



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

S-1-SC-41203

NICOLE CRUZ,

Defendant-Respondent.

STATE OF NEW MEXICO'S BRIEF IN CHIEF

ON CERTIORARI FROM THE NEW MEXICO COURT OF APPEALS

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STATEMENT REGARDING RECORD CITATIONS

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

STATEMENT OF COMPLIANCE PURSUANT TO RULE 12-318(G)

This Answer Brief complies with the 11,000 word limit set forth in Rule 12-318(F)(3) NMRA. I certify that the body of this brief, written in 14-point Times New Roman contains: 9,727 words. I relied on the word count provided by Microsoft Word, Microsoft Office Standard.

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SUMMARY OF PROCEEDINGS

I. Introduction

Defendant sexually assaulted her thirteen-year-old stepdaughter (CL) repeatedly. The jury found that this was coercive and that Defendant caused the penetration of CL's vagina. The jury convicted Defendant of a second-degree felony for a sexual offense against a child. Defendant appealed, arguing that Criminal Sexual Penetration of a Minor by a Person in a Position of Authority (CSPM (position of authority)) is a "nonexistent" crime, thus her conviction was fundamental error and she was entitled to retrial. The Court of Appeals agreed, determining it was bound by *State v. Figueroa*, 2020-NMCA-007, and *State v. Revels*, 2025-NMSC-021.

Defendant seeks to avoid punishment based on statutory changes meant to increase punishments for sex crimes against children. The Court of Appeals has discarded the jury's findings based on a case wherein the Court of Appeals held it could not simply supplant a jury's findings. Defendant would have this case remanded for retrial on the broad conclusion of the Court in *Revels*, subverting the very interests of justice *Revels* sought to protect.

This Court should affirm Defendant's conviction because she was found guilty of every element of Criminal Sexual Contact of a Minor by a Person in a Position of Authority (CSCM (position of authority)), with the added finding that the act was

penetrative. Doing so would allow CL the dignity of calling the crime committed against her what it was: penetration, without forcing her to testify again at retrial.

Affirming Defendant's conviction would be aligned with the broader legislative intent behind our sex crimes statutes. 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. However, these errors were not fundamental, especially given that this jury's verdict necessarily included the findings necessary to convict Defendant of CSPM (force or coercion).

If this Court holds that the error here was fundamental, it should clarify the direct-remand rule expressed in *Revels*. In *Revels* this Court concluded that the direct-remand rule did not apply to cases of fundamental error *because* certain principles did not apply to fundamental error cases. Every one of those principles applies here. And those principles should decide when the direct-remand rule applies.

If this Court clarifies *Revels*, then it can apply the direct-remand rule to have Defendant resentenced for CSCM (position of authority).

II. Facts and Procedural Background

Defendant sexually assaulted her thirteen-year old stepdaughter, CL, on a regular basis for several months. [12-19-2023 CD 2:07-:24-38:13, 1:57:13-24] Defendant told CL not to tell anyone and CL was afraid Defendant would hurt her in some way if she did. [Id. 2:36:53-37:20] CL did not recall Defendant making any overt threat or using violence. [Id. 1:56:48-3:33:55] Defendant put her penis in CL's mouth and between CL's vaginal lips.¹ [Id. 2:33:29-35:47] Given that Defendant committed penetrative sex acts, the State charged Defendant with Criminal Sexual Penetration in the Second Degree (Child Age 13-18) (force or coercion) and Aggravated Indecent Exposure (Victim Less Than 18 Years Old). [RP 1-2]

At trial, CL, then seventeen years old, took the stand and testified about the abuse she suffered in detail in front of strangers and Defendant. [12-19-2023 CD 1:56:48-3:33:55] Defendant attacked CL's credibility by scrutinizing the accounts CL had given during the investigative and litigation processes. Defendant suggested CL made up the accusations because she wanted better living conditions, despite the fact CL was no longer living with Defendant at the time she reported what had happened. [Id. 2:41:02-3:26:53]

¹ Defendant has transitioned from male to female. [RP 193] This brief uses her current pronouns, but some of the cited audio may contain individuals mistakenly referring to her by male pronouns.

Defendant initially offered an instruction on second-degree CSCM (position of authority) to the court as a lesser-included offense, but withdrew it upon realizing that the punishment for CSCM-II is identical to the punishment for CSPM-II. **[12-20-2023 CD 8:56:45-57:20, 8:59:57-9:00:25, 9:28:44-29:31]** The State, however, properly moved for an instruction on CSCM-II as a lesser-included offense. **[12-20-2023 CD 9:21:10-9:45:30]** The district court accepted the State’s instructions for CSPM (position of authority) and CSCM (position of authority) as a lesser-included offense, **[RP 315-16]** even though the use note for CSPM (position of authority) states that it is not to be used for crimes occurring after the 2007 amendment to the CSP statute. *See* UJI 14-945 NMRA use note; *see also* NMSA 1978, § 30-9-11(E) (2009).

The jury found Defendant guilty of CSPM (position of authority). **[RP 338-39]** Because the jury unanimously agreed that Defendant committed CSPM, it did not return a verdict for CSCM (position of authority). Defendant appealed, claiming she was convicted of a “nonexistent” crime and asking for retrial. **[See COA BIC]** In a brief memorandum opinion, the Court of Appeals held that *Figueroa* and *Revels* required reversal and remand for retrial. *State v. Cruz*, A-1-CA-41999, mem. op. (N.M. Ct. App. Nov. 11, 2025) (nonprecedential).

ARGUMENT

Standard of review and preservation

Defendant conceded she did not preserve this issue at trial and raised her claim on appeal as fundamental error. **[COA BIC 2]** Our courts exercise fundamental error “only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims.” *State v. Notah*, 2022-NMCA-005, ¶ 25 (internal quotation marks and citation omitted). Fundamental error review follows two steps. “First, [courts] determine whether error occurred.” *State v. Sivils*, 2023-NMCA-080, ¶ 10. Second, courts ask “whether that error was fundamental.” *Id.* ¶ 11.

If jury instructions “fail to provide the juror with an accurate rendition of the relevant law,” this can lead to confusion and may implicate fundamental error. *Figueroa*, 2020-NMCA-007, ¶ 6 (internal quotation marks and citation omitted). “If a reasonable juror would have been confused or misdirected, then [courts] review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant’s conviction was the result of a plain miscarriage of justice.” *Id.* (text only).

