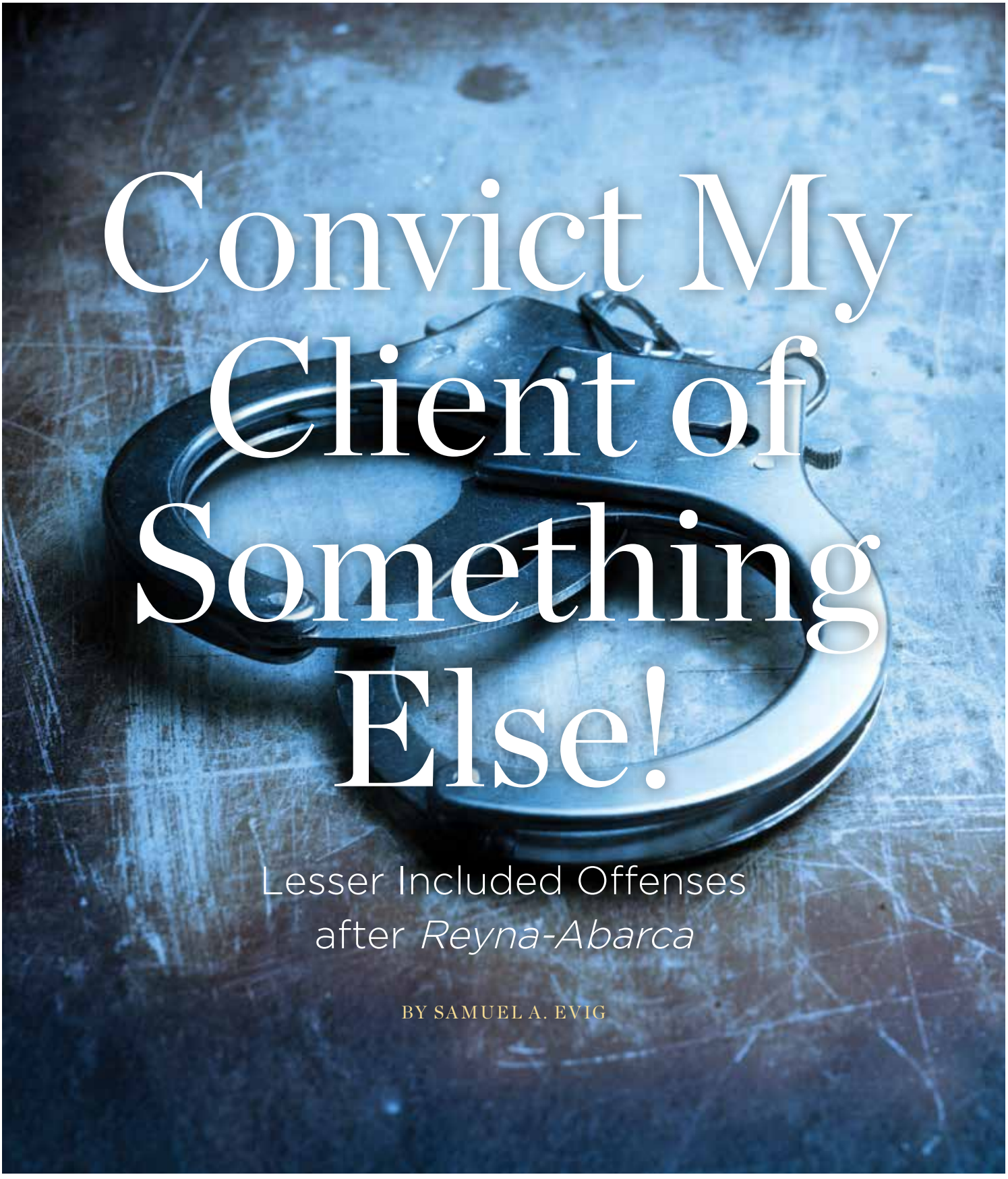

Convict My Client of Something Else!

Lesser Included Offenses after *Reyna-Abarca*

BY SAMUEL A. EVIG

The Colorado Supreme Court recently changed the standard for when one offense is included in another, invalidating years of its own precedent and creating new challenges for criminal practitioners. This article considers the implications of the new standard.

A recent decision by the Colorado Supreme Court, *Reyna-Abarca v. People*, changed the rules for determining whether one offense is a lesser included offense of another.[1] In the long run, this change may clarify this issue, but in the short run it has introduced uncertainty by overturning a host of prior rulings about which crimes are and are not lesser included offenses of other crimes. The change in the definition of a lesser included offense affects all phases of a criminal case, from plea bargaining through sentencing, and has significant consequences for defendants, attorneys, and judges.

Why Lesser Offenses Matter

The public and attorneys who do not practice criminal law may not understand why lesser offenses matter. Most people tend to view trials in a sort of binary way—either a person is guilty or not. But that understanding ignores fundamental issues that criminal practitioners face. Often, the issue at trial is not whether the accused is guilty, but whether the accused is guilty of exactly what the prosecutor alleges or guilty of some lesser offense. Lesser offenses can dramatically change the parties' negotiations, the issues the jury decides, and the eventual sentence a court may impose.

The issues surrounding lesser included offenses generally arise in the context of:

1. claims that one charged offense is subsumed by another charged offense for purposes of double jeopardy or merger (i.e., whether the defendant can be convicted and punished for both offenses);
2. a defendant's request that the jury be instructed on a non-charged lesser offense; and
3. the prosecution's request that the jury be instructed on a non-charged lesser offense.[2]

Double jeopardy and statutory merger are sentencing issues. As discussed in greater detail below, because Colorado and federal law normally authorize only one punishment for a single crime, the double jeopardy version of this controversy asks whether a lesser crime is in fact merely part of a charged crime. If so, double jeopardy principles prevent a defendant from receiving multiple punishments for the same act.[3] Similarly, the merger inquiry involves whether the charged crime and any lesser crimes must constitute one crime for sentencing purposes.[4]

> "Lesser offenses can dramatically change the parties' negotiations, the issues the jury decides, and the eventual sentence a court may impose."

