ADVANCE SHEET HEADNOTE
June 12, 2023

2023 CO 37

No. 21SC796, *Pellegrin v. People*—Multiple Sentences or Punishments—Merger of Offenses—Statutory Interpretation—Offenses and Penalties—Jury Trial Right—Factors Enhancing Sentence.

In this case, the supreme court considers two issues. The first is whether section 18-1-408(5)(c), C.R.S. (2022), creates a "single distinction" test, such that an offense is included in another offense if it involves either a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability, but not if both distinctions exist. The second is whether under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, criminal defendants have a Sixth Amendment right to have a jury, not the trial court, determine whether the crime for which they were convicted included an act of domestic violence under section 18-6-801(1)(a), C.R.S. (2022).

The court now concludes that section 18-1-408(5)(c) does not create a single distinction test. Accordingly, an offense is included in another offense under section 18-1-408(5)(c) if it differs from the offense charged only in the respect that

(1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. Applying that construction here, the court further concludes that because the offenses of harassment and stalking differ in more ways than the two distinctions identified in section 18-1-408(5)(c), harassment is not an included offense of stalking under that statutory provision and therefore the defendant's convictions for harassment and stalking do not merge.

Last, the court concludes that a domestic violence finding under section 18-6-801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny. Accordingly, the defendant had no Sixth Amendment right to have a jury, instead of the trial judge, determine whether the crimes for which he was convicted included an act of domestic violence.

Accordingly, the court rejects the portion of the opinion of the division below adopting and applying a single distinction test but otherwise affirms the division's judgment.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 37

Supreme Court Case No. 21SC796
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA1487

Petitioner:

Trevor A. Pellegrin,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
June 12, 2023

Attorneys for Petitioner:
Megan A. Ring, Public Defender
Emily Hessler, Deputy Public Defender
Denver, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General
Brittany Limes Zehner, Assistant Solicitor General
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE MÁRQUEZ concurred in part and concurred in the judgment.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 This case principally requires us to decide two issues. The first is whether section 18-1-408(5)(c), C.R.S. (2022) ("subsection 408(5)(c)"), creates a "single distinction" test, such that an offense is included in another offense if it involves *either* a less serious injury or risk of injury to the same person, property, or public interest *or* a lesser kind of culpability, but not if both distinctions exist. The second is whether under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, criminal defendants have a Sixth Amendment right to have a jury, not the trial court, determine whether the crime for which they were convicted included an act of domestic violence under section 18-6-801(1)(a), C.R.S. (2022) ("subsection 801(1)(a)").[1]

¶2 We now conclude that subsection 408(5)(c) does not create a single distinction test. Accordingly, an offense is included in another offense under

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether the court of appeals erred in concluding section 18-1-408(5)(c), C.R.S. (2021), creates a "single distinction" test, meaning that because harassment differs from stalking only insofar as a less serious injury and lesser kind of culpability suffice to prove harassment, the offenses do not merge.
2. Whether the federal and state constitutions require that a jury make a domestic violence finding subjecting the defendant to an increased penalty.

subsection 408(5)(c) if it differs from the offense charged only in the respect that (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. Applying that construction here, we further conclude that because the offenses of harassment and stalking differ in more ways than the two distinctions identified in subsection 408(5)(c), harassment is not an included offense of stalking under that subsection and therefore Trevor A. Pellegrin's convictions for harassment and stalking do not merge.

¶3 Next, we conclude that a domestic violence finding under subsection 801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny. Accordingly, Pellegrin had no Sixth Amendment right to have a jury, instead of the trial judge, determine whether the crimes for which he was convicted included an act of domestic violence.

¶4 We thus reject the portion of the opinion of the division below adopting and applying a single distinction test but otherwise affirm the division's judgment.

I. Facts and Procedural History

¶5 Pellegrin and the victim began dating, moved in together shortly thereafter, and later became engaged. During the parties' relationship, Pellegrin took private, intimate photos of the victim in various stages of undress.

¶6 The relationship subsequently ended, but several months after it did, Pellegrin and the victim spent three or four days together. At about that time, Pellegrin learned that the victim had started seeing someone else. This information upset Pellegrin, and over the next few days, he repeatedly called and texted the victim. In the course of these communications, Pellegrin called the victim names, sent nude photos of her that he had taken during their relationship, and threatened to post the nude photos online and send them to her younger brother.

¶7 Thereafter, the victim learned that her Facebook cover and profile photos had been changed to nude photos of her (which she recognized as photos that Pellegrin had taken while they were dating). She also saw that her profile biography had been changed to say that she was an "awful" person, a "cheater," and a "slut."

¶8 In this same time frame, the victim received over one hundred text messages and photos from strangers, including messages with photos of naked men, messages saying that unknown people were driving by her home, and messages soliciting sex. At some point, the victim learned that these text messages were in response to two Craigslist advertisements that Pellegrin had placed.

¶9 One advertisement had been posted on the "casual encounters" board stating:

> So my name's [victim's name] I live in the springs I'm looking for a few guys to come show me a good time I've never tried this but I'm willing to try it you can find me on Facebook just search my name [victim's name] my phone number is [victim's phone number] please call me with what your [sic] interested in and maybe we can get together tonight I stay off [directions to the victim's home]. Surprise me [emojis] text me a nude photo of yourself to get mines [sic] [emoji]

This ad included four photos of the victim, including two of the nude photos that had been posted on her Facebook profile.

¶10 The other advertisement, entitled "Free engagement ring," had been posted on the "free stuff" board and stated, "Text or call for free good time [victim's phone number]," and included the same photos as the first advertisement.

¶11 Upon becoming aware of these advertisements, the victim contacted the police, who arrested Pellegrin at his home.

¶12 The People subsequently charged Pellegrin with, as pertinent here, one count of stalking under section 18-3-602(1)(c), C.R.S. (2022), two counts of posting a private image for harassment (one count for the Facebook posting and one for the Craigslist posting) under section 18-7-107, C.R.S. (2022), and one count of harassment under section 18-9-111(1)(e), C.R.S. (2022). The case ultimately proceeded to trial, and a jury convicted Pellegrin of stalking, posting a private image to Craigslist for harassment, and harassment.

