IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39383

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

TANNER AUTREY,

Defendant-Respondent.

On Certiorari to the New Mexico Court of Appeals

STATE OF NEW MEXICO'S BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendant lured K.M. to his house, dragged her into the bedroom, beat her for an extended period, tied her arms with duct tape, and then raped her. A jury convicted him of, among other crimes, first-degree kidnapping and second-degree criminal sexual penetration. The Court of Appeals, relying on one of its recent split decisions, ruled that the kidnapping and CSP were the same offense for double jeopardy purposes.

This Court should reverse the Court of Appeals and affirm Defendant's convictions. The framework that the Court of Appeals applied was contrary to well-established precedent and the Legislature's intent. This Court should hold that the conduct underlying the kidnapping and the CSP convictions was not unitary. It should also recognize that the Legislature authorized punishment under both statutes.

FACTS AND PROCEDURAL HISTORY

Between late November 2016 and December 21, 2016, Defendant sexually assaulted K.M. three times at his house. **[12/5/18 CD 1:13:50-1:17:40]** Although the sexual acts were not consensual, Defendant did not strike or choke her. **[*Id.* 1:17:07-26]**

On December 21, 2016, Defendant told K.M. that he wanted a chance to explain himself, after which the two would no longer see each other. **[*Id.* 1:22:15-27]** She agreed to come over to Defendant's house for 30 minutes to give him the opportunity to explain. **[*Id.* 1:22:30-55]** She arrived at his house at approximately 11:45 p.m. **[*Id.* 1:23:52-1:24:22]** She timed him as he spoke, and stood up to leave after approximately 30 minutes had expired. **[*Id.* 1:26:23-1:27:12]** Defendant hugged her, and refused to let go. **[*Id.* 1:27:15-1:28:07]** She struggled to free herself, but could not break away; he was substantially larger than she was. **[*Id.* 1:28:12-1:29:40]**

Defendant threw K.M. over a loveseat; she got up and ran. **[*Id.* 1:29:40–1:30:30]** She unlocked the front door and opened it, but he slammed it shut on her hand. **[*Id.* 1:30:31-41]** He pushed her into a Christmas tree and then dragged her, struggling, into the bedroom. **[*Id.* 1:30:54-1:32:16]**

For an "extended period of time[,]" Defendant choked, struck, spit on, and evidently bit her. **[*Id.* 1:35:20-40]**; *see also* **[St. Exs. 36-48, 61-67]** (depicting injuries). After he managed to remove her clothes and take her phone, Defendant bound her arms behind her back with duct tape. **[12/5/18 CD 1:37:10-58]** He brought her to the bed, wrapped his legs around her, and laid with her in the dark. **[*Id.* 1:38:18-1:39:05]**

After they had laid there for "a while," Defendant penetrated her vagina with his penis. **[*Id.* 1:39:05-1:39:51]** K.M. stated that Defendant did not penetrate her until after her hands were bound, but Defendant claimed that he did so both before and after binding her. **[*Id.* 1:37:10-1:40:22]** (K.M.'s account); **[12/6/18 CD 8:14:41-8:15:12 p.m.]** (Defendant's account). Defendant lacerated her vagina in a manner that would have required "great force[;]" it was the sort of injury that can happen in childbirth. **[12/6/18 CD 2:37:26-2:39:36]** (describing laceration); **[St. Exs. 69-71]** (depicting laceration).

Defendant rubbed his genitals on K.M.'s face and attempted to penetrate her mouth with his penis, but she successfully resisted. **[12/5/18 CD 1:40:51-1:41:35]** He also attempted to penetrate her anus with his penis. **[12/6/18 CD 11:11:32-11:12:01]**; *see also* **[St. Ex. 72]** (depicting damage to her anus). She denied that he penetrated her anus with his fingers, but thought that his fingers were "in the area" because he was attempting to penetrate her with his penis. **[*Id.* 11:11:32-11:12:01]** Defendant, however, testified that he did anally penetrate her with his fingers. **[12/6/18 CD 8:16:36-8:17:15 p.m.]**; **[St. Ex. 55 24:20-50]**

Defendant said that the assault, which he characterized as consensual sex, lasted approximately four hours. **[12/6/18 CD 8:23:29-40 p.m.]** K.M. estimated that she resisted for slightly more than half of this time and that he penetrated her for one to two hours. **[*Id.* 11:17:26-11:18:00]** After he finished, he left her alone in

the bedroom. **[12/5/18 CD 1:41:50–1:42:16]** She managed to retrieve her phone, call for help, and escape Defendant's house, still "completely naked." **[*Id.* 1:42:30-1:47:40]**

The State charged Defendant with, among other crimes, first-degree kidnapping and second-degree criminal sexual penetration resulting in personal injury. **[1 RP 1-3]** The kidnapping was based on Defendant "binding [K.M.'s] arms with duct tape," and the fact that he inflicted "a sexual offense" on her. **[2 RP 381]** The CSP count alleged that he "caused the insertion of the penis and/or fingers into the vagina of [K.M.] using force or physical violence," resulting in "tearing to the vaginal area…and/or bruising[.]" **[*Id.* 378]** The jury convicted Defendant of all the charged crimes. **[*Id.* 410-13]**

In a memorandum opinion, the Court of Appeals found that convicting Defendant for first-degree kidnapping and CSP violated double jeopardy. *State v. Autrey*, A-1-CA-38116, mem. op. ¶ 8 (N.M. Ct. App. April 12, 2022) (nonprecedential). Relying heavily on its decision in *State v. Serrato*, 2021-NMCA-027, 493 P.3d 383, *cert. denied* S-1-SC-38204 (Jun. 30, 2021),[1] the Court found that Defendant's conduct was unitary and that the Legislature did not

[1] The State petitioned for certiorari in *Serrato*, which this Court denied. The State moved for rehearing, which the Court granted. It then denied certiorari again.

authorize punishment under both statutes. *Autrey*, A-1-CA-38116, mem. op. ¶¶ 6-19. This Court granted certiorari to review both conclusions. **[Cert. Pet. p. 1]**

ARGUMENT

The Court of Appeals erred by relying on *Serrato*. The framework it used and the result it reached were contrary to decades of precedent and clear legislative intent. Under the correct analysis, the conduct underlying the kidnapping and CSP convictions was not unitary and the Legislature authorized punishment under both statutes.

