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# STATE V. PADILLA: AN AGGRAVATED READING OF THE STATE'S AGGRAVATED FLEEING A POLICE OFFICER STATUTE

AARON BACA\*

## I. INTRODUCTION

*State v. Padilla*<sup>1</sup> addresses matters of statutory interpretation of New Mexico's aggravated-fleeing-a-law-enforcement-officer statute<sup>2</sup> and Law Enforcement Safe Pursuit Act (LESPA).<sup>3</sup> The crime of aggravated fleeing has posed problems for courts concerning the issue of whether an accused can raise as a defense the conduct of police officers who initiate high-speed vehicular chases.<sup>4</sup> Aggravated fleeing is a fourth-degree felony<sup>5</sup> created by the Legislature in 2003 as part of a broad set of statutes that were designed to eliminate or reduce dangerous police chases.<sup>6</sup> What is in dispute in *Padilla* is whether the Legislature intended to premise criminal liability under the aggravated fleeing statute, in part, on the conduct of police officers who chase fleeing suspects.<sup>7</sup>

This note will look at provisions of the aggravated fleeing statute, the LESPA, and the application of these provisions by the *Padilla* court.<sup>8</sup> This note will argue *Padilla* is a warning to New Mexico defense attorneys. The *Padilla* holding exposes elasticity in the state's canons of statutory interpretation that permit inconsistent results among the appellate courts.<sup>9</sup> Here, this elasticity beguiles the very purpose of the canons: to effectuate the will of the Legislature.<sup>10</sup>

## II. STATEMENT OF THE CASE

*State v. Padilla* began its way through New Mexico's courts in a dark alley in Portales in the fall of 2003.<sup>11</sup> Felipe Padilla, the defendant, fled from a police officer during the predawn hours of October fourteenth.<sup>12</sup> Following a high-speed chase through the city, Padilla was tried and convicted of aggravated fleeing a police officer under a recently enacted New Mexico statute that provided a felony enhancement to the misdemeanor charge of evading a peace officer.<sup>13</sup> The New Mexico Court of Appeals overturned Padilla's conviction and remanded the case for a new trial on a finding that the trial court failed to render sufficient instruc-

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1. 2008-NMSC-006, 176 P.3d 299.

2. See NMSA 1978, § 30-22-1.1 (2003).

3. See The Law Enforcement Safe Pursuit Act, NMSA 1978, §§ 29-20-1 to -4 (2003). The name of this statute can be confusing, at times, because it is the same name given to the legislative bill that created both the aggravated fleeing statute and the LESPA.

4. See *State v. Padilla*, 2006-NMCA-107, 142 P.3d 921, *rev'd*, 2008-NMSC-006, 176 P.3d 299; *infra* Part IV.

5. NMSA 1978, § 30-22-1.1(B) (2003).

6. See *infra* notes 41, 55 and accompanying text.

7. *Padilla*, 2008-NMSC-006, ¶ 8, 176 P.3d 299, 301; see *infra* note 91 and accompanying text.

8. See *infra* Parts IV, V.

9. See *infra* notes 174-79 and accompanying text.

10. See *infra* Part V.

11. 2008-NMSC-006, ¶ 2, 176 P.3d at 300.

12. *Id.*

13. *Id.* ¶ 1, 176 P.3d at 300.

tions to Padilla's jury on the elements of aggravated fleeing an officer.<sup>14</sup> On certiorari review, the New Mexico Supreme Court reinstated Padilla's aggravated fleeing conviction, holding that the aggravated fleeing statute does not require proof that an officer's pursuit of a defendant accords with the LESPA.<sup>15</sup>

Padilla's conviction arose from a series of poor decisions he made that October night. Driving with two acquaintances in Portales, Padilla exited a street and parked in an alley sometime around 2 a.m. the morning police arrested him.<sup>16</sup> Padilla's choice of parking at this odd hour and his failure to get out of the car after parking attracted the attention of an officer who was watching from his patrol car a short distance away.<sup>17</sup> The officer took note of Padilla's license plate and called in the tag to run a check of Padilla's vehicle.<sup>18</sup>

The information the police dispatch radioed back demanded more attention. Padilla's license plate didn't belong to the Buick he was driving. It came back registered to a Ford.<sup>19</sup> Because of the apparent vehicle registration violation, the officer turned on his car's overhead emergency lights and prepared to stop Padilla.<sup>20</sup>

The planned stop didn't occur. Padilla gunned his engine. Accelerating, he ran a stop sign driving away from the alley.<sup>21</sup> In the minutes that followed, Padilla pushed the sedan to speeds of eighty miles per hour.<sup>22</sup> He would run a total of ten stop signs with the single police officer following him.<sup>23</sup> At certain times, Padilla's car crossed over center lines as he sped around corners.<sup>24</sup> He ran one stop sign traveling in excess of fifty miles per hour in a zone posted for no more than twenty-five miles per hour.<sup>25</sup> At one point during the chase, Padilla barely missed colliding with another car.<sup>26</sup> The entire chase was recorded on a dashboard video camera in the officer's patrol car.<sup>27</sup>

Padilla's flight did not last long. He drove into a mobile home sales lot where he abandoned the vehicle when the stairway to a trailer was blocking his path.<sup>28</sup> He continued to run on foot and crawled under a nearby mobile home.<sup>29</sup> After an officer ordered him to come out, Padilla crawled from under the trailer and was arrested.<sup>30</sup>

Padilla was charged with driving with a suspended or revoked license, failure to have car insurance, resisting/evading, reckless driving, improper display of a license plate, and aggravated fleeing.<sup>31</sup> The charge of aggravated fleeing was a new

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14. *State v. Padilla*, 2006-NMCA-107, ¶ 1, 142 P.3d 921, 924.

15. *Padilla*, 2008-NMSC-006, ¶ 1, 176 P.3d at 300.

16. *Id.* ¶ 2, 176 P.3d at 300.

17. *Id.*

18. *Id.*

19. *Padilla*, 2006-NMCA-107, ¶ 5, 142 P.3d at 925.

20. *Padilla*, 2008-NMSC-006, ¶ 2, 176 P.3d at 300.

21. *Padilla*, 2006-NMCA-107, ¶ 5, 142 P.3d at 925.

22. *Padilla*, 2008-NMSC-006, ¶ 3, 176 P.3d at 300.

23. *Id.*

24. *Id.* ¶ 4, 176 P.3d at 300.

25. *Padilla*, 2006-NMCA-107, ¶ 5, 142 P.3d at 925.

