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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff/Petitioner,

vs.

S-1-SC-39383
A-1-CA-38116

TANNER AUTREY,

Defendant/Respondent.

ON CERTIORARI REVIEW TO THE
NEW MEXICO COURT OF APPEALS

DEFENDANT/RESPONDENT'S ANSWER BRIEF

APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT
CURRY COUNTY, NEW MEXICO
THE HONORABLE DREW TATUM PRESIDING

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STATEMENT REGARDING RECORD CITATIONS

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Citations to the exhibits are set forth by Exhibit number and, where appropriate, citation to the time-stamp: **[Ex. 55, Hour:Minute:Second]**

STATEMENT OF COMPLIANCE

The body of the attached answer brief exceeds the page limits set forth in Rule 12-318(F)(2) NMRA because counsel used Times New Roman, a proportionally-spaced type face.

As required by Rule 12-318(F)(3)-(G) NMRA, I certify that this brief is proportionally spaced and the body of the brief contains 10,700 words (not to exceed 11,000 for an answer brief). This brief was prepared using Microsoft Word, version 2016.

TABLE OF AUTHORITIES

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NATURE OF THE CASE

The State primarily faults the Court of Appeals memorandum opinion in *State v. Autrey*, No. A-1-CA-38116, mem. op. (N.M. Ct. App. April 12, 2022) (non-precedential), for relying upon its prior holding in *State v. Serrato*, 2021-NMCA-027, 493 P.3d 383. The State claims that *Serrato* was wrongly decided because it conflicts with past precedent and the Legislature's intent. **[BIC 5-23]** However, discerning legislative intent for dual punishment in the double jeopardy context is not simply a matter of looking at legislative history or whether dual punishment was previously permitted (under different statutory provisions and applying a different analysis). On the contrary, our courts have not hesitated to revisit precedent decided under prior double jeopardy analyses. *Cf. State v. Montoya,* 2013-NMSC-020, ¶¶ 2, 33-54, 306 P.3d 426 (reversing past cases premised on an older double jeopardy analysis); *State v. Porter*, 2020-NMSC-020, ¶¶ 8-10, 476 P.3d 1201 (discussing a case decided prior to this Court's adoption of the modified approach and recognizing that because of changes in the law, the reasoning in that case was "no longer supported" and did not control the Court's analysis of a double jeopardy violation under current law); *see also State v. Luna*, 2018-NMCA-025, ¶ 7, 458 P.3d 457; *State v. Reed,* 2022-NMCA-025, ¶¶ 15-16, 22, 510 P.3d 1261, *cert. denied* No. S-1-SC-39187 (Feb. 24 & May 3, 2022). This is because, as this Court has explained in distinguishing older cases, "determining

what the Legislature intended—or perhaps more accurately, what the Legislature most likely would have intended had it contemplated the potential overlap between particular statutes—is a task for which there is no simple test. The problem is exacerbated by the ever increasing number and complexity of criminal statutes." *Montoya,* 2013-NMSC-020, ¶ 33.

More fundamentally, the State advocates for a position wholly inconsistent with *Apprendi*, due process, and our current approach to double jeopardy to remedy errors caused by its own charging choices. Here, the State had other facts upon which it could have based aggravation to first degree kidnapping so as to avoid double jeopardy; the State simply chose not to do so. *Cf. Reed*, 2022-NMCA-025, ¶ 27 (explaining that is the State's responsibility to ensure that distinct conduct supports each charge tried).

Because the Court of Appeals, both in *Serrato* and this case, correctly applied current double jeopardy analysis, consistent with *Apprendi* and due process, and in accordance with this Court's double jeopardy approach to similar statutes, Tanner Autrey respectfully asks this Court to quash certiorari or issue an opinion affirming the Court of Appeals.

STATEMENT OF RELEVANT FACTS

On December 22, 2016, K'Tanna Mares accused Tanner Autrey of inflicting multiple injuries upon her during an hours-long struggle (including

injuries inflicted in the living room and injuries inflicted before and after an intervening phone call in the bedroom), before eventually raping her in his home. **[12/5/18 CD 1:29:32-42:13] [12/6/18 CD 11:17:24-18:08]** She claimed he had previously raped her in his home on three prior occasions **[12/5/18 CD 1:13:52-15:07]**, but said she did not tell her husband or authorities about them when they happened and continued to voluntarily return to Tanner's place. **[12/5/18 CD 1:15:07-49, 1:17:55-18:21]**; **[12/6/18 CD 9:46:30-49:15]**

Tanner maintained that all of the encounters, including the one on December 22, had been entirely consensual, albeit "aggressive." **[12/6/18 CD 7:56:52-57:09, 8:08:55-10:09, 8:12:14-15:04, 8:33:56-35:06, 8:44:00-21, 8:47:30-48:00]**

For the events on December 22, a grand jury indicted Tanner on one count of second-degree criminal sexual penetration (injury); one count of first-degree kidnapping (intent to inflict death, injury, or a sexual offense); one count of aggravated battery on a household member (no great bodily harm); and one count of interference with communications. **[RP 1-2]** The State dropped charges related to subsequent allegations of witness intimidation and bribery of a witness before trial, and it does not appear that the State ever pursued charges related to the three

prior alleged rapes.[1] **[12/6/18 CD 6:13:11-48]** Tanner's case went to trial on December 5-7, 2018.

K'Tanna's testimony at trial

K'Tanna met Tanner at a church picnic in 2008 when she they were both teenagers and carried an on-again-off-again friendship with him ever since. **[12/5/18 CD 1:07:10-08:00, 1:09:50-1:10:26]** They had a brief consensual sexual relationship when they were teenagers, but since that time had just been friends. **[12/6/18 CD 9:36:44-37:21, 9:42:03-57]**

K'Tanna said that their relationship became more intense around October 2016; they were talking and texting almost every day and hanging out on occasion. **[12/15/18 CD 1:10:10-11:00]** K'Tanna was twenty-one years old in 2016, and had been married to Logan Hartman for two-and-a-half to three years. **[12/5/18 CD 1:05:50-06:30, 1:08:00-20]; [12/6/18 CD 9:37:21-43]** However, she turned to Tanner for emotional support because she was having a difficult time with her best friend Heather Begley and needed someone that cared about and supported her.

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[1] The State unsuccessfully sought to exclude discussion of the prior alleged rapes, although it did limit discussion thereof. **[RP 176-78, 208-13, 226-27]** The court excluded the fact K'Tanna had, during defense counsel's interview, disclosed that someone named "Matt" also raped her around this time. **[9/26/28 CD 2:12:30]; [RP 227]** However, Tanner mentioned it in his testimony and during the police interview that was played for the jury. **[12/6/22 CD 8:37:09-23]; [Ex. 55, 23:55-24:10]** However, the record contains no details of those allegations (timing, location, who the person was, etc.) and it is not clear the State ever pursued charges.