¶13 The trial court subsequently sentenced Pellegrin to a controlling term of three years of supervised probation and ninety days in jail. Additionally, pursuant

to subsection 801(1)(a), the court made domestic violence findings for the acts underlying each charge and ordered Pellegrin to participate in a domestic violence evaluation and comply with its recommendations.

¶14 Pellegrin appealed, arguing, as pertinent here, that under subsection 408(5)(c), his conviction for harassment is a lesser included offense of stalking because harassment involves a less serious injury or risk of injury and a lesser kind of culpability than stalking. *People v. Pellegrin*, 2021 COA 118, ¶¶ 59, 68, 500 P.3d 384, 397–98. He thus contended that his convictions for these crimes must merge. *Id.* at ¶ 59, 500 P.3d at 397. Pellegrin further argued that the Sixth Amendment requires a jury, not the trial judge, to determine whether the crimes for which he was convicted included an act of domestic violence. *Id.* at ¶ 76, 500 P.3d at 400. The division, however, ultimately affirmed Pellegrin's convictions. *Id.* at ¶ 85, 500 P.3d at 401.

¶15 Regarding subsection 408(5)(c), the division initially concluded that an offense is lesser included under that provision "only where the lesser offense differs in the degree of injury or risk of injury *or* in the kind of culpability, but not both." *Id.* at ¶ 68, 500 P.3d at 398. In support of this determination, the division explained that (1) when "or" is used in a statutory provision, it is presumed to be used in its disjunctive sense and (2) the word "only" is restrictive and synonymous with "exclusively." *Id.* at ¶¶ 69–70, 500 P.3d at 398. Applying that reasoning here,

the division concluded that the use of the word "only" before the disjunctive "or" in subsection 408(5)(c) evinced the General Assembly's intent to limit the word "or" to "a single distinction" between the two offenses at issue, and not to an "and/or" meaning. *Id.* at ¶ 70, 500 P.3d at 399.

¶16 The division found further support for this interpretation in the opinions of several other divisions of the court of appeals, as well as in two opinions of this court. *See id.* at ¶¶ 71–73, 500 P.3d at 399–400; *see also People v. Leske*, 957 P.2d 1030, 1041 (Colo. 1998) (concluding that sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust under subsection 408(5)(c) because the two offenses do not involve different degrees of culpability, injury, or risk of injury but differ with respect to other elements); *People v. Raymer*, 662 P.2d 1066, 1070 (Colo. 1983) (concluding that aggravated robbery is a lesser included offense of felony murder based on the victim's death in the course of that robbery because, when "the robbery victim is actually killed during the course of a robbery, then the crime of aggravated robbery differs from the charge of felony murder only in the sense contemplated by section 18-1-408(5)(c), namely, that an injury less serious than death suffices to establish its commission").

¶17 The division went on to conclude, however, that even if subsection 408(5)(c) did not create a single distinction test, Pellegrin's harassment and stalking convictions would not merge because those crimes differ in more than just the two

ways identified in the statute. *Pellegrin*, ¶ 74, 500 P.3d at 400. By way of example, the division noted that harassment and stalking differ in the class of victims to which they apply because, unlike harassment, which is committed against "another person," the class of victims under the stalking statute includes "a member of that person's immediate family[] or someone with whom that person has or has had a continuing relationship." *Id.* (alteration in original; quoting § 18-3-602(1)(c)).

¶18 The division next addressed Pellegrin's assertion that he had a Sixth Amendment right to have a jury, as opposed to the trial judge, determine whether the crimes that he committed included an act of domestic violence. *Id.* at ¶ 76, 500 P.3d at 400. The division concluded that because a domestic violence finding under subsection 801(1)(a) does not impose a "penalty" as contemplated by *Apprendi*, Pellegrin had no right to have a jury determine whether the crimes for which he was convicted included an act of domestic violence. *Id.* In so ruling, the division relied on *People v. Heisler*, 2017 COA 58, ¶¶ 44–63, 488 P.3d 176, 183–86, in which another division of the court of appeals had concluded that subsection 801(1)(a) does not violate the Sixth Amendment because "court-ordered domestic violence treatment, imposed pursuant to section 18-6-801(1)(a), is not a form of punishment and, therefore, the statute does not mandate a 'penalty' as contemplated by *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348, and its progeny."

Pellegrin, ¶¶ 80–81, 500 P.3d at 400–01 (quoting, in part, *Heisler*, ¶ 45, 488 P.3d at 183).

¶19 Pellegrin then petitioned this court for a writ of certiorari, and we granted his petition in part.

II. Analysis

¶20 We first consider whether harassment is a lesser included offense of stalking under subsection 408(5)(c). We then proceed to examine whether the Sixth Amendment requires a jury to decide whether a crime included an act of domestic violence for purposes of subsection 801(1)(a).

A. Subsection 408(5)(c)

¶21 We begin our subsection 408(5)(c) analysis by setting forth the applicable standard of review and the pertinent principles of statutory construction. We then construe subsection 408(5)(c) to determine whether that statute creates a "single distinction test." Concluding that it does not, we proceed to apply our construction of that provision to the facts before us.

1. Standard of Review and Principles of Statutory Construction

¶22 We review issues of statutory interpretation de novo. *People v. Cali*, 2020 CO 20, ¶ 14, 459 P.3d 516, 519. In construing a statute, we aim to ascertain and give effect to the General Assembly's intent. *Id.* at ¶ 15, 459 P.3d at 519. In undertaking this analysis, we look first to the statutory language, and we give words and

phrases their plain and ordinary meanings. *Id.* We read the statutory words and phrases in context, construing them according to the rules of grammar and common usage. *Id.* In addition, we read the statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts and avoiding constructions that would render any of the statutory words or phrases superfluous or that would lead to illogical or absurd results. *Id.* at ¶ 16, 459 P.3d at 519. And because we must respect the General Assembly's choice of language, we do not add words to a statute or subtract words from it. *Id.* at ¶ 17, 459 P.3d at 519.

