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CRIMINAL LAW—New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine— *State v. Campos*

I. INTRODUCTION

In New Mexico, second-degree murder is elevated to first-degree felony murder when it is committed during the course of an inherently dangerous felony.¹ In *State v. Campos*,² the New Mexico Supreme Court affirmed Tony Campos' first-degree felony murder conviction based on the underlying felony of first-degree criminal sexual penetration.³ The New Mexico Supreme Court held that, under the strict elements test, first-degree criminal sexual penetration is collateral to or independent of second-degree murder.⁴ Although the strict elements test traditionally has been limited to double jeopardy analysis, the *Campos* court extended the strict elements test to collateral felony analysis.⁵ Thus, the *Campos* decision reflects a shift in New Mexico's criminal jurisprudence.⁶ The *Campos* court further concluded that the defendant's conviction and sanction for both first-degree criminal sexual penetration and first-degree felony murder violated his constitutional protection against double jeopardy,⁷ reflecting a departure from New Mexico's traditional double jeopardy analysis.

This Note first describes the facts involved and decision rendered in *Campos*. An historical overview of the application of the felony murder doctrine and the methodology employed by New Mexico courts in analyzing an individual's protection against double jeopardy follows. The Note then analyzes the court's rationale in the *Campos* decision. Finally, the implications of this decision for the felony murder rule and double jeopardy analysis in New Mexico are discussed.

II. STATEMENT OF THE CASE

In *State v. Campos*,⁸ the defendant was convicted of first-degree criminal sexual penetration (CSP)⁹ and first-degree felony murder¹⁰ after waiving his right to a jury trial.¹¹ The victim, Victor Gutierrez, and the defendant had been drinking heavily on June 12, 1992, and engaging in horseplay with sexual overtones at Lisa Salcido's

1. See N.M. STAT. ANN. § 30-2-1(A)(2) (Repl. Pamp. 1994); see also *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

2. 122 N.M. 148, 921 P.2d 1266 (1996).

3. See *id.* at 162, 921 P.2d at 1280.

4. See *id.* at 156, 921 P.2d at 1274.

5. See *id.*

6. See *id.*

7. See *id.* at 162, 921 P.2d at 1280.

8. No. 92-146 (Dist. Ct. N.M. May 13, 1993) (*Campos I*).

9. See N.M. STAT. ANN. § 30-9-11(A)(Repl. Pamp. 1994) (Criminal Offenses Act). The statute defines criminal sexual penetration as "the unlawful and intentional causing of a person to engage in . . . anal intercourse . . . to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission." *Id.*; see also N.M. STAT. ANN. § 30-9-11(C)(2)(Repl. Pamp. 1994). This section defines first-degree criminal sexual penetration as "all sexual penetration perpetrated . . . by the use of force or coercion that results in great bodily harm or great mental anguish to the victim." *Id.*

10. See N.M. STAT. ANN. § 30-2-1(A)(2)(Repl. Pamp. 1994). The Act defines first-degree murder as the "killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit any felony." *Id.*

11. See *Campos I*, No. 92-146 (Dist. Ct. N.M. May 13, 1993).

home.¹² At approximately 2:00 a.m., Campos laid Gutierrez in the front yard and stripped Gutierrez of his clothing. The two men re-entered Ms. Salcido's home where the naked Gutierrez was acting like a dog. At some point, someone remarked that Gutierrez should have a tail. Gutierrez attempted to walk home but fell to the ground. Shortly thereafter, Campos laid Gutierrez on the front lawn. Laughing and calling for others to watch, he twice impaled into Gutierrez's anus with the entire length of a mop handle causing severe internal bleeding and later his death.¹³

The trial court judge convicted and sentenced the defendant for both first-degree CSP and first-degree felony murder.¹⁴ On direct appeal to the New Mexico Supreme Court,¹⁵ Campos argued that his conviction for first-degree felony murder should be reversed.¹⁶ He argued that the felony-murder rule was inapplicable in this case because the first-degree CSP was not collateral to or independent of the victim's murder.¹⁷ Campos argued that Gutierrez died as a direct result of the CSP.¹⁸ Therefore, Campos' action underlying the CSP and the homicide comprised of a single, unitary act, not two independent actions. Campos also argued that his conviction and sanction for both first-degree CSP and first-degree felony murder violated his constitutional protection against double jeopardy.¹⁹

Under the strict elements test,²⁰ the New Mexico Supreme Court concluded that first-degree CSP is collateral to or independent of homicide.²¹ CSP is not a lesser included offense or sub-set of second-degree murder.²² Thus, Campos committed two independent acts. However, the court concluded that under the identical strict elements test, Campos' conviction and sanction for both first-degree CSP and first-degree felony murder violated the double jeopardy provision of both the state and

12. See *Campos* 122 N.M. at 150, 921 P.2d at 1268. Unless otherwise specified, the facts in this section are taken from the New Mexico Supreme Court in the *Campos* decision found at 122 N.M. 148, 921 P.2d 1266 (1996).

13. See *id.* at 150-51, 921 P.2d at 1268-69. The two men were in the home and front yard of Lisa Salcido and her boyfriend, Bernie Baca. See *id.* Baca later called the police. See *id.* Campos was arrested that morning at Salcido's house. See *id.* at 151, 921 P.2d at 1269. Gutierrez was rushed by ambulance to the hospital where he died of internal bleeding. The mop punctured his intestine, liver, diaphragm, pericardial sac of his heart, injured his lung and "ended by bulging the skin near his shoulder" where Campos left the mop. *Id.*

14. See *id.*

15. See N.M. R. APP. P. 12-102 (A)(1) (appeals from the district court in which a sentence of death or life imprisonment has been imposed shall be taken directly to the New Mexico Supreme Court).

16. See *Campos* 122 N.M. at 150, 921 P.2d at 1268.

17. See *id.* at 151, 921 P.2d at 1269.

18. See *id.* at 153, 921 P.2d at 1271.

19. See *id.* Campos argued three additional grounds for reversal in his appeal to the New Mexico Supreme Court: 1) that the trial court erred in convicting him of first-degree felony murder because the trier of fact found reasonable doubt as to his intent to kill or knowledge that his acts created a strong probability of death or great bodily harm to Victor Gutierrez; 2) that his severe intoxication should serve as a defense to first-degree felony murder; and 3) that he was denied his constitutional right to confront one of the witnesses. See *id.* None of these issues is the focus of this Note. For a discussion of intoxication as a defense to murder, see Vicki Zelle, Note, *CRIMINAL LAW—The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal*—State v. Brown, 28 N.M. L. REV. ____ (1998).