[12/5/18 CD 1:11:50-12:47] Although K'Tanna testified that she and Tanner were just friends, she did not tell her husband, best friend, or anyone about her relationship with Tanner, and acknowledged discussing what she characterized as "rape fantasies" with Tanner. **[12/5/18 CD 1:11:30-50, 1:12:47-13:52]; [12/6/8 CD 8:57:00-59:14, 9:39:42-42:03]**

From Thanksgiving through December 22, K'Tanna and Tanner had sexual relations four times. **[12/5/18 CD 1:13:52-15:07]** K'Tanna claimed that she consented to none of them. **[*Id.*]** However, she described voluntarily returning alone to his house before each of these encounters. **[12/6/18 CD 9:46:30-49:15]**

With respect to the first three uncharged rapes, K'Tanna testified that she did not report them to anyone and continued talking to, texting with, and seeing Tanner afterward. **[12/5/18 CD 1:15:07-49, 1:17:55-18:07]** She did not report them because she did not want to reveal that she was spending time with Tanner. **[1:17:31-18:21]** She testified that she continued to communicate and visit with Tanner because she was hoping he could explain his prior actions to her satisfaction. **[1:15:49-16:28]**

K'Tanna testified that the first three incidents were not "violent" like the last one **[12/5/18 CD 1:16:28-17:46]; [12/6/18 CD 10:34:46-35:40]**, but did not offer any specifics about them aside from saying that she feared Tanner during them because of his lack of emotion. **[12/6/18 CD 10:35:40-37:10]** In text messages,

K'Tanna also appeared upset that Tanner was seeing other individuals at the time. **[Ex. 1-3]**

Regarding the charges here, K'Tanna testified that Tanner contacted her on December 21 and asked for a chance to finally explain himself before they went their separate ways. **[12/5/18 CD 1:20:35-21:20, 1:22:15-22:30]** She agreed, and went to his house around midnight, after she got off work. **[1:24:08-56]** She called her husband and told him she would be late getting home and gave him a false excuse; she did not tell him where she was going. **[12/5/18 CD 1:23:00-24:00]; [12/6/18 CD 9:49:47-50:30]**

When she entered Tanner's house, he locked the door behind her. K'Tanna testified that this was what he always did. **[12/5/18 CD 1:24:22-56]** They talked for a while, but Tanner did not attempt to explain his past behavior, so K'Tanna told him she was going to leave. **[1:26:03-27:14]** Tanner requested a hug. **[1:27:14-57]** When K'Tanna tried to pull away from the hug, he would not release her. **[1:27:57-28:27]**

Tanner pushed her over a loveseat. **[1:29:32-30:16]** She wriggled free, ran to the door and tried to open it, but he slammed it shut on her hand and then pushed her into the Christmas tree next to the door. **[1:30:16-31:08]** Tanner got mad at her for messing up the Christmas tree and then forced her into the bedroom, hitting her head on the door frame. **[1:31:08-32:15]**

In the bedroom, K'Tanna said that they struggled violently for hours over her phone while Tanner also slowly undressed her. **[1:33:45-35:14]** K'Tanna explained that the struggle happened all over the room because when she would get her phone, Tanner would grab it away and throw it across the room. She would throw whatever objects she could, "trash[ing] everything," to distract him and get to the phone only for him to pull her away from it again. **[12/5/18 CD 1:33:45-35:14]; [12/6/18 CD 11:00:57-01:58, 11:03:40-05:17]** Throughout the assault, K'Tanna asked Tanner to let her go, but he kept choking her, striking her in the face, spitting, yelling at her, and pinning her to the ground. **[12/5/18, 1:35:19-37:10, 1:38:17-39:41]; [12/6/18 CD 10:56:23-57:15, 10:58:24-59:39]** She said that Tanner also got a gash on his forehead when she head-butted him during the struggle and, after blood dripped on her face, he "freaked out" and asked if she was bleeding, but she did not want to tell him it was his. **[12/6/18 CD 10:59:39-11:00:57]**

At some point while they were struggling in the bedroom, her bracelet broke, which upset her. Tanner went to the kitchen to get a plastic bag to collect the beads for her. **[11:18:00-19:00]** While he was gone, K'Tanna called a male friend she thought could intimidate Tanner, but the friend did not pick up the

phone.[2] **[11:19:00-22:15]** K'Tanna did not call the police or her husband since, at this point, she still did not want anyone to know where she was. **[*Id.*]**

After the phone call and additional struggling, K'Tanna was exhausted. **[12/5/18 CD 1:37:20-38:17]** Tanner bound her arms behind her back with duct tape. **[1:37:20-38:17]** Tanner then had her lay with him a while before he pulled her on top of him and penetrated her vaginally against her will. **[1:38:17-40:48]** He also unsuccessfully attempted to penetrate her anally and orally. **[1:40:50-42:13]** K'Tanna testified that the entire encounter lasted approximately four hours; they fought for more than two hours, and the rape itself lasted another hour or two, though not as long as the physical struggle which preceded it. **[12/6/18 CD 11:17:24-18:08]**

The assault ended when Tanner left the room and K'Tanna was able to retrieve her phone, plug it in, and respond to a phone call from her husband. **[12/5/18 CD 1:41:55-45:10]** She yelled for her husband to call the cops and gave her approximate location. **[1:44:36-45:10]**

Tanner walked in, asked her why she would do that, and noted that she had gotten his address wrong. **[12/5/18 CD 1:45:10-45:33]; [12/6/18 CD 11:27:57-28:43, 11:30:21-56]** He then freed her from the duct tape and hustled her out the

[2] It is unclear if this is a reference to a 1-2 minute call that apparently occurred around 2:20 a.m.—though testimony suggests that was made to her husband—or if

door, still naked and holding her clothes. **[12/5/18 CD 1:45:10-46:26]** K'Tanna was met outside by her best friend (and housemate) Heather, and then taken by ambulance to the hospital. **[1:46:00-47:53]**

Testimony of the police officers

Various officers testified about photographing and interviewing K'Tanna and Tanner and searching Tanner's residence. **[1:36:59-37:49, 1:45:05-31, 1:49:24-55:53, 2:02:16-02:54]** Officer Loomis observed redness on K'Tanna's arm and a few scratches on Tanner's arms and neck. **[12/6/18 CD 2:04:51-05:27, 4:40:08-44:05, 4:44:17-46:47]** Neither Officers Loomis or Sena observed or photographed any gash or injury on Tanner's head. **[2:04:59-5:27, 4:47:42-49:00, 6:09:08-09:22]**

Detective Scope indicated that Tanner's home appeared "tidy" and the only thing that looked messed up was the bedsheets, not the Christmas tree or anything else in the bedroom. **[1:50:27-54:45]**

Tanner's interview with police was admitted during Officer Sena's testimony. **[Ex. 55]**

Testimony of the SANE

The Sexual Assault Nurse Examiner observed and photographed numerous bruises and injuries on K'Tanna **[2:20:08-21:28, 2:24:21-31:47]**, but could not say

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she is referring to a different call. **[12/6/18 CD 4:21:44-23:24, 4:32:37-34:00,**

when the bruises were inflicted. **[2:31:47-33:34]** The SANE also observed redness and inflammation in the vaginal area, a vaginal laceration which she typically associated with child birth, and some injured areas around the anus. **[2:37:32-40:31, 2:42:03-52]** She indicated that, in her experience, the vaginal laceration was not typical for consensual sex **[2:41:49-42:03]**, although her experience examining individuals who had engaged in consensual rough sex was limited. **[3:24:15-3:26:00]**

Testimony of Tanner Autrey

Tanner testified in his own defense. **[12/6/18 CD 7:50:10-8:50:20]** He testified that he and K'Tanna had a history of engaging in consensually forceful and aggressive sexual behavior, including during the three prior sexual encounters between November and December. **[12/6/18 CD 7:56:52-57:09, 8:08:55-09:13, 8:12:14-55, 8:44:00-21]** He also stated that his encounter with K'Tanna on December 22, while forceful, was entirely consensual. **[8:09:10-10:09, 8:12:14-15:04, 8:33:56-35:06, 8:47:30-48:00]**

Tanner explained that after K'Tanna arrived that day, they talked for a bit, he gave her a hug, and was planning on giving her a scarf as a Christmas present.[3] **[8:05:25-06:51]** They started kissing and moved to the bedroom where they had

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4:37:55-38:10]

consensual but aggressive sex. **[8:08:12-10:09, 8:14:32-15:14]** There were numerous breaks where Tanner left the bedroom. **[8:23:55-24:35]** During one, at around 2:20 a.m., K'Tanna called someone whom he believed was her husband. **[8:24:35-25:40, 8:35:27-36:20]** After that phone call, he taped her hands together with consent, and they resumed having consensual sex. **[8:12:55-16:23, 8:26:16-46]** Tanner testified that when she told him she did not want him to do something (like oral or anal sex), he stopped. **[8:16:23-17:40]** After they finished and he had removed the duct tape, he walked into the room and heard her telling someone on the phone to call the police. He asked her why she did that and said she gave the wrong address. **[8:25:08-26:16]**

Tanner's jury was instructed on both first- and second-degree kidnapping. **[RP 354-355]** The only distinction between the two offenses was, to convict Tanner of the greater offense, the jury had to find that "[t]he defendant inflicted a sexual offense upon K'Tanna Mares during the course of the kidnapping." **[RP 354]** Thus, notwithstanding K'Tanna's testimony about the physical struggle occurring in multiple rooms, over hours, and resulting in multiple different injuries, or the separate charge of aggravated battery **[RP 359]**, the State made no

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[3]The scarf was meant to be a humorous gift since K'Tanna had been upset because he had left a hickey on her neck during a previous encounter and she was worried her husband would see it. **[8:07:03-08:12]**

effort to include infliction of injury as an alternative basis to aggravate the kidnapping charge.

