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 REPLY BRIEF

RAÚL TORREZ
Attorney General

VAN SNOW
Assistant Attorney General

Attorneys for the State
201 Third St. NW, Suite 300
Albuquerque, NM 87102
(505) 490-4843

TABLE OF CONTENTS

Citations to the record proper are in the form **[RP]**. Citations to the audio transcript of proceedings are the form **[Date CD Hour:Minute:Second]**. The audio recording was prepared with For the Record software.

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

NEW MEXICO STATUTES AND SESSION LAWS

NEW MEXICO COURT RULES

ARGUMENT

This Court has the choice between two different views of how the Legislature meant the kidnapping and criminal sexual penetration (CSP) statutes to interact. Its decision will impact not only how parties and lower courts resolve some of the most dangerous sex crimes, but how they approach other cases involving compound and predicate offenses. The State argues that double jeopardy will sometimes prohibit punishment for both first-degree kidnapping and CSP, but does not do so here because Defendant committed those offenses with meaningfully distinct forces in time and space. Defendant claims that double jeopardy principles will *always* bar punishment for both crimes *as a matter of law*, no matter how distinct the restraint and penetration. The State's interpretation is the better one: it is consistent with decades of precedent, the facts of the case, and legislative intent.

I. Defendant's mechanical argument proves too much.

The State showed that, by the Court of Appeals' reasoning in *Serrato* and *Autrey*, it is impossible to convict a defendant of both first-degree kidnapping and a sexual offense committed during the kidnapping. **[BIC 14-17]** As a matter of law, the conduct will always be unitary and the kidnapping will always subsume the elements of the sexual offense. In other words, there was nothing special about this case that made the charges the same for constitutional purposes and nothing the

State could do differently when proceeding under a sexual offense theory in the future. Rather than dispute this conclusion, Defendant embraces it; he defends *Serrato* to its fullest extent and argues that the State cannot punish for both crimes only because of its legal theory. **[AB 13-19, 44-47]**

But Defendant's and the Court of Appeals' reasoning would extend even further than this case or kidnapping and CSP generally. It would bar at least one conviction in any prosecution involving a compound offense that relies on proof of a completed predicate crime. For example, assume that the State charged a defendant for committing a CSP "in the commission of any other felony" as well as the predicate crime. The conduct underlying both crimes would always be unitary regardless of the predicate offense because the CSP was not "complete unless and until the [predicate felony] occurred." *State v. Serrato*, 2021-NMCA-027, ¶¶ 24-26, 493 P.3d 383. The crimes would always fail the modified *Blockburger* test because the "in the commission of another felony" element would automatically incorporate all of the elements of the predicate crime. *See id.* ¶¶ 31-32 (finding that the "sexual offense" element of kidnapping completely subsumed the charged sex offense).

The same would seem to go for any other compound crime. *See, e.g.*, NMSA 1978, § 30-3-7(A) (1985) ("Injury to a pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing

her to suffer a miscarriage or stillbirth as a result of that injury"); § 30-2-3(B) (1994) ("Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony"); § 30-42-3(A) and (D) (2009) (defining "pattern of racketeering activity" to mean the commission of at least two enumerated predicate crimes). Affirming the Court of Appeals' reasoning would work a massive change in New Mexico law that the Legislature did not intend.

New Mexico courts have already rejected the notion that a mechanical application of double jeopardy principles automatically dooms a compound offense. This Court acknowledged 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. In that case, this Court concluded that double jeopardy did not bar convictions for both a compound and predicate offense *even though* they apparently failed the *Blockburger* test: "because we have concluded that our Legislature intended predicate offenses and racketeering offenses to be separate, we are not swayed by Defendant's argument that this Court should apply the *Blockburger* test to conclude that they are the same

offense for purposes of double jeopardy." *Id.* ¶ 17. Although *Loza* involved consecutive punishments, this is a distinction without a difference in this context.[1]

The State's position is not that it will always be able to convict a defendant of first-degree kidnapping as well as a sexual offense. Under the pre-*Serrato* rule, it could not do so when, for example, the defendant used the same force to accomplish both the sex crime and the kidnapping. **[BIC 5-12]** But it should not be categorically barred from doing so either.