A defendant's or the prosecution's request that the court instruct the jury on a non-charged lesser offense arises in the trial context. And it is in this context that many tactical and strategic influences operate and where practicing lawyers need a firm grip on exactly what lesser crimes might qualify for addition to the jury's decision tree.

For those wondering why a criminal defendant would ask a judge to instruct the jury about a crime with which he or she was never charged, the answer is, in hope that the jury will convict the defendant of the less serious crime and acquit of the more serious one.

For example, consider a hypothetical defendant charged with one count of second degree burglary of a dwelling[5] and three habitual criminal counts.[6] If convicted of these charges the hypothetical defendant will be sentenced to a mandatory 48 years in prison.[7] But if the judge instructs the jury on the lesser offense of first degree criminal trespass and the jury finds the defendant guilty of that charge rather than the original charge of second degree burglary (and there is the tactical problem), the hypothetical defendant faces a mandatory prison sentence of only 12 years, even with the habitual criminal counts.[8] So criminal defense lawyers have a big incentive to present the jury with a less serious alternative to a charged crime, but only if they have some confidence that the jury likely won't (or better, cannot) find the defendant guilty of both crimes.

This central strategic (and constitutional) question—whether the jury may find a defendant guilty of both the original charged crime and a lesser crime—depends in turn on whether the lesser crime is what the cases call a "lesser included offense" or a "lesser non-included offense." If a lesser crime is a lesser included offense, the judge must instruct the jury that it cannot convict the defendant of both the greater

crime and the lesser crime, precisely because the lesser crime is "included" for constitutional purposes in the original charged crime.[9] And adding a lesser included offense does not violate any notions of notice or due process, again because the lesser offense is already essentially charged as part of the charged offense.[10] But if the lesser charge is a non-included offense, the jury may find the defendant guilty of both.

The definitions of these two terms—lesser included and lesser non-included—and the tests courts have adopted to distinguish between them thus become critical to this central strategic decision of whether to request that the court instruct the jury about lesser crimes. Practitioners on both sides, as well as judges, need to understand these definitions and tests to understand how *Reyna-Abarca* changed the field.

A Practitioner's Perspective on Lesser Included Offenses

A defendant benefits when one offense is a lesser included offense of another because a defendant generally cannot receive two punishments for the same crime.[11] Both the U.S. and Colorado constitutions protect a person from suffering multiple punishments for the same offense.[12] While a legislature may authorize multiple punishments based on the same criminal conduct, the absence of that authorization means a court only has the authority to impose a single punishment.[13]

Colorado has a statute regarding multiple punishments, CRS § 18-1-408(1)(a), which permits a person, when his or her conduct "establishes the commission of more than one offense," to be *prosecuted* for more than one offense. But the statute precludes *conviction* (and the attendant punishment) for more than one offense at a time under several circumstances, as relevant here, when one offense is "included in the other, as defined in subsection (5) of this section."[14] This provision means that there is a reduced danger to a defendant in requesting a lesser included offense instruction because (1) the judge instructs the jury that it may only find the defendant guilty of only one of the greater or lesser offenses,[15] and (2) even if a jury somehow convicted a defendant of a greater offense and a lesser included offense, the court could impose only one punishment because the convictions merge.[16]

Either the prosecution or defense may request a lesser included offense instruction.[17] A trial court must instruct on a lesser included offense at the defense request when there is a "rational basis in the evidence to acquit of the charged offense and yet convict of the lesser requested offense."[18] A prosecutor may request, and should receive, a lesser-offense instruction even over defense objection when an offense is a lesser included offense or the offense gives "fair notice to the defendant that he may be required to defense against the uncharged offense."[19] The prosecution request does not appear to require a rational basis analysis, but instead depends on whether the lesser offense is "easily ascertainable from the charging instrument" and is not "an attempt to salvage a conviction from a case that has proven to be weak."[20]

A Practitioner's Perspective on Lesser Non-Included Offenses

A lesser non-included offense presents a slightly different picture. First, the lesser non-included doctrine that Colorado follows is a minority position.[21] The lesser non-included offense doctrine stems from the idea that a defendant's theory of the case may permit the jury to find a defendant innocent of one charge but guilty of a lesser charge that may not have been a lesser included offense.[22] In that circumstance, the defendant is essentially consenting to an added count.

A good example would be a defendant facing a charge of third degree assault, which requires the actor to knowingly or recklessly cause injury to another.[23] Assume the charges are based on the person getting into an argument and starting a fight in public. A defendant, in a case with proper facts, could request the court to instruct the jury on a charge of disorderly conduct pursuant to CRS § 18-9-106(1)(d) along with the charges the district attorney levied. The disorderly conduct statute makes it unlawful to fight with another in a public place. Disorderly conduct is not a lesser included offense because it contains elements not present in third degree assault—principally the element that one is fighting with another in a public place. While disorderly conduct is probably not a lesser included offense of third degree assault, it carries a reduced penalty when compared with third degree assault. Thus, if a jury finds the accused guilty of disorderly conduct as opposed to third degree assault, the sentence would be to the reduced charge.

The justification for the notion of a lesser non-included offense is that it can "insure better trials and fairer verdicts" because without the instruction, "the jury may be aware of the commission of a crime, not the principal charge, and yet convict the defendant of the greater crime."[24] The standard for a lesser non-included instruction is if there is a rational basis to acquit on the greater charge and convict on the lesser.[25] There are at least two other limits on the defense requesting a lesser non-included instruction. First, a defendant may not request such an instruction if it contradicts a defendant's sworn testimony at trial.[26] Second, a court may refuse to give a lesser non-included instruction if doing so would open the door to evidence the defendant successfully suppressed by a motion in limine.[27]

In theory, the prosecution has a limited right to a lesser non-included instruction at trial.[28] But this right exists in extraordinarily limited circumstances, namely where "the charging document contains allegations of the lesser non-included offense sufficient to give the defendant notice of such added charge."[29]

The prosecution has a right, under Crim. P. 7(e), to amend charges in terms of form or substance at any time before trial. The addition of charges may trigger other rights, such as a preliminary hearing, but other than that the right is relatively unfettered. The rule further permits amendments of form "at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." This standard is prosecution friendly.[30]

But requesting a lesser non-included offense presents a difficult choice for defense counsel. If the jury returns a guilty verdict on both the greater offense and the lesser non-included offense, there is no merger and a defendant may receive convictions and sentences for both offenses.[31] Further, if those sentences are not

based on identical evidence, the judge could run the two sentences consecutively, thus lengthening the sentence.[32] Finally, and this issue applies to both lesser included and lesser non-included offenses, the defendant may want to pursue a strategy of complete acquittal. Hence the issue of whether one offense is included in another is not simply a mental exercise but presents a minefield of strategic, ethical, and client relation issues for defense counsel.