The only sexual assault the State instructed the jury on was criminal sexual penetration (CSP) in the second degree (force or injury). **[RP 351]** The State did not instruct the jury on criminal sexual contact or suggest to the jury in any way that they could consider it as the basis for the kidnapping.

Tanner was convicted of first-degree kidnapping instead of second-degree kidnapping, second-degree CSP, aggravated battery, and interference with communications. **[RP 410-13]**

Tanner appealed. In a Memorandum Opinion, the Court of Appeals vacated his CSP, finding that because the same conduct underlying the CSP was used to aggregate the kidnapping from a second-degree felony to a first-degree felony, the CSP charge was subsumed in the kidnapping and punishment should not be permitted for both. *State v. Autrey*, No. A-1-CA-38116, mem. op. (N.M. Ct. App. April 12, 2022) (non-precedential).

The State appealed to this Court, which granted certiorari upon the State's motion for rehearing.

ARGUMENT

I. SERRATO WAS CORRECTLY DECIDED.

The State attacks the Court of Appeals' application of current double jeopardy analysis in *Serrato* not by applying current double jeopardy analysis, but based on a pure legislative intent analysis and citing past cases reaching a different result. **[BIC 5-23]** Because the purpose of double jeopardy analysis *is* to glean legislative intent, the State's analysis is problematic since it renders New Mexico's distinct double jeopardy analysis irrelevant to discerning the legislative intent *to allow for dual punishment* in the double jeopardy context. The State seeks to only argue legislative intent generally, relying solely on those considerations and cases supportive of its position, without acknowledging the evolution of double jeopardy jurisprudence, or contrary considerations, cases, or constitutional issues. As argued below, double jeopardy analysis already provides the framework for determining legislative intent to allow for dual punishment and *Serrato* correctly followed that analysis.

A. The *Serrato* Court's straightforward application of New Mexico's double jeopardy law was correct.

"The Double Jeopardy Clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *State v. Gonzales*, 2013-NMSC-016, ¶ 15, 301 P.3d 380 (internal quotation marks and citation omitted); U.S. Const. amends. V

and XIV; N.M. Const. art. II, § 15. In the context of multiple punishment, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

In *Serrato*, the defendant was convicted, in relevant part, of first-degree kidnapping (based on the infliction of a sexual offense), carrying a mandatory eighteen-year sentence, and one count of criminal sexual contact of a minor (CSCM) (clothed), carrying a six-year sentence. 2021-NMCA-027, ¶ 27. The one and only sexual offense alleged was that, at one point during the kidnapping, the defendant ran his hand down the middle of the child's clothed chest a single time. *Id.* ¶¶ 5-7. The State argued that in doing so, he had to have made contact with the side of the child's clothed breasts (although the child had denied that the defendant's hand actually made contact with her breasts). *See* **[*Serrato,* A-1-CA-36381 BIC 5-6, 22-26** (citing to the record and quoting the child's testimony)**]**

On appeal, Mr. Serrato argued that his dual convictions for first-degree kidnapping (infliction of sexual offense) and CSCM were premised on the same conduct (the CSCM) and violated his right to be free from double jeopardy. *Id.* ¶ 21. A majority of the Court of Appeals agreed.

First, the Court recognized that Mr. Serrato's case involved a "double description" double jeopardy claim under *Swafford v. State*, 1991-NMSC-043, ¶ 8,

112 N.M. 3, because it involved the defendant being punished under multiple statutes for unitary conduct. *State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704. The Court of Appeals therefore applied the two-pronged test for such claims established in *Swafford*. *Serrato*, 2021-NMCA-027, ¶¶ 11-12.

Under the first prong, the court considers "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes." 1991-NMSC-043, ¶ 25. In determining whether conduct is unitary, our courts generally consider "the elements of the charged offenses and the facts presented at trial" before looking at whether the acts forming the basis for each offense are "separated by sufficient indicia of distinctness." *Swafford*, 1991-NMSC-043, ¶ 27; *see also Porter*, 2020-NMSC-020, ¶ 12. Distinctness depends on considerations such as "the separation of time or physical distance between the illegal acts, the quality and nature of the individual acts, and the objectives and results of each act." *State v. Mora*, 2003-NMCA-072, ¶ 18, 133 N.M. 746 (internal citations and quotation marks omitted).

Looking at the elements of first-degree kidnapping at issue in *Serrato*, the Court of Appeals recognized that the first-degree kidnapping was not a completed offense unless and until a sexual offense was inflicted, since the infliction is itself an essential element of that crime. 2021-NMCA-027, ¶¶ 23-27. In reaching this conclusion, the Court expressly considered and rejected the State and dissenting

opinion's arguments that (1) kidnapping is by default in the first degree, and (2) that it is therefore complete as soon as the elements for second degree kidnapping are complete. *Id.* Indeed, the majority indicated that such an argument misconstrues the requirements of the statute and effectively treats some elements as irrelevant to the commission of a first-degree kidnapping. *Id.* ¶¶ 25-27. The majority rejected such a view, saying "our review of the case law confirms that our task in double jeopardy analysis is to examine not only the conduct required for the base crime of the greater offense, but also that required to elevate the base crime to a higher felony degree." *Id.* ¶ 26.

Because a sexual offense was required for the commission of the first-degree kidnapping and the one and only sexual offense in the case was the one instance where the defendant touched the side of the child's clothed breast—i.e., the same conduct at issue in the CSCM—the majority correctly found the conduct underlying the offenses unitary. *Id.* ¶ 27.

The Court of Appeals then turned to the second prong of the analysis for double description cases. *Serrato*, 2021-NMCA-027, ¶ 28. Under *Swafford* and its progeny, this requires courts "to determine if the Legislature intended for the unitary conduct to be punished as separate offenses." *State v. Montoya*, 2011-NMCA-074, ¶ 40, 150 N.M. 415; *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747; *Porter*, 2020-NMSC-020, ¶ 15.

In addressing legislative intent for double-description cases, courts first look at the statutory language to determine if the statutes at issue expressly provide for multiple punishments. *Swafford*, 1991-NMSC-043, ¶¶ 9-12. The Legislature is well aware of how to allow for dual punishment if it truly intends for it to apply. *See, e.g.*, NMSA 1978, § 30-16-38 (1971) (allowing for multiple convictions under different statutes related to credit card crimes); NMSA 1978 § 58-13C-508(K) (2010) (allowing for securities offenses to be in addition to other crimes). Accordingly, when a statute expressly allows for dual punishment, the inquiry is over and dual punishment is permitted even when it is based on unitary conduct. *Swafford*, 1991-NMSC-043, ¶ 30.