“The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand.” *State*

v. Garvin, 2005-NMCA-107, ¶ 13, 138 N.M. 164 (internal quotation marks and citation omitted). Fundamental error should not be applied to isolated, minor improprieties “when the record as a whole demonstrates that a defendant received a fair trial.” *Id.* ¶¶ 13-14 (internal quotation marks and citation omitted).

Fundamental error may also be found under circumstances that “implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” *State v. Jimenez*, 2007-NMCA-005, ¶ 26, 141 N.M. 106 (internal quotation marks and citation omitted). For this doctrine to come into play, “the jury instruction given must differ materially from the uniform jury instruction, omit essential elements, or be so confusing and incomprehensible that a court cannot be certain that the jury found the essential elements under the facts of the case.” *State v. Greenwood*, 2012-NMCA-017, ¶ 22 (text only). Defendants “must demonstrate prejudice from the errors [they] allege[.]” *State v. Astorga*, 2016-NMCA-015, ¶ 5.

To the extent this analysis involves issues of statutory interpretation, this Court’s review is de novo. *Figueroa*, 2020-NMCA-007, ¶ 6.

In the Court of Appeals, the State argued that this case is distinct from *Figueroa* and *Revels*. [See COA AB] In footnotes, the State noted that considering CSPM (position of authority) “nonexistent” was not aligned with legislative intent. [Id. at 10 n.1, 16 n.2] However, the State did not go so far as to say “force or coercion” may be satisfied by a jury’s findings based on “position of authority” jury

instructions, where the jury could not have reached its conclusion without finding all the necessary elements of “force or coercion.” *State v. Calderon*, published after briefing ended for this case, brought the clarity to our CSP laws necessary to make this argument. *See generally* 2026-NMCA-026, ¶¶ 1-43. The State alerted the Court of Appeals to *Calderon* and contended that it was applicable supplemental authority to these facts, *see* State’s Notice of Supplemental Authority, *State v. Cruz*, A-1-CA-41999 (N.M. Nov. 11, 2025), but the Court of Appeals reversed for retrial in reliance on *Figueroa* and *Revels*. The State therefore petitioned for certiorari and asks this Court to affirm the district court’s decision or apply the direct-remand rule.

I. This case should not be remanded for retrial because there was no fundamental error here.

A. 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).

The jury’s findings as to CSPM (position of authority) constitute CSCM under a “position of authority” theory with an added element of penetration. Thus, *Cruz* is distinct from prior “nonexistent” crime cases, including *Figueroa*, wherein the court was not asked to consider CSCM. *See generally* 2020-NMCA-007. Although it was error to issue an instruction with a use note that was not to be utilized after a 2007 amendment to our CSP statute, this error was not fundamental.

Here, the jury’s findings align acutely to the requirements for a CSCM (position of authority) conviction. The jury found: “1. The defendant caused the

insertion, to any extent, of a penis into the vagina of [CL].” **[RP 315]** This satisfied the CSCM requirement that “1. The Defendant touched or applied force to the unclothed vagina of [CL] OR caused [CL] to touch the penis of the defendant.” **[RP 316]** The jury found: “2. [CL] was at least thirteen [] but less than eighteen [] years old.” **[RP 316]** The jury found: “3. The defendant was a parent and used this position of authority to coerce [CL] to submit to sexual contact.” **[RP 315]** CSCM required “2. The defendant was a parent AND used this position of authority to coerce [CL] to submit to sexual contact.” **[RP 316]**

As instructed, the two crimes only differ in that CSPM required a finding that there was penetration while CSCM requires only a touching. Under *State v. Romero*, when “the charged penetration unavoidably entail[s] contact to some extent . . . CSCM constitutes a lesser-included offense of the CSPM charge, and [d]efendant[s] are] on notice and [can] anticipate[] that evidence of the CSCM [will] be presented at trial.” 2013-NMCA-101, ¶ 10. Here, the CSPM charged unavoidably entailed contact to some extent. So, Defendant was on notice that she would have to defend herself against a charge of CSCM, which is a crime carrying the same punishment.

A “nonexistent crime” may be defined as “a crime that is not found in the statutes,” Thea Johnson, *Fictional Pleas*, 94 Indian L.J. 855, 863-64 (2019), or “an act that the law does not make criminal,” *Scott v. United States*, 740 F. Supp. 2d 1317, 1322 (S.D. Fla. 2010) (internal quotation marks and citation omitted). The

conduct here is criminalized in NMSA 1978, Section 30-9-13(B)(2)(a) (2003) (CSCM (position of authority)). Crimes are not defined by their “location or heading [in a statutory code]. An offense is defined by its elements—it is simply the sum of its elements.” *Wilson v. State*, 2014-KA-01478-COA, ¶ 37, 198 So. 3d 408 (Miss. Ct. App. 2016) (text only); *see also United States v. Parker*, 165 F. Supp. 2d 431, 450 (W.D.N.Y. 2001) (“It is black letter law that a crime is defined by its elements.” (citing Black’s Law Dictionary)). “[E]rroneous labeling of [a]crime charged” does not automatically amount to prejudice against the defendant or warrant a conclusion that such labeling renders the crime “nonexistent.” *See Evans v. State*, 2004-KA-00772-COA, ¶ 6, 916 So. 2d 550 (Miss. Ct. App. 2005) (finding errors in citing and mislabeling to be “mere surplusage and not prejudicial to [the defendant]’s ability to prepare an adequate defense”); *see also United States v. Kumar*, 617 F.3d 612, 622-23 (2d Cir. 2010) (holding no merit in “nonoffense” claim when it was still a punishable crime).

Defendant has suffered no legal injury. The jury was instructed upon and found her guilty of all the elements of a necessarily included offense to CSPM, CSCM. The only difference was that the jury found that Defendant did not merely make contact with CL’s vagina—she penetrated it. Because the penetration charged necessarily entails contact and all of the other elements of the two crimes are identical, the jury’s findings were sufficient to convict Defendant for CSCM

(position of authority), which the State properly entered as a necessarily included lesser-offense. Both crimes have identical punishments. There is no fundamental unfairness to finding a defendant guilty of a second-degree sexual offense against a child and then punishing them for such.