I. THE COURT OF APPEALS' APPROACH WAS CONTRARY TO PRECEDENT AND LEGISLATIVE INTENT.

A. Kidnapping, CSP, and double jeopardy before *Serrato*.

Historically, kidnapping was a first-degree felony. NMSA 1953, § 40A-4-1(B) (1973). It consisted of, among other theories, "the unlawful…restraining…by force…with intent" to hold the victim for ransom, hostage, or "service against the victim's will[.]" *Id.* (A). If the perpetrator freed the victim "without having had great bodily harm inflicted on him by his captor," the kidnapping would fall to a second-degree felony. *Id.* (B).

Under this version of the statute, the Court of Appeals and this Court rejected double jeopardy challenges from defendants who were convicted of both kidnapping and CSP.

In *State v. Singleton*, the Court of Appeals rejected the argument that CSP and kidnapping convictions "merged" – it noted that the "kidnapping occurred prior to the acts of [CSP]" and that they consequently rested on different evidence. 1984-NMCA-110, ¶¶ 20-21, 102 N.M. 66.[2] In *State v. Tsethlikai*, the State convicted the defendant of committing a CSP in the course of a felony as well as second-degree kidnapping. 1989-NMCA-107, ¶ 3, 109 N.M. 371. The predicate felony for the CSP charge was the kidnapping. *Id.* ¶¶ 3-4. Turning to the Legislature's intent, the Court of Appeals stated that "[b]ecause CSP II and kidnaping address different social norms, consecutive sentences for those two crimes is, in general, permissible." *Id.* ¶ 8.

This Court reached a similar result in *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304. There, the defendant forced his way into his victim's car and pulled her into the back seat. *Id.* ¶ 4. As his brother drove the car, the defendant bound the victim and raped her. *Id.* At trial, the jury convicted him of first-degree kidnapping and second-degree CSP. *Id.* ¶ 1. The State used the kidnapping charge to elevate the CSP count to a second-degree felony under a "commission of any other felony" theory. *Id.* ¶¶ 7-8. The defendant argued that doing so violated double jeopardy

[2] At the time, "merger" was "an aspect of double jeopardy" that applied in situations involving "multiple punishment when multiple charges are brought in a single trial." *Id.* ¶ 20 (quoting *State v. Sandoval*, 1977-NMCA-026, ¶ 12, 90 N.M. 260).

"because the same acts are being used to establish both kidnapping and criminal sexual penetration and are being used yet a third time to raise the latter crime to a second-degree felony." *Id.* ¶ 8. This Court rejected his argument.

It ruled that the conduct underlying each count was not the same; the defendant's claim to the contrary "confuses the use of the same facts to prove *successive* offenses that depend on separate conduct with the use of the same facts to prove *concurrent* offenses that depend on the *same* conduct." *Id.* ¶¶ 9-10 (emphasis in original). There was substantial evidence "that defendant intended to commit criminal sexual penetration from the moment of the abduction." *Id.* ¶ 10. The kidnapping was complete as soon as he restrained the victim "with the requisite intent" even though it continued throughout the CSP. *Id.* It ruled that CSP was not a lesser-included offense of kidnapping and that independent facts supported each conviction. *Id.* ¶¶ 11-13.

Citing *Tsethlikai*, the Court also approved of enhancing the CSP count with the kidnapping charge, noting that "convictions normally are allowed for both predicate and compound offenses, and our courts have held that criminal sexual penetration statutes and kidnapping statutes protect different social norms." *Id.* ¶ 14.

A year after *McGuire*, this Court formalized its modern approach to double jeopardy challenges in *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3. But

Swafford did not at a stroke silently overrule the holdings of all prior double jeopardy cases. Instead, this Court appeared to endorse *McGuire*, writing that, although that it "admittedly did not follow the precise analytic framework we establish today," it and similar cases "nonetheless understood the fundamental problem that similar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Id.* ¶ 29. It cited *McGuire*, apparently approvingly, three times. *Id.* ¶¶ 29, 34.

In 1995, the Legislature added a theory of kidnapping for defendants who restrained their victims with the intent "to inflict death, physical injury or a sexual offense on the victim." NMSA 1978, § 30-4-1(A)(4) (1995). This change did not affect the reasoning in *McGuire* because restraining a victim for the purposes of inflicting a sexual offense was already actionable under a "hold to service" theory. *See McGuire*, 1990-NMSC-067, ¶ 8 ("to '[h]old for service' includes holding for sexual purposes") (quotation mark omitted). The 1995 amendment also narrowed the step-down for second-degree kidnapping; a defendant could only qualify if he "voluntarily frees the victim in a safe place *and* does not inflict great bodily harm upon the victim." § 30-4-1(B) (1995) (emphasis added).