The *Serrato* Court correctly recognized that the statutes at issue did not expressly allow for dual punishment. *Serrato,* 2021-NMCA-027, ¶ 28. When statutes do not expressly permit multiple punishment, a court applies *either* the strict elements test from *Blockburger v. United States*, 284 U.S. 299 (1932), *or* the modified test from *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, in order to compare the elements of the relevant statutes and the State's legal theory of the case as a proxy for determining if the Legislature intended multiple punishments. *See Gutierrez*, 2011-NMSC-024, ¶ 58. Courts apply a modified *Blockburger* analysis—focusing not on the statutory language itself, but "on the State's legal

theory of the crime"—when dealing with generic, multi-purpose statutes, or statutes written in the alternative. *Id.*

Recognizing that the statutes for kidnapping and CSCM were multi-purpose and written in the alternative, the *Serrato* court applied the modified-*Blockburger* test, comparing the State's legal theory of the elements for each crime. *Serrato,* 2021-NMCA-027, ¶¶ 28-29. Because, under the State's chosen legal theory, the first-degree kidnapping included the infliction of a sexual offense as an element of that crime, the Court of Appeals found that the CSCM (the only sexual offense inflicted) was fully subsumed in the elements of the first-degree kidnapping. "Under the modified *Blockburger* analysis, if we determine that one of the offenses subsumes the other offense, 'the double jeopardy prohibition is violated, and punishment cannot be had for both.'" *Porter*, 2020-NMSC-020, ¶ 20.

The Court of Appeals did not address the optional third prong evaluating other indicia of legislative intent—though the briefing in *Serrato* did—because this Court has repeatedly stated that the inquiry is over if one crime is subsumed in the other. *See Porter*, 2020-NMSC-020, ¶ 20 (explaining that if one statute subsumes the other under the modified-*Blockburger* approach, the analysis is done, but if neither is subsumed, then the court proceeds to consider other factors); *State v. Silvas*, 2015-NMSC-006, ¶ 12, 343 P.3d 616 (similar); *State v. Swick*, 2012-NMSC-018, ¶¶ 27-29, 279 P.3d 747 (similar); *Swafford*, 1991-NMSC-043, ¶ 30

(when one crime is subsumed under the other "**the inquiry is over** and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.") (emphasis added). *See also Reed,* 2022-NMCA-025, ¶ 23 (citing *Luna*, 2018-NMCA-025, ¶ 11).

Hence, the Court of Appeals' double jeopardy analysis in *Serrato* was entirely consistent with and correctly applied existing precedent.

B. The Legislature did not intend for elements within a single crime like first-degree kidnapping to be deemed non-unitary conduct.

The State's primary argument on appeal is that the *Serrato* Court's analysis of the unitary conduct issue was flawed because legislative intent and past cases dictate that the conduct at issue is not and cannot be considered unitary. That is, the State maintains that the Legislature intended for infliction of a sex offense, an element of the greater offense, to be deemed non-unitary to that greater offense, apparently finding that element is not "essential" or important to the crime (though it doubles the sentence). Because the State's argument is based on logical fallacies, outdated cases, and an unconstitutional construction of the kidnapping statute, the majority in *Serrato* correctly rejected the State's interpretation.

1. Kidnapping is not presumptively in the first degree; it is in the second degree unless and until additional elements are shown.

First, the State asserts that the "infliction" conduct is not unitary because our Legislature intended for kidnapping to be presumptively in the first degree, so that

first-degree kidnapping is complete before any infliction has even occurred. **[BIC 5]** That is, the State maintains, kidnapping is a crime committed in the first degree unless additional facts dictate a *reduction* to second-degree. This Court has already dispensed with the idea that someone is presumptively guilty of first-degree kidnapping unless they establish otherwise, though the State has never acknowledged this authority in litigating *Serrato* or the instant case. In *State v. Gallegos*, 2009-NMSC-017, ¶¶ 16-18, 146 N.M. 88, this Court held: "The elements set forth in the special verdict form are not affirmative defenses that must be raised by a defendant at trial. Rather, it is the State's burden to prove the elements contained in the special verdict form in order to obtain a conviction for first-degree, rather than second-degree kidnapping." Discussed further, *infra*, the State's proposed interpretation would unconstitutionally relieve the State of its burden and treat disproving elements as a defense. *See id.*; *Apprendi v. New Jersey,* 530 U.S. 466 (2000). *Accord* UJI 14-403 NMRA, *committee commentary* (explaining that to help distinguish first and second-degree kidnapping, "separate instructions were created … that incorporate the distinguishing findings as essential elements.").

In New Mexico, second-degree kidnapping is the "unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception with intent" to accomplish some further act. NMSA 1978, § 30-4-1(A)

(2003); UJI 14-403A NMRA (elements of second-degree kidnapping). It is a second-degree felony if these base level requirements are met. It only becomes a first-degree felony if, as this Court has previously recognized, *the State additionally proves* an additional enumerated harm the victim was *not* freed in a safe place, or the defendant inflicted either a sexual offense or physical injury on the victim. § 30-4-1(B); UJI 14-403 NMRA (elements of first-degree kidnapping).

> The elements in Subsection (A), found in UJI 14-403, if established, *only support a charge of second-degree kidnapping*…It follows that a prosecutor seeking to indict an accused for first-degree kidnapping should also be required to present both the primary elements found in UJI 14-403 as well as the additional elements found in the special verdict form to the grand jury.

Gallegos, 2009-NMSC-017, ¶ 16 (emphasis added).

The difference in punishment between the two forms of kidnapping is significant, with second-degree kidnapping carrying a nine-year sentence and first-degree kidnapping carrying an eighteen-year sentence, which cannot be suspended or deferred. *See* NMSA 1978, § 31-18-15 (A)(3), (6) (2016); NMSA 1978, § 31-18-15 (A) (2022).

Given the differing elements and punishments, it is clear that the Legislature intended for the kidnapping statute to function in much the same way as other statutes involving a base level offense and an aggravated form or forms requiring the establishment of additional facts (sometimes premised on commission of another offense). *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768

(recognizing that "whenever possible, [the appellate courts] must read different legislative enactments as harmonious instead of as contradicting one another" including by looking at the overall structure of the statute and its function in a legislative scheme); *cf. State v. Nozie*, 2009-NMSC-018, ¶ 25, 146 N.M. 142 (recognizing that the greater the possible punishment, the more likely additional fault is required).

The criminal sexual penetration statute, for instance, results in harsher punishment for various aggravating circumstances, including that the penetration occurred in the course of the commission of another felony. *See* NMSA 1978, § 30-9-11(E) (2009) (setting forth various elements that will establish the criminal sexual penetration was in the second degree). However, courts apply a double description double jeopardy analysis to *all* of the elements, including the associated felony, and the conduct is deemed unitary when another crime is relied upon as an essential element to elevate the base offense. *See State v. Simmons*, 2018-NMCA-015, ¶¶ 25-30, 409 P.3d 1030 (vacating kidnapping when it was relied upon to elevate criminal sexual penetration); *see also Montoya*, 2011-NMCA-074, ¶¶ 30-43 (finding a double jeopardy violation for kidnapping and a sex offense even before the adoption of the modified approach, although also finding the State could have properly relied on a separate aggravating offense without running afoul of double jeopardy).

The aggravated burglary statute similarly results in a harsher sentence if the State establishes, in addition to the basic burglary elements, that the defendant was armed with a deadly weapon, armed himself with a deadly weapon after entering, or *committed a battery* upon someone. *See* NMSA 1978, § 30-16-4 (1963). Where "committing a battery" is itself a crime, both the Court of Appeals and this Court have applied traditional double description double jeopardy analysis to all of the elements of the aggravated crime and found that the aggravated offense is not complete until the battery is committed, rendering the conduct for both crimes unitary. *See e.g., State v. Sena*, 2020-NMSC-011, ¶¶ 45-57, 470 P.3d 227; *State v. Azamar-Nolasco*, S-1-SC-37760, *10, decision (N.M. June 24, 2021) (non-precedential) (vacating the aggravated burglary conviction when the battery could not be separated from that required for first-degree murder); *State v. Sosa*, A-1-CA-36936, mem. op. (N.M. Ct. App. Jan. 30, 2020) (non-precedential) (vacating battery when used to aggravate burglary).