II. Defendant's Conduct Was Not Unitary.

Consistent with his maximalist view, Defendant barely mentions the facts of the case in his discussion of unitary conduct. **[AB 44-46]** That is because, under his argument, the facts in a particular case are irrelevant. All that matters is that the State charged a particular theory of kidnapping and a sexual offense. Tellingly,

[1] This Court has recognized as much:

> [T]he U.S. Supreme Court has repeatedly noted that whether a defendant is subject to multiple punishments for the same offense does not depend upon whether the charges were brought at a single trial or a successive trial. "If two offenses are the same … for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." "We have often noted that the [Double Jeopardy] Clause serves the function of preventing both successive punishment and successive prosecution, but there is no authority … for the proposition that it has different meanings in the two contexts."

State v. Gallegos, 2011-NMSC-027, ¶ 41 n.2, 149 N.M. 704 (citations omitted). *See also State v. Rodriguez*, 2005-NMSC-019, ¶ 23, 138 N.M. 21 ("We clarify that the *Blockburger* test applies in New Mexico in assessing both multiple punishment and successive prosecution claims").

Defendant seemed to agree that the State could have punished him for both crimes if it had charged the crime under the "bodily injury" theory of first-degree kidnapping. **[AB 45-46]** But this is a distinction based entirely on the State's legal theory, not the facts, which Defendant's reasoning simply skips over.

But the facts are important, and show that the kidnapping and CSP here were based on conduct that was distinct: in time, place, manner of commission, and harms inflicted. Defendant started in the living room by grabbing K.M., throwing her around, slamming the door on her hand, and dragging her into the bedroom. **[12/5/18 CD 1:27:15-1:32:16]** In the bedroom, he beat her for an extended period of time – maybe more than two hours – until she stopped struggling. **[*Id.* 1:35:20-40**; **12/6/18 CD 11:17:26-11:18:00]** He then took off her clothes, tied her hands behind her back with tape, and brought her to the bed. **[12/5/18 CD 1:37:10-1:39:05]** They laid there for "a while," then, he raped her for between one and two hours. **[*Id.* 1:39:05-51**; **12/6/18 CD 11:17:26-11:18:00]** During the course of the rape, he tore her vagina using "great force[.]" **[12/6/18 CD 2:37:26-2:39:36]**

It strains credulity to say that the conduct underlying the kidnapping and CSP charges was "the same." *See Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3 ("The first part of our inquiry asks…whether the conduct underlying the offenses is unitary, *i.e.,* whether the same conduct violates both statutes."); *State v.*

Swick, 2012-NMSC-018, ¶ 11, 279 P.3d 747 ("First we consider whether the conduct underlying the two convictions was unitary (the same conduct).").

Rather than proving that the facts were not distinct, Defendant can only point out that one element of the kidnapping charge overlapped with the CSP count. **[AB 46]** This necessarily concedes that the conduct underlying each was not "the same" – a partial overlap is not a complete overlap; only a complete overlap of facts makes conduct the same.[2] Defendant's reasoning would, again, make all first-degree kidnappings under a sexual offense theory unitary with a sex crime as a matter of law. This was too far even for the Court of Appeals in *Serrato*, which "pause[d] to acknowledge that punishment for both the predicate and compound offenses is permissible when the State bases its theory for each offense through non-unitary conduct." 2021-NMCA-027, ¶ 27. The problem is that, by both the Court of Appeals' and Defendant's reasoning, it is impossible for both crimes to be distinct.