In *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, ¶ 72, 478 P.3d 880, this Court recognized that *McGuire* was still good law. The defendant, convicted of first-degree kidnapping, attempted CSP, and murder, argued that there was insufficient evidence that the kidnapping was separate from his other crimes. *Id.* ¶¶ 1, 21. Citing *McGuire*, the Court recognized that the kidnapping was complete when the defendant restrained the victim with the requisite intent before he attempted to commit CSP. *Id.* ¶¶ 24-25. It rejected the defendant's argument that the restraint used to kidnap the victim was the same used to commit the other crimes; "there was sufficient evidence of an independent factual basis for each guilty verdict[.]" *Id.* ¶ 26.

Although *Jacobs* was not a double jeopardy case, it predicted future cases in that area by: (1) looking to *McGuire* to determine when the kidnapping was complete, and (2) considering whether the restraint used to kidnap the victim was the same force used to commit other crimes. *See also State v. Allen*, 2000-NMSC-002, ¶¶ 67, 70, 128 N.M. 482 (citing *McGuire* and finding no double jeopardy violation when "the kidnapping, attempted CSP, and murder were factually distinct"); *State v. Saiz*, 2008-NMSC-048, ¶ 34, 144 N.M. 663, *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 34, 146 N.M. 357 (citing *McGuire* to find that conduct underlying CSP and kidnapping was not unitary).

In the 2003 Special Session, the Legislature strengthened the State's sex crime laws with House Bill 2, the "Omnibus Sex Offender Bill."[3] 2003 N.M. Laws, 1st Spec. Sess., ch. 1. Among other provisions, the bill created the special indeterminate probation and parole scheme for sex offenders, *id.* §§ 1, 6-7, 8-9, and increased the penalties for CSP and criminal sexual contact of a minor. *Id.* §§ 3-5. It further narrowed the step-down provision separating first- and second-degree kidnapping. *Id.* § 2. Under this change, a perpetrator could qualify for the second-degree offense only if he voluntarily freed the victim in a safe place "and does not inflict physical injury *or a sexual offense upon the victim*." *Id.* (emphasis added). This is the current version of the kidnapping statute. NMSA 1978, § 30-4-1 (2003).

Both the Court of Appeals and this Court cited *McGuire* or its rule as good law in first-degree kidnapping cases after the 2003 amendment. *See State v. Dominguez*, 2014-NMCA-064, ¶ 10, 327 P.3d 1092 (citing *McGuire* for the proposition that "[t]he crime of kidnapping is complete when the defendant, with the requisite intent, restrains the victim, even though the restraint continues through the commission of a separate crime"); *State v. Jackson*, 2020-NMCA-034, ¶ 40, 468 P.3d 901 (citing that portion of *Dominguez*). Although it was not a

[3] The final version of the bill is available online at: https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=2&year=03s

double jeopardy case, the Court of Appeals in *State v. Garcia* cited *McGuire* when holding that a defendant completed a kidnapping before inflicting a sexual offense on the victim. 2019-NMCA-056, ¶ 21, 450 P.3d 418.

Less than three years ago, this Court stated that "the crime of [first-degree] kidnapping was complete" when the defendant "restrained Victim with the intent of inflicting a sexual offense on Victim." *State v. Sena*, 2020-NMSC-011, ¶ 36, 470 P.3d 227, *reh'g denied* (July 20, 2020).[4] As authority for this proposition, it cited *McGuire*. *Id.* Although the Court did not use that language to resolve a double jeopardy claim, it did so when determining a related issue – whether the district court erred by not instructing the jury that it had to find that the restraint underlying the kidnapping was not "incidental" to the commission of other crimes. *Id.* ¶ 41. This Court allowed the State retry him on one count of CSP and first-degree kidnapping. *Id.* ¶¶ 4, 58-59. *See also State v. Samora*, 2016-NMSC-031, ¶ 35, 387 P.3d 230 (permitting retrial on both the first-degree kidnapping conviction and the CSP charge).

During this period, courts found that convicting a defendant for CSP and

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[4] Although *Sena* did not expressly state that the State enhanced the kidnapping conviction under a sexual offense theory, undersigned counsel verified that it did by examining the record in that case – the following citations refer to the volumes of the record proper in *Sena*. *See* **[2 RP 452** (instructing the jury that it had to determine whether the defendant committed a sexual offense if it found him guilty of kidnapping); **3 RP 471** (finding the defendant guilty of kidnapping), **475** (finding that the defendant inflicted a sexual offense on the victim)**]**.

kidnapping violated double jeopardy if the record did not establish "force or restraint separate from the CSP." *State v. Montoya*, 2011-NMCA-074, ¶¶ 38-39, 150 N.M. 415. *See also State v. Marquez*, S-1-SC-33548, dec. ¶ 15 (N.M. Mar. 23, 2015) (nonprecedential) (finding insufficient evidence of kidnapping "[b]ecause the evidence of unlawful restraint here is indistinguishable from the evidence of force Defendant applied while committing CSCM"); *State v. Simmons*, 2018-NMCA-015, ¶ 28, 409 P.3d 1030 ("if the jury could have found that the kidnapping was accomplished during the CSPs, which is possible given the testimony, the conduct would be unitary because the force used for the kidnapping would be the same force used for the CSPs").

Before *Serrato*, it was well-established that the State could convict a defendant of both first-degree kidnapping and CSP so long as the restraint occurred before the sexual offense or was otherwise separate from the force used to accomplish the CSP. New Mexico courts also recognized that the two crimes were aimed at different social evils.

B. *Serrato*.

In *Serrato*, two judges of the Court of Appeals adopted a very different approach.