26. *Id.* ¶ 5, 142 P.3d at 926.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* ¶ 6, 142 P.3d at 926.

law on New Mexico's books on the morning of Padilla's arrest.<sup>32</sup> A Roosevelt County jury convicted Padilla of all counts.<sup>33</sup>

Padilla appealed only his felony aggravated fleeing conviction, arguing that because the statute reads a police pursuit must be conducted "in accordance with the provisions of the Law Enforcement Safe Pursuit Act," the trial court erred by refusing Padilla's requested instruction that the jury consider whether Padilla's arresting officer acted in accord with the LESPA.<sup>34</sup> Padilla won on appeal where the court of appeals held that the phrase "in accordance with the provisions of the Law Enforcement Safe Pursuit Act" is an essential element of the crime charged against Padilla, and was erroneously omitted from instructions to Padilla's jury.<sup>35</sup> A divided state supreme court reinstated Padilla's conviction in 2008, holding that the "in accordance with the provisions of [LESPE]" phrase is not an essential element of the crime of aggravated fleeing.<sup>36</sup>

### III. BACKGROUND

#### A. *Aggravated Fleeing a Police Officer*<sup>37</sup>

Running from the police prior to 2003 was a petty misdemeanor in New Mexico under the state's evading/resisting statute.<sup>38</sup> That year the Legislature created the new crime of aggravated fleeing a law enforcement officer, which is a fourth-degree felony.<sup>39</sup> According to the new statute:

Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle in pursuit *in accordance with the provisions of the Law Enforcement Safe Pursuit Act*.<sup>40</sup>

The Legislature passed the aggravated fleeing statute and the separate New Mexico LESPA in a single bill. (Because the bill was also called the Law Enforcement Safe Pursuit Act, it will be referred to herein as "the Bill.")<sup>41</sup> Conviction under the aggravated fleeing statute carries a maximum penalty of eighteen months in prison and/or a fine of up to \$5,000.<sup>42</sup>

Prior to the court's ruling in *Padilla*, aggravated fleeing an officer was not addressed in the state's Criminal Uniform Jury Instructions (UJI). Lacking a specific

32. See NMSA 1978, § 30-22-1.1 (2003).

33. *Padilla*, 2006-NMCA-107, ¶ 8, 142 P.3d at 926.

34. *Id.* ¶ 9, 142 P.3d at 926.

35. *Id.*

36. *State v. Padilla*, 2008-NMSC-006, ¶ 1, 176 P.3d 299, 300.

37. NMSA 1978, § 30-22-1.1.

38. See NMSA 1978, § 30-22-1 (1981).

39. NMSA 1978, § 30-22-1.1(B) (2003).

40. NMSA 1978, § 30-22-1.1(A) (2003) (emphasis added).

41. H.B. 30, 46th Leg., Reg. Sess. (N.M. 2003).

42. NMSA 1978, § 31-18-15 (2007).

instruction for the charge, the UJI rules directed courts to fashion appropriate instructions based on the statutory language creating the new crime.<sup>43</sup>

*B. Resisting, Evading, or Obstructing a Police Officer*<sup>44</sup>

The misdemeanor crime of evading a police officer is a much older law in New Mexico dating to the state's territorial days.<sup>45</sup> A person convicted under the resisting/evading statute faces no more than six months confinement in a county jail, and/or a fine of up to \$500, depending on the sentencing judge's discretion.<sup>46</sup>

Resisting/evading penalizes those acts committed by persons who obstruct, resist, or oppose any police officer engaged in the "lawful discharge of his duties."<sup>47</sup> Additionally, the charge extends to those who intentionally flee or evade an officer, and those who refuse to bring to a stop a vehicle that a uniformed officer in an appropriately marked vehicle has signaled to stop.<sup>48</sup>

To convict someone of evading or obstructing police, the state must prove beyond a reasonable doubt: (1) that the officer attempting to apprehend the suspect was acting within his lawful duties and (2) that the suspect knowingly fled, evaded, or obstructed the officer trying to execute the apprehension.<sup>49</sup> Alternatively, a person may be convicted of obstructing or evading by resisting or abusing an officer acting in the lawful discharge of his duties.<sup>50</sup>

New Mexico's aggravated fleeing a police officer statute was adopted during a wave of similar legislation in other states following increased media coverage and heightened public scrutiny of dangers posed to the public by police pursuits.<sup>51</sup> Research at the time showed that as many as 300 people die each year in the United States because of accidents resulting from police pursuits.<sup>52</sup>

Locally, two years before the passage of New Mexico's safe pursuit act, at least six people were killed in traffic accidents resulting from police chases.<sup>53</sup> Efforts to enhance New Mexico's evading statute, as well as establish pursuit policies for state law enforcement officers, became particularly feverish following the 2001 death of Manola Jojola.<sup>54</sup> Lawmakers adopted the aggravated fleeing statute under the belief that the misdemeanor crime of evading a police officer inadequately protected the public.<sup>55</sup>

43. UJI-Criminal, Gen. Use Note, NMRA.

44. NMSA 1978, § 30-22-1 (1981).

45. KEARNY CODE OF LAWS OF NEW MEXICO, art. III, § 4 (1846).

46. NMSA 1978, § 31-19-1(B) (1984).

47. NMSA 1978, § 30-22-1 (1981); *see also* UJI 14-2215 NMRA.

48. NMSA 1978, § 30-22-1.

49. UJI 14-2215 NMRA.

50. *Id.*

51. *See* Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 511 (2006).

52. F.P. Rivara, *Motor Vehicle Crash Deaths Related to Police Pursuits in the United States*, 10 INJURY PREVENTION 93-94 (2004).

53. Leslie Linthicum, *Wrong Place, Wrong Time*, ALBUQUERQUE J., Sept. 9, 2001, at A1.

54. David Miles, *Bill Beefs Up Penalties for Fleeing From Officers*, ALBUQUERQUE J., Feb. 15, 2002, at A10. Jojola died in 2000 when a car being chased by police broadsided his pickup in Albuquerque.

55. Rep. Rhonda S. King, *Rep. Reports on Hectic Session*, ALBUQUERQUE J., Feb. 27, 2003, at A4 ("The legislation would require law enforcement officers to be trained in how to safely conduct high-speed pursuits, with an emphasis on the need to protect the public. The new law would also require law enforcement

### C. Law Enforcement Safe Pursuit Act<sup>56</sup>

While the aggravated fleeing statute is aimed at those people who run from the police,<sup>57</sup> the companion LESPA squarely targets the conduct of New Mexico police.<sup>58</sup> The LESPA, among other things, mandates increased police training with regard to conducting high-speed chases.<sup>59</sup> The law defines a high-speed pursuit, spells out criteria to be considered by police when initiating a high-speed pursuit, responsibilities of officers during and after a pursuit, and police academy curriculum. The LESPA also requires that every police agency within the state establish and enforce policies governing high-speed pursuits that have as minimum standards those requirements of the LESPA.<sup>60</sup>

### D. Felony Fleeing in Other States

New Mexico is not alone in having a statute establishing a felony enhancement for offenders who run from the police. Similar enhancements exist in nearly every state in the union. The New Mexico statute, however, is unique because of how it categorizes police conduct within the law.<sup>61</sup>

It is useful to consider similar statutes in other jurisdictions to see how this categorization of police conduct works. Broadly speaking, the statutes fall into two categories: the generic and the non-generic. Both types of statutes address the matter of appropriate police conduct. States employing the generic model of construction typically mandate that police conduct be “duly authorized,”<sup>62</sup> or “acting in the lawful discharge of an official duty.”<sup>63</sup> States employing the non-generic model define police conduct as requiring some kind of additional pronouncement. Here, the non-generic statute often states that an officer must be conducting a pursuit in an appropriately marked vehicle, or be wearing a particular insignia, or that the officer use appropriate signals during a high-speed chase.<sup>64</sup> The non-generic statute may often take on a hybrid formulation of both the generic and non-generic by incorporating elements from each. Those hybrid-type statutes typically state that an officer must be acting both lawfully and conducting a pursuit in an appropriately marked vehicle or uniform.<sup>65</sup>

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agencies to develop policies on high-speed pursuits that include safeguards for the public and it would stiffen the penalties for drivers who endanger the public while fleeing from police officers.”).