¶23 If the statute is unambiguous, then we need not consider further aids of statutory construction. *Id.* at ¶ 18, 459 P.3d at 519. If, however, the statute is ambiguous, then we may turn to such other aids of construction, including the consequences of a given construction, the ends to be achieved by the statute, and the statute's legislative history. *McCoy v. People*, 2019 CO 44, ¶ 38, 442 P.3d 379, 389. A statute is ambiguous when it is reasonably susceptible of multiple interpretations. *Id.*

2. Proper Construction of Subsection 408(5)(c)

¶24 Section 18-1-408(1)(a) prohibits multiple convictions for more than one offense if "[o]ne offense is included in the other, as defined in subsection (5) of this section." Pertinent here, subsection 408(5)(c), in turn, provides that an offense is included in another if "[i]t differs from the offense charged only in the respect that

a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

¶25 Pellegrin asserts that subsection 408(5)(c) is unambiguous and that an offense is lesser included if it differs from the offense charged in the respect that it involves a less serious injury or risk of injury, a lesser kind of culpability, or *both* a less serious injury or risk of injury *and* a lesser kind of culpability.

¶26 The People, in contrast, contend, and the division below concluded, that an offense is lesser included under the plain language of subsection 408(5)(c) only if a "single distinction" exists between the two offenses, namely, either a less serious injury or risk of injury *or* a lesser kind of culpability. If, however, an offense involves *both* a less serious injury or risk of injury *and* a lesser kind of culpability, then, in the People's view, the offense is not lesser included and, accordingly, the allegedly lesser and greater offenses do not merge.

¶27 As an initial matter, we conclude that the statutory language is reasonably susceptible of multiple interpretations and is therefore ambiguous. As the People assert, the word "or" is a disjunctive word that is "ordinarily 'assumed to demarcate different categories.' [sic]" *People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009) (citing but not quoting *Garcia v. United States*, 469 U.S. 70, 73 (1984)). Under this view, the word "or" means either one or the other but not both.

¶28 Pellegrin, in contrast, contends that in subsection 408(5)(c), "or" is used in its inclusive sense, meaning "and/or." In support of this position, Pellegrin points to case law providing that such a reading is proper when necessary to carry out the intent of the legislature or to avoid an absurd or unreasonable result. *See, e.g.*, *Henrie v. Greenlees*, 208 P. 468, 469 (Colo. 1922) (substituting "and" for "or" to effectuate the legislature's intent); *Waneka v. Clyncke*, 134 P.3d 492, 494 (Colo. App. 2005) ("When interpreting a statute, a reviewing court may substitute 'or' for 'and,' or vice versa, to avoid an absurd or unreasonable result."), *aff'd*, 157 P.3d 1072 (Colo. 2007); *In re Estate of Dodge*, 685 P.2d 260, 265–66 (Colo. App. 1984) (same and giving "or" its "usual inclusive construction").

¶29 In our own precedent, we have acknowledged both of these approaches. *See, e.g.*, *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993) (noting that courts can sometimes construe "or" to mean "and" to carry out the legislature's intent but that "or" is presumed to be disjunctive unless the legislature's intent is clearly to the contrary); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 976 n.14 (Colo. 1993) (same and collecting cases).

¶30 Here, we perceive nothing in the statutory language at issue that reveals a clear legislative intent to use "or" in its disjunctive rather than inclusive sense. Accordingly, in our view, the statutory language can reasonably be construed in either manner. We therefore conclude that subsection 408(5)(c) is ambiguous, and

we thus turn to other aids of statutory construction. *See McCoy*, ¶ 38, 442 P.3d at 389. Doing so persuades us that as used in subsection 408(5)(c), "or," particularly when used with "only," means that an offense is included in another when it differs in either *or both* of the ways set forth in that subsection *but in no other way*. We reach this conclusion for several reasons.

¶31 First, and contrary to the People's assertion, we believe that the legislature's use of the word "only" in subsection 408(5)(c) supports our interpretation. Specifically, in our view, the most natural and logical meaning of the word "only" here is to differentiate the distinctions set forth in subsection 408(5)(c) from any other distinctions that might exist in the statutes at issue (i.e., as meaning these distinctions and none other).

¶32 Second, as Pellegrin asserts, interpreting subsection 408(5)(c) as creating a single distinction test leads to illogical and absurd results. Under such an interpretation, an offense would be included in another when it involves either (1) a less serious injury or risk of injury than the greater offense but the same kind of culpability or (2) the same injury or risk of injury but a lesser kind of culpability than the greater offense. An offense would not be included in another, however, if it involves *both* a less serious injury or risk of injury *and* a lesser kind of culpability than the greater offense. Thus, the more the subsection 408(5)(c) distinctions apply, the less applicable subsection 408(5)(c) becomes. We cannot

conceive of, nor do the People provide, any reason why the General Assembly would have intended so illogical, inconsistent, and counterintuitive a result.

¶33 Third, the legislative history of subsection 408(5)(c) supports our foregoing interpretation. As we have explained in prior cases, the Colorado Criminal Code "was substantially influenced by the Model Penal Code." *People v. Childress*, 2015 CO 65M, ¶ 22, 363 P.3d 155, 161. More specifically, we have observed that section 18-1-408(5) was modeled on a Michigan statute, which, in turn, was patterned after the analogous section in the Model Penal Code. *Leske*, 957 P.2d at 1037 n.11. Indeed, section 1.07(4)(c) of the Model Penal Code and subsection 408(5)(c) are worded identically. We thus deem instructive the Model Penal Code commentary for section 1.07(4)(c), which explains that the statutory language "provides for two conceptually distinct situations; either one *or both* may apply to a given fact pattern." Model Penal Code § 1.07 cmt. 5, at 133 (Am. L. Inst. 1985) (emphasis added).

