



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 REPLY BRIEF

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 Reply Brief complies with the 4,400 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: 4,078 words. I relied on the word count provided by Microsoft Word, Microsoft Office Standard.

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INTRODUCTION

Defendant ultimately argues that form should take priority over substance, no matter the cost. The State responds to specific arguments made by Defendant and otherwise relies upon the arguments put forth in its brief in chief.

Defendant asserts that the State “is unhappy with the result in this case.” [AB 1] That is correct. The State is unhappy that Defendant was found guilty of raping a child, but the Court of Appeals held a purported formalistic error, which did not prejudice Defendant, warranted discarding these findings. Defendant is less correct when she asserts “the State seeks to avoid the consequences of its error.” [AB 3] This is not a case of the State trying to avoid relitigating a victimless crime. Rather, the State seeks to avoid the unjust consequence of requiring a child victim to testify again for a procedural error that is not so fundamentally unfair as to justify Defendant avoiding the consequences of sexually assaulting a child.

More often than not, Defendant does not actually engage with the State’s arguments. Instead, Defendant insists form over substance, without explaining any purpose that form would serve. [See, e.g., AB 23-26 (never explaining what role the conclusion in *State v. Revels* plays when none of the principles behind it are served)] Defendant recites facts from cases without explaining their relevance or, on the other side, why differing facts meaningfully distinguish these cases. [See, e.g., 18-21 (never clarifying why differing facts from *State v. Apodaca* and *State v. Calderon*

change the meaning of “force or coercion” here or change what a jury must find to satisfy requirements for such a conviction)] Defendant responds to the State’s criticisms of *State v. Figueroa* by pointing out that the State’s criticisms are at odds with the case they criticize. [See AB 5, 16-17, 21-22] Defendant criticizes the State’s arguments as to the direct remand rule by pointing to the conclusion in *Revels* as the only explanation why the reasoning behind that conclusion should not matter. [See AB 23-26] But the purposes underlying the direct remand rule mattered to this Court when it dedicated a substantial portion of that opinion explaining why the direct-remand rule works the way it does. *See Revels*, 2025-NMSC-021, ¶¶ 39-47.

Defendant summarizes her critiques of the State’s arguments very succinctly when she notes, “[t]his is a results-oriented argument,” while asserting such arguments have no place in stare decisis considerations. [AB 24] Defendant characterizes such arguments, such as when the State refers to the principles behind *Revels*, as being “[un]principled.” [AB 25] Yet, the purpose of the law is not to ignore the results of procedure. *See State v. Hodge*, 1994-NMSC-087, ¶ 31, 118 N.M. 410 (“Throughout history men have had to suffer from legal systems which worshipped rigid formalities at the expense of justice The rules of criminal procedure were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply the means to an end: the achievement of equal justice for all.” (text only)).

We do not draft criminal codes to test prosecutors' good form. We draft them to prohibit crimes, such as rape. *See State v. Ogden*, 1994-NMSC-029, ¶ 27, 118 N.M. 234 (“[S]trict construction is only one factor influencing interpretation of punitive legislation, and it should not be used to defeat the policy and purposes of a statute. . . . [T]he language of penal statutes should be given a reasonable or common sense construction consonant with the objects of the legislation, and the evils sought to be overcome should be given special attention.” (internal citations omitted)).

The rules Defendant relies upon were similarly not made simply as obstacles for prosecutors to overcome, but to protect *fundamental* rights, *fundamental* unfairness, and the integrity of our judicial system. *See, e.g., State v. Garvin*, 2005-NMCA-107, ¶ 13, 138 N.M. 164 (“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.” (internal quotation marks and citation omitted); *State v. Jimenez*, 2007-NMCA-005, ¶ 26, 141 N.M. 106 (stating fundamental error may be found under circumstances that “implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” (internal quotation marks and citation omitted)). Even stare decisis does not exist for its own sake, but to force courts to think *critically* about their decisions before overturning precedent. *See Romero v. Byers*, 1994-NMSC-031, ¶ 12, 117 N.M. 422 (“Not one of the five

justifications that were valid in *Roseberry* remains valid today . . . While the doctrine [of stare decisis] serves the values of uniformity, predictability, and stability in the law, it was never meant to perpetuate the harsh and unjust results which blind adherence mandated, or to effectuate a petrifying rigidity in the law. A change in conditions compels adoption of a different rule.” (text only)).