56. NMSA 1978, §§ 29-20-1 to -4 (2003).

57. NMSA 1978, § 30-22-1.1 (2003).

58. NMSA 1978, §§ 29-20-1 to -4.

59. NMSA 1978, § 29-20-3.

60. NMSA 1978, § 29-20-4.

61. See *infra* notes 69–70 and accompanying text.

62. See, e.g., ARK. CODE ANN. § 5-54-125 (West 2008).

63. See, e.g., MINN. STAT. ANN. § 609.487 (West 2009). The reference in such generic laws to “lawful duty” or the mandate that an officer be within the “lawful discharge” of his duty appears to explicitly recognize the common law notion that individuals may defend themselves against unlawful and even capricious police action. In other words, the choice by an officer to detain an individual for reasons outside the course of trying to affect an arrest or manage the peace in some way has been recognized as falling outside an officer’s lawful duty and, therefore, does not constitute a legitimate police function from which an individual can be charged with evasion. See generally 4 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW §§ 567, 569 (15th ed. 2008).

64. See, e.g., GA. CODE ANN. § 40-6-395 (West 2008).

65. Compare FL. STAT. ANN. § 316.1935 (West 2004), with 625 ILL. COMP. STAT. ANN. 11-204.1 (West 2004).

The requirement that an officer act lawfully or discharge his duties in a lawful manner appears to be a universal proscription governing the conduct of police,<sup>66</sup> regardless of whether the statute explicitly states that criteria.<sup>67</sup> In general, the purpose of the police-conduct provisions of these statutes is to provide suspects with a form of notice that they are being pursued by actual police officers.<sup>68</sup>

In comparison, New Mexico's version of aggravated fleeing falls into the non-generic category. New Mexico's aggravated fleeing statute mandates that police conduct a pursuit in an "appropriately marked . . . vehicle" in addition to the requirements of proper signals and signal equipment.<sup>69</sup> But New Mexico departs from the norm in that its statute makes additional reference to police conduct by referencing the state's LESPA in the aggravating fleeing statute, as well.<sup>70</sup>

In this way, New Mexico appears to be joined by Connecticut as having a separate statute that spells out specific criteria police must take into account when considering a high-speed pursuit.<sup>71</sup> Arizona also references a separate statute in its felony fleeing law that partially regulates police conduct.<sup>72</sup>

The Connecticut statute, however, does not follow the additional step taken by the New Mexico statute in that it is not incorporated by reference into the state's fleeing statute.<sup>73</sup> The Connecticut law clearly defines specific criteria and policies police must take into account when deciding whether to conduct a high-speed chase.<sup>74</sup> The statute, like New Mexico's LESPA, sets out training requirements for Connecticut police, as well as factors police there should evaluate when initiating a high-speed chase.<sup>75</sup>

Arizona's felony fleeing statute is categorically closer to the New Mexico style of construction.<sup>76</sup> The statute, like New Mexico's, defines the aggravating behaviors an offender must commit to trigger a felony enhancement,<sup>77</sup> and then incorporates by reference a separate statute regarding limited police conduct.<sup>78</sup> This separate statute is unlike New Mexico's LESPA because it only addresses what types of vehicles are to be considered appropriate official vehicles for the purposes of a felony fleeing charge.<sup>79</sup>

### E. Statutory Interpretation

There is no hard-and-fast rule dictating how New Mexico courts must interpret an act of the Legislature. New Mexico's courts follow common law principles and

66. See 4 TORCIA, *supra* note 63, § 567.

67. See *id.*

68. Cf. *id.* § 199 (explaining that assault or battery on a police officer is aggravated only if the defendant knows that "his victim is a police officer").

69. See NMSA 1978, § 30-22-1.1 (2003).

70. *Id.*

71. See CONN. GEN. STAT. ANN. § 14-283 (West 2005).

72. See ARIZ. REV. STAT. ANN. §§ 28-622.01, 28-624 (1997).

73. Compare CONN. GEN. STAT. ANN. § 14-223 (West 2000), with NMSA 1978, § 30-22-1.1.

74. See CONN. GEN. STAT. ANN. § 14-283.

75. See *id.*

76. Compare ARIZ. REV. STAT. ANN. §§ 28-622.01, 28-624, with NMSA 1978, §§ 30-22-1.1, 29-20-1 to -4 (2003).

77. ARIZ. REV. STAT. ANN. § 28-622.01.

78. *Id.* § 28-624.

79. *Id.*

court precedent when confronted with a statute requiring further analysis. The procedures followed by any one court can vary in detail, but they share common principles throughout New Mexico. These principles are similar in name and nature to the statutory principles employed in most state and federal courts.

Generally speaking, a court's ultimate goal in statutory interpretation is to give effect and meaning to the intent behind a legislative enactment by looking to the plain meaning of language used in the statute.<sup>80</sup> If the law is clear on its face, there generally is no need for further review.<sup>81</sup> If, however, there is ambiguity in the law or in the results that will be achieved by applying the law according to its literal reading, a court will then look to legislative history (if available) and the context in which the law was created.<sup>82</sup> Courts will avoid construing a statute in a way that would be "absurd, unreasonable, or contrary to the spirit" of the law.<sup>83</sup> Also, if an otherwise clear law results in an application that is unjust, then the legislative intent that was behind the law is to be preferred over the law's literal reading.<sup>84</sup> To search for legislative intent of an ambiguous law, a court looks to the overall structure and function of the statute in the comprehensive legislative scheme.<sup>85</sup>

Under these principles, courts consider themselves without power to revise the language used in a criminal statute, and must interpret the statute so as to avoid rendering any part of the statute surplusage or superfluous.<sup>86</sup> Finally, what is, or is not, an essential element of an offense will depend on the statutory language creating the offense.<sup>87</sup>

#### IV. RATIONALE

*Padilla* arises from a dispute over whether the Legislature meant to depart from common law norms when crafting New Mexico's aggravated fleeing statute.<sup>88</sup> The case turns on whether criminal liability rests entirely on the accused's own conduct, or whether additional factors beyond the accused's control constitute an element of the newly enacted statute.<sup>89</sup> As such, the *Padilla* court spends little time examining the actual circumstances of the Portales police pursuit of Felipe Padilla. The facts of the chase and the arrest constitute only a few paragraphs of the court's decision because the court determined that the case rests entirely on how best to construe New Mexico's aggravated fleeing statute and its companion, the LESPA.<sup>90</sup> "The question raised by this appeal is whether the Legislature intended the phrase 'in accordance with the provisions of the [LESPA]' found at the end of the aggravated fleeing statute to be an essential element of the crime of aggravated fleeing."<sup>91</sup>

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80. State *ex rel.* Kline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).