¶34 For these reasons, we conclude that an offense is included in another under subsection 408(5)(c) if it differs from the offense charged *only* in the respect that (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. If any other distinctions exist, then subsection 408(5)(c) is inapplicable. To the extent that court of appeals

divisions in prior cases have, like the division below, construed subsection 408(5)(c) as creating a single distinction test, we overrule those cases.

¶35 With our foregoing construction in mind, we turn to the facts before us.

3. Application

¶36 Section 18-3-602(1)(c) provides, in pertinent part:

> A person commits stalking if directly, or indirectly through another person, the person knowingly: . . . [r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress.

¶37 Section 18-9-111(1)(e), in turn, provides:

> A person commits harassment if, with intent to harass, annoy, or alarm another person, he or she: . . . [d]irectly or indirectly initiates communication with a person or directs language toward another person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, or other interactive electronic medium that is obscene.

¶38 The question here is whether harassment differs from stalking only in the respect that it involves a less serious injury or risk of injury "to the same person, property, or public interest," a lesser kind of culpability, or both. § 18-1-408(5)(c).

For several reasons, we conclude that these offenses differ in more than just the ways set forth in the statute.

¶39 First, harassment and stalking do not involve an injury or risk of injury to the "same person, property, or public interest." To the contrary, as the division below observed, the class of victims protected by the stalking statute comprises both a specific person and "a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship." § 18-3-602(1)(c). The harassment statute, in contrast, limits the class of victims to a single specific person. § 18-9-111(1)(e).

¶40 Second, harassment and stalking punish different conduct. Stalking prohibits conduct involving following, approaching, contacting, surveilling, or communicating, § 18-3-602(1)(c), whereas harassment involves only initiated communications, § 18-9-111(1)(e). In addition, although stalking involves repeated conduct, § 18-3-602(1)(c), harassment is committed by the initiation of a single improper communication, § 18-9-111(1)(e). And stalking can be established by showing that the defendant made "any form of communication" with the victim, § 18-3-602(1)(c), whereas harassment requires that the defendant's communications be "by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium," § 18-9-111(1)(e).

¶41 In light of the foregoing, harassment and stalking differ in a number of ways other than the two distinctions set forth in subsection 408(5)(c). Accordingly, we conclude that subsection 408(5)(c) is inapplicable, and we need not—and do not—reach the difficult question of the proper interpretation of "lesser kind of culpability."

¶42 We are not persuaded otherwise by Pellegrin's assertion that when a lesser offense differs from the greater in one or both of the ways identified in subsection 408(5)(c) and "*is otherwise a subset of the greater*," it is a lesser included offense, even if the offenses differ in ways other than those set forth in subsection 408(5)(c). Specifically, Pellegrin contends that in this case, the test set forth in section 18-1-408(5)(a) ("the subset test") accounts for any differences that make the greater offense more extensive than the lesser. In support of this position, Pellegrin quotes our opinion in *Leske*, 957 P.2d at 1040, in which we stated:

> [U]nder subsection (5)(c), if proof of the facts required to prove the statutory elements of the greater offense necessarily establishes all of the elements of the lesser offense except that the offenses require proof of a different *mens rea* element or degree of injury or risk of injury, the lesser offense is nonetheless included.

For several reasons, we are unpersuaded by Pellegrin's argument.

¶43 First, the interpretation that Pellegrin proffers is inconsistent with the plain language of subsection 408(5)(c). As detailed above, under subsection 408(5)(c), the "only" way that a lesser offense can differ from the greater is in one or both of

the ways specified in the statute. Nothing in subsection 408(5)(c) indicates a legislative intent to allow offenses with several other differences to satisfy that subsection as long as the allegedly lesser offense is "otherwise a subset of the greater." Such an interpretation would require us to add words to the statute and would render the word "only" superfluous, neither of which we may do. *Cali*, ¶¶ 16–17, 459 P.3d at 519.

¶44 Second, Pellegrin's suggested interpretation contravenes subsection 408(5)(c)'s mandate that a lesser included offense involve an injury or risk of injury to "the *same* person, property, or public interest." (Emphasis added.) In urging us to adopt his interpretation, Pellegrin argues that under the stalking statute, when one person communicates with another person or someone related to that person, the actor necessarily communicates with another person for purposes of the harassment statute. This interpretation and reasoning, too, would require us to add words to the statute, here, by reading the word "same" as "the same or a subset of the same." Again, we cannot do so. *Id.* at ¶ 17, 459 P.3d at 519.

¶45 Third, Pellegrin's proposed interpretation conflates subsection 408(5)(c) with the subset test. Under the subset test, an offense is included in another if "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." § 18-1-408(5)(a). Pellegrin asserts that his interpretation is consistent with our prior determination that it is possible for an

offense to satisfy the requirements of both subsection 408(5)(c) and the subset test. We agree that it is possible for an offense to be lesser included under more than one section 18-1-408 test. *See, e.g.*, *People v. Chapman*, 557 P.2d 1211, 1213–14 (Colo. 1977) (concluding that careless driving is an included offense of reckless driving under subsection 408(5)(c) because it involves a lesser kind of culpability and also because careless driving is established by proof of the same or less than all of the facts required to establish reckless driving). Here, however, it is not at all clear that harassment can *independently* satisfy the requirements of either subsection 408(5)(c) or the subset test, nor is the applicability of section 18-1-408(5)(a) before us. In any event, nothing in section 18-1-408 indicates that the General Assembly intended for an offense to be included in another offense when it cannot satisfy the requirements of any single test under that statute but it can conceivably satisfy some elements of multiple tests thereunder. Indeed, the language and structure of section 18-1-408(5), which describe three independent methods of establishing a lesser included offense, show otherwise.