20. See discussion *infra* Part IV.A.

21. See *Campos* 122 N.M. at 156, 921 P.2d at 1276. Traditionally, New Mexico courts employed the strict elements test solely in the double jeopardy arena. The *Campos* court expanded the use of the strict elements test to felony murder analysis to determine whether an underlying felony is collateral to or independent of the homicide. See *id.* at 155, 921 P.2d at 1273.

22. See *id.* at 156, 921 P.2d at 1276.

federal constitutions²³ because Campos committed one act that caused the victim's death.

III. HISTORICAL AND CONTEXTUAL BACKGROUND

The felony murder doctrine is rooted in English common law.²⁴ All homicide "committed during the perpetration or the attempted perpetration of a felony constituted felony murder,"²⁵ sanctioned by death.²⁶ "Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule,"²⁷ which has been described as "an unsightly wart on the skin of the criminal law"²⁸ and "an anachronistic remnant [that has] 'no logical or practical basis for existence in modern law.'"²⁹ Modern jurisdictions have criticized and limited the application of the felony murder rule to varying degrees. Some of the distinct and varied state approaches include those of Kansas, California, and Arizona. For example, Kansas courts focus their inquiry on whether the underlying felony and the homicide may be considered a unitary act.³⁰ The Kansas Supreme Court reasoned that:

Time, distance, and the causal relationship between the underlying felony and the killing are factors to be considered in determining whether the killing is a part of the felony and, therefore, subject to the felony murder rule. The collateral felony must, therefore, be felonious conduct other than the lethal act itself . . . the lethal act itself cannot serve as the independent collateral felony.³¹

Thus, Kansas courts employ several factors to determine whether the underlying felony was part of or caused the homicide. Such an approach grants the judiciary much discretion in determining whether the underlying felony and homicide were committed by a single act.

California's inquiry, however, concentrates on the criminal's independent felonious design or intent.³² The felony murder rule applies only when the defendant did not intend to kill his victim. If the defendant intended to kill, he may not be convicted of first-degree felony murder. California courts focus solely on the defendant's mens rea regardless of the defendant's actions. Thus, the California felony murder rule serves to deter accidental homicides that occur during "the

23. See *id.* The New Mexico Supreme Court also held that: 1) the reasonable doubt found by the trial court was not a factual dispute to be considered on appeal, see *Campos* 122 N.M. at 157, 921 P.2d at 1275; and 2) intoxication fails to be a defense to first-degree felony murder, see *id.* at 161, 921 P.2d at 1279.

24. See *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

25. *Id.* at 441, 564 P.2d at 1323.

26. See *id.* Irrespective of whether a death occurred, most felonies were punishable by death regardless of the criminals intent or the heinousness of the felony. See *id.*

27. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446 (1985).

28. H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973).

29. *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980)(quoting Roy Moreland, *Kentucky Homicide Law with Recommendations*, 51 KY. L. J. 59, 82 (1962)).

30. See *State v. Prouse*, 767 P.2d 1308 (Kan. 1989).

31. *Id.* at 1313 (citations omitted).

32. See, e.g., *People v. Mattison*, 481 P.2d 193 (Cal. 1978) (unitary felonious act served as the collateral felony when criminal did not intend to kill). But see *People v. Hansen*, 885 P.2d 1022, 1030-31 (Cal. 1994)(willful discharge of a firearm at an occupied dwelling served as the collateral felony for first-degree felony murder when an occupant was killed).

course of committing a felony."³³ Such an approach seems counter-intuitive because it is close to impossible to deter individuals from committing accidental shootings.

Arizona statutorily enumerated certain felonious conduct resulting in death that would elevate a homicide to first-degree felony murder.³⁴ Regardless of the criminal's felonious purpose or whether the felony and the homicide were a unitary act, Arizona courts simply look to the statutes in determining the applicability of the felony murder rule.³⁵ Such an approach ensures that the judiciary comports with legislative intent, avoids confusion among the courts regarding a criminal's mens rea, and alleviates convoluted tests to determine which underlying felonies are collateral to the homicide.

New Mexico does not statutorily enumerate which felonies, in concert with homicide, result in first-degree felony murder. Arising from both legislative enactments³⁶ and judicial interpretations,³⁷ New Mexico's approach to felony murder is distinct from that found in other states. Ultimately, New Mexico's legislature and judiciary have defined felony murder as second-degree murder committed during the course of an inherently dangerous felony.³⁸ However, in an attempt to curb the broad use of the felony murder rule, the New Mexico judiciary enunciated three limitations to New Mexico's distinct version of felony murder.³⁹

A. *New Mexico's Felony Murder Doctrine*

The definition of felony murder in New Mexico significantly differs from that in other jurisdictions in that New Mexico insists that persons convicted of felony murder have a mens rea denoting an intent to kill. The New Mexico Supreme Court defined first-degree felony murder as second-degree murder⁴⁰ committed during the course of an inherently dangerous felony.⁴¹

In *State v. Ortega*, the New Mexico Supreme Court "imposed a mens rea requirement for felony murder,"⁴² explicitly overruling its precedent that the felony

33. *People v. Smith*, 678 P.2d 886, 891 (Cal. 1984) (citations omitted).

34. See ARIZ. REV. STAT. ANN. §13-1105.A.2. (West 1997) (such conduct includes: committing or attempting to commit sexual conduct with a minor; sexual assault; molestation of a child; marijuana offenses; dangerous drug offenses; narcotics offenses; involving or using minors in drug offenses; kidnapping; burglary; arson; robbery; escape; child abuse; or unlawful flight from a pursuing law enforcement vehicle). See also *State v. Miniefield*, 522 P.2d 25 (Ariz. 1974) (arson is felonious conduct that was statutorily enumerated to elevate a homicide to first-degree felony murder).

35. See *Miniefield*, 522 P.2d at 25.

36. See, e.g., N.M. STAT. ANN. § 30-2-1(A)(2)(Repl. Pam. 1994).

37. See, e.g., *State v. Harrison*, 90 N.M. 439, 441, 564 P.2d 1321, 1323 (1977); *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

38. See N.M. STAT. ANN. § 30-2-1(A)(2); see also *Harrison*, 90 N.M. at 439, 564 P.2d at 1321.

39. See *Harrison* 90 N.M. at 441, 564 P.2d at 1323; see discussion *infra* Part III.B.

40. See N.M. STAT. ANN. § 30-2-1(B) (Repl. Pam. 1994). The statute defines second-degree murder as the killing of "another human being without lawful justification or excuse . . . if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another." *Id.* To be convicted of second-degree murder in New Mexico, the defendant must have possessed the intent to kill. See *Ortega*, 112 N.M. at 563, 817 P.2d at 1205 (establishing that a defendant must have possessed the requisite mens rea).