The Trial Court's Role

A trial court need not instruct on lesser offenses absent a party's request.[33] But case law indicates that, especially in homicide cases, a court should provide lesser included instructions "whenever there is some evidence, however slight, incredible, or unreasonable, tending to establish the lesser included offense.[34] In fact, the Colorado Supreme Court has indicated that whenever a mental state issue distinguishes offenses, the jury should decide the "grade of the crime."[35] An appellate court will review the particular facts associated with the decision to give a particular lesser included offense instruction or not under a harmless error standard.[36] And appellate courts will not find such an error harmless based solely on a jury's verdict of guilt on the charged offenses.[37]

Finally, while no law in Colorado requires a trial court to ask whether counsel has discussed lesser-offense instructions with the client, doing so might curtail ineffective assistance of counsel claims. After all, if counsel has considered a lesser offense instruction, discussed it with his or her client, and ultimately rejected it, the decision is probably a strategic one.

Colorado's General "Elemental" Approach

States vary in their approaches to deciding whether one crime includes another. At one end of the spectrum, some courts look only at the actual language in the charging document (the "pleading test"), which has been subject to criticism for affording the prosecution too much control over what lesser offenses may exist.[38] At the other end of this conceptual spectrum, some courts look at the actual evidence presented at trial (the "evidence test"),[39] which has the disadvantage of not being applicable until after the close of evidence.[40] A third approach, generally called the "elements test" or "cognate test," attempts to address these drawbacks by considering the elements of each crime and the logical connections between those elements.[41]

> "Colorado has for a very long time been committed to an elements approach. But Colorado appellate courts have also applied that single approach in several different and sometimes inconsistent ways."

Colorado has for a very long time been committed to an elements approach.[42] But Colorado appellate courts have also applied that single approach in several different and sometimes inconsistent ways. Before *Reyna-Abarca*, there were at least three of these inconsistent applications. The first was a variant of the "strict elements test" articulated in *Blockberger v. United States* and applied in *People v. Henderson*.[43] That test required courts to analyze whether one offense requires proof of a fact that the other does not. The second test, the "essential elements test," was applied in *Armintrout v. People* and required courts to determine whether "proof of the essential elements of the greater offense necessarily establish" the elements of the lesser.[44] Yet another test required courts to determine whether "all of the essential elements of the lesser offense comprise a subset of the essential elements of the greater offense, such that it is impossible to commit the greater offense without also committing the lesser."[45]

These tests all sound similar, and in many ways they are. But applying some of the formulations in contexts where the greater offense has multiple methods of commission proved unworkable. In those contexts, the strict elements test all but guaranteed that one offense could never be a lesser included offense, because in crimes involving multiple methods of commission, there would always be a requirement of proof for one offense that the other offense would not require. The essential elements test suffered from the same failing: when there are different ways to commit offenses, there is no guarantee that proving the essential elements of the greater offense will also prove the lesser.

Felony murder is a good example of the problems with these tests. Pursuant to CRS § 18-3-102(b), a person commits felony murder when a person's death (other than one of the participants in the crime) occurs during the commission, attempted commission, or immediate flight from certain enumerated felonies. A non-exhaustive list of those felonies includes arson, robbery, burglary, and kidnapping. An adult defendant convicted of felony murder receives one of two possible sentences: death, or life without the possibility of parole.[46]

Assume that a felony murder is based on the death of a victim occurring during an aggravated robbery. A person can commit aggravated robbery, defined in CRS § 18-4-303, in at least four different ways and, if convicted, would receive a sentence of 10 to 32 years.[47] Assume further that the prosecution charged the defendant pursuant to CRS § 18-4-302(b) by alleging that "by the use of force, threats or intimidation" the defendant put "the person

robbed or any other person in reasonable fear of death or bodily injury." Robbery is an element of aggravated robbery.[48] For felony murder, the prosecution must only prove that a robbery or attempted robbery occurred, as distinguished from an aggravated robbery.

Under the old tests, proving the felony murder did not necessarily prove the aggravated robbery (or for that matter, the robbery). A couple of reasons justify that conclusion. First, felony murder only requires the defendant to "attempt" a robbery instead of actually completing it.[49] In that way, a person could be logically guilty of felony murder but not guilty of robbery or aggravated robbery.

Second, aggravated robbery, depending on the subsection charged, may require a dangerous weapon and intent, if resisted, to harm another person, while robbery does not.[50] Felony murder has no such intent requirement, save for the intent necessary for the predicate felony—which for robbery only requires that the defendant "knowingly take anything of value" by the use of "force, threats, or intimidation."[51] So, a defendant could logically be not guilty of aggravated robbery or robbery but logically guilty of felony murder.[52] In that case, it would not be impossible "to commit the greater offense without also committing the lesser."[53] Similarly, establishing felony murder would not necessarily establish aggravated robbery.[54] So, under strict application of the prior formulations of the test, despite robbery being an express precondition for the commission of felony murder, and robbery being an element of aggravated robbery, aggravated robbery was not a lesser included offense of felony murder.