The defendant lived across the street from the victim, a 10 year-old girl. 2021-NMCA-027, ¶¶ 2-3. One night, he lured her to the window, then grabbed her

and pulled her outside. *Id.* ¶ 3. He led her back to his house, where he barricaded the door and told her that she could not leave. *Id.* ¶¶ 4-5. He asked her to have sex, then touched her intimate areas. *Id.* ¶¶ 4, 6. After trial, the jury convicted him of one count of first-degree kidnapping, one count of criminal sexual contact of a minor, and one count of enticement of a child. *Id.* ¶ 8.

The defendant claimed that convicting him of first-degree kidnapping and CSCM constituted double jeopardy because "his conviction for CSCM was used to elevate [the] kidnapping charge from second to first-degree kidnapping." *Id.* ¶ 21. He argued that the conduct underlying each conviction was unitary because first-degree kidnapping under a "sexual offense" theory was not complete "unless and until the CSCM occurred[.]" *Id.* ¶ 24. The State, apparently relying on *Dominguez*, countered that the kidnapping was complete as soon as the defendant took the victim through the window, while the CSCM occurred later in his bedroom. *Id.*

A majority of the Court of Appeals panel agreed with the defendant. It reasoned that the first-degree "sexual offense" enhancement was an element of the crime of kidnapping. *Id.* ¶¶ 25-26. Accordingly, "the elements of first-degree kidnapping were not satisfied until a sexual offense was committed" and, because he was only charged with one "sexual offense," "there are no independent factual bases to support each offense." *Id.* ¶ 26.

The majority also found that the Legislature did not intend to impose multiple punishments. *Id.* ¶¶ 28-32. Relying solely upon the modified *Blockburger* test, the majority found that the CSCM charge was entirely subsumed by the kidnapping conviction because the jury found that he committed a sexual offense and the only such offense in the record was the CSCM. *Id.* ¶¶ 30-31. It vacated the CSCM conviction as the lesser offense. *Id.* ¶ 32.

The dissent noted that, under the majority's reasoning, "it would never be permissible to allow convictions for both predicate and compound offenses because the predicate offense would always be subsumed within the other offense as a matter of law." *Id.* ¶ 51. It cited *McGuire* – which the majority did not cite or discuss – to show that this result was contrary to precedent. *Id.* It also observed that, under the majority's reasoning,

> a defendant who kidnaps and subsequently inflicts even the slightest physical injury on the victim or a defendant who simply does not voluntarily release the victim in a safe place would receive the exact same punishment as a defendant who kidnaps and violently rapes his victim: Each would be guilty of only a single count of first-degree kidnapping.

Id. ¶ 52. Drawing on precedent, including *Dominguez* and *Montoya*, the dissent argued that the conduct underlying the two convictions was not unitary.

C. The Court of Appeals' blanket application of *Serrato*.

In this case, the Court of Appeals took the reasoning of *Serrato* to its maximum logical extent. Citing *Serrato*, it held that "the elements of first-degree

kidnapping were not satisfied until a sexual offense was committed." *Autrey*, A-1-CA-38116, ¶ 11. The State, relying on *McGuire*, had argued that the kidnapping was complete as soon as Defendant restrained K.M. by tying her arms. Without discussing *McGuire*, the Court stated that *Serrato* "forecloses th[at]…argument." *Id.* ¶ 12. It rejected the idea that the jury could have relied on the other, uncharged sexual acts – for example, the attempted CSP of K.M.'s mouth – because it was not instructed that those were sexual offenses. *Id.* ¶¶ 13-15.

Relying again on *Serrato*, the Court applied only the modified *Blockburger* test to determine if the Legislature intended to punish both crimes. *Id.* ¶¶ 16-19. It found that the CSP was "entirely subsumed" within the first-degree kidnapping conviction because the jury was only instructed on one "sexual offense," CSP. *Id.* ¶¶ 18-19. It vacated the "lesser" conviction of CSP. *Id.* ¶ 19.

Under *Serrato* and *Autrey*, it is impossible as a matter of law to convict a defendant of both first-degree kidnapping under a sexual offense theory and an underlying sex crime.

The conduct would always be unitary because the kidnapping would not be complete until the defendant completed the sexual offense. Both decisions rejected the idea that other, uncharged acts could constitute a sexual offense for the purposes of kidnapping. They also apparently rejected the view that a separation in time and space between the restraint and the sex act could make the conduct not

unitary. Even though the defendant in *Serrato* kidnapped the victim from her bedroom, led her across the street into his bedroom, and barricaded the door before committing the sex crime, the Court still found his conduct was unitary. Because the courts based their reasoning on the wording of the kidnapping statute's step-down element, this error would occur every time that the State attempted to charge a defendant with a sex crime and a first-degree kidnapping. A separation in time and space between the restraint and the penetration would never be enough to separate the two charges because the kidnapping would not be complete until the sexual offense was.

The charges would always fail the second step of the double description analysis. Both decisions used only the modified *Blockburger* test, and found that the underlying sex crime was subsumed by the "sexual offense" element of the kidnapping charge. Again, this reasoning would apply any time the State relied on a charged sex crime to establish first-degree kidnapping.

Another way to illustrate this is by applying the *Serrato* / *Autrey* approach to cases in which courts have found that convicting a defendant of first-degree kidnapping and CSP did not violate double jeopardy. For example, in *Dominguez*, the defendant tricked the victim into letting him into her house. 2014-NMCA-064, ¶ 2-3. He then produced a gun, put it to her head, said that he would rape her, and threatened to kill her daughter if she did not comply. *Id.* ¶ 3. After agreeing not to

rape her next to her child's bedroom, he did so in another room. *Id.* Under the *Serrato* / *Autrey* rule, the conduct underlying his kidnapping and CSP convictions would be unitary because the kidnapping was not complete until he inflicted the sexual offense. The offenses would fail the modified *Blockburger* test because the sexual offense element of kidnapping would completely subsume the CSP conviction. Similarly, if the defendant in *McGuire* had been charged under a sexual offense theory under the 2003 version of the statute, his kidnapping would not have been complete until he penetrated his victim and the sexual offense element would have subsumed the CSP.