41. See *Ortega*, 112 N.M. at 563, 817 P.2d at 1205.

42. *Ortega*, 112 N.M. at 563, 817 P.2d at 1205; (quoting *State v. Lopez*, 122 N.M. 63, 65, 920 P.2d 1017, 1019 (1996)).

murder rule required no mens rea.⁴³ In *Ortega*, the defendant kidnapped two girls who looked rich” and were wearing jewelry because he wanted to buy cocaine.⁴⁴ After beating the girl that was driving, he stabbed her thirty-eight times.⁴⁵ The defendant then stabbed the passenger over forty-five times.⁴⁶ The court held that New Mexico’s felony murder rule requires both causation and intent to kill or knowledge that one’s actions “create a strong probability of death or great bodily harm.”⁴⁷ Therefore, the prosecution was required to prove that Ortega intended to kill the two women after he kidnapped and stabbed them.⁴⁸

B. Limitations on New Mexico’s Felony Murder Rule

Prior to *Ortega*, the New Mexico Supreme Court had placed statutory and judicial limitations on the felony murder doctrine. New Mexico’s initial reform of

43. See, e.g., *State v. Pierce*, 109 N.M. 596, 601, 788 P.2d 352, 357 (1990) (stating that the requisite mens rea may be inferred when a death occurs during the commission of an inherently dangerous felony); *State v. Price* 104 N.M. 703, 704, 726 P.2d 857, 858 (1986) (explicitly holding that the felony murder doctrine imposes no mens rea requirement).

Until 1990, New Mexico courts held that the felony murder doctrine required no mens rea. See *Pierce* 109 N.M. at 601, 788 P.2d at 357; see also *Price* 104 N.M. at 704, 726 P.2d at 858 (although felony murder requires no mens rea, felony murder may be intentionally committed)(citations omitted).

In *Pierce*, the court held that the mens rea for first-degree felony murder may be inferred from the commission of the felony. See *Pierce* 109 N.M. at 601, 788 P.2d at 357. Although the defendant in *Pierce* was mentally ill and therefore lacked malice aforethought, her first-degree felony murder conviction was upheld because the homicide occurred during the commission of the kidnapping and child abuse. See *id.* at 597, 601, 788 P.2d at 353, 357. Ultimately, the prosecution bore no burden of proving the defendant’s requisite mens rea—the intent to kill or minimal knowledge that her actions created a strong probability of death or great bodily harm. See *Price* 104 N.M. at 704, 726 P.2d at 858.

The *Ortega* court overruled *Price* and *Pierce* for three reasons. First, the court stated that crimes involving homicide are “generally attended by moral culpability” and thus should not be considered a strict liability crime. See *Ortega* 112 N.M. at 562, 817 P.2d at 1204. Unlike homicide, strict-liability crimes generally have minimum sentencing. The court further noted that courts and legislatures believe that the state must bear the burden of proving the requisite mens rea. See *id.*; see also *Price* 104 N.M. at 705, 726 P.2d at 859.

Secondly, the Due Process Clause of the Constitution has been interpreted to require every element of an offense be proven beyond a reasonable doubt. See *Ortega* 112 N.M. at 562, 817 P.2d at 1204; *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246 (1952)). Therefore, New Mexico’s murder statute requires proof that the defendant intended to kill the victim or minimally knew his or her actions “create[d] a strong probability of death or great bodily harm” to the victim. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994). The New Mexico Supreme Court expressly held that “unintentional or accidental killing[s] will not suffice” to elevate a homicide committed during the course of an inherently dangerous felony to first-degree felony murder. See *Ortega* 112 N.M. at 563, 817 P.2d at 1205.

Third, New Mexico’s homicide provision of the criminal code expressly imposes a mens rea requirement for both first-degree and second-degree murder. See *Ortega* 112 N.M. at 564, 817 P.2d at 1206. The criminal sanction for first-degree murder is death or life imprisonment. See N.M. STAT. ANN. § 31-18-14 (Repl. Pamp. 1994). The criminal sanction for second-degree murder is nine years imprisonment and a fine not to exceed \$12,500. See N.M. STAT. ANN. § 31-18-15(A)(2) and 31-18-15(D)(2). The supreme court determined that, consonant with legislative intent, felony murder necessarily imposed a mens rea requirement. See *Ortega* 112 N.M. at 563, 817 P.2d at 1205; see also *State v. Campos*, 122 N.M. 148, 153, 921 P.2d 1266, 1271 (1996).

44. See *Ortega* 112 N.M. at 557-58, 817 P.2d at 1199-1200.

45. See *id.* at 558, 817 P.2d at 1200.

46. See *id.*

47. *Id.* at 566, 817 P.2d at 1208.

48. See *id.* The *Ortega* court did not remand the case for the prosecutor to prove the intent to kill, holding that the jury must have found that the defendant intended to kill his victim. Thus, *Ortega* is dicta. However, New Mexico courts have adopted the proposition that second-degree murder requires that the defendant possessed an intent to kill. See, e.g., *State v. Lopez*, 122 N.M. 63, 65, 920 P.2d 1017, 1019 (1996); *State v. Bankert*, 117 N.M. 614, 621, 875 P.2d 370, 377 (1994); *State v. Griffin*, 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993).

the felony murder doctrine began in *State v. Harrison*.⁴⁹ To curb a broad application of the felony murder doctrine, the New Mexico Supreme Court enunciated three judicial limitations on the felony murder rule.⁵⁰ First, a causal relationship between the homicide and the underlying felony must exist.⁵¹ Second, the underlying felony must be independent of or collateral to the murder.⁵² Finally, the underlying felony must be inherently dangerous.⁵³ However, the *Harrison* court failed to discuss the application of the collateral felony limitation on the felony murder rule. Prior to *Campos*, New Mexico jurisprudence failed to delineate the proper methodology for applying the collateral felony limitation to felony murder.⁵⁴

C. Double Jeopardy as Applied to the Felony Murder Doctrine

The underlying foundation of double jeopardy is "that a person need run the gauntlet only once."⁵⁵ The United States Supreme Court has delineated a tripartite model of an individual's protection against double jeopardy. First, the model protects defendants against a second trial after an acquittal.⁵⁶ Second, the model protects defendants against a second trial for the identical action after a successful conviction.⁵⁷ Third, the double jeopardy clause ensures that individuals will not be subject to multiple convictions and punishment based on a single action.⁵⁸ The double jeopardy clause serves both individual and societal purposes.⁵⁹ However, the "deceptively plain language [of the double jeopardy clause] has given rise to problems both subtle and complex."⁶⁰ In response to such problems, the New Mexico Supreme Court implemented a two-prong test to ascertain whether the State has violated a defendant's protection against double jeopardy.⁶¹ First, the court must determine whether the defendant was charged with two criminal offenses after he

49. 90 N.M. 439, 564 P.2d 1321 (1977).