81. State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990).

82. *Blackhurst*, 106 N.M. at 735, 749 P.2d at 1114.

83. State v. Smith, 2004-NMSC-032, ¶ 10, 98 P.3d 1022, 1026.

84. *Id.* ¶ 9, 98 P.3d at 1025.

85. *Id.* ¶ 10, 98 P.3d at 1026.

86. State v. Javier M., 2001-NMSC-030, ¶ 32, 33 P.3d 1, 15.

87. State v. Rhea, 93 N.M. 478, 480, 601 P.2d 448, 450 (Ct. App. 1979).

88. State v. Padilla, 2008-NMSC-006, ¶¶ 8–10, 176 P.3d 299, 301–02.

89. *Id.* ¶ 8, 176 P.3d at 301.

90. *Id.* ¶ 7, 176 P.3d at 301.

91. *Id.* ¶ 8, 176 P.3d at 301.



According to the strict reading of the aggravated fleeing statute argued by Padilla, the term “in accordance with the [LESPA]” would mean the phrase is essential to the charge of aggravated fleeing.<sup>92</sup> Failure to instruct a jury on this element would constitute a fundamental error requiring reversal of any conviction obtained without the instruction.<sup>93</sup>

The state argued that if the phrase “in accordance with the [LESPA]” can be construed as being outside the intended aggravated fleeing charge, there would be no need to instruct a jury to consider the conduct of police alongside that of a defendant.<sup>94</sup> As such, a conviction obtained without the instruction would be valid.<sup>95</sup>

Thus, *Padilla* began an exploration of legislative intent, purpose, and statutory relevance to settle the issue of whether New Mexico’s brand of aggravated fleeing demands attention be paid to the conduct of police, as well as that of defendants.<sup>96</sup> The court in *Padilla* searched the rules of its own precedent to focus its statutory interpretation lens. “Our ultimate goal in statutory construction is to ascertain and give effect to the intent of the Legislature,” the majority stated.<sup>97</sup> The court said its first level of analysis was to determine the Legislature’s purpose in passing the aggravated fleeing statute and the LESPA.<sup>98</sup> In accordance with its principles of statutory construction, however, the court stated that it would not be bound to a literal interpretation of a statute when “such strict interpretation would defeat the intended object of the legislation.”<sup>99</sup>

As a backdrop for its analysis, the *Padilla* majority examined the very nature of criminal statutes and criminal liability in general.<sup>100</sup> Criminal liability, the court reasoned, is usually premised solely on the conduct and intent of the accused.<sup>101</sup>

#### A. Aggravating Circumstances

Despite these common law principles, there are times when a legislature will premise criminal liability on more than the conduct and intent of the accused, the court concluded.<sup>102</sup> *Padilla* reasoned that the Legislature sometimes chooses to enhance a criminal charge based on the severity of the crime.<sup>103</sup> Typically, an aggravated-type crime is that which is “made worse or more serious by circumstances

92. *Id.*

93. *Id.*

94. See Petitioner–State of New Mexico’s Brief-in-Chief at 4, *Padilla*, 2008-NMSC-006, 176 P.3d 299 (No. 29,947).

95. See *id.*

96. *Padilla*, 2008-NMSC-006, ¶¶ 10–11, 176 P.3d at 301–02.

97. *Id.* ¶ 10, 176 P.3d at 302 (quoting *State v. Smith*, 2004-NMSC-032, ¶ 8, 98 P.3d 1022, 1025 (internal quotation marks omitted)).

98. *Id.*

99. *Id.*

100. *Id.* ¶ 11, 176 P.3d at 302.

101. *Id.* (quoting, 1 TORCIA WHARTON’S CRIMINAL LAW § 1 at 2 (15th ed. 1993) (explaining that the typical criminal statute usually has but two purposes: (1) to define the conduct that is deemed offensive or injurious to society, and (2) to punish the accused for committing the act defined, but with enough latitude to “accommodate the characteristics of individual offenders”)).

102. See *id.* ¶ 18, 176 P.3d at 303.

103. *Id.* ¶13, 176 P.3d at 302.

such as violence, the presence of a deadly weapon, or the intent to commit another crime.”<sup>104</sup>

Under this analysis the court concluded “the New Mexico Legislature has adhered to these general principles of criminal law” in drafting the aggravated fleeing statute.<sup>105</sup> “The text of the statute focuses on the accused’s conduct and the accused’s knowledge and intent.”<sup>106</sup> The court based this finding on its reading that the aggravated fleeing statute triggers when an accused “chooses to engage a police officer in a high speed pursuit . . . in a manner that endangers the lives of others.”<sup>107</sup> Minus these factors, the conduct of a defendant would be no different than conduct defined in the unenhanced evading statute.<sup>108</sup> Because the statute focuses on the accused’s behavior, the court reasoned that the manner in which a police officer conducts himself during a chase is not logically “a fact or situation that increases the degree of liability or culpability for a criminal act.”<sup>109</sup>

Despite the traditional construction of criminal statutes, the court stated that there are rare circumstances in which a law will evaluate the conduct of police. An example is the crime of aggravated assault on a police officer, which requires a jury to find that a police officer was acting “in the lawful discharge of his duties.”<sup>110</sup> The court stated that the Legislature chose to elevate the severity of the crime, as compared to aggravated assault on the general public, based on the victim’s status as a police officer.<sup>111</sup> The difference between aggravated fleeing and aggravated assault of an officer, the court found, is that with the aggravated assault of an officer statute, the Legislature chose to protect police who are conducting police duties.<sup>112</sup> The court found that police are not viewed as victims for the purposes of the aggravated fleeing statute. So, “outside of these limited exceptions, the norm remains to gauge the severity of a crime by the conduct of the accused, not by the conduct of the officer tasked with arresting the accused.”<sup>113</sup>

To conclude that the conduct of a police officer was relevant in trying to prove a defendant guilty of fleeing the police officer would be unorthodox and most likely unwieldy, the court stated.<sup>114</sup> Such a holding would create a host of mini-trials to evaluate police conduct. These mini-trials would consume the resources of a court trying an aggravated fleeing suspect.<sup>115</sup>

### *B. Law Enforcement Safe Pursuit Act*

*Padilla* found the LESPA is different than those statutes exemplified by the aggravated assault on an officer statute. The LESPA, the court decided, was meant to protect the public at large, rather than police officers in particular.<sup>116</sup>

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104. *Id.* (quoting BLACK’S LAW DICTIONARY 71 (9th ed. 2009)).