The Court of Appeals and defendants have tried to apply this blanket reasoning in other cases.[5]

D. This Court should return the law to its pre-*Serrato* state.

The recent *Serrato* / *Autrey* analysis is contrary to precedent and the Legislature's intent. The former rule, that a defendant could be convicted of both crimes so long as the restraint occurred before the sexual offense and he did not use the same force to accomplish the two crimes, is more faithful to decades of

[5] *See* Second Notice Proposed Summary Disposition, *State v. Dent*, A-1-CA-40313, pp. 3-8, (N.M. Ct. App. Jan. 26, 2023) (proposing to summarily vacate a CSP conviction based on *Serrato* because the defendant was also convicted of first-degree kidnapping); Brief in Chief, *State v. Gregor*, A-1-CA-39735, pp. 12-13 (N.M. Ct. App. May 6, 2022) (arguing in part based on *Serrato* that his convictions for kidnapping and underlying sex crimes violated double jeopardy); Brief in Chief, *State v. Neal*, A-1-CA-40205, p. 14 (N.M. Ct. App. Nov. 8, 2022) (same).

precedent and better effectuates the Legislature's intent. This Court should return to it by reversing the Court of Appeals here and overruling *Serrato*.

The view that first-degree kidnapping is not complete until the defendant commits the underlying sex offense is directly contrary to *McGuire, Dominguez* and all of the cases citing them. Neither the majority in *Serrato* nor the Court in *Autrey* cited *McGuire*. Although *McGuire* was decided under a pre-2003 version of the kidnapping statute, both this Court and the Court of Appeals have applied its rule under the modern version. *See Sena*, 2020-NMSC-011, ¶ 36 (citing *McGuire*); *Dominguez*, 2014-NMCA-064, ¶ 10 (same); *Jackson*, 2020-NMCA-034, ¶ 40 (citing that portion of *Dominguez* for the same rule).

The view that kidnapping and an underlying sex offense are automatically unitary is contrary to precedent. *See Jackson*, 2020-NMCA-034, ¶ 41 ("Because we conclude that Defendant's conduct was not unitary, Defendant's convictions for kidnapping and two counts of CSP II do not violate double jeopardy"); *Dominguez*, 2014-NMCA-064, ¶ 10 ("Defendant's conduct was not unitary because either alternative—kidnapping by deception or by force—was factually distinct from the conduct supporting the CSP II conviction"). The *Serrato* court attempted to distinguish *Dominguez* by noting that the conduct underlying the kidnapping and the CSP there was not unitary. 2021-NMCA-027, ¶ 27. But that is

the point: under the *Serrato* / *Autrey* view, the conduct would always be unitary as a matter of law.

Serrato and *Autrey* are contrary to *Dominguez* in another way. When *Dominguez* was decided, the district court should have used a special verdict form for the jury to record that a sexual offense had occurred to convict of first-degree kidnapping. 2014-NMCA-064, ¶ 13. The defendant argued that he could only be convicted of second-degree kidnapping because the jury had not specifically found that a sexual offense occurred. *Id.* ¶ 14. This Court rejected that argument, concluding that he should have been convicted of first-degree kidnapping anyway *because* the jury had found defendant guilty of CSP, a sexual offense. *Id.* ¶ 19. Although the Court did not reach this conclusion during its double jeopardy analysis, it approved of what the reasoning in *Serrato* and *Autrey* forbade: using a charged sexual offense to establish first-degree kidnapping.

Serrato and *Autrey* held that the Legislature did not intend to punish both crimes separately based solely upon their application of the modified *Blockburger* rule. *Blockburger*, however, "is not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent." *Swafford*, 1991-NMSC-043, ¶ 12. Courts may use other cannons of construction, such as considering the "social evils sought to be addressed by each offense." *Id.* ¶ 13. They may also look to "the language, structure, and legislative history of statutes to

divine legislative intent." *Id.* By declining to employ any other canons of statutory construction and refusing to consider any other indicia of legislative intent, the *Serrato* and *Autrey* courts lost sight of the ultimate purpose in a double description challenge: "divin[ing] legislative intent." *Id.*

New Mexico appellate courts have recognized for decades that "criminal sexual penetration statutes and kidnapping statutes protect different social norms," *McGuire*, 1990-NMSC-067, ¶ 14, and that "consecutive sentences for those two crimes is, in general, permissible." *Tsethlikai*, 1989-NMCA-107, ¶ 8. Accordingly, the statutes are aimed at different social evils. As discussed above, it was well-established by the 1990s that convictions under both statutes were permissible and could even be used to enhance each other.

This Court "presume[s] that the Legislature knows the state of the law when it enacts legislation," *Kmart Corp. v. Taxation & Revenue Dept.*, 2006-NMSC-006, ¶ 15, 139 N.M. 172, so it would have known that courts had interpreted the kidnapping and CSP statutes to generally permit convictions under both when it modified the kidnapping step-down element in 2003. It added this language as part of an omnibus bill that strengthened the state's sex crime laws. The plain language of the amendment made it more difficult for defendants to qualify for second-degree kidnapping. Before the amendment, an offender only had to release the victim in a safe place without inflicting great bodily injury to qualify for second-

degree kidnapping. After the amendment, the offender would be disqualified if he inflicted any bodily injury or committed a sexual offense. The amendment thus made it *easier* for the State to convict a defendant of first-degree kidnapping if he also committed a sexual offense.