Reyna-Abarca and the New Test

Reyna-Abarca consisted of four different cases (*Reyna-Abarca*, *People v. Hill*, *People v. Medrano-Bustamante*, and *People v. Smoots)* consolidated on appeal to the Supreme Court. Each of the four cases dealt with the same question—whether driving under the influence (DUI) was a lesser included offense of vehicular assault (based on a DUI) or vehicular homicide (based on a DUI).[55] A quick reading of the statutes would seem to make the answer perfectly obvious—how can a DUI, which itself is an element of both of the greater charges, not be a lesser included offense?[56]

A closer look at the elements of the crimes makes this a complicated question, one on which the Court of Appeals' panels reached different results and articulated different reasons justifying those results in the four cases. In three of the underlying cases (*Reyna-Abarca*, *Hill*, and *Medrano-Bustamante*), the Court held that DUI was not a lesser included offense of vehicular homicide-DUI or vehicular assault-DUI.[57] In *Smoots*, the panel held that DUI was a lesser included offense of vehicular assault-DUI.[58] The Court's reasons for these conclusions, not to mention their disagreement about outcomes, illustrate some of the problems with the existing standards.

The three panels that concluded DUI was not a lesser included of vehicular assault-DUI or vehicular homicide-DUI grounded their decisions on the definition of "motor vehicle."[59] The CRS Title 42 definition of "motor vehicle" applicable to the DUI statute is "any self-propelled vehicle that is designed primarily for travel on the public highways."[60] But the CRS Title 18 definition of "motor vehicle" applicable to vehicular assaults or vehicular homicides is "any self-propelled device by which persons or property may be moved, carried, or transported from one place to another by land, water, or air."[61] Thus, because it would be possible to commit vehicular assault without committing DUI (by operating an airplane or boat while under the influence and causing serious bodily injury), the Court in three of these cases concluded that DUI was not a lesser included offense.

The *Smoots* panel concluded that DUI was a lesser included offense of vehicular assault-based DUI. *Smoots* was a split opinion in which two judges, for slightly different reasons, found DUI was a lesser included offense, while a third judge dissented from that conclusion.[62] The majority found that though the definition of "motor vehicle" applicable to vehicular assault DUI was broader than the DUI definition of "motor vehicle," the defendant's acts satisfied elements "common to both statutes."[63]

Smoots had a concurring opinion in which the judge relied on the reasoning from *Boulies v. People* to justify the conclusion.[64] The dissenting judge reasoned, similar to the other three cases, that DUI was not a lesser included offense of vehicular assault-DUI.[65] Thus the Court of Appeals reached a rough consensus that DUI is not a lesser included offense of DUI-based vehicular assault or vehicular homicide. However, the Colorado Supreme Court disagreed with that conclusion.

The New (Old) Standard

The Colorado Supreme Court did not break new ground in choosing a standard. The "new" standard comes from *Schmuck v. United States*, a 1989 U.S. Supreme Court case[66] that was favorably cited by the Colorado Supreme Court in a 1996 decision.[67] The defendant in *Schmuck* engaged in a scheme in which he "rolled back" the odometers for used cars, sold those cars at an inflated price, and then mailed fraudulent title documents.[68] At his trial on mail fraud charges, the defendant sought a lesser included instruction for a misdemeanor offense related to rolling back the odometers. The trial court denied that request, and he appealed. In a 5 to 4 decision, the U.S. Supreme Court analyzed a federal rule similar to Colorado's regarding when one offense is a lesser included of another and indicated that the defendant's requested misdemeanor was not a lesser included offense.[69]

The test the *Schmuck* Court adopted, and that Colorado has now adopted, is whether "the elements of the lesser offense are a subset of the elements of the charged offense."[70] The *Reyna-Abarca* Court applied some gloss to this so-called "subset test" by adding that "one offense is not a lesser included offense of another if the lesser offense requires an element not required for the greater offense."[71]

The Colorado Supreme Court understood that this new test altered its own precedent. For instance, the Court identified *Meads v. People* as a case that would have a different result under the new standard.[72] *Meads* presents a useful comparison of what the new test means.

In *Meads*, the Court considered whether second degree aggravated motor vehicle theft was a lesser included offense of theft.[73] By applying the tests in use at that time, the *Meads* Court found aggravated motor vehicle theft was not a lesser included offense of theft because the

element of obtaining or exercising control over a thing of value (a required element for theft) did not necessarily establish the obtaining of or exercising control over a motor vehicle (required for aggravated motor vehicle theft).[74] The *Reyna-Abarca* Court noted that under the new standard *Meads* would have a different result because a motor vehicle is always a particular thing of value and thus is a subset of a thing of value.[75] Under the new test, the element in the motor vehicle statute that required the item taken to be a motor vehicle is not a "separate element" but instead is simply a "subset" of the larger class of items comprising "things of value."

The Dissent

Justice Coats wrote a dissent, joined by Justices Eid and Boatright. The dissenters' main target was the majority's alleged lack of fidelity to stare decisis and to what the dissenters claim has been settled law for 50 years. The dissent also noted that *Schmuck*, from which the majority derived its "subset test," was based narrowly on the U.S. Supreme Court's interpretation of a federal rule, without the benefit of Colorado's rich pre-rules jurisprudence rejecting the idea that both the prosecution and the defendant have equivalent rights to ask that the jury be instructed in lesser offenses.[76] But perhaps most importantly for present purposes, the dissenters expressed concern that the new test unjustifiably expanded the reach of the double jeopardy bar by making more and more crimes practitioners once thought were lesser non-included offenses into lesser included offenses. The dissenters complained that this change affected "practical considerations" that involve "prosecuting, defending, and sentencing."[77]

The new test requires a close analysis of prior precedent regarding lesser included offenses, as the following discussion of four post-*Reyna-Abarca* decisions illustrates.

Applying *Reyna-Abarca*

As of the writing of this article, there have been several Court of Appeals opinions and two Supreme Court opinions applying the new test.[78]

In *Page v. People*, the Colorado Supreme Court analyzed whether unlawful sexual contact is a lesser included offense of sexual assault.[79] If the *Reyna-Abarca* test had not changed anything, it is unlikely the Court would have even considered this issue because another case, *People v. Loyas*, held that unlawful sexual contact was not a lesser included offense of sexual assault.[80] The Court of Appeals panel in *Loyas* reasoned that because unlawful sexual contact required the defendant to act with a sexual purpose, while sexual assault did not have that intent requirement, the one was not a lesser included offense of the other.[81] But the *Page* Court rejected this analysis under the new subset test, concluding that a person cannot engage in a number of sexual acts without having a sexual purpose—whether that was "arousal, gratification, or abuse."[82] It therefore overruled *Loyas* and held that unlawful sexual contact *is* a lesser included offense of sexual assault.