This Court's analysis of the felony murder statute in *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, is particularly instructive. There, this Court concluded that separate punishment for the underlying felony and the felony murder constituted double jeopardy. The Court determined that the felony murder statute's inclusion of the underlying felony as an element "reveals a clear answer" regarding legislative intent. *Id.* ¶¶ 21-22. In other words, the two offenses are "unitary by

definition; [felony murder] expressly requires that the killing happen 'in the commission of' the underlying felony." *Id.* ¶ 23 (quoting NMSA 1978, § 30-2-1(A) (1994)). "Thus, when a jury finds a defendant guilty of felony murder, it has already determined the fact-based unitary conduct question," and there is no need to repeat it during a *Swafford* analysis. *Id.*

The Court noted that its conclusion was consistent with the legislative purpose of the felony murder statute, which is to "elevate what would otherwise be a second-degree murder to first-degree murder, with the attendant increase in punishment, based on the fact that the killing happened during the commission of a felony." *Frazier*, 2007-NMSC-032, ¶ 26. Where the underlying felony has "already served to enhance the murder to first degree," the felony is subsumed by the first-degree murder conviction and the conduct at issue is unitary. *Id.* ¶¶ 25-26.

Like the statutes discussed above, the kidnapping statute *requires* an additional element in order to be a kidnapping in the first degree. § 30-4-1(B). In this case, the State chose to enhance it based on infliction of a sexual offense on the victim. The infliction of a sexual offense is, therefore, part of the kidnapping conduct informing a unitary conduct analysis.

As noted above, the State's construction of the statute—as *presuming* injury is inflicted, a sex offense is inflicted, or a person was not voluntarily freed unless it is proven otherwise—creates due process concerns under *Apprendi, supra*. In

Apprendi, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an "element" of the crime, which had "to be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 469.[4] The State's approach by contrast would allow the State to punish a defendant more harshly by proving less, that is, by presuming injury, a sexual offense, or failure to free in a safe place unless it is proven otherwise.

This Court addressed a similar problem with the tampering statute in *State v. Radosevich*, 2018-NMSC-028, 419 P.3d 176. There, the "indeterminate crime" tampering provision (or default provision) allowed the State to punish defendants more harshly than the misdemeanor tampering provision by simply not tying the tampering to any particular crime. Acknowledging that "we must be guided by the well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions," this Court overturned or limited past cases and found that the tampering statute could not be constitutionally interpreted to impose greater penalties for tampering when the underlying crimes

[4] The Supreme Court's decision in *Apprendi* was presaged by its holding in *Jones v. United States*, 526 U.S. 227 (1999). There, the United States Supreme Court held that the tiered sentencing scheme in the federal carjacking statute, which provided for increasingly severe punishment based on additional factors, contained "elements" and, thus, delineated distinct offenses rather than a single crime with varying penalties. 526 U.S. at 229.

are unknown than when the underlying crimes are known. *Radosevich*, 2018-NMSC-028, ¶¶ 8, 24-27 (internal citation omitted).

The same is true here. Assuming, as this Court must, that the Legislature intended for the kidnapping statute to be interpreted in a constitutional manner, it is clear that kidnapping is presumptively in the second degree unless and until the State proves beyond a reasonable double that an injury was inflicted, a sexual offense was inflicted, or the individual was not voluntarily freed in a safe place.

2. First degree kidnapping is not complete just because the elements of second degree kidnapping have occurred; it is complete when the aggravating element occurs.

Like its assertion that kidnapping is presumptively in the first degree, the State additionally argues that the *Serrato* Court was wrong because past cases have indicated that first-degree kidnapping is complete as soon as there is restraint with the requisite intent (apparently without regard to when or whether the additional elements occur). To support its claim, the State begins by citing the older, pre-*Apprendi*, pre-*Swafford* and pre-*Gutierrez* cases—particularly this Court's Opinion in *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304. The State notes that our courts have continued to cite to *McGuire*, although often in other contexts. **[BIC 7-12]**

The State's argument fails because it is premised on a logical fallacy—the idea that a crime is complete *before* the elements of that crime actually occur—and

contrary to the plain requirements of the statute, due process and *Apprendi* considerations, as well as more recent double jeopardy jurisprudence.

By analogy, New Mexico law is very clear that conduct in the vein of an attempt to complete another crime is not the same as conduct required to complete that offense; the conduct related to the attempt may be necessary for the eventual completion of the crime, but it is not by itself sufficient for it. *See, e.g.*, NMSA 1978, § 30-28-1 (1963) ("Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission."). Hence, a battery is not complete just because the elements of an assault are complete, although assaultive conduct is necessary to the eventual completion of a battery. *Compare* NMSA 1978, § 30-3-1 (1963) (assault) & NMSA 1978, § 30-3-2 (1963) (aggravated assault), *with* NMSA 1978, § 30-3-4 (1963) (battery) & NMSA 1978, § 30-3-5 (1969) (aggravated battery). An aggravated burglary is not complete merely because the elements of burglary—an unauthorized entry with intent—have occurred if the State is seeking to premise it upon some further conduct such as arming themselves after entry or battering someone. *See* NMSA 1978, § 30-16-4 (1963).

As the majority in *Serrato* correctly recognized, the same is true of first-degree kidnapping. *Serrato,* 2021-NMCA-027, ¶ 26 ("The dissenting opinion argues that the focus of our analysis ought to be limited to the conduct required in

the essential elements of the base crime, not the elements elevating such crime to a higher felony degree…We again emphasize that the requirements provided in Section 30-4-1(B) are elements that the State is required to prove to convict for first-degree kidnapping"). While a *second-degree kidnapping* (the base offense) is complete when there is restraint or confinement with the requisite intent, a first-degree kidnapping is, by definition, not complete unless and until an injury is inflicted, a sexual offense is inflicted, and/or the victim is not voluntarily freed in a safe place. To hold otherwise would destroy the distinction between the offenses of second- and first-degree kidnapping, as specifically delineated by the Legislature. *Cf. State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1 (recognizing that we do not construe statutes in a manner that renders any part of it surplusage or superfluous).

As a factual matter, someone cannot complete an offense *before* the elements of the offense have actually been done. Such reasoning has due process and *Apprendi* concerns since it effectively holds a person accountable for increased punishment for a crime before all of the elements of that crime are satisfied. As the majority in *Serrato* indicated, it suggests that some elements of the crime are less important to establishing that crime than others—something strongly disapproved of in *Jones* and *Apprendi* and its progeny. 530 U.S. at 490 (making it clear that

what constitutes an element of the offense is any fact that increases the sentence for that offense).

In addition, as the State's unitary conduct analysis here in Tanner's case suggests **[BIC 25-28]**, it invites the State to analyze the factual distinctness between two elements of the exact same offense rather than looking at distinctness between the different offenses with which the defendant is charged. If, as *Swafford* and its progeny suggest, we look to the elements of each offense charged in analyzing unitary conduct, then an approach which ignores some elements is erroneous. 1991-NMSC-043, ¶ 27.

Finally, it invites prosecutors to default to the aggravated degree of the offense in charging, instead of the base level offense, by treating some elements as "non-essential" elements, giving rise to the due process and *Apprendi* issues previously discussed.

Thus, even assuming that *McGuire*'s analysis is still controlling precedent under existing double jeopardy analysis (although Tanner argues otherwise below), its holding must be revisited and overturned as being inconsistent with due process, *Apprendi*, and current double jeopardy analysis. *See Radosevich*, 2018-NMSC-028, ¶ 21 ("We do not overturn precedent lightly, but where our analysis 'convincingly demonstrates that a past decision is wrong, the Court has not

hesitated to overrule even recent precedent'… the presence of a constitutional concern is particularly significant." (internal citation omitted)).

3. The past cases cited by the State are not controlling precedent and do not require a finding of non-unitary conduct between two elements of the same offense.

The State argues that past cases require a finding of unitary conduct, citing *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, and *State v. Tsethlikai*, 1989-NMCA-107, 109 N.M. 371. **[BIC 6]** These cases were decided under an older version of the kidnapping statute which did not include the provisions at issue here (the intent to inflict a sexual offense *or* any enhancement for the infliction of it) and under a completely different double jeopardy analysis. More importantly, they do not support the State's position.