To justify *Serrato* and *Autrey*'s departure from *McGuire*, this Court would have to believe that the Legislature intended to undo that decision in the same bill that increased the penalties for sex crimes. It would further have to conclude that the Legislature, instead of simply stating that the State could not convict under both statutes, chose to accomplish that result in a manner that was so subtle that it took courts nearly 20 years to figure out. The more logical conclusion is that the Legislature intended the 2003 amendment to do what it expressly provided: increase the penalties for kidnapping and sexually assaulting victims.

Other statutes show that the Legislature did not intend to make it impossible to convict a defendant of both first-degree kidnapping and a charged sex crime. When interpreting a statute, this Court considers "its function within a comprehensive legislative scheme." *State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183 (quoting *State v. Rivera,* 2004–NMSC–001, ¶ 13, 134 N.M. 768).

Some statutes treat those who commit first-degree kidnapping as sex offenders. *See* NMSA 1978, § 31-20-5.2(F)(1) (2003) (defining "sex offender).[6] By itself, this could indicate that the Legislature thought of kidnapping and the underlying sex crime as a merged offense for which the defendant would be convicted only once. Other statutes, however, undercut this.

The Legislature created a special sentencing structure for the most violent sex offenses. NMSA 1978, §§ 31-18-25 (2015) and -26 (1996). But that act defines "violent sexual offense" to include only first- and second-degree CSP. § 31-18-25(F). Even though the jury found that Defendant committed a second-degree CSP by tearing K.M.'s vagina and beating her, he would not qualify for the violent sex offense sentencing scheme under the Court of Appeals' reasoning because he would be convicted of only first-degree kidnapping. The same would be true for any violent defendant who kidnapped and unlawfully penetrated his or her victim in one encounter.

Although similarly-situated defendants would have to register as sex offenders, the Department of Public Safety would not have to preserve their information even though it would have had to if they were convicted only of CSP.

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[6] But only under an "intent to inflict a sexual offense" theory. *Id.* It is possible to imagine a scenario in which a defendant kidnaps a victim with the intent to hold her hostage, then ends up inflicting a sexual offense after restraining her. In that situation, the first-degree kidnapper would not count as a sex offender.

See NMSA 1978, § 29-11A-5(D), (E) (2007) (requiring retention for kidnapping only when the victim was below the age of 18 and the offender was not the victim's parent). This cannot be the result that the Legislature intended when it created the special sentencing regime for violent sex offenses, broadened the scope of kidnapping, and created a registry for sex offenders.

The *Serrato* / *Autrey* rule conflicts with precedent and the Legislature's intent. This Court should return to the law as it existed before *Serrato*.

II. DEFENDANT'S CONVICTIONS FOR FIRST-DEGREE KIDNAPPING AND CSP DID NOT CONSTITUTE DOUBLE JEOPARDY.

The Court of Appeals found that convicting Defendant of first-degree kidnapping and CSP violated double jeopardy under a "double description" theory. *Autrey*, A-1-CA-38116, ¶¶ 6, 19. This Court reviews double jeopardy claims de novo. *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

A court violates the double jeopardy provisions of the state and federal constitutions if it imposes "multiple punishments for the same offense." *Swafford*, 1991-NMSC-043, ¶ 5. The Legislature is free to define criminal offenses and set appropriate punishments; in this context, the double jeopardy clauses bar courts only from "prescribing greater punishment than the legislature intended" by imposing multiple penalties for a single offense. *Id.* ¶ 7 (quotations omitted).

To resolve a double description challenge, a reviewing court must determine whether the Legislature intended to authorize multiple punishments. *Id.* ¶ 25. First, the court must decide whether the same – or unitary – conduct created liability under both statutes. *Swick*, 2012-NMSC-018, ¶ 11. If the conduct was not unitary, the offenses were not the same and the analysis ends. *Id.* If the conduct was unitary, the court must ask whether the Legislature "inten[ded] to punish the two crimes separately." *Id.*

A. The instructions at issue.

To convict Defendant of first-degree kidnapping, the jury had to find that he "restrained or confined" K.M. "by force intimidation *by binding her arms with duct tape*[.]" **[2 RP 381]** (emphasis added). This restraint could not be "slight, inconsequential, or merely incidental to the commission of another crime[.]" *Id.* The jury had to find that Defendant actions were unlawful and that he intended to inflict a sexual offense on K.M. *Id.* To qualify as first-degree kidnapping, it had to find that Defendant "inflicted a sexual offense" on K.M. "during the course of the kidnapping[.]" *Id.* The instructions did not define the term "sexual offense."

To convict Defendant of CSP (personal injury), the jury had to find that he "caused" K.M. to engage in sexual intercourse and penetrated her vagina with his "penis and/or fingers…through the use of force or physical violence[.]" **[*Id.* 378]** It had to find that these acts "result[ed] in tearing to the vaginal area…and/or

bruising to" K.M. *Id.* Finally, the jury had to find that Defendant's actions were unlawful. *Id.*

B. The conduct underlying the convictions was not unitary.

The conduct underlying two charges is unitary only if it was "the same conduct." *Swick*, 2012-NMSC-018, ¶ 11 (parentheticals omitted). *See also Swafford*, 1991-NMSC-043, ¶ 25 ("The first part of our inquiry asks…whether the conduct underlying the offenses is unitary, *i.e.,* whether the *same* conduct violates both statutes") (emphasis added). Two acts are not the same if they are "separated by sufficient indicia of distinctness." *State v. Porter*, 2020-NMSC-020, ¶ 12, 476 P.3d 1201 (quotations omitted). Reviewing courts consider separations in time and space, as well as the "object and result or quality and nature" of the acts. *Id.* (quotations omitted).When determining whether conduct was unitary, New Mexico courts "have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed." *State v. DeGraff*, 2006-NMSC-011, ¶ 27, 139 N.M. 211.