In essence, the only thing the CSPM (position of authority) jury instruction added to this case was the additional hurdle for the State to overcome to proving that Defendant penetrated CL rather than simply touching her. “[W]e do not view [the d]efendant’s conviction as fundamentally unfair because the State had to prove an element beyond the scope of the statute to convict [the d]efendant.” *State v. Ferran-Sandoval*, 2024-NMCA-066, ¶ 18; *see also State v. Samona*, 2016-NMSC-031, ¶ 27 (noting this Court only “reverse[s] when the misinstruction leaves [the Court] with no way of knowing whether the conviction was or was not based on the *lack* of the essential element” (emphasis added) (internal quotation marks and citation omitted)). Thus, the jury’s findings were sufficient to find Defendant guilty of a legitimate, existing crime, beyond a reasonable doubt. *See United States v. Latore*, 922 F.2d 1, 10 (1st Cir. 1990) (“Considering the charge as a whole, as [the court] must, and construing its language in a common-sense manner, [the court] find[s] that the jury was properly instructed on the factors necessary for a finding that [the crime was committed].”); *cf. Campos v. Bravo*, 2007-NMSC-021, ¶¶ 19-21, 141 N.M. 801 (“[B]efore reversal is required on the ground that one of the alternatives is legally

inadequate, *Yates* insists that it also be impossible to tell which ground the jury selected.” (internal quotation marks and citation omitted)).

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 only reason the jury did not return a verdict on CSCM (position of authority) was because they found Defendant guilty of what they were instructed was the greater offense, CSPM. **[RP 313]**

If this Court concludes that CSPM (position of authority) is a “nonexistent” crime, it still does not render the conviction void. This position is informed by cases such as *People v. Melton*, 667 N.E.2d 1371 (Ill. App. Ct. 1996). In *Melton*, the defendants were charged with and pled guilty under a repealed statute. *Id.* at 1376-77. However, their actions still constituted a crime under the Illinois criminal code, which “left intact the substance of the prior enactment and merely broadened its scope.” *Id.* at 1377. The court noted that “[o]nly where the defendant demonstrates prejudice will the mere fact that a criminal complaint contains an incorrect citation to the criminal statute be grounds for dismissal of the conviction.” *Id.* Critical to the court’s decision, “it [was] enough that the information or indictment, when read in its entirety, was sufficient to enable [the] defendants to prepare a defense.” *Id.* at 1378. “Although the defendants were not ‘perfectly’ charged, they were ‘properly’ charged.” *Id.* (citation omitted).

Both CSPM-II and CSCM-II are second-degree sexual offenses against a child. *Compare* § 30-9-11(E) (proscribing the minimum sentence for CSPM-II), *with* § 30-9-13(B)(2) (mirroring the description of type of crime, degree, and minimum sentence for CSCM). Both carry the same punishment, including parole. *See* NMSA 1978, § 31-21-10.1(I) (2007) (classifying the two together); *id.* § 31-20-5.2(F) (2003) (same); *id.* § 29-11A-3(I) (2013) (same); *id.* § 29-11A-5(D) (2007) (same); *id.* § 29-11A-5.1(A) (2013) (same); *id.* § 31-18-15 (2024) (same).

Thus, in practical terms, Defendant's conviction for CSPM (position of authority) was no different than it would have been had it been labeled CSCM (position of authority). Defendant's own counsel acknowledged this when he scrapped the proffered instructions as to CSCM precisely because the consequences would be exactly the same either way. **[12-20-2023 CD 8:56:45-57:20, 8:59:57-9:00:25, 9:28:44-29:31]** Defendant then complained that she was not on notice of CSCM because it was not in the charging document, **[*id.*]** but defendants are inherently on notice of lesser-included offenses. *See Romero*, 2013-NMCA-101, ¶¶ 10-12 ("CSCM constitutes a lesser-included offense of the CSPM charge, and [the d]efendant was on notice and could have anticipated that evidence of the CSCM would be presented at trial . . . The mere fact that [the d]efendant's chosen trial tactics . . . focused on penetration rather than the contact inherently involved in achieving penetration does not diminish the act of CSCM within the CSPM offense with which

[the d]efendant was originally charged. By being so charged, [the d]efendant was on notice of the facts constituting the CSCM, for which he was ultimately convicted.”).

If Defendant “could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, [then] notice of the greater offense necessarily incorporates notice of the lesser offense.” *State v. Darkis*, 2000-NMCA-085, ¶ 14, 129 N.M. 547 (discussing the standard for the State’s right to a lesser-included instruction) (internal quotation marks and citation omitted). A defendant should not expect to get off consequence-free by asserting they stopped short of penetrating a child, merely touching them in a sexual way. They are on notice that this is also a crime.

Mislabeling the crime was not prejudicial, let alone the threat to judicial integrity that warrants reversal on the grounds of fundamental error. *See Jimenez*, 2007-NMCA-005, ¶ 26 (“[F]undamental error will be found only when there exist circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” (text only)). Not every erroneous alteration to a jury instruction results in a “nonexistent” crime.

Defendant was accused, charged, found guilty of, and convicted of criminal sexual penetration of a minor. She was not charged with a crime because her conduct could be entitled “CSPM (position of authority),” “CSCM (position of authority),”

or “CSPM (force or coercion).” She was charged with a crime because her conduct was criminal.

Calling the culmination of her conduct a “nonexistent” crime disregards the jury’s findings and our CSPM and CSCM statutes. Yet Defendant claims she was prejudiced by calling her crime “criminal sexual penetration of a minor,” when a jury found the contact was penetrative. *See* § 30-9-11(A) (“Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.”).

Ultimately, the jury’s findings should be upheld because our legislature meant to criminalize the conduct the jury found Defendant guilty of. CSPM (position of authority) satisfies the requirements for CSCM (position of authority).

B. The error here was not fundamental and affirmance would be aligned with legislative intent, given that the elements of second-degree CSPM were satisfied here.

It was error to use the instruction of CSPM (position of authority) for a crime occurring after the 2007 amendment. “Failure to use a uniform jury instruction, however, does not necessarily rise to the level of fundamental error.” *State v. Caldwell*, 2008-NMCAS-049, ¶ 24, 143 N.M. 792. Similarly, “not every failure to instruct on an essential element amounts to fundamental error.” *Sivils*, 2023-NMCA-

080, ¶ 11. The initial criminal complaint in this case was for “Criminal Sexual Penetration in the Second Degree (Child Age 13-18)” and made reference to “force or coercion.” [RP 1] The judgment and sentence stated that Defendant was convicted of “Criminal Sexual Penetration in the Second Degree (Child 13-18) (Force or Coercion), 30-9-11(E)(1), a 2nd Degree Felony.” [RP 361]

Where 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 this was an error in jury instructions, not a conviction for a “nonexistent” crime.

i. Legislative intent supports affirming Defendant’s conviction, despite the error in her jury instructions, because the legislature never intended to decriminalize the conduct comprising CSPM (position of authority).