50. *See id.* at 441, 564 P.2d at 1323.

51. *See id.* The *Harrison* court concluded that the kidnapping and rape were closely connected in time to the homicide satisfying the causal relationship limitation placed on the felony murder rule. *See id.*

52. *See id.* The *Harrison* court concluded that the kidnapping was independent of the homicide. *See id.*

53. *See Harrison* 90 N.M. at 441, 564 P.2d at 1323; *State v. Pierce*, 109 N.M. 596, 601, 788 P.2d 352, 357 (1990). The court in *Harrison* concluded that first-degree felonies are inherently dangerous. *See Harrison* 90 N.M. at 442, 564 P.2d at 1324.

54. This Note will later discuss the application and methodology of the collateral felony limitation of the felony murder rule. *See discussion infra* Part IV.A.

55. *North Carolina v. Pearce*, 395 U.S. 711, 727 (1969).

56. *See Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). The Double Jeopardy Clause, found in the Fifth Amendment to the United States Constitution, is made applicable to the states through the Fourteenth Amendment. The clause reads in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Moreover, the New Mexico Constitution provides the same double jeopardy protection. *See N.M. CONST.* art. II, § 15.

57. *See Swafford v. State*, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991).

58. *See id.*; *see also* U.S. CONST. amend. V; N.M. CONST. art. II, § 15. Analysis of an individual's double jeopardy protection against multiple convictions and sanctions will be discussed later in this Note. *See discussion infra* Part V.B.

59. *See, e.g.*, Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM & MARY L. REV. 199, 264 (1995) ("Society gains efficiency by prohibiting costly repeated prosecutions or additional punishments for the same offense, by maximizing the deterrent value of the prosecution through public trial and sentencing in the community where the social wrong was done.").

60. *Crist v. Bretz*, 437 U.S. 28, 32 (1978).

61. *See Swafford* 112 N.M. at 13, 810 P.2d at 1233.

committed a single, or unitary, act.⁶² If the action taken by the defendant is deemed unitary, the court examines the legislative intent behind the two statutes she is alleged to have violated.⁶³ If the defendant's actions under the two statutes are separate and distinct, she may be punished under both statutes with no violation of the double jeopardy clause.

Turning to the "single act" prong of the double jeopardy test, when a defendant is charged with violating multiple statutes, the court examines several factors to determine if the defendant's action underlying the crimes is unitary. Such inquiry focuses on the elements of the implicated statutory offenses as well as whether the circumstances are sufficiently separated by time or by space.⁶⁴ The facts presented during the trial are also considered by the court.⁶⁵

For example, in *Ortega*, the two victims were kidnapped more than two hours before they were stabbed to death.⁶⁶ Therefore, the court determined the defendant's actions underlying the kidnapping and the murder were not unitary. The kidnapping was separate from the homicide. Thus, the court did not need to proceed to the second prong of the double jeopardy test, namely legislative intent.

Another example is *State v. Kersey*.⁶⁷ In *Kersey*, the New Mexico Supreme Court affirmed the proposition that kidnapping and homicide are independent felonious acts separated by sufficient time and space.⁶⁸ The victim in *Kersey* was unlawfully and forcibly abducted from her high school at 10:30 a.m. which completed the act of kidnapping.⁶⁹ More than two hours later and sixty miles away, the victim was strangled and stabbed to death.⁷⁰ The *Kersey* court properly concluded that two separate and distinct felonious acts occurred, which were sufficiently separated by time and space.⁷¹ Thus, the defendant was convicted of and sentenced for both kidnapping and first-degree felony murder.⁷²

Only when the defendant's act underlying the offenses is considered unitary, must the court proceed to the remaining "legislative intent" prong.⁷³ For example, in *State v. Lopez*, a gas station clerk was murdered during the course of an attempted armed robbery.⁷⁴ Thus, the defendant's act of attempted robbery and homicide merged into a single act.⁷⁵ Therefore, the court proceeded to the remaining "legislative intent" prong of the double jeopardy test.⁷⁶

62. See *id.*; see also *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995); *State v. Kersey*, 120 N.M. 517, 903 P.2d 828 (1995); *State v. Meadors*, 122 N.M. 38, 49, 908 P.2d 731, 742 (1995); *State v. Rodriguez*, 113 N.M. 767 (Ct. App.), *cert. denied* 113 N.M. 636, 830 P.2d 553 (1992).

63. See *Swafford* 112 N.M. at 13, 810 P.2d at 1233.

64. See *id.* at 13, 810 P.2d at 1233.

65. See *id.*

66. See *State v. Ortega*, 112 N.M. 554, 558, 817 P.2d 1196, 1200 (1991).

67. 120 N.M. 517, 903 P.2d 828 (1995).

68. See *id.* at 522, 903 P.2d at 833.

69. See *id.* at 523, 903 P.2d at 834.

70. See *id.*

71. See *id.*

72. See *id.*

73. See *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

74. See *State v. Lopez*, 122 N.M. 63, 70, 920 P.2d 1017, 1024 (1996).

75. See *id.*

76. See *id.*

Absent an express mandate from the legislature regarding punishment, the court employs the strict elements or *Blockburger* test to determine legislative intent.⁷⁷ If the elements of each statutory provision with which the defendant is charged are "subsumed" within one another, the court may not convict for both the underlying felony and the homicide.⁷⁸ However, when the elements differ, the court must examine several factors such as: 1) whether the language, history and subject of the statutes grant guidance to the legislature's intent; 2) whether there is a particular evil sought to be addressed by each offense; 3) whether the policies behind each statute differ; 4) whether the legislature intended to create separate, punishable crimes; and 5) the quantum of punishment.⁷⁹

In *Swafford*, the court determined that first-degree CSP was not "subsumed" by or a sub-set of incest.⁸⁰ In contrast to incest, CSP requires force or coercion.⁸¹ Further, unlike incest, the relationship between the victim of CSP and the defendant is irrelevant.⁸² Moreover, the policy behind each statute differs. The policy behind prohibiting CSP is to sanction "forcible, nonconsensual sexual activity and to protect a person's important interests in uncoerced choice of sexual partners."⁸³ The policy behind prohibiting incest is to sanction "sexual relations, whether consensual or not, between relatives."⁸⁴ Thus, the defendant's conviction and sanction for both CSP and incest were not violative of the double jeopardy protections afforded the defendant.⁸⁵ As a result, the *Swafford* court upheld both convictions.⁸⁶