¶46 Fourth, Pellegrin's reliance on the above-quoted language in *Leske*, 957 P.2d at 1040, is misplaced. In *Leske*, we concluded that sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust under either section 18-1-408(5)(a) or subsection 408(5)(c). *Id.* at 1040–41. No party in *Leske* raised, nor did we consider, whether an offense is lesser included under

subsection 408(5)(c) if the allegedly lesser offense differs from the greater in one or both of the ways identified in subsection 408(5)(c) and if it is otherwise a subset of the greater. Moreover, our conclusion in *Leske* that sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust under subsection 408(5)(c) is fully consistent with our analysis today. There, we concluded that subsection 408(5)(c) was not satisfied because the two offenses at issue differed in ways other than the two distinctions set forth in subsection 408(5)(c). *Leske*, 957 P.2d at 1041. As discussed above, the same reasoning applies to the offenses of harassment and stalking.

¶47 In sum, because harassment differs from stalking in more ways than the two specified in subsection 408(5)(c), we conclude that subsection 408(5)(c) is inapplicable here and therefore Pellegrin's convictions for harassment and stalking do not merge.

B. Domestic Violence Finding

¶48 Turning next to Pellegrin's assertion that he has a Sixth Amendment right to have a jury, not the trial court, determine whether the crimes for which he was convicted included an act of domestic violence, we start by addressing the appropriate standard of review and applicable law. We then turn to the merits.

1. Standard of Review and Applicable Law

¶49 Although trial courts have broad discretion over sentencing decisions, we review constitutional challenges to sentencing determinations de novo. *Villanueva v. People*, 199 P.3d 1228, 1231 (Colo. 2008).

¶50 In *Apprendi*, 530 U.S. at 490, the Supreme Court concluded, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (extending the *Apprendi* rule to facts that increase the mandatory minimum sentence to which a defendant is exposed).

¶51 This test applies, however, only when the fact at issue increases a defendant's punishment. *See id.* at 107–08. Accordingly, we must decide whether a domestic violence finding under subsection 801(1)(a) is a fact that increases a defendant's punishment above a statutory maximum or minimum.

¶52 In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), the Supreme Court adopted a seven-factor test for courts to use to determine whether a sentence is punitive in nature:

> [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose

> to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

(Footnotes omitted.)

¶53 These seven factors "are all relevant to the inquiry, and may often point in differing directions." *Id.* at 169. "Absent *conclusive evidence* of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Id.* (emphasis added).

2. Domestic Violence Findings

¶54 Pellegrin asserts that the division below erred when it relied on *Heisler*, ¶ 45, 488 P.3d at 183, to conclude that court-ordered domestic violence treatment pursuant to subsection 801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and therefore the trial court could decide whether the crimes for which Pellegrin was convicted included an act of domestic violence. In Pellegrin's view, *Heisler* was wrongly decided. We disagree.

¶55 *Heisler*, ¶ 24, 488 P.3d at 180, involved a facial challenge to the constitutionality of subsection 801(1)(a). Specifically, the division considered whether subsection 801(1)(a) "improperly authorizes a trial court to make a factual determination that the underlying crime of conviction included an act of domestic violence and that, if found by the court, such a finding mandates domestic violence treatment in addition to any other sentence imposed." *Id.* at ¶ 24, 488 P.3d at

180–81. The division concluded, "[C]ourt-ordered domestic violence treatment, imposed pursuant to section 18-6-801(1)(a), is not a form of punishment and, therefore, the statute does not mandate a 'penalty' as contemplated by *Apprendi* and its progeny." *Id.* at ¶ 45, 488 P.3d at 183 (citation omitted). Thus, subsection 801(1)(a) did not "run afoul of the Sixth Amendment." *Id.* at ¶ 44, 488 P.3d at 183.

¶56 We agree with the *Heisler* division's analysis and conclusion.

¶57 Specifically, as the division there observed, subsection 801(1)(a) contains no express legislative declaration regarding its purpose. *See id.* at ¶ 48, 488 P.3d at 184. Accordingly, we must proceed to apply the seven *Mendoza-Martinez* factors to determine whether the application of subsection 801(1)(a) results in the imposition of punishment. *See id.* We conclude that it does not.

¶58 First, domestic violence treatment does not involve an affirmative disability or restraint, "let alone restraint approaching 'the infamous punishment of imprisonment.'" *Id.* at ¶ 49, 488 P.3d at 184 (quoting *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002)). Domestic violence treatment "does not, on its face, restrict where an offender may live or work and does not alter either the length of [probation or] incarceration." *Id.* (alteration in original; quoting *People v. Rowland*, 207 P.3d 890, 893 (Colo. App. 2009)).

¶59 Second, domestic violence treatment, which prioritizes rehabilitation of the offender and victim and public safety, is not a historic form of punishment. *Id.* at

¶ 50, 488 P.3d at 184; *see also* § 16-11.8-103(4)(a)(I), C.R.S., (2022) (requiring that a court-ordered treatment program comport with the standards set by the domestic violence offender management board, which, among other things, is tasked with implementing intervention methods that prioritize the physical and psychological safety of victims and potential victims and meet the needs of the particular offender).

¶60 Third, nothing in subsection 801(1)(a)'s plain language requires trial courts to make scienter findings before finding an act of domestic violence and ordering an evaluation and treatment. *Id.* at ¶ 57, 488 P.3d at 185.

¶61 Fourth, although domestic violence treatment is designed to reduce the occurrence of future acts of domestic violence and thus promotes deterrence, it does not promote the traditional punitive goal of retribution. *Id.* at ¶ 58, 488 P.3d at 185.

¶62 Fifth, although the behavior to which domestic violence treatment attaches is a crime, *id.* at ¶ 59, 488 P.3d at 185, this alone does not make such treatment punitive. As the Supreme Court has pointed out, Congress may impose both criminal and civil sanctions in respect to the same acts or omissions. *United States v. Ward*, 448 U.S. 242, 250 (1980).

¶63 Sixth, a domestic violence finding is rationally connected to the alternative purpose of rehabilitation of the offender. *Heisler*, ¶ 60, 488 P.3d at 185.