In *Singleton*, it is unclear if the kidnapping was in the first or second degree, though the elements discussion suggests it was in the second degree. 1984-NMCA-110, ¶ 18. If so, then there was clearly no merger issue between second-degree kidnapping and the CSPs because all essential elements of second-degree kidnapping (restraint with intent) *were* complete before the CSPs occurred. Even if the kidnapping in *Singleton* was in the first degree, however, infliction of a sexual offense was not an element of first-degree kidnapping at that time and there was evidence of an alternate aggravating element (injury inflicted) *before* the CSPs in any event. 1984-NMCA-110, ¶¶ 5-7.

In *Tsethlikai*, the defendant pled guilty to second-degree kidnapping (a crime which is complete when there is restraint with intent) and CSP in the commission of a felony, based on the kidnapping. 1989-NMCA-107, ¶ 1. The only double jeopardy question in front of the court there was whether the second-degree kidnapping merged into the CSP in the course of a felony. Relying upon the then-applicable analysis of the felony murder statute set out in *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, the Court of Appeals found that it did not. *Tsethlikai*, 1989-NMCA-107, ¶ 8. *Stephens* was overturned by *State v. Contreras*, 1995-NMSC-056, ¶ 19, 120 N.M. 486, based upon *Swafford*, and further undermined by *Frazier*, 2007-NMSC-032, ¶¶ 4, 11, which expanded the holding in *Contreras*. *Tsethlikai*'s analysis has been thoroughly discredited.

The State next cites *McGuire*, which case forms the basis for its assertion that a first-degree kidnapping is complete when the elements of second-degree kidnapping are satisfied. **[BIC 6-12]** Like *Singleton* and *Tsethlikai*, *McGuire* is based on an outdated legal analysis. First, *McGuire* was decided under a prior version of the statute, which did not include the infliction of a sexual offense as a basis for first-degree kidnapping. Hence, the focus in *McGuire* was on whether the CSP was used to establish that the defendant acted *with the requisite intent* for the first-degree kidnapping and then on whether the kidnapping was then improperly used to enhance the CSP to a second-degree offense. 1990-NMSC-067, ¶¶ 9-14.

McGuire also analyzed the merger questions under approaches which have been disavowed. Specifically, *McGuire* used the lesser-included offense approach from *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, and the compound predicate offense analysis from *Tsethlikai*. *See McGuire*, 1990-NMSC-067, ¶¶ 11, 14. In *Swafford*, this Court recognized that the *DeMary* approach was not applicable in the double jeopardy context, directly disavowing *McGuire*'s approach to double jeopardy. *See Swafford,* 1991-NMSC-043, ¶¶ 22. Further, noting that, "case law is replete with failed attempts at judicial definitions of the same factual event," the *Swafford* Court also expressly revised our unitary conduct analysis to turn "to a large degree on the elements of the charged offenses and the facts presented at trial," while recognizing that *McGuire* had used an incorrect framework for this analysis. *Id.* ¶¶ 27, 29. *Swafford* subsequently led to a different compound predicate offense analysis as well, requiring consideration of the predicate offense. *See Contreras*, 1995-NMSC-056, ¶ 19; *Frazier*, 2007-NMSC-032, ¶¶ 4, 11, 35. This Court has now further clarified that the double jeopardy analysis applicable in double-description cases is the modified-*Blockburger* approach set forth in *State v. Gutierrez*, 2011-NMSC-024, ¶ 58, 150 N.M. 232, which analysis was applied in *Serrato*. *See* 2021-NMCA-027, ¶¶ 16, 28-29.

Finally, *McGuire* was also decided prior to *Apprendi* and its clear guidance as to what constitutes an element of an offense. So while the *McGuire* Court likely

viewed some elements as being secondary or simply *sentencing* aggravators, *see, e.g.*, 1990-NMSC-067, ¶¶ 15-19, subsequent cases—including *Swafford*, *Frazier*, and *Serrato*—have necessarily moved away from such a view.

Notwithstanding the many changes in our law since *McGuire* which have eroded its foundation—changes to the kidnapping statute, the determination of elements of a crime, and the analysis of a double jeopardy claim—the State argues that *McGuire* is still good law. The State asserts this because some observations contained in it continue to be cited with approval and some cases—which were not asked to address the elemental issue raised in *Serrato*—continue to rely upon *McGuire*'s statement that a kidnapping is complete when there is restraint with the requisite intent.

To be clear, some propositions from *McGuire* continue to be true as they involve general observations about the nature of dual punishment or the fact kidnapping is a continuing offense.[5] *Swafford*, 1991-NMSC-043, ¶ 29; *State v. Allen*, 2000-NMSC-002, ¶ 75, 128 N.M. 482. And *McGuire*'s explanation of when a kidnapping is complete remains correct with respect to the base offense of second-degree kidnapping. However, consideration of the State's cases does not

[5] *McGuire* also contained cautionary language about the potentially expansive nature of the kidnapping statute and the fact that dual punishment for unitary conduct is not actually consistent with New Mexico law. 1990-NMSC-067, ¶¶ 8-9.

dictate continued adherence to *McGuire* in *resolving* a first-degree kidnapping double jeopardy claim.

Many of the cases citing *McGuire* for the idea that a kidnapping is complete when there is restraint with intent, do not cite *McGuire* for double jeopardy purposes and rely upon *McGuire* for analyzing the sufficiency of the restraint aspect of kidnapping. *See State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, *overruled on other grounds by State v. Martinez*, 2020-NMSC-002, ¶ 72, 478 P.3d 880; *Allen*, 2000-NMSC-002, ¶¶ 62, 64-69; *State v. Garcia*, 2019-NMCA-056, ¶ 21, 450 P.3d 418; *State v. Sena*, 2020-NMSC-011, ¶ 36, 470 P.3d 227. Incidental restraint analysis is analytically distinct from double jeopardy analysis since it considers whether there is sufficient restraint beyond the restraint involved in an associated assaultive offense to sustain a kidnapping conviction, regardless of whether first- or second-degree kidnapping is at issue. *See State v. Trujillo*, 2012-NMCA-112, ¶¶ 16, 22, 289 P.3d 238 (distinguishing incidental restraint analysis from double jeopardy, where the inquiry is whether separate convictions are sustainable, because "[n]one of these cases addresses the fundamental question of whether the restraint or movement falls within the kidnapping statute at all"); *see also State v. Marquez,* S-1-SC-33548, ¶ 15 (N.M. Mar. 23, 2015) (non-precedential) (insufficient evidence of kidnapping because the restraint upon which the kidnapping relied was incidental to the commission of CSCM).

Those cases citing the language in *McGuire* in the context of double jeopardy claims, do not directly acknowledge that *McGuire*'s analysis hinges on only the elements of second-degree kidnapping and thus, do not appear to have been asked to consider the issue raised in *Serrato*. *See Dominguez v. State*, 2015-NMSC-014, ¶ 16, 348 P.3d 183 (cases are authority for propositions not considered).

In *State v. Saiz*, 2008-NMSC-048, 144 N.M. 663, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, for instance, this Court found no double jeopardy violation for kidnapping and murder because there was evidence the kidnapping was actually based on an intent to inflict a sexual offense and a likely infliction of one, while the murder was based on a subsequent desire to prevent the victim from living and reporting the assault. *Id.* ¶¶ 30-34. This Court cited to *McGuire* generally, after analyzing the claim pursuant to *Swafford*. *Id.* ¶ 34.

In *State v. Dominguez,* 2014-NMCA-064, 327 P.3d 1092, the Court of Appeals analyzed the double jeopardy claim almost identically to its analysis of the sufficiency claim, resulting in its double jeopardy analysis focusing on the restraint element and citing sufficiency cases. *See* 2014-NMCA-064, ¶ 4 (indicating that due to the similarity of the arguments, "our resolution of Defendant's double jeopardy argument is largely determinative of his insufficiency of the evidence

argument"); *id.* ¶¶ 9-10. Given its narrow focus, the *Dominguez* Court did not discuss the infliction of a sexual offense element of kidnapping in finding that the kidnapping was not unitary with the CSP. However, the Court later acknowledged that infliction of the offense *was* meant to be an element of the crime of first-degree kidnapping that the jury had to find. *Id.* ¶¶ 17, 19. The Court ultimately determined that the fact the jury found a sexual offense was inflicted warranted reinstating the first-degree kidnapping conviction even without a special verdict form. *Id.* ¶ 19.