According to K.M.'s testimony, there were separate phases to the assault. The first phase took place in the living room: he hugged her, refused to let her go, threw her over a loveseat, slammed the door on her hand, pushed her into the Christmas tree, and dragged her into the bedroom. The second phase occurred in the bedroom, when he beat her while she struggled. She estimated that this lasted

roughly two hours. He eventually subdued her and bound her with duct tape. They then lay on the bed for "a while."

At this point, the crime of kidnapping was complete even though it continued throughout the commission of other crimes: Defendant had restrained K.M. with the intent to inflict a sexual offense. *Sena*, 2020-NMSC-011, ¶ 36; *McGuire*, 1990-NMSC-067, ¶ 10; *Jackson*, 2020-NMCA-034, ¶ 40; *Garcia*, 2019-NMCA-056, ¶ 21; *Dominguez*, 2014-NMCA-064, ¶ 10. It also served as "an identifiable point at which one of the charged crimes had been completed and the other not yet committed," *DeGraff*, 2006-NMSC-011, ¶ 27, and as a temporal separation between the two offenses.

In the third phase of the assault, Defendant penetrated K.M.'s vagina, tearing and bruising it. This completed the second-degree CSP. K.M. testified that he did not penetrate her until after he had restrained her with duct tape. Defendant disagreed, but he also said that the sex was consensual and the jury rejected his version of events. *Cf. State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94 ("Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts") (quoting *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438).

Although the restraint and the CSP occurred in the same room at around the same time, the conduct underlying each conviction was meaningfully distinct.

Defendant restrained K.M. by wrapping her arms in duct tape. In contrast, the CSP was based on Defendant's forceful vaginal penetration. The convictions were not based upon the same conduct.

Turning to the "object and result or quality and nature" of the acts, the different conduct inflicted distinct harms on K.M. Tying her arms behind her back handicapped her ability to resist, thus making it easier to assault her. The jury found that this was not "slight, inconsequential, *or merely incidental to the commission of another crime*." **[2 RP 381]** (emphasis added). Tying K.M. up also violated her liberty interest in controlling her movements; a person has a right to not be tied up and controlled by another.

The CSP caused actual bodily injury – Defendant tore her vagina using a force akin to childbirth. It violated K.M.'s interest in bodily autonomy; Defendant forced her to have sex. It placed K.M. at risk of an unwanted pregnancy and infection with a sexually-transmitted disease. The two crimes inflicted meaningfully different harms on K.M.

That one element of first-degree kidnapping required the jury to find that Defendant inflicted a sexual offense on K.M. does not change this. As discussed above, New Mexico courts have continued view CSPs as factually distinct from kidnappings even after the Legislature added this element. If the Court of Appeals was correct, then all first-degree (sexual offense) kidnappings would be unitary as

a matter of law with the underlying sexual offense. Again, New Mexico courts have rejected this.

Even under the Court of Appeals' view, the conduct was not the same. According to *Serrato*, the conduct underlying the kidnapping included both restraining K.M. with duct tape *in addition* to penetrating her. The conduct underlying the CSP was only the penetration. These two bodies of evidence overlap, but they are not the same. The test for unitary conduct should not be so onerous as to require a complete disunity of facts between two crimes.

Defendant completed the kidnapping before he committed the CSP. Each crime inflicted distinct harms on K.M. He did not use the same force to accomplish each crime. Ultimately, the conduct underlying each conviction was not the same, and was therefore not unitary.

C. The Legislature intended to punish kidnapping and CSP separately.

If this Court finds that the conduct underlying each conviction was unitary, it must "determine whether the Legislature intended to permit multiple punishments[.]" *Porter*, 2020-NMSC-020, ¶ 15. It first "look[s] to the language of the statute[s]," considering whether they "explicitly authorize[] multiple punishments." *State v. Begaye*, __-NMSC-__, ¶ 21, __ P.4th __ (S-1-SC-38797 Jan. 12, 2023) (quotations omitted). If they do not, the Court applies either the modified or regular *Blockburger* test. *Id.* ¶¶ 21-22.

The kidnapping and CSP statutes do not expressly authorize multiple punishments. Because both provide "alternative methods by which a defendant can violate the statute," this Court would use the modified *Blockburger* test. *Id.* ¶ 24. In doing so, it "compare[s] the elements of the offense, looking to the State's legal theory of how the statutes were violated." *Id.* (quoting *Potter*, 2020-NMSC-020, ¶ 8). To discover the State's theory, the Court looks first to "the statutory language, charging documents, and jury instructions at trial," and, if the theory remains unclear, turns to "testimony, opening arguments, and closing arguments[.]" *Id.*

The State's theory was clear from the jury instructions: Defendant committed a first-degree kidnapping for inflicting a sexual offense, and it charged him with only one sex offense. Its theory was that he kidnapped and raped K.M. If this Court concludes that the sexual offense element entirely subsumes the CSP conviction, then the two crimes would not pass the modified *Blockburger* test.