ARGUMENT

I. Defendant’s argument that it is per se fundamental error to be convicted of a nonexistent crime is unavailing for someone who was not “convicted” of CSPM (position of authority).

Defendant relies on undefined terms such as “nonexistent” and “legal nullity” to insist our precedent demands a mechanical response here, and yet New Mexico has a definition for “conviction” that does not work to Defendant’s advantage. While a jury’s verdict of guilty may be commonly referred to as “convicting” a defendant of a crime, New Mexico defines a “conviction” by the court’s judgment and distinguishes it from the jury’s verdict. *See State v. Keener*, 1981-NMCA-139, ¶ 16, 97 N.M. 295 (“The general rule is that it is the judgment, not the verdict, that is the ‘conviction.’” (internal citation omitted)); NMSA 1978, § 30-1-11 (1963) (“No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court . . .”).

Here, the judgement and sentence referred to CSPM (force or coercion). **[RP 361]** Furthermore, Defendant’s arguments referring to an “error in the charging

document” are equally unavailing where she was charged with CSPM (force or coercion). **[RP 1]** Just as a jury’s verdict does not implicate double jeopardy concerns until the court has actually entered a judgment on such conviction, this Court should not accept that a “conviction” for these purposes refers exclusively to the jury’s guilty verdict. *Cf. State v. Soutar*, 2012-NMCA-024, ¶ 12 (“Our Supreme Court has previously recognized that jeopardy attaches when the court enters a judgment and imposes a sentence on the guilty plea.” (internal quotation marks and citation omitted)).

The same mistake in *Figueroa* is even more pronounced, given the Court’s opening sentence in its opinion: “[a] jury convicted [the defendant] of two counts of [CSPM-II] perpetrated against a child between the ages of thirteen and eighteen through force or coercion contrary to NMSA 1978, Section 30-9-11(E)(1) (2009).” 2020-NMCA-007, ¶ 1. This highlights that in the span of its own opinion the Court narrowed its understanding of a “conviction” in order to turn a UJI deviation into a “nonexistent crime.”¹

¹ Defendant notes that “[t]he State does not [explicitly] ask this Court to overturn *Figueroa*” **[AB 8]** The State has already explained that the Court in *Figueroa* did not consider arguments regarding CSPM (physical force or coercion) or CSCM (position of authority). **[See BIC 23]** Therefore, despite the Court of Appeal’s erroneous analysis of the coercion alternative of “force or coercion,” the question before this Court is not so much whether the decision in *Figueroa* was right for *Figueroa*, as whether *Figueroa* should be restrained or clarified to resolve the conflict between that case and cases such as *Calderon*. That being said, the State would not object to overturning *Figueroa* altogether.

Defendant's grievance cannot be for a conviction of a nonexistent crime because Defendant's grievance falls under an entirely different branch of jurisprudence. According to *Figueroa*, the moment a crime is evaluated to be "nonexistent" it is "per se" fundamental error. *Figueroa*, 2020-NMCA-007, ¶ 13. That is not how New Mexico treats UJI deviations. A jury instruction facially describing an offense without an essential element could be characterized as not describing a cognizant crime. Yet, our courts look deeper than that to determine whether a defendant was *substantively* found guilty of a crime. *See State v. Sivils*, 2023-NMCA-080, ¶¶ 20-22 (describing the exceptions under which a jury instruction facially omitting an essential element is not error). Thus, a merely deviant jury instruction is not a nonexistent crime. Therefore, "conviction" for a nonexistent crime cannot possibly refer in a vacuum to a jury verdict based on deviant jury instructions.

Defendant's central argument is that the State is not entitled to a more nuanced examination of the circumstances here because it called a thing by the wrong name. **[See generally AB]** Defendant called a jury instruction error a "conviction" for a nonexistent crime. The Court of Appeals applied the wrong doctrine. Doubtless, Defendant would prefer if this Court examined the actual underlying issues, instead of applying a mechanical response based on a misnomer and affirming the district court on these grounds alone.

This does, however, resolve Defendant's confusion as to how this Court could possibly affirm Defendant's conviction. [See AB 12 ("It is unclear what the State is asking this Court to do.")] CSPM (force or coercion) is undoubtedly a cognizant crime. See § 30-9-11(E)(1) (CSPM (force or coercion)). Defendant argues the jury instruction was for an invalid legal theory, [AB 12] but this same argument can be made for any jury instruction that seems to omit essential elements of the crime charged. "[N]ot every failure to instruct on an essential element amounts to fundamental error." *Sivils*, 2023-NMCA-080, ¶ 11. The question here is whether the jury was sufficiently instructed for a finding of CSPM (force or coercion), whether the jury instruction fell short of fundamental error because CSCM (position of authority) would have imposed the same punishment, or whether *Revels* should be clarified to allow direct-remand for CSCM (position of authority).