105. *Id.* ¶ 14, 176 P.3d at 302.

106. *Id.*

107. *Id.* ¶ 14, 176 P.3d at 303.

108. *Id.*

109. *Id.*

110. *Id.* ¶ 18, 176 P.3d at 303.

111. *Id.* ¶ 19, 176 P.3d at 304.

112. *Id.* ¶ 20, 176 P.3d at 304.

113. *Id.*

114. *Id.* ¶ 23, 176 P.3d at 304.

115. *Id.*

116. *Id.* ¶ 24, 176 P.3d at 305.

Quoting the statute, the court stated that the act establishes “standards for the ‘safe initiation and conduct of high speed pursuits.’”<sup>117</sup> As such, the act mandates a course of instruction for police officers and requires that local law enforcement agencies create and enforce local pursuit policies.<sup>118</sup> The act also requires that local chief law enforcement officers *enforce* these local policies.<sup>119</sup> The majority found this provision to be evidence that the provisions of the LESPA were not intended by the Legislature to be factors a jury must weigh while considering the fate of an offender under the aggravated fleeing statute.<sup>120</sup> “As this language demonstrates, the Legislature contemplated that the LESPA would be enforced locally and that the local pursuit policy would govern law enforcement officers’ conduct.”<sup>121</sup> This distinction, the court concluded, meant for the act to function as an internal control over police, not an external check as the court of appeals decided.<sup>122</sup>

### C. Dissent

Written by Chief Justice Chávez and joined by Justice Daniels, the *Padilla* dissent did not see the need to conduct an examination of the general nature of criminal sanctions, and instead focused on the legislative function itself. “The Legislature decides what criminal laws to enact and the essential elements that define each crime,” Chávez wrote.<sup>123</sup>

The dissent compared the aggravated fleeing statute to the aggravated assault on a peace officer statute to show that the Legislature has previously split criminal liability according to the conduct of both the accused and the police in aggravating circumstances crimes.<sup>124</sup> Unlike the language used in the aggravated assault statute, Chávez noted that the Legislature chose words different from the language used in other enhancement-type statutes.<sup>125</sup> For the aggravated fleeing statute, Chávez argued the Legislature chose wording more specific than the “in the lawful discharge of his or her duty” language used in the misdemeanor-evading statute, and instead settled on words that expressly state “in accordance with” the LESPA.<sup>126</sup>

Because the LESPA and the aggravated fleeing statute are linked by the wording of this phrase, the Legislature likely intended to protect the public from the conduct of both a fleeing suspect *and* the officer who puts the public at risk during a high-speed chase. The Legislature wanted police to weigh the consequences of a

117. *Id.*

118. *Id.*

119. *Id.* ¶ 25, 176 P.3d at 305.

120. *Id.* (holding that the legislature only intended for the LESPA to be enforced through the policies of local law enforcement agencies). The local enforcement policy was proof enough for the majority that officers would be held accountable to the act’s training and conduct requirements. *See id.* An alternative form of accountability read into the statute by the court of appeals—the exclusion of arrests under the aggravated fleeing statute—was criticized by the majority as being too extreme for application in nonconstitutional protections. *See id.* ¶¶ 26–27, 176 P.3d at 305.

121. *Id.*

122. *Id.* ¶¶ 25–26, 176 P.3d at 305.

123. *Id.* ¶ 36, 176 P.3d at 307 (Chávez, C.J., dissenting).

124. *Id.* ¶ 39, 176 P.3d at 308.

125. *Id.* ¶ 40, 176 P.3d at 308.

126. *Id.*

pursuit premised on low-risk behaviors of would-be fleeing suspects, Chávez argued.<sup>127</sup>

In *Padilla*, Padilla himself was suspected of being guilty of only a vehicle registration violation. Such a violation is likely not a type of dangerous activity warranting a high-speed pursuit under the safe pursuit act, Chávez implied.<sup>128</sup>

Because the dissenters believed the conduct of an officer is an intended target of the aggravated fleeing statute, the “pursuit in accordance with” wording of the aggravated fleeing statute is analogous to requirements in other statutes that police must act in a lawful discharge of their duties.<sup>129</sup> Just as an officer must act lawfully under the aggravated assault statute, so too, must the officer act lawfully under the aggravated fleeing statute.<sup>130</sup> Only in this instance, the lawful duty has been defined by an additional statute, the dissent argued.<sup>131</sup>

Relying on the same statutory construction principles as the majority, the dissent would have found that it is a violation of the canons of statutory interpretation for the courts to stray from the plain language offered by the Legislature.<sup>132</sup> “We must assume that the legislature chose its words advisedly,” the dissent wrote.<sup>133</sup> The dissent concluded that the majority’s reading of the aggravated fleeing statute renders the statute’s final “in accordance with” phrase as useless, which is a well-recognized violation of statutory construction principles.<sup>134</sup>

Finally, the dissent attacked the majority’s conclusion that unorthodox applications would result from a plain-language reading of the aggravated fleeing statute.<sup>135</sup> Juries, the dissent notes, are required to consider whether officers act lawfully in other contexts.<sup>136</sup> In fact, such a factual matter is exactly the kind of job that is best left to the considerations of a jury, which could be instructed to use the LESPA as the threshold for determining whether to proceed with further deliberations.<sup>137</sup> The same considerations would be no more difficult in the aggravated fleeing context than they are for juries deciding aggravated assault on an officer.<sup>138</sup>

Chávez ended his dissent by criticizing the majority for lowering the burden of proof required to convict someone of aggravated fleeing.<sup>139</sup>

127. *Id.*; see also *State v. Padilla*, 2006-NMCA-107, ¶ 16, 142 P.3d 921, 928 (“The penalty imposed on police for failing to comply with the [LESPE] Act is the fact that Defendant may not be convicted of the felony of aggravated fleeing.”).

128. See *Padilla*, 2008-NMSC-006, ¶¶ 37–38, 176 P.3d at 307–08.

129. *Id.* ¶ 39, 176 P.3d at 308.

130. *Id.*

131. *Id.* ¶ 37, 176 P.3d at 307.

132. *Id.* ¶¶ 41–43, 176 P.3d at 308–09.

133. *Id.* ¶ 41, 176 P.3d at 308 (quoting *State v. Maestas*, 2007-NMSC-001, ¶ 22, 149 P.3d 933, 939).

134. *Id.* ¶ 42, 176 P.3d at 308.

135. *Id.* ¶ 44, 176 P.3d at 309.

136. *Id.*

137. *Id.* (“Such an analysis [by a jury] focuses squarely on the conduct of a defendant. A jury can also be instructed to weigh the factors enumerated in the Act and decide whether the immediate danger to the officer and the public created by the high speed pursuit exceed[ed] the immediate danger to the public if the occupants of the motor vehicle being pursued remain[ed] at large.” (internal quotation marks omitted)).