But *Blockburger* is not the end of the inquiry: it raises "only an inference that leads to an examination of other indicia of legislative intent." *Swick*, 2012-NMSC-018, ¶ 13. Under the Court of Appeals' view, first-degree kidnapping is a compound offense that requires a predicate sexual offense. In a related context, this Court has noted that "traditional double jeopardy principles do not lend themselves well to issues arising in the context of a statutory scheme that requires proof of other violations of law through the use of various predicate offenses." *State v.*

Loza, 2018-NMSC-034, ¶ 8, 426 P.3d 34. Under those circumstances, "the *Blockburger* test…is not controlling when the legislative intent is clear." *Id.* (quoting *Garret v. United States*, 471 U.S. 773, 778 (1985)).

As discussed above, it was well-established before 2003 that the State could generally convict a defendant of both first-degree kidnapping and CSP so long as the restraint occurred before the penetration and the defendant did not use the same force to accomplish both crimes. It was also clear that the statutes addressed different social evils and that multiple punishments were appropriate.

The Legislature added the "sexual offense" language to the step-down provision of the kidnapping statute as part of a bill that increased the penalties associated with sex crimes. This narrowed the universe of defendants who would qualify for second-degree kidnapping. It did not expressly forbid multiple punishment or otherwise disclaim well-established state law. For almost 20 years after the 2003 amendment, New Mexico courts continued to apply prior precedent, and the Legislature did not take any action to curtail them. Other statutes would not function correctly if a defendant could not be convicted of the underlying sex crime. All of these circumstances demonstrate that the Legislature approves of convicting defendants of first-degree kidnapping as well as the underlying sexual offense.

In gauging legislative intent, this Court also considers whether a proposed interpretation would lead to absurd results. *See Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 31, 146 N.M. 453 ("In effectuating the intent of the Legislature, we must avoid any interpretations that would lead to absurd or unreasonable results"). As the dissent in *Serrato* noted, 2021-NMCA-027, ¶ 52, the majority's interpretation would treat a defendant who simply kidnapped his victim and failed to voluntarily release her the same as another defendant who kidnapped and violently raped his victim: both would be guilty only of a first-degree kidnapping.

Moreover, to accept the Court of Appeals' interpretation, this Court would have to assume that the Legislature intended to forbid the State from prosecuting defendants for both first-degree kidnapping and an underlying sex crime. But it would have chosen to do so with a mechanism that the State could bypass.

In some cases, the State could base a first-degree kidnapping simply on a defendant's failure to voluntarily release the victim in a safe place. *See* § 30-4-1(B) (requiring both that the defendant release the victim "and" not inflict bodily injury or a sexual offense); UJI 14-403 NMRA (listing failure to release and inflicting a sexual offense as alternatives to element 5). Similarly, the State here could have charged Defendant with first-degree kidnapping on a bodily harm theory that did not implicate the CSP; he beat her into submission and bruised her anus. Charging Defendant for inflicting the bodily injury as well would not constitute double

jeopardy; the Court of Appeals has rejected the view that using the "bodily injury" theory of first-degree kidnapping makes it factually or legally unitary with the underlying battery. *State v. Sotelo*, 2013-NMCA-028, ¶¶ 17-27, 296 P.3d 1232, *cert. denied*, S-1-SC-33936 (Jan. 22, 2013).

Either avenue would allow the State to convict a defendant of first-degree kidnapping and the underlying sex crime without implicating double jeopardy. So if the Court was right and the Legislature intended to block convictions for both crimes, the State could simply avoid this prohibition in some cases by crafty indictment drafting. This would be an absurd interpretation of the statute. It would also render the "sexual offense" theory nearly useless; there would be little point in the State using it if doing so would create a double jeopardy problem. "This Court must interpret a statute so as to avoid rendering the Legislature's language superfluous." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24, 309 P.3d 1047. The language would in many cases exist only to ensnare unwary prosecutors who charged defendants in a straightforward manner for the harms they inflicted: restraining their victims and inflicting a sexual offense.

The Legislature's desire to punish defendants separately for sexual offenses makes sense. "Rape is one of the most brutal, invasive and degrading forms of criminal victimization," yet "[t]he rights of rape victims are rarely vindicated, in either the criminal or civil courts." Steven Bennett Weisburd & Brian Levin, *"on*

the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 Stan. L. & Pol'y Rev. 21, 31 (1994). To say only that Defendant kidnapped K.M. does not fully capture what he did. Punishing sexual offenses separately recognizes and vindicates the unique interests at play.

The rule of lenity can favor a defendant's interpretation of a statute, but only if it is "insurmountably ambiguous." *State v. Benally*, 2021-NMSC-027, ¶¶ 14-15, 493 P.3d 366.[7] There is no such ambiguity here. There is some – the modified *Blockburger* test supports the Court of Appeals' conclusion – but other considerations clearly show that the Legislature authorized multiple punishments.

In sum, available indicia of legislative intent rebut the *Blockburger* inference. The Legislature wants the State to, as it has for decades, charge defendants with both first degree kidnapping and sexual offenses. The Court of Appeals erred by prematurely ending its analysis of legislative intent.

CONCLUSION

The Court of Appeals has adopted an interpretation of the kidnapping statute that is contrary to decades of established precedent. This Court should correct this error by ruling that the conduct underlying Defendant's conviction was not unitary.

[7] *Benally* was a unit of prosecution case, but the rule of lenity applies in double description cases as well. *See State v. Montoya*, 2013-NMSC-020, ¶ 52, 306 P.3d 426 (using the rule in a double description case).

It should further recognize that the Legislature intended to punish defendants under both statutes.

The State respectfully requests that this Court reverse the Court of Appeals and affirm Defendant's convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on February 27, 2023, I filed a true and correct copy of the foregoing Brief in Chief electronically through the Odyssey E-File & Serve System, which caused opposing counsel to be served by electronic means at mary.barket@lopdnm.us.

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