Several policies underlie the individual's protection against double jeopardy. For example, the State is an enormous entity with vast resources and power.⁸⁷ Therefore, repeated attempts to convict an individual serves only to injure the individual.⁸⁸ Rehearsed presentations also increase the risk of an erroneous conviction.⁸⁹ The double jeopardy clause also protects against multiple punishments for the same offense.⁹⁰ Multiple punishments run the risk of the judiciary "prescribing greater punishment than the legislature intended."⁹¹

IV. RATIONALE OF THE CAMPOS DECISION

In *Campos*, the New Mexico Supreme Court discussed the adoption of the first-degree felony murder doctrine and recognized an inherent ambiguity in the application of the doctrine. The *Campos* court re-affirmed the three judicial limitations placed on the felony murder rule in *Harrison*: 1) a causal relationship

77. See *Meadors*, 121 N.M. at 42, 908 P.2d at 735; *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

78. See *Meadors*, 121 N.M. at 42, 908 P.2d at 735.

79. See *Swafford*, 112 N.M. at 13-15, 810 P.2d at 1233-35.

80. See *id.* at 15, 810 P.2d at 1235.

81. See *id.*

82. See *id.*

83. *Id.* at 16, 810 P.2d at 1236.

84. *Id.*; see also *State v. Hargrove*, 108 N.M. 233, 238, 771 P.2d 166, 171 (1989).

85. See *Swafford*, 112 N.M. at 16, 810 P.2d at 1235.

86. See *id.*

87. See *id.* at 7, 810 P.2d at 1227.

88. See *id.* (citing *Grady v. Corbin*, 495 U.S. 508 (1990)).

89. See *id.*

90. See *id.*

91. *Id.* (citations omitted).

between the homicide and the underlying felony; 2) the underlying felony must be collateral to the murder; and 3) the underlying felony is inherently dangerous.⁹² The *Campos* court then addressed the specific assertions Campos brought forward on appeal and discussed the rationale underlying the adoption of the strict elements test in the analysis of the collateral felony limitation of the felony murder rule. The court also reversed Campos' dual conviction and sanction of first-degree CSP and first-degree felony murder in accordance with double jeopardy protections utilizing the strict elements test.⁹³

A. *Campos' Asserted Grounds for Reversal of First-degree Felony Murder*

On appeal, the *Campos* court addressed Campos' asserted grounds for reversal of his first-degree felony murder conviction.⁹⁴ Prior to *Campos*, New Mexico jurisprudence failed to explicitly state a viable test analyzing the collateral felony limitation placed on the felony murder doctrine.⁹⁵ Campos urged the New Mexico Supreme Court to adopt Kansas' approach to the collateral felony limitation. Campos asserted that the court should require the underlying felony and the homicide to be sufficiently separated by time and space.⁹⁶ Therefore, because the CSP with the handle of a mop caused the victim's death, the CSP was not collateral to nor independent of the homicide.⁹⁷ Using the strict elements test, the court rejected Campos' assertion and concluded that first-degree CSP is collateral to or independent of the homicide in *Campos*.⁹⁸

One limitation on the felony murder rule is that the underlying felony must be independent of or collateral to the homicide.⁹⁹ The underlying felony may not be a

92. See *State v. Harrison*, 90 N.M. 439, 441, 564 P.2d 1321, 1323 (1977).

93. See *State v. Campos*, 122 N.M. 148, 162, 921 P.2d 1266, 1280 (1996).

94. See *id.* at 150, 921 P.2d at 1268. The court dismissed Campos' attempt to reverse his felony murder conviction because the lower court failed to find beyond a reasonable doubt that Campos knew his actions would create great bodily harm or death. See *id.* at 157, 921 P.2d at 1275. The *Campos* decision is an unusual situation in that the judge served as the trier of fact. See *id.* When initially evaluating the intoxication evidence, the trier of fact held that he had reasonable doubt as to whether Campos knew his actions would create a strong probability of death or great bodily harm. See *id.* Thus, the court found reasonable doubt as to Campos' requisite mens rea for second-degree murder, in part because of Campos' intoxication. See *id.* However, the court found that as a matter of law, intoxication may not serve as a defense to second-degree murder. See *id.* Since Campos had no defense to second-degree murder, the fact that he committed a felony, namely CSP, elevated the second-degree murder to first-degree felony murder resulting in Campos's first-degree felony murder conviction. See *id.* A majority of the New Mexico Supreme Court determined that the only question for their review regarding the Defendant's mens rea is whether, as a matter of law, intoxication may serve as a defense to second-degree murder. See *id.* For further discussion of intoxication as a defense to murder, see Vicki Zelle, Note, *CRIMINAL LAW—The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal*—*State v. Brown*, 28 N.M. L. REV. ____ (1998).

In his dissent, Justice Franchini criticized the majority's failure to consider the trial court's finding of reasonable doubt as to whether the defendant knew his actions created a strong probability of death or great bodily harm. See *Campos* 122 N.M. at 162, 921 P.2d at 1280. In *Ortega*, the Court required that a defendant charged with felony murder must have "intended to kill (or was knowingly heedless that death might result from his conduct)." See *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1202 (1991). Campos failed to meet such a doctrinal requirement according to Justice Franchini's dissent.

95. See *Campos*, 122 N.M. at 156, 921 P.2d at 1274; see *supra* Part III.B.

96. See *Campos*, 122 N.M. at 153, 921 P.2d at 1271.

97. See *id.*

98. See *id.* at 154, 921 P.2d at 1272.

99. See *id.*; see also *State v. Harrison*, 90 N.M. 439, 441, 564 P.2d 1321, 1323 (1977).

lesser-included offense of the homicide.¹⁰⁰ Although determining what constitutes the same offense seems simple on the surface, it is "virtually kaleidoscopic in application."¹⁰¹ In determining what constitutes a lesser-included offense, the New Mexico Supreme Court analyzes the two felonies employing either the *DeMary* test¹⁰² or the strict elements test,¹⁰³ marking a shift in New Mexico criminal jurisprudence.¹⁰⁴ Under the strict elements test, the *Campos* court determined that first-degree CSP is not a lesser-included offense of second-degree murder.¹⁰⁵

The *Campos* court extended the strict-elements test by determining whether first-degree CSP is collateral to the murder for the first time in New Mexico.¹⁰⁶ Based on the *Campos* decision, the strict elements test is applicable in cases analyzing whether the underlying felony is collateral to the homicide. Under the strict elements test:

a court would find an offense to be a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense.¹⁰⁷

Thus, the test employed by New Mexico courts is whether a criminal may commit second-degree murder without committing first-degree CSP.¹⁰⁸

At issue in the *Campos* decision is whether the felony, first-degree CSP, is collateral to the homicide.¹⁰⁹ The court determined that CSP is neither a lesser-included offense of homicide nor is it a sub-set of second-degree murder.¹¹⁰ CSP requires the specific act of penetration, which is not an element of second-degree murder.¹¹¹ Second-degree murder requires the defendant to act with the knowledge that there is a strong probability of causing death or great bodily harm.¹¹² Thus, CSP requires no mens rea respecting great bodily harm.¹¹³ CSP and homicide are

100. See *Campos*, 122 N.M. at 154, 921 P.2d at 1272.

101. *Whalen v. United States*, 445 U.S. 684, 700 (1980).