138. See *id.* ¶ 39, 176 P.3d at 308.

139. *Id.* ¶ 44, 176 P.3d at 309.

## V. ANALYSIS

*Padilla* is a warning to the New Mexico criminal defense bar. The *Padilla* holding eases state prosecutors' jobs when defendants are hauled into court on charges of fleeing the police in an automobile because the court has, in effect, reduced the amount of proof the state must present to obtain a conviction under the statute.<sup>140</sup>

The following analysis begins with an examination of how elasticity in the court's statutory interpretation principles provides unintentional room in which the *Padilla* court was able to read out of the state's aggravated fleeing statute requirements that the state must show a police officer was acting lawfully during a high-speed pursuit. This article suggests this elastic statutory construction subverts the will of the New Mexico Legislature, which had adopted the aggravated fleeing statute as part of an overall scheme of law<sup>141</sup> to protect the public from the actions of *both* the police and fleeing suspects during high-speed police chases.

*Padilla* could have reached a different result that arguably would have given greater deference to the public policy behind the aggravated fleeing statute. A different reading of the law is possible based on the same set of facts and circumstances.<sup>142</sup> The result reached by *Padilla* is understandable given the complexity of the laws and issues surrounding the New Mexico aggravating fleeing statute. Although this note arrives at a different conclusion, the court should be commended for taking time to explore the issues presented by this case.

This Part will argue that more conservative methods of statutory interpretation, modern notions of establishing criminal liability, and policy support the reading adopted by the *Padilla* dissent and the court of appeals. Lawmaking by its very definition is a function of giving effect to public policy.<sup>143</sup> As such, it is the exclusive job of a legislature, acting as "the voice of the people" to set what is the public's policy.<sup>144</sup>

### A. Legislative Priorities

When interpreting the meaning of a disputed law, a court's primary purpose is to give effect to the will of a legislature.<sup>145</sup> As with any statute for which a legislature's purpose is called into question, "Square One" in determining that purpose is a reading of a statute's text itself.<sup>146</sup>

The New Mexico Legislature spoke on the subject of high-speed police chases in 2003: "Whoever commits aggravated fleeing of a law enforcement officer is guilty

140. See *infra* Part V.D.

141. See NMSA 1978, §§ 30-22-1.1, 29-20-1 to -4 (2003); see also H.B. 30, 46th Leg., Reg. Sess. (N.M. 2003).

142. Compare *State v. Padilla*, 2008-NMSC-006, 176 P.3d 299, with *State v. Padilla*, 2006-NMCA-107, 142 P.3d 921.

143. *Vill. of Deming v. Hosdreg Co.*, 62 N.M. 18, 33, 303 P.2d 920, 930 (1956) ("[P]ublic policy of a state is for the legislature whose judgment as to the wisdom, expediency or necessity of any given law is conclusive on the courts unless the declared public policy runs counter to some specific constitutional objection.").

144. *Padilla*, 2006-NMCA-107, ¶ 11, 142 P.3d at 927 (citing *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995)).

145. *State v. Cleve*, 1999-NMSC-017, ¶ 8, 980 P.2d 23, 26; see also 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2008) ("Intent of the legislature" is the criterion that is most often recited. An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent.").

146. *State v. Johnson*, 2001-NMSC-001, ¶ 6, 15 P.3d 1233, 1235.

of a fourth degree felony.”<sup>147</sup> In that same enactment, the Legislature also spoke about the conduct of police: An officer who pursues a fleeing suspect must conduct his pursuit “in accordance with the provisions of the Law Enforcement Safe Pursuit Act.”<sup>148</sup>

The New Mexico Legislature, however, keeps no legislative history. The debates preceding any bill’s passage are lost. Lost along with those debates are many of the clues that might offer insight into the reasons for the adoption of a particular law.

Because legislative history is lacking in New Mexico, the text of any given law remains paramount in determining its purpose. Here, the Legislature meant *something* by the final phrase of the aggravated fleeing statute, and the court has to assume as much or it risks rendering a portion of the aggravated fleeing statute meaningless and void.<sup>149</sup>

This much is known: The “in accordance with” phrase was not in an earlier version of the bill considered by the New Mexico House of Representatives in 2002 (but which failed to pass).<sup>150</sup> The phrase was included specifically in the newer version of the statute that did pass in 2003. Moreover, the aggravated fleeing statute was but one part of the Bill that created both the aggravated fleeing and the LESPA statutes at issue in *Padilla*.<sup>151</sup> The Bill is effectively a system of law—a scheme—meant to regulate two sets of behavior constituting a single activity: high-speed police chases. Legislators touted this dual aspect of the laws in 2003.<sup>152</sup>

This system of regulating police chases to protect the overall public, as envisioned by the Legislature, suggests that each law must relate to the other.<sup>153</sup> The laws, however, address activity (criminal activity and police activity) that span two separate chapters of the New Mexico Statutes. To reconcile the relationship between the criminal and the law enforcement chapters, the aggravated fleeing statute incorporates by reference provisions of the LESPA.<sup>154</sup> The conduct of the offender is addressed in terms of listed aggravating factors; at the same time, the conduct of police is addressed by reference to the LESPA where that conduct is spelled out in painstaking detail.<sup>155</sup>

147. NMSA 1978, § 30-22-1.1(B) (2003).

148. *Id.* § 30-22-1.1(A) (2003).

149. *See* *Potter v. United States*, 155 U.S. 438, 446 (1894) (“The word ‘willful’ is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something.”); *see also* *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 33 P.3d 1, 15 (“[A] statute must be construed so that no part of the statute is rendered surplusage or superfluous.” (quoting *Katz v. N.M. Dep’t of Human Servs., Income Support Div.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981))).

150. H.B. 164, 45th Leg., Reg. Sess. (N.M. 2002).

151. H.B. 30, 46th Leg., Reg. Sess. (N.M. 2003). Although the Law Enforcement Safe Pursuit Act is a single bill, the legislation created two separate statutes: Aggravated Fleeing a Law Enforcement Officer, NMSA 1978, § 30-22-1.1 (2003), and the Law Enforcement Safe Pursuit Act, NMSA 1978, §§ 29-20-1 to -4 (2003). The 2003 Law Enforcement Safe Pursuit Act is split among two chapters in the New Mexico Statutes because it amends both the Criminal chapter and the Law Enforcement chapter. The statutes, however, were passed under a single bill that governs safe pursuits by law enforcement agencies.

152. *King supra* note 55 at A4.

153. *See* NMSA 1978, §§ 30-22-1.1(A), 29-20-2 (2003).

154. *Id.* § 30-22-1.1(A).

155. *See id.* §§ 29-20-2 to -4.