Again, Defendant's reasoning would go even further. If having one overlapping element is sufficient, all crimes will necessarily be unitary as a matter of law unless they rely on completely unique bodies of facts. But commonly-used

---

[2] *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/same (last visited Jun. 16, 2023) (defining "same" as, among other things: "resembling in every relevant respect," "confirming in every respect," "being one without addition, change, or discontinuance: identical").

elements, like criminal intent, often require a jury to consider a broad range of a defendant's conduct, and so often overlap with other crimes. *See* UJI 14-201 NMRA ("A deliberate intention may be inferred from all of the facts and circumstances of the killing"). Defendant's maximalist approach would dub them all "the same" for double jeopardy purposes.

Presenting the same argument in a different way, Defendant claims that he did not complete a first-degree kidnapping until he raped K.M. **[AB 26-30]** The State agrees that the jury must find beyond a reasonable doubt that a defendant committed a sexual offense to convict him of first-degree kidnapping; its interpretation does not pose due process problem. Again, however, a partial overlap does not make two things completely identical. Defendant committed the real gravamen of the offense – restraining K.M. with the requisite intent – before committing the CSP. That ought to be significant when determining whether the conduct was "the same." This Court's holding in *McGuire* that, for double jeopardy purposes, a kidnapping is complete when the restraint occurs, 1990-NMSC-067, ¶ 10, 110 N.M. 304, – a rule which this Court and the Court of Appeals applied to the current version of the kidnapping statute both in and outside of the double jeopardy context[3] – remains a useful distinction. If a defendant restrained his

[3] *See State v. Sena*, 2020-NMSC-011, ¶ 36, 470 P.3d 227, *reh'g denied* (July 20, 2020) (citing *McGuire*); *State v. Dominguez*, 2014-NMCA-064, ¶ 10, 327 P.3d 1092 (same); *State v. Jackson*, 2020-NMCA-034, ¶ 40, 468 P.3d 901 (citing that portion of *Dominguez* for the same rule).

victim with the requisite intent at a distinct point before committing a sexual offense, that is a strong sign that the force used to accomplish each crime was distinct.

Because Defendant's convictions were not based on the same conduct, punishing him for CSP and first-degree kidnapping does not violate double jeopardy; this Court can reverse the Court of Appeals without reaching the question of legislative intent. *See Swafford*, 1991-NMSC-043, ¶ 25 ("if the conduct is separate and distinct, inquiry is at an end.").

III. The Legislature authorized punishment under both statutes.

Earlier this year, this Court repeated, as it periodically has over last 32 years, that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *State v. Begaye*, ___-NMSC-___, ¶ 13 (S-1-SC-38797, Jan. 12, 2023). *See also State v. Gutierrez*, 2011-NMSC-024, ¶ 55, 150 N.M. 232 ("[T]he sole limitation on multiple punishments is legislative intent") (quotations omitted); *Swafford*,1991-NMSC-043, ¶ 25 (same).

The State demonstrated that from the 1980s until 2021, it was well-established that, as a general proposition, courts could punish defendants for both first-degree kidnapping and a sexual offense. **[BIC 5-12]** Although Defendant quibbles about the continued validity of some of these cases, **[AB 30-39]**, he

cannot dispute that, at the time they were decided, they served as the legal backdrop against which the Legislature legislated. The Legislature amended the statute several times during this period, and never evinced an intent to disrupt this principle. **[BIC 5-9]** To the contrary, it expanded the enhancement provision in 2003 as a part of an omnibus bill aimed at strengthening the state's sex-offense laws. **[BIC 10]**

Defendant's argument would require this Court to believe that, with that 2003 bill, the Legislature intended to silently overrule that settled precedent, reduce the sentences that kidnappers who raped their victims faced, and bar the State from prosecuting both offenses. Instead of just saying that, the Legislature chose to accomplish its objective in a maneuver so subtle that it took courts nearly two decades to catch on. And when courts continued to apply the pre-2003 law and permit convictions under both statutes until *Serrato*,[4] the Legislature did nothing to correct them. Because courts reached the desired result only by application of the modified *Blockburger* test, the Legislature would have had to predict that this Court would adopt that test eight years *after* the 2003 amendment. *See Gutierrez*, 2011-NMSC-024, ¶ 48 (adopting the modified test); *Serrato*, 2021-NMCA-027, ¶ 16 (applying the modified test). This is not a reasonable view of the legislative history of the kidnapping statute.