II. Defendant insists that the jury did not properly convict Defendant of second-degree CSPM but dodges around explaining what more needed to be proved.

Defendant gives away the game when she insists that the "force or coercion" finding "is significant because it establishes a lack of consent." [AB 18] Exactly. CL was a child of thirteen. [12-19-2023 CD 2:07:24-38:13, 1:57:13-24] Defendant was an adult and there was no question as to whether she was married to CL or less than four years older than her. One cannot coerce a willing participant under any definition of that word. Compare *Figueroa*, 2020-NMCA-007, ¶ 11 ("Coercion

under a position of authority theory occurs when a defendant occupies a position which enables that person to exercise undue influence . . . so as to control the free action of [a child's] will.” (text only)), *with Apodaca*, 2025-NMSC-015, ¶ 37 (stating that the essence of consent is “that it is given out of free will” (internal quotation marks and citation omitted)). The question of whether CL consented was answered in the jury’s findings. **[See RP 315]** Defendant seems to require nothing more to satisfy “force or coercion.” **[See AB 18]** That is why the simplest explanation of the issue here is the most revealing: should Defendant be convicted of raping a child based on a jury’s finding that she no less than raped a child?

Defendant continuously calls CSPM (position of authority) a nonexistent crime, but she never explains how she would define a “nonexistent crime.” **[See generally AB]** If the question is whether this conduct is criminalized, the answer can be found in our CSCM (position of authority) provision for a certainty. *See* NMSA 1978, § 30-9-13(B)(2)(a) (2003) (CSCM position of authority)). If the question is whether the theory of liability is valid, Defendant offers no explanation as to why the elements of CSCM (position of authority) fail to establish criminal liability if the “contact” in question is penetrative. **[See BIC 7-8]** (comparing the jury instructions for CSPM (position of authority) and CSCM (position of authority)) If the question is whether the State prosecutes under a valid statute, that is not a problem here. **[See RP 1]** (charging Defendant under Section 30-9-11(E)(1))

If Defendant expects crimes to be labeled identical to the phrasing used in statute, then this creates problems with such crimes as “felony murder” or “depraved mind murder,” which are never phrased those ways in our statutes. *See* NMSA 1978, § 30-2-1(A)(2)-(3) (1994). If Defendant expects jury instruction elements to perfectly mirror statute, this creates issues with just about every jury instruction, which almost always add language to the elements of a crime not found in statute. *Compare* § 30-9-11 (saying nothing of the State of New Mexico), *with* UJI 14-941(4) NMRA (requiring a finding that the crime took place in New Mexico). If Defendant expects the State to confine language to what is found in the same provision, or even the same statute, this creates a problem every time the State identifies what type of “force or coercion” was used by drawing from NMSA 1978, Section 30-9-10 (2005), instead of Section 30-9-11. *See* UJI 14-942 NMRA (CSPM (threats of force or coercion)). Even confining language to what is in *any* statute does not work for each occasion the State must identify the specific type of deadly weapon used to aggravate assault or identify the method of murder. *See State v. Traeger*, 2001-NMSC-022, ¶ 24, 130 N.M. 618 (“[I]t was necessary in this case to specifically name the instrument[, a baseball bat,] in the jury instructions.”).²

² The term “baseball bat” does not appear once in the New Mexico Statutes Annotated 1978.

CSPM (position of authority) is called a “nonexistent crime” because someone called it a “nonexistent crime.” Defendant very helpfully provides a list of other “nonexistent crimes” that demonstrates why the decision to characterize CSPM (position of authority) this way was inconsistent with every other time we have designated a crime “nonexistent.” [See AB 5-7 (listing cases involving such paradoxes as conspiracy to commit depraved-mind murder and assault with intent to commit a violent felony upon someone other than the victim)] As Defendant notes, “[c]ases are not precedent for issues not raised and decided.” [AB 19 (quoting *State v. Cortez*, 2007-NMCA-054, ¶ 16, 141 N.M. 623, parenthetically)]³ And, as Defendant points out, situations when the State merely narrows the scope of liability, and is not deficient regarding essential elements, have nothing to do with nonexistent crimes. [See AB 4-5 (stating that such facts mean *State v. Ferran-Sandoval* has “nothing to do with conviction of a nonexistent crime.”)]