The analysis in *State v. Jackson*, 2020-NMCA-034, 468 P. 3d 901, similarly centered around the restraint question and, citing *Dominguez*, employed a sufficiency of the restraint analysis without considering the differing requirements for first-degree kidnapping. *Id.*

The cases cited by the State substantiate that *McGuire*'s discussion continues to be helpful for second-degree kidnapping claims and for determining if there is sufficient evidence of restraint distinct from that included in another assaultive offense—a sufficiency question. They do not justify continued reliance upon an analysis taken from different statutory language, whose underpinnings have been undermined by subsequent double jeopardy and due process cases. *Cf. Montoya,* 2013-NMSC-020, ¶¶ 40, 52 (considering whether past precedent is a remnant of an abandoned doctrine and recognizing that "[i]n light of the significant

journey our double jeopardy jurisprudence has taken over the past two decades, we conclude that 'time has set its face against' [a past double jeopardy case's] doctrinal underpinnings").

This is particularly true since more recent cases employ an analysis consistent with *Serrato* by considering all of the elements of an offense in conducting unitary conduct analysis.[6] *See e.g.*, *See Sena*, 2020-NMSC-011, ¶¶ 52-57; *Azamar-Nolasco*, S-1-SC-37760, *10 (non-precedential). In particular, in *Sena* this Court recognized that the aggravated burglary conviction required (as at least one alternative) that a battery occur *before* the aggravated burglary was complete, although this Court found that there were multiple batteries which occurred and presumed that the jury relied upon one that did not give rise to double jeopardy. *Id.* ¶ 56.

If this Court had been following *McGuire*'s logic in its double jeopardy analysis in *Sena*, however, this Court would have held that the aggravated burglary was complete when there was an unauthorized entry regardless of when there was a subsequent battery. This Court would not have considered, as this Court clearly

[6] In fact, the State itself has, at sentencing, even conceded double jeopardy in the context of kidnapping based on in the infliction of a sexual offense, albeit in less controversial circumstances. *See e.g., State v. Toney*, A-1-CA-36026, *mem. op.* (N.M. Ct. App. February 25, 2021) (non-precedential) (vacating a sex offense as being subsumed in a first degree kidnapping where, during a kidnapping, the defendant briefly fondled an adult's breast).

did, the question of when and which battery was relied upon for the aggravated burglary to be complete.

In addition, *Sena*'s discussion of and reliance upon *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, further substantiates the invalidity of *McGuire*'s approach to double jeopardy. In discussing the salient points of *Foster* (in the context of double jeopardy analysis), this Court specifically recognized that the crime of first-degree (or aggravated) kidnapping was not complete unless and until great bodily harm was inflicted. *Sena*, 2020-NMSC-011, ¶ 50 ("Thus, the kidnapping [in *Foster*] was completed when the defendant hit the victim on the head with the ashtray, causing the victim great bodily harm. This Court concluded there was sufficient indicia of distinctness when the defendant used force to hit the victim on the head with the ashtray, which completed the crime of aggravated kidnapping, and then separately used force to strangle the victim with an extension cord." (emphasis added) (citations omitted)). That both the *Foster* and *Sena* Courts recognized that the kidnapping was only completed when injury was inflicted undercuts the State's assertion that *McGuire* or its approach to double jeopardy remain controlling. The *Serrato* Court did not, therefore, err in declining to follow *McGuire*'s unitary conduct analysis. And assuming there is a conflict in existing law notwithstanding *Swafford* and our evolution away from *McGuire*'s analysis,

for the reasons explained above, *McGuire's* problematic and outdated approach to double jeopardy should be overturned with respect to first degree kidnapping.

C. The *Serrato* majority did not err in finding that the Legislature did not intend to allow dual punishment.

Leaving unitary conduct aside, the State concedes that under a straightforward application of the modified-*Blockburger* test, the Court of Appeals correctly found that the elements of the CSCM were subsumed, demonstrating that the Legislature did not intend to allow for dual punishment. **[BIC 19-23, 28-29]** Without acknowledging (let alone seeking to overturn) the *many* cases cited above holding that this ends the inquiry, the State maintains that other indicia of legislative intent establish that the Legislature intended to inflict dual punishment for first degree kidnapping and the infliction of any sexual offense (whether a brief touch of a clothed breast, a lower level CSP, or a serious rape). **[BIC 19, 29]**

To be clear, double jeopardy analysis is used to determine legislative to allow for dual punishment absent the Legislature expressly permitting dual punishment (something it is perfectly capable of doing). We engage in this analysis, as opposed to simply making a statutory construction argument based upon whatever suits our purposes, because there is a recognition that given the proliferation of criminal statutes, our Legislature may not have actually contemplated whether it intended dual punishment with respect to each and every

possible statute, making it necessary to glean Legislative intent to punish through a double jeopardy lens. *See, e.g., Montoya*, 2013-NMSC-020, ¶ 33.

Assuming, nonetheless, that the elements of the offenses are viewed as differing, notwithstanding the fact one expressly requires and inflicts additional punishment based on commission of the other, the fact some elements differ is not dispositive of legislative intent. Instead, New Mexico Courts consider "other indicia of legislative intent such as language, history, subject of the statutes, and the quantum of punishment." *State v. Lee*, 2009-NMCA-075, ¶ 9, 146 N.M. 605, 213 P.3d 509. "If those factors reinforce the presumption of distinct, punishable offenses, then there is no violation of double jeopardy." *Id.* However, "when doubt regarding legislative intent remains, ambiguity 'must be resolved in favor of lenity.'" *Swick*, 2012-NMSC-018, ¶ 30.

As touched upon above, the kidnapping provision under which the defendants in *Serrato* and here were prosecuted seeks to protect against a taking or restraint done in order to commit a sexual offense, and seeks to deter infliction of the offense, *by punishing the defendant more harshly for the actual commission of a sexual offense against the victim*. *See* § 30-4-1(B). Likewise, the CSCM and CSP statutes seek to prevent the commission of sexual offenses. *See* NMSA 1978, § 30-9-11 (2009) (CSP); NMSA 1978, § 30-9-13 (2003) (CSCM). Both then seek to

deter sexual batteries, suggesting that punishment for both may be inappropriate when aimed at the same conduct.

Furthermore, with respect to the "quantum of punishment," this too substantiates that the Legislature did not intend to inflict dual punishment for unitary conduct. In *Serrato*, the CSCM was punishable as a third-degree felony, carrying a six-year sentence, while kidnapping during which a sexual offense is inflicted is punished as a first-degree felony, carrying a mandatory eighteen-year sentence. *See* § 31-18-15(A). In *Autrey,* CSP resulting in injury was punished as a second-degree felony, carrying a nine-year sentence, while kidnapping was punished as a first-degree felony, carrying an eighteen-year sentence. *See* § 31-18-15(A). In both instances, the infliction of a sexual offense doubled the kidnapping punishment and exceeded or equaled the punishment for the underlying sexual offense. "Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes." *Mora*, 2003-NMCA-072, ¶ 24 (internal citation omitted).

Furthermore, while the State asserts that the Legislature intended for maximal punishment for sexual crimes **[BIC 20-22, 30]**, it ignores the fact the Legislature did in fact significantly increase punishment for sex offenses by making infliction of one (regardless of injury) a basis for first-degree kidnapping.

Prior to the 2003 amendment of the statute, infliction of a sexual offense such as CSC could not by itself enhance a second-degree kidnapping to a first-degree kidnapping unless it resulted in injury. After the amendment, the State was free to elevate a second-degree kidnapping (carrying a nine-year sentence subject to suspension) to a first-degree kidnapping (carrying a mandatory eighteen-year sentence) based on infliction of a fourth degree CSCM or a misdemeanor CSC.