[4] See note 3 above.

The State pointed out that Defendant's interpretation would break other criminal sentencing statutes. **[BIC 22-23]** Defendant did not generally dispute this; he responds that, at most, one statute might permit similarly-situated defendants to fully register as sex offenders under vacated CSP convictions. **[AB 43]** But to pursue that possibility in the future, the State will have to bring defendants to trial on CSP charges *knowing* that it is violating double jeopardy. This would require a vast waste of prosecutorial, defense, and judicial resources. It would also require the Court to reach the strange conclusion that the Legislature did not want to authorize punishment under both statutes for some purposes but did want to authorize it for others. The far better reading of the overall statutory framework is that the Legislature intended to punish sex offenses separately so that the unique penalties and collateral consequences associated with them would attach in a straightforward way.

Considering the quantum of punishment does not help Defendant. Before 2003, defendants could be convicted of a first-degree felony for first-degree kidnapping and a second-degree felony for the type of CSP that Defendant inflicted. Under Defendant's interpretation, the Legislature intended to reduce this punishment to a single first-degree felony. **[AB 41]** But as discussed above, the legislative history and post-2003 precedent show that the Legislature did not intend to reduce the overall penalty that sex offenders faced: broadening the enhancement

provision made it easier to convict defendants of first-degree kidnapping, and the 2003 bill increased the penalties that offenders faced. 2003 N.M. Laws, 1st Spec. Sess., ch. 1 §§ 2-5. Moreover, the State pointed out that Defendant's interpretation would give rise to grave sentencing disparities: a defendant who committed a first-degree kidnapping by simply failing to voluntarily release his captive would receive the exact same sentence as one who, like Defendant, violently raped his victim. **[BIC 31]** This is yet another exceedingly odd result that this Court would have to accept to endorse Defendant's position.

Defendant tacitly admits that his interpretation would render the "sexual offense" theory of first-degree kidnapping essentially superfluous. He appears to agree that, in this case, the State could have convicted him of both crimes if it had charged him with first-degree kidnapping on a bodily injury theory. *See* **[AB 45]** ("Certainly the State could have asked the jury to 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"). Because the sexual offense theory would create a constitutional problem and because it is generally much easier to prove that a defendant merely inflicted a bodily injury, the State would effectively never have a reason to proceed under the sexual offense theory. That Defendant's construction would render statutory text essentially useless is a good reason to reject it. *See State ex rel ENMU Regents v. Baca*, 2008-NMSC-047, ¶ 10, 144 N.M.

530 ("we refrain from reading statutes in a way that renders provisions superfluous").

Defendant's sole basis for rejecting all of this indicia of legislative intent and accepting this bevy of odd results is the modified *Blockburger* test. **[AB 46-47]** His argument would therefore elevate one tool for gauging legislative intent above all others. Some New Mexico cases, relying on a single sentence from *Swafford*, treat failing *Blockburger* as determinative. *See, e.g.*, *State v. Porter*, 2020-NMSC-020, ¶ 20, 476 P.3d 1201 (quoting *Swick*, 2012-NMSC-018, ¶ 27, which in turn quoted *Swafford*, 1991-NMSC-043, ¶ 30). But even Defendant acknowledges exceptions, *see* **[AB 46-47]** (claiming only that failing *Blockburger* "typically ends the inquiry"), and that one sentence was an incomplete statement of the law.