Based on this structure, the Legislature appears to have intended to require that police conduct be a relevant factor in any attempt to curb the number of police chases and to limit the harm these chases potentially create.<sup>156</sup>

Despite this legislative framework, the *Padilla* majority concluded the state does not have to show an officer was acting in compliance with the LESPA to prove a suspect's guilt under the aggravated fleeing statute.<sup>157</sup> *Padilla* reads the "in accordance with" language in that statute as ambiguous.<sup>158</sup> This ambiguity allowed the court to conclude that the interplay between the aggravated fleeing statute and the LESPA was "regulatory" in nature.<sup>159</sup>

The *Padilla* majority's consignment of checking police conduct during high-speed chases to the internal policies of individual police departments presumes the Legislature intended to create a hierarchy of protection for the public under which one element of enforcement (the behavior of the defendant) would be enforced by a jury trial, and the other element (the behavior of the police) would be enforced by police chiefs outside the realm of public accountability.<sup>160</sup> While this conclusion is arguable, the presumption on which it is based requires reading a purpose into the aggravated fleeing statute and the LESPA that neither states. Such a presumption requires one to ignore a guiding principle of statutory interpretation: that a legislature says what it means and means what it says.<sup>161</sup>

A holding presuming the Legislature preferred to relegate the enforcement of police behavior to police chiefs appears to give less-than-adequate consideration to the singular purpose of the aggravated fleeing statute and the LESPA, which is to reduce high-speed vehicular pursuits.<sup>162</sup> The two laws were meant to work *in tandem* to restrict high-speed chases unless sufficient public safety reasons support a police pursuit.<sup>163</sup> The *Padilla* holding ignores another canon of statutory interpretation, which states that when a statute provides for the performance of certain acts or the exercise of authority by public officers, then the courts should consider these acts as being mandatory.<sup>164</sup> "[W]here the intent of the legislature was to impose a duty on a public officer rather than a discretionary power, even the word 'may' has been held to be mandatory."<sup>165</sup> The Legislature likely did not intend for police to pick and choose when they would act in compliance with the criteria of the LESPA. Nondiscretionary compliance with the LESPA is bolstered by the notion that the "in accordance with" phrase in the aggravated fleeing statute necessarily links it to the LESPA. By incorporating the LESPA into the aggravated fleeing

156. See *id.* § 29-20-3(B) ("The course of instruction shall emphasize the importance of protecting the public at all times and the need to balance the known offense and risk posed by a fleeing suspect against the danger to law enforcement officers and other people by initiating a high speed pursuit.").

157. *State v. Padilla*, 2008-NMSC-006, ¶ 34, 176 P.3d 299, 307; see also *supra* Part IV.

158. See *id.* ¶ 8, 176 P.3d at 301.

159. See *id.* ¶ 25, 176 P.3d at 305; see also *supra* Part IV.B.

160. See *id.* ¶ 25, 176 P.3d at 305.

161. See 2A SINGER & SINGER, *supra* note 145, § 46:1; *State v. Javier M.*, 2001-NMSC-030, 33 P.3d 1.

162. See *supra* Part III and note 55.

163. See NMSA 1978, § 29-20-4(C)(1) (2003) ("[A] law enforcement officer may initiate a high speed pursuit to apprehend a suspect who the officer has reasonable grounds to believe poses a clear and immediate threat of death or serious injury to others or who the officer has probable cause to believe poses a clear and immediate threat to the safety of others that is ongoing and that existed prior to the high speed pursuit.").

164. See 2A SINGER & SINGER, *supra* note 145, § 57:14.

165. *Id.*

statute, the full breadth of the Bill's mandates—colored by the use of terms such as “shall” and “must”—take clear directive power.<sup>166</sup>

Although the majority in *Padilla* attempted to assign the “in accordance with” phrase of the aggravated fleeing statute to a role of regulatory oversight,<sup>167</sup> the majority's reading is strained because the holding ends up understating what the Legislature can be inferred to have meant in drafting the phrase—namely that police must act according to the tenets of the LESPA, which together with the aggravated fleeing statute forms a complete package of legislation. The *Padilla* holding's primary support for reading out the “in accordance with” phrase rests entirely on common law principles,<sup>168</sup> which the court's own statutory interpretation principles suggest were preempted in the aggravated fleeing statute by the Legislature's role of enacting its public policy concerns.<sup>169</sup>

### B. Overall Fit Within the Legislative Scheme

Despite its attempt to determine how the state's aggravated fleeing statute fits within the overall scheme of common law principles of criminal liability, *Padilla* did not adequately examine the aggravated fleeing statute's fit within more specific schemes of New Mexico law. Because of its focus on the common law, the majority concluded the aggravated fleeing statute must work in a way similar to other aggravated-type crimes, and must, therefore, require similar treatment of prohibited conduct.<sup>170</sup> This focus may be too broad.

Because the crime of aggravated fleeing does not focus on an officer's status as a victim, the *Padilla* majority concluded that requiring prosecutors to prove the propriety of an officer's conduct as part of establishing a defendant's guilt would be unorthodox.<sup>171</sup> The majority predicted a rash of mini-trials of police officers that would consume the court dates of aggravated fleeing suspects if substantiation of an officer's conduct was to be required under the aggravated fleeing statute. “[W]e would be remiss . . . if we did not demand a high level of confidence before concluding that the Legislature intended such an unorthodox result.”<sup>172</sup>

By demanding such high confidence, the majority appears to reach beyond its own rules regarding proof of statutory purpose from the Legislature.<sup>173</sup> Establishing that the Legislature did not intend for juries to consider the propriety of police conduct as part of the aggravated fleeing statute requires a belief that the Legislature targeted only the behaviors and actions of the accused. Language suggesting such an inference, however, does not exist in the wording of either the aggravated fleeing statute or the LESPA. The majority's conclusion assumes that the Legisla-

166. See NMSA 1978, §§ 29-20-1 to -4 (2003).

167. See *supra* text accompanying notes 121–22.

168. See *State v. Padilla*, 2008-NMSC-006, ¶¶ 11–13, 176 P.3d 299, 302.

169. See *Vill. of Deming v. Hosdreg Co.*, 62 N.M. 18, 29, 303 P.2d 920, 931 (1956) (“After all, the question is one of policy and, within constitutional bounds, that is for the legislature. Even though we may question the wisdom of a given enactment, as a matter of policy, that gives us no right to strike it down, if it violates no provision of the fundamental law.”).

170. *Padilla*, 2008-NMSC-006, ¶ 14, 176 P.3d at 302.

171. *Id.* ¶ 23, 176 P.3d at 304.

172. *Id.* ¶ 23, 176 P.3d at 304–05.

173. See *State v. Rivera*, 2004-NMSC-001, ¶ 14, 82 P.3d 939, 942 (“[W]e would be exceeding the bounds of our role as an appellate court by second-guessing the clear policy of the legislature. . . .”).



ture did not consider the aggravated fleeing statute to be one of those “rare instances” in which criminal liability stretches beyond the conduct of the accused. No evidence, however, exists to support this conclusion.