¶64 Finally, although, to be sure, some burden to a defendant results from the imposition of domestic violence treatment, we cannot say that any such burden is excessive in relation to its rehabilitative purpose. *Id.* at ¶ 62, 488 P.3d at 185–86.

¶65 Taken together, these factors lead us to conclude that the imposition of domestic violence treatment pursuant to subsection 801(1)(a) does not constitute a punishment. Accordingly, we further conclude that the division below correctly determined that Pellegrin had no Sixth Amendment right to have a jury determine whether the crimes for which he was convicted included an act of domestic violence. In so concluding, we reject Pellegrin's arguments that *Heisler* was wrongly decided and that the division erred in relying on it.

¶66 We are not persuaded otherwise by Pellegrin's contention that under the plain terms of subsection 801(1)(a), the domestic violence finding is punitive. In support of this argument, Pellegrin points to the statute's placement in the criminal code and the facts that (1) it is triggered only on conviction of a crime, (2) the consequences of a domestic violence finding include mandatory evaluation and treatment at the defendant's expense, (3) the completion of treatment is a condition of a person's criminal sentence, and (4) the treatment standards are promulgated by an agency housed within Colorado's Division of Criminal Justice. As noted above, however, the pertinent inquiry is whether we can discern "conclusive evidence" of legislative intent regarding the penal nature of the

statute. *Mendoza-Martinez*, 372 U.S. at 169. For the reasons set forth above, here, we cannot.

¶67 We likewise are unpersuaded by Pellegrin's reliance on *People v. Jaso*, 2014 COA 131, ¶ 1, 347 P.3d 1174, 1176, in which a division of the court of appeals concluded that the habitual domestic violence statute, § 18-6-801(7), violated the defendant's Sixth Amendment right to a jury trial because it required the trial court, as opposed to the jury, to make findings of fact that increased the defendant's punishment. As the division below recognized, *Jaso* is factually distinguishable from this case because there, the habitual domestic violence finding *did* increase the defendant's punishment. *Jaso*, ¶ 7, 347 P.3d at 1176. Here, in contrast, Pellegrin was not subject to the habitual domestic violence statute, and the domestic violence finding at issue did not increase the maximum or minimum punishments for Pellegrin's crimes. Instead, it merely added, as a condition of Pellegrin's sentence, a domestic violence evaluation and any recommended treatment.

¶68 Finally, we acknowledge that in *People v. Disher*, 224 P.3d 254, 256 (Colo. 2010), we stated, "A finding of domestic violence leads to a sentence enhancer requiring the defendant to complete a treatment evaluation and a treatment program in addition to serving whatever sentence the defendant receives for the underlying crime." This quoted language from *Disher*, however, was dicta and

had no bearing on our reasoning or conclusion in that case. Nor did we in any way address the issue now before us. Rather, *Disher* required us to interpret the meaning of an "[i]ntimate relationship," as defined in section 18-6-800.3(2), C.R.S. (2022). *Disher*, 244 P.3d at 256. Moreover, our conclusion today is fully consistent with the sentence in *Disher* immediately preceding the language on which Pellegrin relies: "When the elements of the statute are met, *a judge may find* that a crime committed by a defendant constitutes domestic violence." *Id.* (emphasis added).

¶69 Accordingly, we conclude that a domestic violence finding under subsection 801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny and therefore Pellegrin had no Sixth Amendment right to have a jury, instead of the trial court, determine whether the crimes for which he was convicted included an act of domestic violence.

III. Conclusion

¶70 For these reasons, we conclude that subsection 408(5)(c) does not create a single distinction test. Instead, under that provision, an offense is included in another offense if (1) a less serious injury or risk of injury, a lesser kind of culpability, or both a less serious injury or risk of injury and a lesser kind of culpability suffice to establish its commission; and (2) no other distinctions exist. Applying that construction to the facts before us, we further conclude that because

the offenses of harassment and stalking differ in more ways than the two distinctions identified in subsection 408(5)(c), harassment is not an included offense of stalking under that subsection and therefore Pellegrin's convictions for harassment and stalking do not merge.

¶71 Finally, we conclude that a domestic violence finding under subsection 801(1)(a) does not impose a "penalty" as contemplated by *Apprendi* and its progeny and therefore Pellegrin had no Sixth Amendment right to have a jury, instead of the trial court, determine whether the crimes for which he was convicted included an act of domestic violence.

¶72 Accordingly, we reject the portion of the division's opinion adopting and applying a single distinction test but otherwise affirm the division's judgment.

JUSTICE MÁRQUEZ concurred in part and concurred in the judgment.

JUSTICE MÁRQUEZ, concurring in part and concurring in the judgment.

¶73 Trevor A. Pellegrin argues that his convictions should merge because harassment is a lesser included offense of stalking. I agree with the majority that section 18-1-408(5)(c), C.R.S. (2022), does not create a single distinction test and that harassment does not merge with stalking. However, unlike the majority, I would resolve this case under the "lesser kind of culpability" prong of subsection (5)(c), because commentary to the Model Penal Code reveals that the phrase "kind of culpability" simply refers to the requisite culpable mental state of the offense. Harassment fails to satisfy this prong because it requires a *higher* culpable mental state (intent) than does stalking (knowledge).

¶74 In its analysis of this case, I fear the majority's refusal to read subsection (5)(c) in combination with subsection (5)(a) may lead to unintended consequences. *See* Maj. op. ¶¶ 44–45. The Model Penal Code commentary suggests that subsection (5)(c) is best understood as a variant of the subset test, embracing offenses that do not strictly satisfy subsection (5)(a) but that nonetheless should be considered lesser included offenses. Thus, when determining whether an offense is a lesser included offense, we should begin by examining whether the elements satisfy subsection (5)(a). If any of the elements do not satisfy subsection (5)(a), we should then examine whether those elements instead satisfy subsection (5)(c). Under this approach, if the elements of an offense

otherwise satisfy subsection (5)(a), except for one or both of the ways permitted by subsection (5)(c), the offense is still considered a lesser included offense.