In a second case, *People v. Rock*, the Colorado Supreme Court considered whether second degree trespass is a lesser included offense of second degree burglary.[83] Although both statutes create criminal liability for entering or remaining on a structure or property of another, their definitions of "structure and property" are different.[84] Second degree burglary, the greater offense, involves entering a "building or occupied structure" which includes, among other things, entering a dwelling.[85] Second degree criminal trespass, the lesser offense, involves entering or remaining "in or upon 'the premises of another which are enclosed in a manner designed to exclude intruders or are fenced.'"[86] The Court found that the "premises of another which are enclosed in a manner designed to exclude intruders or are fenced" was a subset of the definitions applicable to burglary and found second degree burglary included second degree trespass.[87]

Rock also introduced an important clarifying concept regarding the new test. Specifically, *Rock* articulates that if "any set of elements sufficient for commission" of the lesser offense are "established by establishing the statutory elements of the greater offense" the offense is a lesser included one.[88] The purpose of that language is to address the multiple methods of commission of offenses present in cases involving charges like felony murder. The Court further said that to be an "included" offense, it is only necessary that one particular set of elements sufficient for conviction be so contained.[89]

Part of the difficulty with the old tests, which is still present in the new test, is that a too literal reading of the statutes can sometimes lead to strange results. Consider what happened in *Rock*. A literal reading of the elements of second degree trespass defines "premises" as something "enclosed in a manner designed to exclude intruders or are fenced." Enclosed in a manner designed to exclude intruders is obviously, in a literal sense, not the same as a "building or occupied structure." But what matters is that every building or occupied structure is, in some sense (according to the Court), designed to exclude intruders. While the elements are different, one is a subset of the other.

Similarly, in *Page*, a literal reading of the statute led to the conclusion that unlawful sexual contact is not a lesser included of sexual assault because it requires that the actor have a sexual purpose;[90] a literal reading of the statutes demonstrates that sexual assault based on sexual penetration as defined by CRS § 18-3-401(6) does not contain that specific requirement. But the correct way to apply these tests is to consider whether elements "fit" into one another using logic and common sense. Thus, the Supreme Court found that sexual penetration always includes a sexual motive.

Yet another example demonstrates the difficulty of applying this decision. Consider again first degree criminal trespass of a dwelling and second degree burglary as discussed above. Pursuant to *People v. Garcia*, first degree criminal trespass *is not* a lesser included of second degree burglary[91] because the "dwelling" portion of burglary is a "sentence enhancer."[92]

Reyna-Abarca cited *Garcia* favorably for the correct test to apply.[93] Consider whether *Garcia* was an accurate application of the test: first degree criminal trespass of a dwelling occurs when "a person knowingly and unlawfully enters or remains in the dwelling of another."[94] Second degree burglary is when a "person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful

entry in a building or occupied structure with intent to commit therein a crime against another person or property."[95] It is a class four felony normally, but a class three felony if the building or occupied structure is a dwelling.[96]

A comparison of the elements of these crimes demonstrates their similarities. Both make it illegal for a person to unlawfully enter or remain in certain places. There are two differences of note. First, trespass requires entering or remaining in the dwelling of "another." Burglary does not expressly require that element as it refers only to a "building or occupied structure" without the requirement that the building or structure be that of "another."[97] This issue should not be fatal for first degree criminal trespass being a lesser included offense, because that same issue arose in the elements of second degree trespass in reference to burglary.[98]

The second difference is that trespass requires the place entered to be a "dwelling." Burglary does not contain that element, except as a sentence enhancer. Burglary only requires the breaking, entering, or remaining in a "building or occupied structure." The statutes define a "dwelling" as "a building which is used, intended to be used, or usually used by a person for habitation."[99] So isn't a "dwelling of another" simply a subset of all the buildings and occupied structures in the world? A person can burgle his or her own dwelling if something prohibits them from being there, such as the existence of a protection order, or burgle the building or occupied structure of another person.[100] Those buildings or occupied structures that happen to belong to someone other than the defendant and are being used for habitation are simply a subcategory of those present in the world. After all, simply because burglary can be committed in more ways than trespass because trespass requires a more specific element does not preclude trespass from being a lesser included offense. So, under the new test, shouldn't first degree criminal trespass be a lesser included offense of second degree burglary? *Reyna-Abarca* failed to answer that question directly and muddied the waters by citing *Garcia,* which held that first degree criminal trespass was not a lesser included offense, with approval.[101]

"*Reyna-Abarca* may also heighten some already difficult ethical issues surrounding defense counsel's decision about whether to request instructions on lesser offenses."

What the Change Means

Reyna-Abarca forces practitioners to consider precedent carefully. Cases predating *Reyna-Abarca* that indicate one offense is a lesser included of another deserve thorough scrutiny. If those cases applied versions of the test the Colorado Supreme Court has moved away from, their precedential value is questionable. And the opposite is also true: cases indicating that one offense was not a lesser included deserve that same scrutiny.

Reyna-Abarca may also heighten some already difficult ethical issues surrounding defense counsel's decision about whether to request instructions on lesser offenses. Colorado precedent establishes that the defense decision to ask for a lesser offense instruction rests with defense counsel, not the defendant.[102] While defense counsel is supposed to consult with the defendant, a failure to do so is not per se ineffective assistance.[103] While requesting lesser offense instructions is something attorneys may do, opening statements or arguments essentially confessing a client's guilt to those lesser offenses are more problematic.