Defendant says “the statute is clear,” [AB 15] but she cannot argue that it expressly prohibits prosecutions for CSPM (position of authority) because such express language does not appear in our statutes. *See generally* § 30-9-11. The amendment she relies upon merely replaced “position of authority” language with

³ This notwithstanding, Defendant contends that this Court should not consider how the circumstances of this case differ from those of *Revels* and *Figueroa* because those cases, she asserts, apply regardless. [See, e.g., AB 23 (“Regardless of the principles underlying the [direct-remand] doctrine, this is a ‘threshold matter.’”).]

the much broader language referring to “force or coercion.” [*See* **BIC 16-18** (discussing this legislative history)]

Far from finding our sex crimes statutes to be “clear,” our courts have cautioned “that looking solely to the plain meaning of the words used in our CSP statute is likely to result in a construction ‘contrary to the spirit of the statute’ and thus contrary to the Legislature’s intent.” *Calderon*, 2026-NMCA-026, ¶ 17 (quoting *State v. Stevens*, 2014-NMSC-011). Defendant’s “clear” reading requires a look beyond plain language, at legislative history, to find her amendment. [*See* **AB 22** (“The only findings the jury made relate to a repealed portion of the statute.”)] Our sex crimes statutes are a convoluted, seemingly contradictory, mess. A deeper analysis is required.

Defendant compares CSCM (position of authority) in the second degree with CSCM (force or coercion) in the fourth degree to assert that our Legislature distinguishes these two crimes. [*See* **AB 13-14**] This is true, but the difference is more helpful for the State’s case. The Legislature also distinguishes CSCM (force or coercion) in the fourth degree, Section 30-9-13(D)(1), from CSCM (force or coercion resulting in personal injury) in the second degree, *id.* (B)(2)(b), and CSCM (armed with a deadly weapon) in the second degree, *id.* (B)(2)(d). This does not negate the “force or coercion” inherent in CSCM (force or coercion resulting in personal injury). Nor does it mean that the way in which someone uses a deadly

weapon to commit sexual assault will not almost always involve perpetration through physical force or some coercive threat, at least inherently. Rather than argue against the State's point, Defendant highlights that a distinction by our Legislature does not foreclose significant or complete overlap. Instead, the Legislature's distinction demonstrates that use of a deadly weapon or one's position of authority makes the matter *worse* than baseline force or coercion.

Regarding the State's cited cases, Defendant is correct as far as she argues Illinois caselaw is not binding in New Mexico. **[See AB 7]** Defendant cites *People v. Tellez-Valancia*, 723 N.E.2d 223, (Ill. 1999) to diminish the persuasive authority of *People v. Melton*, 667 N.E.2d 1371 (Ill. App. Ct. 1996). **[AB 7]** *Tellez-Valancia* does in fact hold a remarkable resemblance to the case at hand and is aptly described by its dissent. *See* 723 N.E.2d at 226-230 (Rathje, J., dissenting) ("The defendants were charged with conduct that was unquestionably a crime when committed and has remained a crime ever since. . . . [The majority's conclusion] gives new meaning to the phrase 'legal fiction.' . . . There is nothing unconstitutional about forbidding [sexually assault of children] The majority exalts form over substance I invite any member of the majority to explain how the defendants would be prejudiced. I would particularly like to hear how the defendants were not given fair warning of the charges against them, and how the defendants will prepare their defenses differently now that they know that the name of the charged offense is

‘aggravated criminal sexual assault’ rather than ‘predatory criminal sexual assault of a child.’ . . . I cannot imagine a greater waste of judicial resources.”).

Defendant is also correct that *State v. Ocon* is instructive here. **[See AB 8-11]** However, Defendant misses that the *Ocon* Court’s decision to reverse a resisting, evading, or obstructing an officer conviction was based on the fact that “the jury was not instructed on the ‘resisting or abusing’ elements of [NMSA 1978] Section 30-22-1(D) [(1981)] that differentiate the offense from the other forms of resisting, evading, or obstructing an officer.” *Ocon*, 2021-NMCA-032, ¶¶ 25-27. While containing strong language exclusively pertinent to Section 30-22-1, *Ocon* was not decided on the basis that the jury was instructed on the wrong subsection, in and of itself, but because of the effect of that error, otherwise known as a result. *See id.* Yet, as discussed above, Defendant herself identifies consent as the crucial aspect of “force or coercion,” which was found by the jury here. Rather than demonstrating that the Court applies a different analysis when the jury was instructed on “the wrong statutory section,” **[AB 9]** *Ocon* demonstrates that the Court’s priority, even under such circumstances, is substance over form.