¶75 Because this case can be easily resolved under the "lesser kind of culpability" prong of subsection (5)(c), and because I worry the majority's understanding of the interaction between subsections (5)(a) and (5)(c) may cause problems in future cases, I respectfully concur in part[1] and concur in the judgment.

I. Analysis

¶76 Section 18-1-408(5)(c) provides that an offense is included in the offense charged if "[i]t differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

¶77 I agree with the majority that section 408(5)(c) does not create a single distinction test. The context provided by the statutory provision as a whole; the legislative history, including the Model Penal Code commentary; and the illogical and absurd results of a contrary interpretation all strongly suggest that the General Assembly did not intend to exclude from the scope of section 408(5)(c) offenses

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[1] Pellegrin also contends that the Sixth Amendment requires that a jury, rather than a trial judge, determine whether the crimes for which he was convicted included an act of domestic violence. I agree with the majority that the Sixth Amendment does not require a jury to determine whether a crime included an act of domestic violence. *See* Maj. op. ¶ 65.

that involve *both* a less serious injury or risk of injury *and* a lesser kind of culpability than the offense charged. *See* Maj. op. ¶¶ 31–33.

¶78 I also agree with the majority's conclusion that harassment is not a lesser included offense of stalking under subsection (5)(c). But I arrive at this conclusion under different reasoning: Harassment is not a lesser included offense of stalking because it does not involve a less culpable mental state. Because we can easily decide this case under the "lesser kind of culpability" prong of subsection (5)(c), and because I have concerns about potential unintended consequences of the majority's view of the relationship between subsections (5)(a) and (5)(c), I concur only in the judgment with respect to this ruling.

A. "Kind of Culpability" Means Culpable Mental State

¶79 As the majority notes, "section 18-1-408(5) was modeled on a Michigan statute, which, in turn, was patterned after the analogous section in the Model Penal Code," and "section 1.07(4)(c) of the Model Penal Code and subsection 408(5)(c) are worded identically." Maj. op. ¶ 33 (citing *People v. Leske*, 957 P.2d 1030, 1037 n.11 (Colo. 1998)); *see* Model Penal Code § 1.07 cmt. 5, at 134 n.124 (Am. L. Inst. 1985). The Model Penal Code commentary regarding section 1.07 therefore informs our understanding of Colorado's parallel section 18-1-408(5). Maj. op. ¶ 33.

¶80 As relevant here, the Model Penal Code commentary to section 1.07 reveals that the phrase "kind of culpability" in section 408(5)(c) refers to the requisite culpable mental state for the offense.

¶81 First, the commentary explains that this prong of paragraph (c) addresses "the case in which the offense differs from the offense charged only in that it requires a *lesser degree of culpability*." Model Penal Code, *supra* § 1.07 cmt. 5, at 133 (emphasis added). The commentary then refers to section 2.02 of the Model Penal Code, which establishes a hierarchy of culpable mental states—notably called "Kinds of Culpability." *Id.* §§ 1.07 cmt. 5, 2.02(2), at 133, 225. These culpable mental states are listed in descending order, starting with "Purposefully" (the most culpable mental state), followed by "Knowingly," then "Recklessly," and then "Negligently" (the least culpable mental state). *See id.* § 2.02(2), at 225–26.

¶82 Second, the commentary specifically points to Model Penal Code section 2.02(5), stating, "Absent a provision such as Section 2.02(5) of the Model Penal Code, [offenses requiring a lesser kind of culpability] would not necessarily be included offenses within the meaning of Paragraph (a)." *Id.* § 1.07 cmt. 5, at 133. In turn, section 2.02(5) unambiguously concerns mens rea, and it provides that proof of a more culpable mental state (such as knowledge) suffices to prove that the defendant possessed a less culpable mental state (such as negligence). *Id.* § 2.02(5), at 226. Colorado has enacted a version of Model Penal Code

section 2.02(5) in section 18-1-503(3), C.R.S. (2022), that likewise concerns mens rea.[2] *See People v. Rigsby*, 2020 CO 74, ¶ 25, 417 P.3d 1068, 1076 ("[A]s a matter of law, a culpable mental state is established by a finding that the defendant acted with a more culpable mental state." (referring to § 18-1-503(3))).

¶83 This discussion in the commentary to the Model Penal Code makes clear that the phrase "kind of culpability" in section 1.07(4)(c) means nothing more than the requisite culpable mental state of an offense.[3] Because section 18-1-408(5)(c) mirrors Model Penal Code section 1.07(4)(c), there is no reason to imbue the same phrase in Colorado's provision with any different meaning.

¶84 With this understanding of the meaning of "lesser kind of culpability," this case becomes straightforward to resolve. Harassment is not a lesser included

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[2] Section 18-1-503(3) provides:

> If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

[3] Several other jurisdictions have likewise interpreted "kind of culpability" to be synonymous with culpable mental state for purposes of analogous provisions to Model Penal Code section 1.07(4)(c). *See*, *e.g.*, *People v. Helliger*, 691 N.Y.S.2d 858, 867 (N.Y. Sup. Ct. 1998); *Fuller v. United States*, 407 F.2d 1199, 1228 & n.28 (D.C. Cir. 1967).

offense of stalking under section 408(5)(c) because harassment requires proof of intent, *see* § 18-9-111(1), C.R.S. (2022), while stalking requires proof of knowledge, *see* § 18-3-602(1), C.R.S. (2022). Harassment thus requires a *greater* "kind of culpability," which violates the second prong of subsection (5)(c). Because this case can be easily resolved on this basis, I need not reach the issue of whether harassment also requires a "less serious injury or risk of injury" than does stalking.

B. Subsection (5)(c) Is a Variant of the Subset Test

¶85 I now turn to my concerns about the majority's analysis.