102. The *DeMary* test is applicable when a jury instruction involving a crime not expressly set forth in the indictment is requested by the prosecution. See *State v. Meadors*, 121 N.M. 38, 42-43, 908 P.2d 731, 735-36 (1995) (applying *State v. DeMary*, 99 N.M. 177, 179, 655 P.2d 1021, 1023 (1982)). The *DeMary* test serves as a safeguard to the defendant's constitutional right to notice of the charging crimes. See *Campos*, 122 N.M. at 155, 921 P.2d at 1273. The *DeMary* test is inapplicable in this circumstance because the prosecution expressly charged *Campos* with first-degree CSP and first-degree felony murder in his indictment. Therefore, for purposes of this Note, the *DeMary* test will not be addressed.

103. See *Meadors*, 121 N.M. at 42, 908 P.2d at 735.

104. See *id.* at 42-43, 908 P.2d at 734-36.

105. See *Campos* at 156, 921 P.2d at 1274.

106. The strict elements test, or *Blockburger* test, has historically been utilized in analyzing double jeopardy claims. See *Campos*, 122 N.M. at 155, 921 P.2d at 1273.

107. *Meadors*, 121 N.M. at 42, 908 P.2d at 735; see also *Swafford v. State*, 112 N.M. 3, 10-13, 810 P.2d 1223, 1230-33 (1991).

108. See *Campos*, 122 N.M. at 155-56, 921 P.2d at 1273-74; *State v. Comeau*, 109 N.M. 81, 86, 781 P.2d 1159, 1164 (Ct. App. 1989); see also *Blockburger v. U.S.*, 284 United States 299, 304 (1932) (indicating the test is whether each statutory requirement of each offense requires proof of additional evidence that the other does not)(citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

109. See *Campos*, 122 N.M. at 154, 921 P.2d at 1272. See also *Comeau* 109 N.M. at 87, 781 P.2d at 1165.

110. See *Campos*, 122 N.M. at 156, 921 P.2d at 1274.

111. See *id.*; N.M. STAT. ANN. § 30-9-11(A) (Repl. Pamp. 1994).

112. See *Campos*, 122 N.M. at 156, 921 P.2d at 1274; N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994).

113. See *Campos* 122 N.M. at 156, 921 P.2d at 1274.

comprised of separate and distinct elements. The court determined the two felonious acts were not unitary. Therefore, the two felonies are independent of one another and CSP may serve as a collateral felony to the homicide in this case.¹¹⁴

B. The Campos Court's Review of Double Jeopardy and the Felony Murder Doctrine

The New Mexico Supreme Court found that Campos' act of twice impaling the handle of a mop in the victim's anus (i.e., first-degree CSP) and the victim's death were considered a unitary act for purposes of Campos' constitutional protection against double jeopardy.¹¹⁵ Utilizing the strict elements test, the court concluded that the single act of criminal sexual penetration with the handle of a mop caused the victim's death.¹¹⁶ Therefore, the "single act" prong of the double jeopardy test enunciated in *Swafford*, was satisfied, and Campos could not be convicted of both crimes.

Next, the *Campos* court held that first-degree CSP and first-degree felony murder were not intended by the legislature to be punishable twice.¹¹⁷ However, the court did not expand on its reasoning regarding legislative intent. Therefore, the court determined that Campos' conviction of both first-degree CSP and felony murder violated his constitutionally protected guarantee against double jeopardy.¹¹⁸ Ultimately, Campos' first-degree CSP conviction and sanction was reversed in part and remanded to the lower court for findings consistent with the New Mexico Supreme Court's decision.¹¹⁹

V. ANALYSIS

The *Campos* court extended the strict elements test to determine whether a felony, in this case first-degree CSP, is collateral to the homicide. This test has historically been applied solely in the double jeopardy arena in an effort to comport with legislative intent. However, extending the strict elements test to collateral felony analysis may confuse future courts.

A. Applying the Strict Elements Test to both Collateral Felony and Double Jeopardy Analysis Led to Opposite Results in Campos.

However salutary the general concept of "collateral felony" appears, it has always been fraught with difficulty in its practical application, hence the desire of the *Campos* court to extend the strict elements test to analyze whether a felony is collateral to the actual homicide. Although the collateral felony analysis seems straightforward, its practical application presents complex issues. Thus, the nature and importance of the collateral felony limitation on felony murder mandated an exploration of alternatives in analyzing the limitation.

114. *See id.*

115. *See id.* at 161-62, 921 P.2d at 1279-80.

116. *See id.*

117. *See id.* at 162, 921 P.2d at 1280.

118. *See id.* at 161-62, 921 P.2d at 1279-80.

119. *See id.* at 162, 921 P.2d at 1280.

In determining whether an underlying felony is collateral to the homicide in question, the *Campos* court applied the strict elements test.¹²⁰ The test requires future courts to examine and compare the statutory elements of each offense to determine whether the elements of the underlying felony "are a sub-set of the statutory elements of the greater offense" homicide.¹²¹ The *Campos* court reasoned that first-degree CSP is not a sub-set and not subsumed by the homicide.¹²² As such, the two offenses were separate and distinct.¹²³

However, when evaluating Campos' challenge that his conviction of both first-degree CSP and felony murder violated his protection against double jeopardy, the court employed the identical strict elements test. The court held that Campos' conduct underlying the first-degree CSP and the homicide "was unitary," a single act.¹²⁴ The court also noted "that the legislature did not intend to punish Campos twice for the same killing."¹²⁵ Therefore, Campos' multiple convictions violated the double jeopardy clause.

