. The State’s policy argument is misplaced.

The State argues at length that public policy concerns warrant affirmance or direct remand. [BIC 34-39] However, the error in this case was the State’s. As explained by the *Figueroa* Court, “[t]he State chose to put Defendant on trial for a crime that did not exist when Defendant was alleged to have committed it. Now, it is bound by the consequences of that choice: remand and . . . a new trial.” 2020-NMCA-007, ¶ 16.

Recently, in the double jeopardy context, the State similarly asked this Court to abandon its approach “asserting that it was so unworkable that it has become intolerable.” *State v. Neal*, 2026-NMSC-___, ¶ 2 (N.M. Apr. 6, 2026). This Court disagreed and “decline[d] to take the drastic step of overruling decades of our own precedent when” the State could have achieved its desired result if it had “pled and tried the case differently.” *Id.* The same is true here. Here, the State similarly asks this Court to jettison two clearly established rules: 1) conviction for a nonexistent crime is fundamental error; and 2) the direct remand rule only applies to sufficiency reversals. Instead, if the State wishes to avoid asking victims to “relive their trauma” [BIC 38], it should exercise greater care in its prosecutions, including identifying a

legally valid theory for the charges it chooses to bring. *Cf. Neal*, 2026-NMSC-___, ¶ 1 (“Prosecutors are called upon to make myriad strategic decisions when planning the prosecution of a criminal defendant. Among these decisions are determinations of the charges to bring and the legal theories on which those charges are based.”)

There is no dispute that this kind of trial can be traumatic, but those are not the concerns addressed by the fundamental error doctrine. The doctrine applies “notwithstanding the apparent culpability of the defendant, [when] substantial justice has not been served. Substantial justice has not been served when a fundamental unfairness within the system has undermined judicial integrity.” *State v. Silva*, 2008-NMSC-051, ¶ 13, 144 N.M. 815, *modified on other grounds by State v. Guerra*, 2012-NMSC-027, ¶ 13, 284 P.3d 1076. Conviction for a nonexistent crime results in fundamental error and is the type of trial error that requires retrial, not imposition of the direct remand rule.

III. CONCLUSION

None of the State’s arguments warrant reversing the Court of Appeals’ memorandum opinion in this case nor discarding the decades of well-reasoned precedent upon which it is built. The Court of Appeals properly applied two long-standing rules: 1) conviction for a nonexistent crime is fundamental error; 2) the direct remand rule only applies to sufficiency reversals. Application of these two

rules required the Court of Appeals to reverse Ms. Cruz's conviction and remand for a new trial. This was the correct result.

Ms. Cruz respectfully requests this Court quash its writ of certiorari or affirm the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served by electronic delivery to Assistant Solicitor General Henry Chynoweth this the 11th day of June, 2026.

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