The legislature’s intent in amending the language to our CSP statute was not to lower the degree of punishment for conduct comprising CSPM (position of authority), but to expand the range of conduct punishable as second degree sex crimes. While it is clear the legislature meant for the new path to CSPM-II to be by way of a “force or coercion” jury instruction, it is also clear that the legislature meant most, if not all, conduct amounting to CSPM (position of authority) to continue to be prosecuted as CSPM-II. Thus, the State’s error lies in the path it took, not the existence of a cognizable crime at the end of that path. This Court need not engage in the absurdity doctrine to do this analysis because the language of our CSPM

provisions is not plain on its face. *See State v. Benavidez*, ____-NMSC-____, ¶ 23, S-1-SC-40452 (N.M. Feb. 23, 2026) (“When the language of the statute is ambiguous, *or* where adherence to the literal use of the words would lead to injustice, absurdity or contradiction, [this Court] will construe a statute according to its obvious spirit or reason.” (emphasis added) (internal quotation marks and citation omitted)); *State v. Montano*, 2024-NMSC-019, ¶ 15 (“Importantly, 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.”); *see also State v. Stevens*, 2014-NMSC-011, ¶ 24 (“[Courts] have struggled with trying to determine legislative intent by simply parsing individual words and phrases of the criminal sexual penetration statute . . . [courts are often required to] search more deeply for legislative intent, to avoid the danger in the law, as in life, of not seeing the forest for the trees.”); *Benavidez*, ____-NMSC-____, ¶ 23 (urging “caution in applying the plain meaning rule. In interpreting statutory language as well as in much of the other work courts are called on to perform, it is necessary to think thoughts and not words.” (internal quotation marks and citation omitted)).

Our legislation once explicitly provided that CSPM (position of authority) was a second-degree offense, *see* NMSA 1978, § 30-9-11(D)(1) (2003, amended 2007), while CSPM by regular “force or coercion” was a third-degree offense, *see id.* (E). The amendment that got rid of the phrase “position of authority” elevated

CSPM (force or coercion) from a third to second-degree offense. *See* § 30-9-11(E)(1). The ambiguity contained within the phrase “force or coercion” is apparent in how often our courts look to its legislative history to discern its meaning. *See, e.g., Stevens*, 2014-NMSC-011, ¶¶ 24-39 (tracing as far back as our territorial laws); *Calderon*, 2026-NMCA-026, ¶¶ 18-29 (analyzing the legislative intent behind “physical force”); *Figueroa*, 2020-NMCA-007, ¶¶ 8-9 (noting language prior to amendment before addressing the “plain meaning” of our sex offense statutes). Indeed, a plain language reading of Section 30-9-11(E)(1) would suggest that coercing a child with one’s position of authority would fit neatly under “force or coercion.”

“In ascertaining . . . legislative rationale, [this Court] may consider the history and background and the overall structure of the statute . . . as well as the particular statute’s function within a comprehensive legislative scheme.” *Benavidez*, ____-NMSC-____. ¶ 23 (internal quotation marks and citation omitted). The fact that CSPM (position of authority) was once a higher degree of CSPM than CSPM (force or coercion) illustrates an acknowledgment that this betrayal of a child’s trust is viler than the same conduct performed by a stranger. The amendment that removed the language “position of authority” was intended to punish sexual offenses *more* heavily, raising regular “force or coercion” against a child to a second-degree felony. *See* 2007 N.M. Laws ch. 69 (“An Act relating to . . . *increasing* penalties for sex

offenses against minors ” (emphasis added)); *see also* N.M. Legis. Council Serv., Highlights of the Forty-Eighth Legislature First Session, 2007 and First Special Session 2007, at 16 (“The legislature clarified crimes and *increased penalties* for crimes committed upon children ” (emphasis added)). Where once a child had to show that CSPM was committed with a deadly weapon, with aid, resulting in personal injury, or by a person in a position of authority in order to prove a second-degree offense, “force or coercion” was now enough. *See* § 30-9-11(E)(1). The legislature still required these proofs to establish CSCM-II, however. *See* § 30-9-13(B).

CSCM (force or coercion) on a child thirteen to eighteen is a fourth degree offense. Section 30-9-13(D)(1). CSPM (force or coercion) on an adult is a third degree offense. Section 30-9-11(F). CSPM (force or coercion) upon a child is a second-degree offense. Section 30-9-11(E)(1). And *any* CSPM of a child under thirteen is a first-degree offense. Section 30-9-11(D)(1). We punish penetration more than contact. We punish offenses all the more when they are committed upon children. We continue to punish CSCM (position of authority) in the second degree. Section 30-9-13(B)(2)(a). We continue to punish the use of one’s position of authority to commit CSP on adults in correctional facilities and jails. Section 30-9-11(E)(2). And to do this, courts apply a definition of “position of authority” to adults

that is not found in our definitions section. *See* NMSA 1978, § 30-9-10(E) (2005) (defining “position of authority” only as it relates to children).

Even though it is a fourth degree offense either way, we specify whether the sexual act perpetrated on a minor by a school employee was penetrative or contact only. *Compare* § 30-9-11(G)(2) (punishing certain school employees who commit CSPM on a child thirteen to eighteen as a fourth degree felony), *with* § 30-9-13(D)(2) (punishing perpetrators under the exact same circumstances, when the sexual act is contact, as a fourth degree felony). CSPM can rise as high as an aggravated first-degree felony, Section 30-9-11(C), CSCM only rises so high as a second-degree felony, Section 30-9-13(B).

Under *Calderon*, the distinction between CSPM-II from CSPM-IV is that CSPM-IV occurs when “the child willingly participates” in the sexual act. 2026-NMCA-026, ¶ 42.

Our Legislature has made sexual penetration of a child under the age of sixteen—someone who cannot consent as a matter of law—a fourth degree felony if evidence shows that the child voluntarily participates. If, however, a defendant engages in sexual intercourse with a child age thirteen to sixteen who does not voluntarily participate, necessarily using *force or coercion*, the degree of the crime is increased to a second degree felony.