By extending the strict elements test to analyze whether the underlying felony is collateral to the homicide, the court reached the opposite conclusion that was reached in the double jeopardy analysis. When deciding whether CSP was collateral to homicide, the court concluded that first-degree CSP and first-degree felony murder were distinct.¹²⁶ However, when deciding whether Campos' protection against double jeopardy was violated by a conviction of both first-degree CSP and felony murder, the court concluded the conduct underlying first-degree CSP and first-degree felony murder was unitary.¹²⁷

The *Campos* court did state that the strict elements tests applied in the collateral felony arena and in the double jeopardy arena were distinct for three reasons. First, the purpose behind each test differs. The collateral felony doctrine analyzes whether the felony murder rule applies in the instant case.¹²⁸ The double jeopardy analysis focuses on whether the defendant may be punished twice.¹²⁹ However, this argument fails because the application and methodology of the strict elements test as applied to collateral felony and double jeopardy analysis is identical. The basis for following the test is irrelevant to its actual application.

The *Campos* court also noted that the collateral felony doctrine analysis only included the examination of the statutory elements and that the facts of the case are irrelevant.¹³⁰ The court should take into consideration the statutory elements of the two charged offenses as well as the facts of each particular case when analyzing a

120. See *supra* Part IV.A.

121. See *Campos*, 122 N.M. at 155, 921 P.2d at 1273 (quoting *State v. Meadors*, 121 N.M. 38, 42, 908 P.2d 731, 735 (1995)).

122. See *id.* at 156, 921 P.2d at 1274.

123. See *id.*

124. See *id.* at 161-62, 921 P.2d at 1279-80.

125. *Id.* at 162, P.2d at 1280 (citation omitted). See also *Swafford v. State*, 112 N.M. 3, 15, 810 P.2d 1223, 1235 (1991).

126. See *Campos*, 122 N.M. at 156, 921 P.2d at 1274.

127. See *id.* at 162, 921 P.2d at 1280.

128. See *id.* at 156, 921 P.2d 1274.

129. See *id.*

130. See *id.*

defendant's protection against double jeopardy.¹³¹ The factual distinction the court draws upon is illusory. Regardless of the particular facts of a case, the court has traditionally looked to the statutory elements and legislative intent when analyzing whether an individual's protection against double jeopardy has been violated.¹³²

Lastly, the court determined that when the underlying felony is a lesser-included offense of second-degree murder, the felony is not collateral to the homicide and the defendant may not be convicted of felony murder.¹³³ Double jeopardy analysis does not analyze whether the two felonies are lesser-included offenses of one another. This distinction is also illusory. The very definition of the strict elements test enunciated in *Meadors* and *Swafford* directs a court to determine whether an offense is a

lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense.¹³⁴

Therefore, double jeopardy analysis traditionally analyzes whether one felony is a lesser included offense of another.

In this case, the court analyzed Campos' first-degree CSP to determine if the felony murder doctrine was applicable. Under the strict elements test, the court concluded that CSP was not a sub-set of second-degree murder.¹³⁵ CSP and second-degree murder contained different statutory elements.¹³⁶ Thus, CSP may serve as the underlying felony for felony murder because it is collateral to the murder.¹³⁷

B. *The Court Departed from the Traditional Two-Prong Double Jeopardy Test*

The *Campos* court stated that it applied the two prong double jeopardy test enunciated in *Swafford* when it concluded that Campos' conviction for both first-degree CSP and first-degree felony murder violated his constitutional protection against double jeopardy.¹³⁸ However, the court failed to expand on its rationale for rendering such a conclusion. Opponents of such a conclusion would argue that under the two prong double jeopardy test enunciated in *Swafford*, both of Campos' convictions should stand.

Under the strict elements test, the statutory elements of CSP may not be subsumed by the statutory elements of homicide. In concluding that CSP is collateral to the homicide in this case, the *Campos* court concluded that the elements of CSP are not subsumed by the elements of homicide. Accordingly, the two acts were separate and distinct not unitary. However, when applying the same test in the

131. *See id.*

132. *See, e.g.,* *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995); *State v. Kersey*, 120 N.M. 517, 903 P.2d 828 (1995); *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991);

133. *See Campos*, 122 N.M. at 155, 921 P.2d 1273.

134. *State v. Meadors*, 121 N.M. 38, 42, 908 P.2d 731, 735 (1995); *see also Swafford*, 112 N.M. at 10-13, 810 P.2d at 1230-33.

135. *See Campos*, 122 N.M. at 156, 921 P.2d at 1274.

136. *See supra* Part IV.A.

137. *See Campos*, 122 N.M. at 160, 921 P.2d at 1274.

138. *See id.* at 166, 921 P.2d at 1280.

double jeopardy analysis, the court concluded that Campos' conduct while committing CSP and homicide was the result of a unitary act.

Assuming *arguendo*, the court was correct in deciding that the conduct underlying CSP and homicide was caused by a single act, the court should analyze the "legislative intent" prong of the double jeopardy test. However, the court failed to examine legislative intent in this case.

VI. IMPLICATIONS

A. Policy Considerations

In *Campos*, the New Mexico Supreme Court departed from its traditional double jeopardy analysis. Strong policy considerations, such as stability and predictability, support the notion of adherence to precedent. Reliance on judicial principles is core to the foundation of a judicial system. However, in the instant case, reliance and adherence to precedent may have been violated.¹³⁹

In *Campos*, the New Mexico Supreme Court reversed the defendant's dual conviction and sanction for first-degree CSP and first-degree felony murder irrespective of the two prong double jeopardy test enunciated in *Swafford*.¹⁴⁰ In 1991, the *Swafford* court concluded that the strict elements test should be utilized in determining whether the defendant's conduct for both the underlying felony and the homicide was unitary for purposes of double jeopardy analysis. If Campos' conduct was unitary, the court should proceed to determine whether the legislature intended to punish the defendant for CSP and homicide separately. Such analysis requires an inquiry into: 1) whether the language, history and subject of the statutes grant guidance to the legislature's intent; 2) whether there is a particular evil sought to be remedied by each offense; 3) whether the policies behind each statute differ; 4) whether the legislature intended to create separate, punishable crimes; and 5) the quantum of punishment.¹⁴¹ In this case, the court failed to analyze the underlying felony and homicide under the two prong *Swafford* double jeopardy test. However, double jeopardy analysis is "controlled by legislative intent (whether the legislature intended to set up different offenses), rather than by a test independent of the legislative intent."¹⁴²

139. Although the reasonable doubt issue raised in the *Campos* decision is not a focus of this paper, it is important to note that the *Campos* court upheld Campos' conviction irrespective of the lower court's finding of reasonable doubt of his requisite mens rea. In 1991, the *Ortega* Court overruled its prior decisions that the felony murder doctrine imposed no mens rea requirement. See *State v. Ortega*, 112 N.M. 544, 557, 817 P.2d 1196, 1199 (1991). A long string of cases following *Ortega* explicitly imposed a mens rea requirement on the felony murder doctrine. See *Campos*, 122 N.M. 148, 921 P.2d 1266; *State v. Contreras*, 120 N.M. 486, 903 P.2d 228 (1995); *State v. Griffin*, 116 N.M. 689, 866 P.2d 1156 (1993). Campos must have intended to kill his victim. Minimally, Campos must have known that his actions created a strong probability of death or great bodily harm, the requisite mens rea for second-degree murder. See N.M. STAT. ANN. § 30-2-1(B)(Repl. Pamp. 1994). The lower court had reasonable doubt of Campos intent and knowledge. See *Campos*, 122 N.M. at 157, 921 P.2d at 1275.