In *McCoy v. Louisiana*, an attorney pursued a trial strategy of conceding his client committed murders but contesting his client's mental state during those acts, effectively trying to convince the jury to convict on a lower class of homicide to avoid the death penalty.[104] The attorney did so over his client's repeated objections because the client wanted to maintain his innocence and present an alibi defense.[105] The U.S. Supreme Court found that counsel's decision to concede the client committed the acts in the face of the client's desired defense of total innocence violated the client's Sixth Amendment rights.[106] So if an attorney is pursuing a defense strategy of convincing a jury to convict on a lesser offense by admitting his or her client did the lesser offense, *McCoy* indicates the client has a role in that decision, and probably controls it.[107] Thus, consulting with the client is a good idea and probably a necessary step before counsel asks a jury to convict a client of a lesser offense.

Conclusion

Whether one offense includes another now has an arguably clearer test. While instituting that test invalidates a fair amount of precedent, this short-term confusion should lead to longer term stability.

Defense counsel must carefully advise clients before trial about these issues. Sometimes the client's best defense is to ask the jury to convict on something lesser. Prosecutors must consider the strategic implications related to these issues as well, because understanding the risks of a jury convicting on a lesser offense factor into plea negotiations. And judges are now tasked with applying a new test without the benefit of years of precedent to guide their decision. CL

Samuel A. Evig is a partner at Dahl, Fischer, and Wilks, LLC. His practice focuses on criminal defense—evig@dfwlawcolorado.com.

Coordinating Editor: Judge Morris Hoffman, c/o jjennings@cobar.org

NOTES

1. *Reyna-Abarca v. People*, 390 P.3d 816 (Colo. 2017). As discussed, this case involved four separate cases consolidated for appeal.

2. *People v. Garcia*, 940 P.2d 357, 360–61 (Colo. 1997).

3. *Reyna-Abarca*, 390 P.3d at 824.

4. *See* note 16, *infra*.

5. CRS § 18-4-203 indicates that second degree burglary is normally a class four felony, but if it is of a dwelling, it is a class three felony.

6. CRS § 18-1.3-801 defines habitual criminal counts. It contains three distinct levels of sentence enhancement. First, when a person has two qualifying prior felony convictions in the 10 years preceding the current conviction, CRS § 18-1.3-801(1.5) requires a non-discretionary sentence of three times the maximum of the presumptive sentencing range. This is known as the "little habitual" or by other less flattering names. The second level, when a person has three prior qualifying felony convictions, results in a non-discretionary sentence of four times the maximum of the presumptive range for that level of offense as described in CRS § 18-1.3-801(2). This provision is usually referred to as the "big habitual." Finally, CRS § 18-1.3-801(1)(a), sometimes referred to as the "super habitual," provides for a life sentence when a person has two prior convictions for a class one felony, a class two felony, or a class three felony (the class three felony must be a crime of violence). In our example, the three habitual counts denote three prior felony convictions, meaning the prosecution charged our defendant with the big habitual.

7. Colorado's sentencing statutes are somewhat labyrinthine. But CRS § 18-1.3-401(1)(a)(V)(A) gives the general sentencing range for a class three felony (here four to 12 years). Four times the maximum of that presumptive range (from the big habitual enhancement) gives the 48-year sentence.

8. First degree criminal trespass is a class five felony. *See* CRS § 18-4-502. It therefore carries a presumptive range of one to three years pursuant to CRS § 18-1.3-401.

9. *See People v. Moore*, 877 P.2d 840, 844 (Colo. 1994). And the Colorado criminal jury instruction states: "While you may find the defendant not guilty of the crimes charged and the lesser included offence[s], you may not find the defendant guilty of more than one of the following offenses: . . ." COLJI-Crim. E:14.

10. *Brown v. People*, 239 P.3d 764, 771 (Colo. 2010) (citing *Garcia*, 940 P.2d at 362–63; *People v. Barger*, 550 P.2d 1281, 1282–83 (Colo. 1976); and *People v. Cooke*, 525 P.2d 426, 428–29 (Colo. 1974)).

11. *Reyna-Abarca*, 390 P.3d at 824. There are some statutory exceptions to this rule, such as cases where one crime, though based on identical evidence, injured multiple victims. In that circumstance, the law permits, and sometimes requires, a court to impose consecutive punishments for identical conduct if there are multiple victims. *See* CRS § 18-1-408(3).

12. *Reyna-Abarca*, 390 P.3d at 824 (citing U.S. Const. Amends. V, XIV; Colo. Const. art. II § 18; and *Whalen v. United States*, 445 U.S. 684, 688 (1980)).

13. *Id.* at 824 (citing *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005), and *Whalen*, 445 U.S. 684).

14. The statute lists a number of circumstances where a person may receive only one sentence, but this article focuses on the lesser included issue only. *See* CRS § 18-1-408(1)(a) through (e).

15. COLJI-Crim. E:14.

16. *Lewis v. People*, 261 P.3d 480, 481–83 (Colo. 2011) (court analyzing "judicial" and "statutory" merger to determine whether convictions merge). This case used the *Blockberger* test and illustrates the point that if convictions merge, a defendant receives only one punishment.

17. *People v. Rock*, 402 P.2d 472, 475–76 (Colo. 2017). The right of the defendant to request a lesser included offense rests on constitutional concerns, while the right of the prosecution to request an instruction is based on the theory that the indictment charging a greater offense necessarily includes a lesser offense. *See* Crim. P. 31 and *Cooke*, 525 P.2d 426.

18. *Rock*, 402 P.2d at 475.

19. *Garcia*, 940 P.2d at 358–59. Interestingly, *Garcia* reversed a Court of Appeals ruling that first degree criminal trespass is not a lesser included offense of second degree burglary, because the prosecution can charge second degree burglary as burglary of a "building" or a "dwelling," while first degree trespass requires the defendant to unlawfully enter a "dwelling." The Court held that the "dwelling" issue was a sentence enhancer and noted that the defendant should have been on notice that he faced the lesser offense of trespass. *Garcia*, discussed with approval in *Reyna-Abarca*, relied on *Armintrout v. People*, 864 P.2d 576 (Colo. 1993), which addressed whether a conviction for second degree burglary of a dwelling merged into a conviction for first degree burglary (which helps explain why the "sentence enhancer" question arose).