Id. (citation omitted). This reasoning is incompatible with *Figueroa*’s holding that “position of authority” cannot satisfy “force or coercion,” and thus can be

accomplished without “force or coercion,” even though it includes a finding that the victim was coerced. One cannot coerce an already willing participant.

“Force or coercion” was meant to be the foundation upon which our other sex crimes build, with the exception of statutory rape. Our CSCM statute echoes how our CSP statute applies to adults. There is no need for a CSP-IV provision for adults, because the willingness of an adult victim deprives the act of its criminality. Thus the baseline for adults is simple CSP (force or coercion). Section 30-9-11(G)(1). Our CSCM statute establishes the same baseline at CSCM (force or coercion). Section 30-9-13(D)(1). For victims of CSP and CSCM, this crime is elevated to the second degree (or sometimes third with CSCM above the clothes) when the perpetrator uses a deadly weapon, is aided by others, causes personal injury to the victim, or holds a position of authority over the victim. *See* §§ 30-9-11(E), 30-9-13(B)-(C). CSPM-II need not list these factors because its baseline begins at the second degree. *See* § 30-9-11(E)(1). Legislative intent to have one of these elevating factors “position of authority” be decriminalized or a lesser crime than CSPM-II would be a stark departure from this pattern.

It seems implausible the legislature broke with all these patterns in order to ensure that if CSCM (position of authority), without “force or coercion,” includes a penetrative sex act, this penetration should either go unacknowledged or substantially lower the degree of felony the defendant can be convicted of. The

legislative intent was to make “force or coercion” the path to a CSPM conviction. But towards the inclusion of more sex acts, not the exclusion. And if inclusion was the purpose, then it would be contrary to legislative intent to characterize one of these former paths as “nonexistent.”

It would be one thing if, as in the adult context, all the State needed to prove for CSPM (position of authority) was a position of authority over the victim. *Cf.* UJI 14-963 NMRA. However, jury findings for CSPM (position of authority) also require that the defendant take a more active role and “use” this position of authority to coerce the child. *See* UJI 14-945(3). In 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.” *See* § 30-9-10(A)(1) (physical force or violence provision); *id.* (A) (“Physical or verbal resistance of the victim is not an element of force or coercion.”); *State v. Apodaca*, 2025-NMSC-015, ¶ 37 (“The physical force or physical violence alternative of *force or coercion* does not require the State to prove that a significant amount of strength or exertion was used to perpetrate the sexual penetration; *force or coercion* simply means that the victim did not consent.”).

All of this to say, the spirit and character of our sex crimes statutes embraces a broad reading of “force or coercion,” wherein the facts necessary for a finding of CSPM (position of authority) could satisfy this standard if the defendant “uses” their

position of authority by way of force or coercion. The court’s reading in *Figueroa*, that the plain language of our statutes completely forecloses “position of authority” as a “nonexistent” crime is against the spirit and character of these statutes.

ii. Another reason there was no fundamental error is that the jury, in order to reach its verdict, necessarily made the implicit finding that Defendant used force, in tandem with her position of authority, to penetrate CL.

Based on the facts they were presented with, the jury could not have concluded that Defendant used her position of authority to coerce CL into sexual penetration, without also finding that she used this authority when she physically began to perform sexual acts on CL.

It is usually fundamental error to omit an essential element of a crime from jury instructions. *State v. Barber*, 2004-NMSC-019, ¶ 20, 135 N.M. 621. However, “[e]rror is not fundamental when the jury could not have reached its verdict without also finding the element omitted from the instructions.” *Id.* ¶ 29; *cf. State v. Orosco*, 1992-NMSC-006, ¶ 19, 113 N.M. 780 (“[This Court] rest[ed its] decision on the basis that, under the undisputed evidence of unlawfulness in the cases and the facts upon which the juries relied to find that defendants committed the acts, the juries themselves effectively determined the existence of the omitted element.”).

Under *Figueroa*, “[n]one 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’—i.e. moral, social, or domestic force—to perpetrate CSPM, and .

. . [findings] that [a d]efendant ‘coerced’ [a victim] thus cannot support Defendant’s conviction of CSPM-II.” 2020-NMCA-007, ¶ 11.

However, under *Calderon*:

Each subsection of Section 30-9-11(E), second degree CSP . . . requires lack of consent by the victim, either as a *matter of law* (if the victim is underage or incompetent) or as a *matter of fact* (if the victim can lawfully consent), and also requires that the penetration be caused, or ‘perpetrated,’ by *force or coercion* sufficient to show that the sexual act was involuntary.

2026-NMCA-026, ¶ 26. This sets a standard of physical force that the “position of authority” findings in this case can satisfy because they necessarily included such an exertion of force causing penetration in tandem with Defendant’s use of her position of authority.

Figueroa did not consider CSPM (force or coercion) under its “physical force” alternative, nor CSCM (position of authority) as a lesser-included offense. *See generally* 2020-NMCA-007 (making no mention of CSCM, except in a single footnote); *id.* ¶ 4 (“[T]he State disavowed any reliance on a ‘physical force’ theory of CSPM-II.”). CSPM (position of authority) jury instructions already require findings of causing penetration and involuntariness, in that one cannot coerce someone who is already voluntary. *See* UJI 14-945(1)-(2). What’s missing is that the crime was perpetrated *by* force or coercion. *See Calderon*, 2026-NMCA-026, ¶ 26. However, 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. *See* UJI 14-945(2).

Coercion under a position of authority theory occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence is the means of compelling submission to the contact. Such coercion might take many forms but is less overtly threatening than physical force or threats. Undue influence results from moral, social, or domestic force exerted upon a party, so as to control the free action of his or her will.

Figueroa, 2020-NMCA-007, ¶ 11 (text only).

In other words, the perpetrator wielded this position such as to overcome the victim’s will. If 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 then the jury’s findings implicitly included a finding that the crime was perpetrated by force or coercion paired with a position of authority. This force was sufficient to overcome the victim’s will because it successfully asserted the perpetrator’s position of authority. These findings amount to a cognizant crime. This contradicts *Figueroa*’s holding that such findings will always produce a legal nullity.