Rather than engage with the two fundamental error exceptions laid out in *Sivils* and *Ocon*, Defendant asserts that that (1) it is “per se” fundamental error to convict for a nonexistent crime, and (2) *Ocon* treats jury instructions addressing the wrong provision differently than instructions omitting essential elements. **[See AB**

9] But a *conviction* of a nonexistent crime did not occur here. And the Court in *Ocon* still looked to substance over form, even going so far as saying “although the jury instruction in Defendant’s case omitted *two* essential elements, reversal is not warranted.” 2021-NMCA-032, ¶ 13 (emphasis added). Clearly, the omission of essential elements is not assessed by how many are missing in form, but by whether they are present in substance. Therefore, it is not automatically fundamental error if a jury instruction resembles an instruction for a nonexistent crime, if it still requires the jury to find the essential findings for a cognizant crime.

Defendant is noticeably silent on whether “the jury implicitly [found] that the State [had] proven” perpetration by physical force and lack of consent. *Sivils*, 2023-NMCA-080, ¶ 19. Nor does she argue that “the jury’s verdict, considered together with the given instructions and the parties’ legal and factual presentations, leaves [any] doubt that the jury would have found the omitted element if properly instructed.” *Id.* ¶ 21 (text only). Perhaps because she cannot.

III. Defendant does not engage with the State’s arguments when she argues that the reasoning behind *Revels* should not matter because of the conclusion based on that reasoning.

Defendant argues that “[r]egardless of the principles underlying [the direct-remand] doctrine, this is a threshold matter. 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.” [AB 23

(internal quotation marks and citation omitted)] In other words, regardless of why this Court made a rule (that direct-remand only applies to sufficiency cases), this Court made the rule, so we should blindly follow it here. Defendant mistakes this Court addressing an issue before other issues in *Revels* with this Court having no regard for the reasoning behind its resolution to this issue. However, the principles underlying the direct-remand doctrine mattered to this Court when it dedicated a substantial portion of its opinion in *Revels* explaining *why* it was declining to apply the direct-remand rule in the way that it was. *See Revels*, 2025-NMSC0921, ¶¶ 39-47. If being a “threshold matter” was so conclusive, in and of itself, this Court need not have exerted so much energy on its explanation.

IV. Defendant’s critiques of the State’s public policy arguments are misplaced.

Finally, Defendant criticizes the State’s public policy concerns because “the error in this case was the State’s.” [BIC 26] However, that is not quite true, despite the State’s attempts to take responsibility for its own failures leading to this result. This error also belongs to the defense attorney, who did not speak up about the error; the court that missed the error; and broad, sweeping rulings based on limited circumstances. Yet CL would bear the heaviest burden for these failures—to get up in front of strangers and the person who betrayed and assaulted her to relitigate the most traumatic and vulnerable moment of her life. *That* is fundamentally unfair. *That* affects the integrity of our judicial system. If this is the only way to address a

prosecutor missing a use instruction in a UJI where the defendant's substantive rights are not infringed, then something has gone terribly wrong.

There are some fundamental rights that must be protected notwithstanding the defendant's apparent guilt. *Ocon*, 2021-NMCA-032, ¶ 8. Yet these protections must be employed "guardedly" and "only under extraordinary circumstances." *State v. Marquez*, 2016-NMSC-025, ¶ 46. With so much at stake for the victim, as well as defendant, it seems the right to be convicted of an "existent" crime should cut deeper than the mechanical right to a label. Forcing the victim, automatically, to testify again punishes her because a crime was given the arbitrary modicum of "nonexistent".

It is within the public's interest to criminalize rape, in every form. It is against public interest to subscribe to the notion that there is a form of rape that somehow falls outside our statutes when all common sense and reason tells us it does not.

Defendant raises separation of powers concerns. **[See AB 14-15]** The Legislature perhaps made a messy amendment, but the problem in this case was created by the judiciary. It is for the judiciary to decide whether the courts excuse a type of rape on a technicality. Or if the courts apply common sense and reason instead.

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 June 18, 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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