140. See *supra* Part III.C.

141. See *Swafford v. State*, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991).

142. James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1 (1995); see also *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) (legislative intent is essential in Double Jeopardy Clause analysis to determine whether multiple punishment is constitutional); *Whalen v. United States*, 445 U.S. 684, 688 (1980) (multiple punishments cannot be resolved without determining legislative intent).

The court should analyze the above *Swafford* factors in determining whether the legislature intended to punish Campos separately for CSP and first-degree murder. For example, the policy behind CSP is to sanction "forcible, nonconsensual sexual activity and to protect a person's important interests in uncoerced choice of sexual partners."¹⁴³ On the other hand, the policy behind felony murder is to sanction conduct that creates a strong probability of death and to protect the safety and life of innocent citizens.¹⁴⁴ Further, the particular evil sought to be deterred by each offense differs. Sanctioning CSP is an attempt to prevent forced sexual activity. Sanctioning felony murder is an attempt to prevent the death of innocent individuals.

Ironically, *Swafford* is analogous to *Campos*. In *Swafford*, the defendant was convicted of both criminal sexual penetration and incest, both of which the New Mexico Supreme Court upheld. *Swafford* unsuccessfully argued that the criminal sexual penetration and incest resulted from the same or unitary act.¹⁴⁵ The *Swafford* court concluded that the statutory elements of CSP and incest differed; the policy objectives differed; and the legislature intended to sanction both evils separately.¹⁴⁶ Therefore, the double jeopardy protection afforded the defendant in *Swafford* was not violated.

Turning to the particular facts of this case, CSP is "not a continuing offense, rather it is completed upon penetration."¹⁴⁷ In this case, once Campos forced the handle of the mop into his victim's anus, he committed and completed first-degree CSP. The victim, Gutierrez, died hours later at the hospital several miles from Salcido's home, where the CSP occurred.

This very issue was examined by the *Kersey* court which held that kidnapping and murder were separate and distinct crimes which could be punished separately in accordance with legislative intent. The *Kersey* court concluded that once the victims were forcibly taken from the high school, the act of kidnapping was completed. Therefore, the victim's subsequent murder was separate and distinct from the kidnapping.

Under the two prong double jeopardy test, which the *Campos* court admits is the proper test, Campos' convictions for both first-degree CSP and first-degree felony murder were constitutional and should have been upheld.

B. The Need for Clarification of the Strict Elements Test.

For the first time in New Mexico jurisprudence, the New Mexico Supreme Court extended the strict elements test to the collateral felony prong of the felony murder rule. Under the strict elements test, the New Mexico Supreme Court concluded that first-degree CSP and homicide were separate and distinct¹⁴⁸ because the offenses

143. See *Swafford*, 112 N.M. at 15, 810 P.2d at 1234.

144. See *State v. Campos*, 122 N.M. 148, 154, 810 P.2d 1266, 1272 (1996); *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991).

145. See *Swafford*, 112 N.M. at 7, 810 P.2d at 1227.

146. See *id.* at 14-15, 810 P.2d at 1234-35.

147. See *State v. Corneau*, 109 N.M. 81, 86, 781 P.2d 1159, 1164 (Ct. App.) *cert. denied* (1989); *State v. Ramirez*, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

148. See *supra* Part IV.A.

contained separate elements. However, when the court applied the same strict elements test to its double jeopardy analysis the court reached the opposite conclusion. It determined that Campos' conduct underlying the felony and the homicide was a single, unitary act for purposes of the double jeopardy analysis. Application of the strict elements test in the collateral felony arena of the same case led to the opposite conclusion. As a result, the court should reconcile the test's application.

Attempting to merge the analysis of two very different and extraordinarily complex doctrines is not a viable or clear solution. Legislative action is the only viable and explicit solution. It is difficult to define the connection between the commission of the underlying felony and the homicide. As a result, the New Mexico legislature should enact a statute explicitly enumerating which felonies may elevate a homicide committed during the course of an inherently dangerous felony to first-degree felony murder.¹⁴⁹ The legislature should explore the juxtaposition relationship of the collateral felony limitation to felony murder and double jeopardy protections.

The extreme position of abolishing felony murder is yet another possibility. The drafters of the Model Penal Code intended to abolish the felony murder doctrine. However, "such a course was thought to be impolitic, given the weight of prosecutive opposition."¹⁵⁰ Therefore, abolishment of the felony murder rule is unlikely.

C. Campos' Conviction for Felony Murder is Ultimately Correct for Public Policy

Campos not once, but twice, forcibly impaled the entire length of the handle of a mop into his victim's anus. Laughing, he then left his victim naked, lying outside with the mop bulging from his shoulder. Campos ran inside Ms. Salcido's home when he heard police approaching and pretended to sleep. Campos' acts were beyond dangerous, they were heinous. The judiciary maintains an interest in protecting the health and safety of its citizens. Although the lower court may have found reasonable doubt on a technical legal issue, the New Mexico Supreme Court may find support from a strong public opinion. Further, punishment for such actions is consistent with the legislature's criminal sanctions approach.

VI. CONCLUSION

In *State v. Campos*, the court extended the strict elements test to determine whether the underlying felony, CSP, was collateral to the homicide. The court also examined New Mexico's approach to the felony murder doctrine, which was intended solely to elevate second-degree murder to first-degree felony murder when the underlying felony is collateral to the homicide. First-degree criminal sexual penetration, under the strict elements test, is a collateral felony. Thus, Campos was convicted of first-degree felony murder. Although the result in *Campos* may be

149. See ARIZ. REV. STAT. ANN. §13-1105.A.2. (West 1997).

150. Herbert Weschler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968).

correct with regard to public opinion, it fails to comport with New Mexico precedent. The court's decision resulted in two opposite conclusions while applying the same test to the same facts in the same case. The court's failure to address such a dispositive issue may cause confusion among the courts in New Mexico. The New Mexico Supreme Court must clarify whether the strict elements test is the proper test for determining whether an underlying felony is a unitary act with the homicide, which has double jeopardy implications. Lastly, the court must determine whether double jeopardy analysis must pass both the "single act" and "legislative intent" prongs of traditional *Swafford* double jeopardy analysis.

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