At trial, there was no evidence suggesting that CL initiated the sexual encounters, that Defendant somehow managed to initiate these sex acts without physical force, that Defendant talked CL into the sexual acts, or that Defendant somehow managed to apply pressure absent physical force. [*See, e.g., 12-19-2023 2:21:50-24:06, 2:28:10-29:25, 2:32:52-35:47* (CL testifying that *Defendant*

touched Defendant's private parts to the inside of CL's mouth and between her vaginal lips)] CL testified that the interactions would begin with Defendant touching her. [*Id.* 2:20:10-24:06, 2:28:10-29:25, 2:32:52-35:47] Before Defendant physically acted, she had not used her position of authority to penetrate CL. Upon physically acting, she began using her position of authority to penetrate CL. She could not have done this under the facts of the case, without physical force.

There may be some ways to verbally induce a child to engage in a sex act, without threat and without physical force being the *cause* of the penetration. However, here, the jury's findings answer the question "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[,] [t]he essence of [which] is that it is given out of free will." *Apodaca*, 2025-NMSC-015, ¶ 37 (text only); *see also State v. Martinez*, 2021-NMSC-012, ¶ 21 ("[T]he use of force or coercion is inherent in the sexual penetration of a victim who is unable to consent.").

[U]nder the rule of fundamental error reversal is required only when the interests of justice so require. A rule of automatic reversal would mandate a new trial in every instance of a failure to instruct, even though it was not only undisputed but indisputable that the element was met. Such a result . . . would be a perversion of justice, a classic demonstration of profoundly inequitable results that follow when the judiciary worships form and ignores substance. Applying a rule of automatic reversal is not required by the relevant constitutional principles and fails to take into account [this Court's] role as an appellate tribunal . . . Our rules authorize reversal for errors occurring at trial, even if of constitutional dimension, only when the interests of justice require or when the trial court has exceeded the scope of its

powers . . . It cannot be said that every failure to instruct on an essential element necessarily renders a trial fundamentally unfair. [Courts] are therefore justified in examining the facts in each case to determine whether the error in the instructions rose to the level of fundamental error so as to justify reversal.

Orosco, 1992-NMSC-006, ¶¶ 13-17, 113 N.M. 780 (internal quotation marks and citations omitted).

“Position 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. It was error to instruct on CSPM (position of authority), but the jury could not have reached its verdict without finding a lack of consent and that Defendant used physical force (in tandem with her position of authority) to overcome CL’s will and cause penetration. Thus there was no fundamental error here.

II. Even if there was fundamental error, this Court should remand for entry of judgment for CSCM (position of authority) because every principle underlying the direct-remand rule in *Revels* applies to this case.

If this Court holds there was fundamental error in this case, this Court should remand for entry of judgment for the instructed offense of second-degree CSCM. This Court should clarify the direct-remand rule in *Revels* to allow for entry of judgment when the basis for reversal affects only the greater offense.

The direct-remand rule is that “a court may order resentencing on an adequately proven lesser included offense when reversing the defendant’s conviction of a greater offense[.]” *Revels*, 2025-NMSC-021, ¶ 44 (quotation marks and citation

omitted). In *Revels*, this Court limited the direct-remand rule to apply only when a conviction is reversed for insufficient evidence. *Id.* Upon holding that felony murder predicated on aggravated assault was a “nonexistent” crime, this Court declined to adopt a defendant’s assertion that the direct-remand rule precluded retrial or resentencing. *Id.* ¶¶ 39-40. This Court also rejected the State’s argument in *Revels* that “the direct remand rule always allows remand for entry of judgment on second-degree murder after a felony murder conviction is vacated.” *Id.* This Court stated, “[w]e clarify the direct remand rule applies only to cases that are reversed on appeal for insufficient evidence—in other words, cases where the defendant has been acquitted—and its application depends on the evidence and the jury instructions given in each case.” *Id.*

This Court reached its conclusion after considering several principles it derived from prior direct-remand cases. *Id.* ¶ 47. These principles were that direct-remand should be used: 1) when “the interests of justice [would be] better served” by doing so, 2) “when the jury has already found the elements of a lesser included offense beyond a reasonable doubt, [and therefore] the interests of justice are better served by direct remand,” 3) when there is no “genuine factual question for the jury to resolve on remand,” and 4) when the jury has been instructed on a lesser-included offense; and that 5) when “the record demonstrates that sufficient evidence supports

that offense, then the appellate court has the discretion to remand for resentencing or retrial on the lesser-included offense.” *Id.* ¶¶ 43, 47.

When deciding whether to overturn precedent, this Court considers “such common-sense factors as whether the precedent is a remnant of abandoned doctrine, whether the precedent has proved to be unworkable, whether changing circumstances have deprived the precedent of its original justification, and the extent to which parties relying on the precedent would suffer hardship from its overruling.” *State v. Montoya*, 2013-NMSC-020, ¶ 40 (quotation marks and citation omitted). However, this Court could clarify *Revels* without contradicting any of the above principles at the core of that decision. To 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 all these principles apply, depriving that one conclusion of its original justification.

Here, as discussed above, the jury necessarily found the elements of the lesser-included offense of CSCM (position of authority) were proven beyond a reasonable doubt. There is no genuine factual question the jury could resolve on retrial that was not already resolved at the first trial. The jury was instructed upon the lesser-included offense of CSCM (position of authority). The record demonstrates sufficient evidence to support a conviction for CSCM (position of authority). Thus, the

principles of justice would be better served by remanding this case for resentencing of CSCM (position of authority). The only thing standing in the way of this result is the Court's conclusion drawn from those principles that: "the direct remand rule applies only to cases that are reversed on appeal for insufficient evidence." *Revels*, 2025-NMSC-021, ¶ 40.

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 a lesser-included offense, and the basis for reversal affected only the greater but not the lesser offense. The interests of justice should not be overshadowed by a rule meant to further those interests.

A holding to this effect would be consistent with other courts that have not demanded retrial under such circumstances, including the United States Supreme Court. In *Morris v. Matthews*, a defendant, who had pled guilty to aggravated robbery, was subsequently charged with aggravated murder in a separate trial, which was aggravated because it was done while fleeing immediately after committing the aggravated robbery. 475 U.S. 237, 240-42 (1986). The lower courts held that a conviction of aggravated murder was barred by double jeopardy. *Id.* at 242-44. However, the jury had made all the findings necessary to convict the defendant of murder. *Id.* On review, the Supreme Court held "[i]n cases like this . . . where it is

clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause." *Id.* at 247.