20. *People v. Jimenez*, 217 P.3d 841, 870 (Colo. App. 2008). *But see People v. Scott*, 10 P.3d 686, 687–88 (Colo.App. 2000) (affirming trial court's decision to allow amending charge to a lesser included offense despite the effort being an attempt to salvage a conviction).

21. *See generally* Donaldson, "Lesser-Related State Offense Instructions: Modern Status," 50 *A.L.R. 4th* 1081 (1986). *People v. Rivera*, 525 P.2d 431 (Colo. 1974), established the doctrine in Colorado. In 2017, the Colorado Supreme Court recognized that the U.S. Constitution does not require courts to follow this doctrine, but that the doctrine provides better protection to the accused and remains part of Colorado law. *Montoya v. People*, 394 P.3d 676, 688 (Colo. 2017).

22. *Rivera*, 525 P.2d at 434.

23. CRS § 18-3-204.

24. *Rivera*, 525 P.2d at 434.

25. *See People v. Hall*, 59 P.3d 298, 299 (Colo. App. 2002) (trial court's grant of prosecution request for a lesser included offense was proper, but because there was no rational basis to convict on the lesser non-included offense submitted by the defendant, denial of the instruction was proper).

26. *People v. Naranjo*, 401 P.3d 534 (Colo. 2017) (citing *People v. Garcia*, 826 P.2d 1259, 1262–64 (Colo. 1992)).

27. *State v. Garcia*, 17 P.3d 820, 826–27 (Colo. App. 2000).

28. *See Garcia*, 940 P.2d 357.

29. *Garcia*, 17 P.3d at 826.

30. *See People v. Washam*, 413 P.3d 1261 (Colo. 2018) (narrowing a date range in charges after the jury was sworn did not violate defendant's rights); *Higgins v. People*, 868 P.2d 371 (Colo. 1994) (permitting amendment to name three additional victims after the limitations period for charging had run was not error). *But see People v. Moody*, 674 P.2d 366 (Colo. 1984) (trial court properly denied motion to amend dates in a prosecution where dates were material elements of charges).

31. *Montoya*, 394 P.2d at 690–91.

32. *Id.* at 691 (citing *People v. Muckle*, 107 P.3d 380, 383–84 (Colo. 2005)).

33. *Rock*, 402 P.2d at 476 (citing *People v. Romero*, 694 P.2d 1256, 1269 (Colo. 1985)). Interestingly, at least one jurisdiction, New Jersey, requires trial courts to instruct on lesser included offenses without request. *See* Pflaum, "Justice is Not All or Nothing: Preserving the Integrity of Criminal Trials through the Statutory Abolition of the All-Or-Nothing Doctrine," 73 *U. Colo. L.Rev.* 289, 295–98 (2002) (citing *State v. Rose*, 568 A.2d 545 (N.J. Super. Ct. App. Div. 1990) (a trial court has a duty to sua sponte provide a lesser included instruction when the facts indicate the appropriateness of that charge)).

34. *People v. Roman*, 398 P.3d 134, 139 (Colo. 2017).

35. *Id.* at 137–38.

36. *Id.* at 139.

37. *Id.* The court will analyze the case itself, including the perceived strength of the evidence. The closer the case, in terms of evidence, the more damaging the failure to give the lesser-offense instruction.

38. *Meads v. People*, 78 P.3d 290, 294 (Colo. 2003) (citing *State v. Jeffries*, 430 N.W.2d 728 (Iowa 1988); *State v. Meadors*, 908 P.2d 731 (N.M. 1995); and Pflaum, *supra* note 33 at 295–98)).

39. *Meads*, 78 P.3d at 294.

40. *Id.*

41. *Id.*

42. *Reyna-Abarca*, 390 P.3d 816, 824 (citing *Rivera*, 525 P.2d 431).

43. *Id.* at 824 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and *People v.*

Henderson, 810 P.2d 1058, 1061 (Colo. 1991)).

44. *Id.* (citing *Armintrout*, 864 P.2d 576).

45. *Id.* (citing *Garcia*, 940 P.2d at 360).

46. CRS § 18-1.3-401(1)(a).

47. Assuming the aggravated robbery is a crime of violence.

48. The statute states "a person who commits robbery is guilty of aggravated robbery" if the person commits the robbery under circumstances listed in the rest of the statute. *See* CRS § 18-4-302(1).

49. Interestingly, the *Reyna-Abarca* Court did not consider or discuss how attempts fit into this dynamic, because by definition attempts are lesser included offenses of completed crimes. *See* CRS § 18-1-408(1)(b).

50. *See* CRS § 18-4-302(1)(a).

51. CRS § 18-4-301.

52. This is because a jury could find the robbery was only attempted. In this situation, each crime would have elements the others do not. Aggravated robbery would require that the robber put the victim or any other person in reasonable fear of death or injury, robbery would require an actual taking, and felony murder would not require either of those elements.

53. *See Reyna-Abarca*, 390 P.3d at 824 (citing *Garcia*, 940 P.2d at 360).

54. *Id.* (citing *Boulies v. People*, 770 P.2d 1274, 1275–82 (Colo. 1989)).

55. *Id.* at 817.

56. *See* CRS § 18-3-106(1)(b) (making it unlawful when a person "operates or drives a motor vehicle while under the influence . . . and such conduct is the proximate cause of the death of another") and CRS § 18-3-205(1)(b) (making it unlawful when a person "operates or drives a motor vehicle while under the influence . . . and this conduct is the proximate cause of a serious bodily injury to another.").

57. *Reyna-Abarca*, 390 P.3d at 819, 821.

58. *Id.* at 820.

59. *Id.* at 819, 821. In the fourth case, *Smoots*, the majority applied a different sort of test, an analysis similar to that in *Boulies*, 770 P.2d at 1278–81, to hold that DUI is a lesser included offense. But *Smoots* involved two different judges applying two different tests and a third dissenting. *Id.* at 820.

60. *Reyna-Abarca*, 390 P.3d at 827 (citing CRS § 42-2-102(58)).