After all, as *Montoya* recognized, we are considering not just whether the Legislature intended to allow for dual punishment under the facts of *Autrey*—i.e., when there is a serious rape charge and the State premised the kidnapping *solely* on that instead of factually available allegations of injury or infliction of another uncharged offense—but also under the facts of *Serrato* and numerous other cases involving different sexual offense statutes and relatively minor and/or fleeting sexual touches used to significantly elevate a kidnapping.

The State next asserts that although the Legislature specifically made kidnapping independently subject to several sex offender punishment schemes[7]—strongly suggesting it was intended to subsume lesser sexual offenses—a person

[7] In particular, the Legislature made kidnapping with a sexual component an independently registrable offense under SORNA, *see* NMSA 1978, § 29-11A-3(I)(6)-(7) (2013) (defining a sex offense as a kidnapping or false imprisonment when committed the intent to inflict a sexual offense), and independently subject to sex offender probation and parole. *See* NMSA 1978, § 31-20-5.2(F)(1) (2003); NMSA 1978, § 31-21-10.1(I)(1) (2007).

who commits a sex offense vacated on double jeopardy grounds might not be subject to the special sentencing provisions in NMSA 1978, Sections 31-18-25 (2015) -26 (1996), and their records might not be retained under NMSA 1978, Section 29-11A-5(D), (E) (2007).

It is unclear that vacating a conviction on double jeopardy grounds would prevent application of either of these statutes, since the person was still technically convicted of sex offense and, under Section 31-18-26, is entitled to a special hearing (and possibly a jury trial) on its applicability. *Cf. Montoya v. Driggers*, 2014-NMSC-009, ¶¶ 5-6, 320 P.3d 987 (finding a defendant required to register and subject to SORNA requirements for a CSP II subsumed in a first-degree kidnapping conviction). And given the other statutes directly accounting for kidnapping as a sex offense, the Legislature's intent is at most ambiguous. Such ambiguity must be resolved in favor of lenity. *Swick*, 2012-NMSC-018, ¶ 30.

Finally, the State claims that it would be absurd to require the State to prove to the jury that separate acts support each conviction in order to obtain discrete punishments for those convictions or to clarify upon which acts it is basing its charges. **[BIC 32-33]** This is not an absurd result, especially when the State is pursuing multiple serious crimes carrying lengthy sentences. *See e.g., Radosevich*, 2018-NMSC-028, ¶ 16 (recognizing that the jury trial guarantees "that all facts essential to a defendant's sentence must be determined by a jury, whether or not a

judge…might think those facts were proved in a particular case"). On the contrary, this is precisely what is expected of the State under current law. *Reed*, 2022-NMCA-025, ¶ 27 (explaining that is the State's responsibility to ensure that distinct conduct supports each charge tried). Nor is it particularly onerous to ask the State to identify discrete sexual offenses on which the jury could base its verdict given the potentially lengthy sentence involved. *Cf. State v. Haskins*, 2008-NMCA-086, ¶ 21, 144 N.M. 287 (sustaining separate CSC convictions for different sexual contacts).

In sum, if this Court chooses to consider other indicia of legislative intent, such considerations further support *Serrato*.

II. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE UNITARY CONDUCT THE STATE RELIED UPON IN THIS CASE SUBJECTED TANNER TO DOUBLE JEOPARDY.

A. The conduct underlying the first-degree kidnapping and CSP was unitary.

The State claims the Court of Appeals erred in finding unitary conduct in this case. **[BIC 25-28]** For the first time, the State references the actual standard looked at for unitary conduct analysis. **[BIC 25]**. As explained above, "[t[he conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial." *Porter*, 2020-NMSC-020, ¶ 12. Hence, consistent with the analysis of the conduct issue in *Serrato* and in cases involving similar statutes (*Sena*, *Frazier*, etc.), this Court considers all of the elements of first degree

kidnapping in relation to the CSP. "We must identify the criminal acts and the conduct at issue, and '[i]f it reasonably can be said that the conduct is unitary,' then we must conclude that the conduct was unitary." *Porter*, 2020-NMSC-020, ¶ 12.

The State acknowledges that it premised the kidnapping on the infliction of a sexual offense and that the only sexual offense it put before the jury was the CSP occurring December 22. However, relying upon its prior argument that a kidnapping is complete once there is restraint with the requisite intent, the State breaks up the elements of first-degree kidnapping and looks at distinctness between the restraint element and the infliction of a sexual offense. Specifically, the State notes that the restraint started long before the sexual offense was committed and that there was a struggle during which physical injuries were inflicted that preceded the rape. **[BIC 25-26]** The State argues that the first-degree kidnapping was complete at this point, making the infliction of a sexual offense—though a necessary element of first-degree kidnapping—separate from it. **[BIC 25-26]**

Certainly, the State could have asked the jury find that the first-degree kidnapping was complete at this point by premising it not on the infliction of a sexual offense, but on the infliction of injury and having the jury make such a

finding.[8] The State did not do so. Nor is this a situation like *Sena,* where the jury was given (and instructed on) multiple options, making it likely the jury relied upon a battery that was not separately charged. *Cf. Sena*, 2020-NMSC-011, ¶¶ 52, 54, 56. What the State cannot do is "wait for an appeal to adequately separate Defendant's conduct to support each conviction; rather, the State must do this work below to ensure that distinct conduct supports each charge tried." *Reed*, 2022-NMCA-025, ¶ 27.

Here, the jury was only instructed on one CSP and given no reason to rely upon any other basis for the first-degree kidnapping conviction. **[RP 351, 354]** Thus, as presented to the jury here, the first-degree kidnapping was not complete unless and until the jury found that Tanner inflicted the CSP. Since this made the CSP a required part of the first-degree kidnapping, it was not distinct from it and the conduct was unitary. *Autrey*, A-1-CA-38116, ¶¶ 11-15.

B. The Legislature did not intend to punish both CSP and a first-degree kidnapping based on the same conduct.

The State acknowledges that the statutes at issue do not permit dual punishment and that under the modified *Blockburger* test, the CSP in this case is subsumed in the kidnapping. **[BIC 28-29]** As explained above, this typically ends

[8] Indeed, in one recent case involving similar allegations, the State avoided double jeopardy concerns by charging the sexual offenses separately and premising the first-degree kidnapping on the infliction of injury from batteries preceding it. *See State v. Salazar,* 2023-NMCA-026, 527 P.3d 693.

the inquiry. *Porter*, 2020-NMSC-020, ¶ 20; *Silvas*, 2015-NMSC-006, ¶ 12; *Swick*, 2012-NMSC-018, ¶¶ 27-29; *Swafford*, 1991-NMSC-043, ¶ 30; *Reed,* 2022-NMCA-025, ¶ 23 (citing *Luna*, 2018-NMCA-025, ¶ 11).

The State nonetheless argues that the, for reasons set forth in its attack on *Serrato*, the Legislature did not intend to permit dual convictions here. **[BIC 29-33]** For the reasons already explained, *Serrato* correctly applied existing double jeopardy law and did so in a constitutional manner, which was consistent with numerous other cases. The *Serrato* Court then correctly determined that when, as here, the State relies upon unitary conduct to elevate a second degree kidnapping to a first degree kidnapping, the Legislature did not intend to permit dual convictions for unitary conduct. *Autrey*, A-1-CA-38116, ¶¶ 12, 14, 17-19, n. 2-3 (recognizing same). Accordingly, the Court of Appeals did not err in finding a double jeopardy violation in this case and vacating Tanner's CSP conviction for similar reasons. *Autrey*, A-1-CA-38116, ¶¶ 16-19.

CONCLUSION

For the reasons set forth above, Tanner Autrey respectfully asks this Court to quash certiorari or issue an opinion affirming the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of this pleading was e-filed in the Odyssey/Tyler Technology File and Serve system and electronically delivered to Assistant Attorney General Van Snow and John Kloss at the New Mexico Attorney General's Office this 12th day of June, 2023.

/s/ Mary Barket
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