This Court decided *Swafford* in 1991. It described the *Blockburger* test as it stood then, recognizing that it was "not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent." 1991-NMSC-043, ¶ 12. It recognized that the test generated inferences about legislative intent. *See id.* ("if each statute requires an element of proof not required by the other, it may be *inferred* that the legislature intended to authorize separate application of each statute . . . [c]onversely, if proving violation of one statute always proves a violation of another . . . then it would *appear*…") (emphasis added). In the next paragraph, it cited *Garrett v. United States*, 471 U.S. 773 (1985), for the

proposition that courts look "to the language, structure, and legislative history of statutes to divine legislative intent." 1991-NMSC-043, ¶ 13. Later in the opinion, it told courts to apply "the *Blockburger* test," suggesting that they should take the test as it existed in 1991. *Id.* ¶ 30. It then, without citation to authority, said that "punishment cannot be had for both" if two statutes failed *Blockburger*. *Id.*

But in 1991 it was well-established – by *Garrett*, which the *Swafford* court approvingly cited – that failing *Blockburger* produced only a presumption that could be rebutted by other indicia of legislative intent. *Garrett* involved a subsequent prosecution where the government sought to convict a defendant of engaging in a continuing criminal enterprise on the basis of predicate crimes it proved in an earlier prosecution. 471 U.S. at 776-77. The Court recognized that the statutes failed *Blockburger* and that the defendant would win if that test was controlling. *Id.* at 779. Congress had not expressly authorized punishment under both statutes – the Court had recently dealt with that issue in *Missouri v. Hunter*, 459 U.S. 359 (1983). But even in the absence of express authorization, the *Garrett* Court found that the "language, structure, and legislative history" of the relevant statutes "show in the plainest way that Congress intended" to punish for both. 471 U.S. at 779. "Insofar as the question is one of legislative intent, the *Blockburger*

presumption must of course yield to a plainly expressed contrary view on the part of Congress."[5] *Id.*

In *Swafford*, this Court did not expressly reject *Garrett*. Instead, it cited that decision and told courts to apply "the *Blockburger* test[.]" 1991-NMSC-043, ¶¶ 13, 30. The *Swafford* Court did not hesitate to expressly depart from some federal precedent; after discussing the rule of lenity, it invited readers to compare the state operation of the rule to the federal treatment. *Id.* ¶ 34. It did not do so with *Garrett*.

Recent precedent from this Court confirms that *Blockburger* does not control when legislative intent is sufficiently clear from other sources. As discussed above, this Court in *Loza* declined to bar punishment for compound and predicate offenses even though they failed *Blockburger* because other indicia of intent showed that the Legislature intended to authorize multiple punishments. 2018-NMSC-034, ¶ 17. The *Loza* Court relied extensively on *Garrett*: the name appears throughout that decision. This strongly suggests that this Court did not repudiate the rule from *Garrett* with *Swafford*. In *State v. Baroz*, this Court resolved a double description challenge without applying the *Blockburger* test because other canons of construction clearly showed that the Legislature intended to authorize cumulative penalties for the firearm enhancement. 2017-NMSC-030, ¶¶ 22-27, 404 P.3d 769.

---

[5] Again, *Garrett* involved a subsequent proceeding. But, as discussed in note 1 above, *Blockburger* plays the same role there as it does in double description cases.

That outcome makes the most sense. The "sole limitation on multiple punishments is legislative intent," and "*Blockburger* is not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent." *Swafford*, 1991-NMSC-043, ¶¶ 12, 25. Giving *Blockburger* a determinative role would elevate a mechanical application of one tool for gauging intent over the intent itself in cases like this one, where it is clear what the Legislature meant to do. Moreover, such a simplistic and rigid approach would be at odds with this Court's modern, context-specific double-jeopardy jurisprudence.

CONCLUSION

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

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ Van Snow
Van Snow
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
(505) 490-4843

CERTIFICATE OF SERVICE

I certify that, on June 21, 2023, I filed a true and correct copy of the foregoing Reply Brief electronically through the Odyssey E-File & Serve System, which caused opposing counsel Mary Barket to be served by electronic means at mary.barket@lopdnm.us.

/s/ Van Snow
Assistant Attorney General