A myriad of other states have allowed resentencing rather than retrial upon remanding a case on grounds other than sufficiency. For example, in *State v. Sanseverino*, the Connecticut Supreme Court concluded that "in the case of any other harmful instructional impropriety, the appropriate remedy is to reverse the defendant's . . . conviction and to remand the case for a new trial." 969 A.2d 710, 717 (Conn. 2009). However, "[u]nder the unique circumstances of this case, [the court] conclude[d] that the state [was] entitled to the modification of the judgment that it seeks," from the greater offense to the lesser offense. The court gave a few reasons for its decision, one of which being it could "conceive of no reason why it would be unfair to the defendant to impose a conviction of [the lesser offense]." *Id.* The result was instructions to the appellate court to "remand the case to the trial court with direction either to order a new trial on the kidnapping charge or to render a judgment of conviction of unlawful restraint in the second degree[.]" *Id.* at 723.

These cases do not stand alone. *See State v. Boots*, 848 P.2d 76, 81 (Or. 1993) ("On remand the state may choose whether to reduce the defendant's conviction and sentence to murder . . . or to retry the charge of aggravated murder. If the state

chooses to retry the charge of aggravated murder, the trial may be limited to the determination of whether defendant is guilty of the enhanced crime of aggravated murder, and the jury may be instructed that defendant's responsibility for the intentional murder of the victim has been established."); *People v. Richards*, 227 Cal. Rptr. 3d 95, 103 (Cal. Ct. App. 2017) ("When a greater offense must be reversed, but a lesser included offense could be affirmed, [courts] give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (internal quotation marks and citation omitted)); *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990) ("In view of our analysis, the appropriate relief is not to reverse the greater conviction outright but to reverse and remand to the trial court, giving the state the option of either retrying . . . or of having the trial court sentence defendant on the less serious offense"); *LaPierre v. State*, 734 P.2d 997, 1005 (Alaska Ct. App. 1987) ("Upon remand, the state should be permitted the option of proceeding to retry the reversed convictions or of requesting entry of judgments for manslaughter as to each count."); *People v. Sepulveda*, 65 P.3d 1002, 1008 (Colo. 2003) ("[T]he People may choose to request a conviction for second-degree murder, or may elect to retry the defendant for the greater offense of first-degree murder."); *Brockington v. United States*, 699 A.2d 1117, 1121 (D.C. 1997) ("[The court] therefore . . . remand[s] for retrial . . . or for entry of a judgment of conviction of simple possession at the government's option."); *Cochran v. State*, 576 S.E.2d 867,

869-70 (Ga. 2003) (“[The court] remand[s] to the trial court for retrial or re-sentencing.”); *Commonwealth v. Gonzalez*, 14 N.E.3d 282, 285 (Mass. 2014) (“Because the error affected only the jury’s finding regarding [an element], and did not affect the jury’s finding regarding the elements of murder in the second degree, the Commonwealth shall have the option of either proceeding with a new trial on the murder indictment or accepting a reduction of the verdict to murder in the second degree.”); *People v. Gridiron*, 460 N.W.2d 908, 912 (Mich. Ct. App. 1990) (“The appropriate procedure for this case is to reverse the conviction and instruct the trial court to enter a conviction on the lesser offense and to resentence accordingly, with an option to the prosecutor to retry on the original charge on which defendant was convicted.”).

In *Rutledge v. United States*, the Supreme Court acknowledged this principle in dicta. See 517 U.S. 292, 305-06 (1996). In *Rutledge*, the Defendant had been convicted of both the greater offense of continuing criminal enterprise and its lesser offense of conspiracy to distribute controlled substances. *Id.* at 292. Although his conviction was reversed for trial error as opposed to sufficiency of the evidence, the Court noted, “there is no reason why this pair of greater and lesser offenses should present any novel problem beyond that posed by any other greater and lesser included offenses” and cited multiple cases issuing direct-remand for insufficiency of the evidence. *Id.* at 305. But when discussing those cases, the Court did not

confine its language to sufficiency of the evidence. Instead, it stated that “federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense.” *Id.* at 306.

The principles outlined in the appellate cases cited in *Rutledge*, like those outlined in *Revels*, are not confined to reversals for insufficient evidence. For instance, in *State v. Bay*, the court stated:

This procedure ordering the entry of a judgment of guilty of the lesser and included offense does not constitute interference with the function of the trial judge or jury in a criminal trial, but rather constitutes action in accordance with the findings of the trier of fact. Moreover, this procedure does not deprive defendant of his right to have a trial judge or jury decide on the proof of the elements of the lesser and included offense, but rather recognizes that the trier of fact has already made that decision. This procedure also does not subject defendant to double jeopardy, because there will be no new proceedings in which the state will be given an opportunity to relitigate his guilt.

567 So.2d 798, 799 (La. Ct. App. 1990) (internal quotation marks and citation omitted).

Direct-remand does not have to be confined to sufficiency cases. In fact, the principles it stands upon encourage its expansion to include certain instances of fundamental error. Courts across the country have encountered instances when these principles support direct-remand upon a non-sufficiency issue, indicating that these circumstances are not unique to sufficiency cases.

If the error here was fundamental and therefore must be reversed, then at the very least, direct-remand can spare the victim from the injustice of having to endure retrial over a mechanical response to technicalities. Therefore, this Court should direct remand for resentencing on CSCM (position of authority) if it holds that the error here was fundamental and requires reversal.

III. Public policy warrants affirmance or, in the alternative, direct-remand.

Victims are less likely to report sexual assault when they have little faith they will be believed or that conviction will actually occur. Alexa Sardina & Alissa Ackerman, *Restorative Justice in Cases of Sexual Harm*, 25 City CUNY L. Rev. 1, 6 (2022). The lack of faith in our justice system's handling of sexual assault is clear in the sentiment that the judicial process feels so violative, victim's will refer to it as "the second rape." *Id.* 5-6.

In this case, the victim was a child, who suffered a sexual penetration by a person who used their position of authority and physical force to compel her into submitting. The fact that the State clarified that the sexual act here was penetrative and by a person in a position of authority, should not undue jury findings that make up a cognizable crime. It is hard to imagine a victim walking away from such a reversal with the notion that their experience, their trauma, or the wrong that was done to them were taken seriously.