61. *Id.* (citing CRS § 18-1-901(3)(k)).

62. *Id.* at 820.

63. *Id.*

64. *Id.* (citing *Boulies*, 770 P.2d 1274). *Boulies* dealt with the felony-murder and aggravated robbery conundrum discussed above. There, the Colorado Supreme Court reviewed and reversed a decision by the Court of Appeals holding that aggravated robbery was not a lesser included offense of felony murder. In *Reyna-Abarca*, the Court noted they still believed they reached the correct result (that aggravated robbery is a lesser included offense of felony murder), but did so by straying from the strict elements test. *Reyna-Abarca,* 390 P.3d at 825.

65. *Id.* at 820.

66. *Schmuck v. United States*, 489 U.S. 705 (1989).

67. *People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996). The Court cited *Shmuck* in this case for the proposition that "the prosecution cannot constitutionally require a defendant to answer a charge not contained in the charging instrument."

68. *Schmuck*, 489 U.S. at 707.

69. Interestingly, part of the U.S. Supreme Court's analysis turned on the fact that a defendant cannot be held to answer a charge not contained in an indictment, *id.* at 717–18, a problem not present in the case of lesser included offenses.

70. *Reyna-Abarca*, 390 P.3d at 826.

71. *Id.*

72. *Id.* (citing *Meads*, 78 P.3d 290).

73. *Meads*, 78 P.3d at 292.

74. *Reyna-Abarca*, 390 P.3d at 826.

75. *Id.* at 827.

76. The *Schmuck* Court was interpreting Fed. R. Crim. P. 31(c).

77. *Reyna-Abarca*, 390 P.3d at 832.

78. The Court of Appeals opinions at the time of the writing of this article are not final, and petitions for review with the Supreme Court are pending for most of them. But they are, at this point, shaping the contours of this new test. *See People v. Hoggard*, 2017 COA 88 ¶ 33, *cert. granted* 2018 WL 1709939 (holding that second-degree forgery is a lesser included offense of felony forgery); *People v. Wambolt*, 2018 WL 3153749 (finding, contrary to prior opinions, that driving under restraint is a lesser included offense of driving after revocation prohibited); and *People v. Jackson*, 2018 COA 79 (addressing issues concerning attempted and completed crimes charged for different victims based on the same act). Another opinion, *People v. Welborne*, 2018 WL 4224996, illustrates the ramifications of the opinion. The case addressed the question of whether criminal mischief is a lesser included offense of arson. Initially, the Court of Appeals ruled that because criminal mischief contained an element of the acts having to occur "in the course of a single criminal episode" that it could not be a lesser included offense of arson. *People v. Welborne*, 2017 COA 105. In an unpublished order, the Colorado Supreme Court remanded that decision for reconsideration in light of *Reyna-Abarca* and *Rock*. 2018 WL 2772787. The Court of Appeals then found criminal mischief is a lesser included offense of arson. *Welborne*, 2018 WL 4224996. The theme of cases being remanded for reconsideration under *Reyna-Abarca* is a clear trend. *See Shomaker v. People*, 17SC624; *Cardman v. People*, 16SC789; *Bradley v. People*, 16SC708; and *Vasquez-Castorena v. People*, 16SC885.

79. *Page v. People*, 402 P.3d 468 (Colo. 2017).

80. *People v. Loyas*, 259 P.3d 505 (Colo.App. 2010).

81. *Id.* at 509–10. In particular, sexual assault may involve either sexual intrusion or sexual penetration per CRS § 18-3-401. Sexual intrusion requires a sexual purpose, while penetration does not. *See* CRS § 18-3-401(6).

82. *Page*, 402 P.3d at 471–72.

83. *Rock*, 402 P.2d 472.

84. *Id.* at 479.

85. *Id.* (citing CRS §§ 18-4-203(1) and 18-4-101(1)).

86. *Id.* (citing CRS § 18-4-503(1)).

87. *Id.*

88. *Id.* at 478.

89. *Id.*

90. *See* CRS § 18-3-404, which uses the term sexual contact, which is defined in CRS § 18-3-401(4) as touching done "for the purposes of sexual arousal, gratification, or abuse."

91. *Garcia*, 940 P.2d at 358.

92. *Id.* at 362.

93. *Reyna-Abarca*, 390 P.3d at 825.

94. CRS § 18-4-502.

95. CRS § 18-4-203(1).

96. CRS § 18-4-203(2).

97. *Cf.* CRS § 18-4-502 with CRS § 18-4-203.

98. Per the discussion in *Rock*, 402 P.2d 472, second degree trespass requires entering or remaining in "the premises of another." This issue did not preclude second degree trespass from being a lesser included offense of burglary there.

99. CRS § 18-1-901(3)(g).

100. *People v. Allen*, 944 P.2d 541, 546 (Colo. App. 1996) (holding that protection order precluding defendant from contacting victim made issue of whether defendant had an ownership interest in the building not relevant).

101. *Reyna-Abarca*, 390 P.3d at 825.

102. *See Arko v. People*, 183 P.3d 555, 556 (Colo. 2008).

103. *People v. Newmiller*, 338 P.3d 459, 464 (Colo.App. 2014).

104. *McCoy v. Louisiana*, 2018 WL 2186174 at n. *1. (U.S. May 14, 2018).

105. *Id.*

106. The *McCoy* majority cited a Colorado case, *People v. Bergerud*, 223 P.3d 686 (Colo. 2010), for the proposition that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 2018 WL 2186174 at *10. As the dissent in *McCoy* pointed out, *Bergerud* rested, in part, on the Colorado Supreme Court finding that counsel did not admit guilt to an offense. *Id.* at n.*3. *McCoy* also slightly limits other Colorado precedent. Both *Arko* and *Newmiller* indicate that the decision to request a lesser-offense instruction falls within defense counsel's discretion. And while *McCoy* may not alter that conclusion, it changes how counsel may choose to argue a defense based on those lesser offenses.

107. The dissent in *McCoy* points out that counsel effectively did just this—asked the jury to convict on a lesser included offense. *McCoy,* 2018 WL 2186174 at *9–10.