¶86 The majority misapprehends the relationship between subsections (5)(a) and (5)(c), concluding that these provisions establish distinct, wholly independent tests. This leads the majority to conclude that an offense cannot be deemed a lesser included offense if its elements satisfy a combination of elements of multiple tests. *See* Maj. op. ¶¶ 44–45. I disagree. For many of the same reasons that the "or" in paragraph (c) is best construed inclusively, *see* Maj. op. ¶¶ 31–33, the "or" joining the paragraphs of subsection (5) should be construed the same way to accomplish the overarching purpose of that subsection.

¶87 The Model Penal Code commentary to section 1.07 clarifies the relationship between subsections (5)(a) and (5)(c). As discussed above, the commentary specifically points to Model Penal Code section 2.02(5), stating, "Absent a provision such as Section 2.02(5) of the Model Penal Code, [offenses requiring a

lesser kind of culpability] would not necessarily be included offenses within the meaning of Paragraph (a)." Model Penal Code, *supra* § 1.07 cmt. 5, at 133. In other words, the drafters of the Model Penal Code intended paragraph (c) to embrace offenses that would not fully satisfy paragraph (a) but that nonetheless should be considered lesser included offenses. *See id.*

¶88 In a simple example, assume the elements of Offense A (say, negligent homicide) are *identical* to the elements of Offense B (intentional homicide), except for mens rea: Offense A requires proof of negligence, whereas Offense B requires proof of intent. In this circumstance, the requirements of paragraph (a) are not fully met because Offense A requires proof of a different element (negligence) that is not required for proof of Offense B, and that element is not logically established by proof of the higher mens rea (intent) under Offense B. *See, e.g.*, *People v. Helliger*, 691 N.Y.S.2d 858, 867 (N.Y. Sup. Ct. 1998) ("Logically speaking, 'being unaware of a risk' (negligence) is not necessarily included when a person acts with a 'conscious disregard of a risk' (recklessness), which, in turn, is not necessarily included within 'intending a consequence' (acting intentionally)."). To remedy this problem, the "lesser kind of culpability" prong of paragraph (c) ensures that Offense A still qualifies as a lesser included offense of Offense B for purposes of

merger.[4] *Fuller v. United States*, 407 F.2d 1199, 1228 & n.28 (D.C. Cir. 1967) (stating that Model Penal Code section 1.07(4) provides a more precise definition of an included offense than the "customary definition" of "one which is necessarily established by proof of the greater offense," which is "not strictly accurate when crimes are differentiated on the basis of the kind of intention the actor must have," citing as an example an intentional killing, which does not establish that the actor was reckless).

¶89 The broader point is that paragraph (c) is intended to embrace offenses that do not fully satisfy paragraph (a) but are nevertheless intuitively consistent with the meaning of "lesser included." *See Reyna-Abarca v. People*, 2017 CO 15, ¶ 61, 390 P.3d 816, 826. This means, however, that some offenses should be deemed lesser included because they meet a *combination* of the requirements of

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[4] I recognize that, in this respect, paragraph (c) accomplishes essentially the same work as Model Penal Code section 2.02(5) (or in Colorado, section 18-1-503(3)), which "sets up a hierarchical system of culpable mental states in which . . . proving a more culpable mental state necessarily establishes any lesser culpable mental state." *Rigsby*, ¶ 21, 471 P.3d at 1074. Indeed, Colorado's adoption of section 18-1-503(3) renders the "lesser kind of culpability" prong of section 18-1-408(5)(c) arguably superfluous. However, Model Penal Code section 1.07(4)(c) (on which section 18-1-408(5)(c) is patterned) is intended to ensure that such offenses are considered included offenses for the purposes of merger regardless of whether a jurisdiction has also adopted a version of section 2.02(5). *See* Model Penal Code, *supra* § 1.07 cmt. 5, at 133–34.

paragraphs (a) and (c). Consider a hypothetical scenario involving modified versions of harassment and stalking, in which the required mens rea of harassment and stalking are reversed so that harassment instead requires knowledge and stalking requires intent, and in which harassment requires a lesser form of injury than stalking. In this hypothetical, all other elements of harassment are either the same as, or comprise a subset of, the elements of stalking:

	Harassment	**Stalking**
Mental state	*Knowledge*	*Intent*
Conduct	A single communication	Repeated communications
Means	Communication in person, by telephone, or computer	Any form of communication, or following, approaching, contacting, or surveilling
Injury	*Annoyance or alarm*	*Emotional distress or bodily injury*
Victim	Another person	Another person

¶90 In this hypothetical, harassment would not qualify as a lesser included offense of stalking under section 408(5)(a) because not all of the elements of harassment comprise a subset of the elements of stalking. Put another way, proof of harassment is *not* established by "proof of the same or less than all the facts" required to establish stalking. However, harassment in this hypothetical requires a "less serious injury" and a "lesser kind of culpability" to establish its commission. That is, the two elements that do not meet the requirements of section 408(5)(a) nevertheless *do* meet the requirements of section 408(5)(c). In my

view, harassment in this hypothetical should be deemed a lesser included offense of stalking. But under the majority's approach, it would not, because subsection (5)(a) and subsection (5)(c) may not be considered in combination.[5] *See* Maj. op. ¶ 45.

¶91 I respectfully disagree. Under the majority's reasoning, an offense that requires the *same* culpable mental state and proof of injury as the charged offense would be considered a lesser included offense if it satisfies the *Reyna-Abarca* subset test under subsection (5)(a), but that same offense would *not* be deemed a lesser included offense if it requires a *less* culpable mental state or *less* serious injury (satisfying subsection (5)(c)). I do not believe such a result squares with legislative intent.

¶92 Because I disagree with the majority's understanding of the relationship between subsections (5)(a) and (5)(c), and because this case can instead be easily resolved on the basis of the "lesser kind of culpability" prong of subsection (5)(c), I respectfully concur in part and concur in the judgment.

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[5] I recognize that section 18-1-503(3) would separately allow a court to conclude that an offense is lesser included if it satisfies subsection (a) except that it requires a less culpable mental state. *See Rigsby*, ¶ 25, 471 P.3d at 1076. But the majority's approach would preclude a court from reaching that conclusion if the offense instead—or also—required a less serious injury.