Sex crimes are the least reported category of crime, even more so when committed upon children, even more so while the victim is still a child. *Id.* at 3. Victims have attributed the decision not to report to “a belief that the police could not do anything about the crime, fear that they would not be believed, fear of retribution, and feelings of shame and embarrassment.” *Id.*

Many survivors are particularly concerned that they will endure a traumatic and humiliating trial and still not receive justice. Oftentimes, trials are traumatic not only for the survivor but also for those that support them. Moreover, when continuances are filed, plea bargains are offered, or when reduced sentences are negotiated, people who have been sexually harmed may feel revictimized.

Id. at 11-12. If retrial is called for and a victim cannot bear to go through all of this again, a person who raped a child goes free.

Nearly twenty percent of women and eight percent of men are sexually assaulted before they reach the age of eighteen. *Id.* at 3. However, the rates are likely far higher because of how underreported sex crimes are. *Id.* at 4. Only approximately thirty-six percent of rapes and thirty-four percent of attempted rapes are reported to police. *Id.* Approximately sixty to seventy percent of adults that experienced sexual abuse in their youth never report this abuse as children. *Id.* Only ten to eighteen percent report within their lifetime. *Id.* Out of every thousand sexual assaults, only twenty-five people will be incarcerated. *Id.* at 7. Already, “[l]ess than [one percent] of all rapes and attempted rapes lead to a conviction.” *Id.*

Victims of sexual assault have already lost so much faith in the process. *See id.* at 11-12, 33-34; *see also* Maria Imperial & Jeanne Mullgrav, *The Convergence Between Illusion and Reality: Lifting the Veil of Secrecy Around Childhood Sexual Abuse*, 8 St. John's J. Legal Comment. 135, 137-44 (1992) (detailing many of the struggles child victims endure in both bringing an abuser to justice and coping with the long-term effects of such experience).

People who have experienced sexual harm report that their victimization often begins a lengthy process that involves continuous interactions with various criminal legal professionals, including law enforcement and attorneys.² Unfortunately, this contact with the criminal legal system often does more harm than good. They often encounter individuals who are skeptical about their claims, diminish their credibility, minimize their experience, are dismissive of them entirely, or are generally insensitive to their experience . . . behaviors by criminal legal professionals and others [can] exacerbate the trauma of rape and other types of sexual harm.

Sardina, *supra* at 5-6.

The criminal legal response to sexual harm is problematic because it often confuses, disappoints, and traumatizes survivors in several ways including complex rules and procedures of the legal system, the public nature of the legal proceedings, the relegation of a survivor's role in legal proceedings, the requirement to retell the intimate details of the act of sexual harm, the sequestering of witnesses who may be the survivor's friends and family, and defense attorney questioning which may exacerbate the self-blame the survivor is already experiencing.

Id. at 33-34. This process is all the more traumatic for a child.

² In New Mexico, this process is further prolonged by the expectation that survivors, as a matter of course, describe their assault again in their pretrial statements under Rule 5-503 NMRA.

After having been sexually abused, most children feel responsible for the abuse or are too ashamed to reveal it. The sexually abused child may experience feelings of self-blame, anger, fear, confusion, shame, and depression. Sexual abuse often occurs where there is a relationship based on trust and authority such as the father/daughter relationship.

Imperial, *supra* at 137.

The child in this case was one of the rare few to come forward about her assault while still a child. She was brave in her pursuit of justice. CL was forced to tell her story over and over again. [12-19-2023 CD 1:54:27-3:34:07] She was not permitted to have the support of her aunt while she told her story because her aunt was a named witness. [*Id.* 3:07:50-08:41] Although “penetration” as it is understood at law is different than how most laymen understand penetration in the sexual context, Defendant attacked CL’s credibility because she struggled to identify what attorneys meant by “penetration.” [*Id.* 2:44:47-3:34:07] This was because Defendant’s penetrative acts were to put his penis between her vaginal lips and into her mouth. [*Id.* 2:33:29-35:47]

Although children often repress such memories, CL was faulted for not mentioning during an interview that Defendant had put Defendant’s genitals in her mouth. [*Id.*] She forced herself to continue with her testimony, despite the shock of realizing Defendant was, in fact, in the courtroom with her, having previously not recognized Defendant. [*Id.* 1:57:26-53, 2:40:10-56] CL persevered, even when asked repeatedly if she needed a break. [*Id.* 2:45:35-49, 3:25:44-52]

CL was thirteen when she was assaulted. [*Id.* 1:56:48-57:51] She was seventeen when she testified. [*Id.*] She had been dealing with this case for almost two years. [*See RP 1*] At the end of the day, the jury believed CL and found beyond a reasonable doubt that Defendant committed a sex crime.

A child has no choice but to depend upon and trust someone in a position of authority over them. A person who betrays this trust and uses their position of authority to coerce a child into sexual conduct is even more abhorrent than a stranger who engages in such conduct. New Mexico has a substantial public interest in keeping its children safe. There is a substantial public interest in not allowing for a technical loophole to permit defendants to demand retrial, after being held guilty of criminal conduct beyond a reasonable doubt.

That a single child will be asked to relive their trauma because of an error that caused no real harm to the perpetrator should be enough. That three children would have to do so should be enough. *See State v. Johnson*, A-1-CA-42157; *State v. Dunklee*, A-1-CA-42153. If not, the effect on victims in the aggregate should be enough.

Victims entangled in the criminal justice process should not have to endure an endless series of proceedings that undermine their dignity and repeatedly re-victimize them. Rather, they deserve respect and support, as well as a swift and fair resolution [of] their cases. While the rights of criminal defendants must be zealously protected, they should not overshadow the parallel rights of victims.

Hon. Dean Pineles, *State of Vermont v. Robert Lyle Percy: Historic Criminal Justice Cases*, 49 Vt. Bar. J. 24, 26 (2023).

Our legislature meant to protect children. *Figueroa* was supposed to maintain deference to the findings of the jury. *Revels* was supposed to uphold judicial interests. The rules our courts have come up with to further these ends should not be used against them.

Defendant raped CL. A jury found her guilty of every element of a cognizant crime. That should be enough not to prolong CL's suffering anymore. Whether the jury called the crime by the right name, it knew what it was going. The jury convicted Defendant of a criminal sex crime against a child as a second-degree felony upon conduct we deem illegal. There is no excuse to subvert their ruling here.

CONCLUSION

For the reasons argued above, the State respectfully asks this Court to sustain Defendant's conviction or, in the alternative, apply the direct-remand rule for entry of a conviction for CSCM (position of authority).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 12, 2026, I filed a true and correct copy of the foregoing brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means.

/s/Henry Chynoweth

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