The Legislature enacted a felony enhancement of what was previously a misdemeanor crime.<sup>174</sup> The enhanced crime and its enhanced penalty would naturally necessitate an additional showing of some kind of proof at trial.<sup>175</sup> It is up to the Legislature to define what that additional proof should be, not the courts. Nevertheless, whether this was a factor defined by the Legislature lies beyond the court’s own recognized boundaries of appellate law.<sup>176</sup> Additionally, this conclusion requires a finding that such a result would be absurd when, in fact, the court of appeals found the position to be perfectly reasonable.<sup>177</sup>

Despite these inconsistencies with various canons of statutory interpretation, the court’s examination of the general nature of criminal statutes is not without purpose.<sup>178</sup> The court is obligated to thoroughly evaluate the aggravated fleeing statute’s place in the overall scheme of New Mexico’s body of law.<sup>179</sup> The majority’s focus on the fit within common law criminal principles, however, is misplaced because it replaces an examination of how the aggravated fleeing statute fits within the context of specific related enactments of New Mexico’s criminal and law enforcement codes with an examination of a fit within all of common law criminal principles.<sup>180</sup>

The Legislature adopted the aggravated fleeing and the LESPA statutes in the wake of incidents in which bystanders to police chases were seriously injured and killed.<sup>181</sup> Because of the deaths and injuries, the statute links police conduct during such chases specifically to the procedures, policies, and training requirements spelled out in the LESPA. The LESPA mandates that police must terminate certain pursuits when sufficient danger to the public, “created by the high speed pursuit,” outweighs the danger posed by the continued freedom of the occupant(s) of the vehicle.<sup>182</sup> The LESPA is itself a restraint on police conduct during high-speed chases.<sup>183</sup>

It is hard to imagine that this public safety mandate can be better served by internal police administrative powers, as is suggested by the *Padilla* majority, than by the fact-finding powers of the courts which are typically used to sort out factual determinations of disputes and controversies.

174. See NMSA 1978, § 30-22-1 (1981).

175. See 1 WHARTON’S CRIMINAL EVIDENCE §§ 2.3, 2.5 (15th ed. 2009); see also 4 TORCIA, *supra* note 63 §§ 567, 569.

176. *Burch v. Foy*, 62 N.M. 219, 223, 308 P.2d 199, 202 (1957) (stating it would be improper for the court to consider all of the consequences that would result from the legislature’s choice of words in a statute).

177. See *State v. Padilla*, 2006-NMCA-107, ¶ 17, 142 P.3d 921, 927.

178. See Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 LA. L. REV. 218 (1968) (noting that in some instances courts must perform the function of integrating the interpretation of the statute into a general body of law, or coordinating its principle with other applicable principles).

179. See 2A SINGER & SINGER, *supra* note 145, § 46:5 (discussing the importance of considering the entire legislative scheme in addition to the particular scheme when a court is tasked with statutory interpretation).

180. See *id.* (“[S]tatutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme . . .”).

181. *Linthicum*, *supra* note 53.

182. NMSA 1978, § 29-20-4(C)(2) (2003).

183. See *id.*

*Padilla* should have adopted the findings of its dissenting justices and the lower court of appeals. It is not clear that the majority's fear of resource-intensive mini-trials would have ever materialized had the court affirmed the findings of the appeals court.<sup>184</sup> There, the lower appellate court set out instructions for trial courts on the proper procedures for evaluating police conduct under the aggravated fleeing statute. The court of appeals found that only two steps were necessary to prove that a pursuit was made in accordance with the LESPA.<sup>185</sup> First, if the issue is contested, as a matter of law the trial judge should decide whether the local pursuit policy complies with the requirements of the LESPA. If so, a jury will then determine whether the officer's pursuit of a defendant complied with the local pursuit policy. The inquiry would end there and the jury's focus would then shift entirely to the conduct of the accused.<sup>186</sup>

### C. Other Jurisdictions Lend Possible Guidance

The treatment by other states of their own aggravated fleeing statutes offers additional insight into *Padilla's* findings regarding the essential elements of the state's aggravated fleeing statute. Although aggravated fleeing—or felony fleeing—takes on different forms, all of the statutes in other states incorporate some form of police duty into their statutes, as does the statute in New Mexico.<sup>187</sup> Rulings by appellate courts in those states decided challenges to their own felony fleeing statutes using principles remarkably similar to those used in *Padilla*, but with outcomes and conclusions that expose certain weaknesses within the *Padilla* holding.

The Arizona Supreme Court overturned a defendant's felony fleeing conviction when it held prosecutors failed to prove that proper police signals and markings were used during a high-speed chase of a defendant in Tucson in 1979.<sup>188</sup> Like New Mexico's statute, the Arizona felony fleeing statute incorporates by reference provisions in a separate Arizona statute that specifically delineate proper police procedures.<sup>189</sup> Although the Arizona officer had properly activated his car's warning lights and sirens, the fact that the car did not contain proper insignia defeated the reach of that state's felony fleeing statute.<sup>190</sup> The Arizona court decided that to rule otherwise would render useless a piece of the statute as intended by that state's legislature.<sup>191</sup>

Similarly, the Georgia Court of Appeals reversed the conviction of an Atlanta man who hijacked a small truck and fled from police who spotted him driving the vehicle a short distance later.<sup>192</sup> When police began following the defendant, he sped away and abandoned the truck at an apartment complex.<sup>193</sup> The pursuit was

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184. See *State v. Padilla*, 2006-NMCA-107, ¶ 20, 142 P.3d 921, 929.

185. *Id.*

186. *Id.*

187. See *supra* Part III.D.

188. See *State v. Schultz*, 597 P.2d 1023, 1024 (Ariz. Ct. App. 1979).

189. See ARIZ. REV. STAT. ANN. §§ 28-622.01, 28-624 (1997). Section 28-624 of the Arizona Revised Statutes Annotated does not detail police duties. The section only defines official emergency vehicles.

190. *Schultz*, 597 P.2d at 1024.

191. *Id.*

192. See *Bradford v. State*, 651 S.E.2d 356, 358 (Ga. Ct. App. 2007).

193. *Id.* at 357.

short and the initial responding officer did not activate his emergency lights or sirens as he chased down the fleeing vehicle.<sup>194</sup> This failure to activate either the emergency lights or other signals was insufficient to support a charge of felony fleeing under the Georgia statute.<sup>195</sup> As in Arizona, the Georgia court held that the police-signal requirement was an essential element of the felony crime and could not support a conviction unless that element was proved by the state.<sup>196</sup>

These cases and their statutes are noticeably different than *Padilla* and the New Mexico laws. Both the Arizona and Georgia cases involve issues concerning either the markings or appropriateness of police signals to defendants. The holdings in these cases focus on whether police were acting in a manner, prescribed by law, that in some way made facts known to the defendants there that they were being pursued by police. In this sense, these cases involve the issue of notice. For the purposes of criminal law, notice is important in a fleeing statute because defendants must be given an opportunity to know that what they were doing was wrong.<sup>197</sup>

The *Padilla* holding is partly premised on the idea that the “in accordance with the provisions of the [LESPA]” phrase necessarily equals the same thing as the phrases “lawful duty” or “lawful discharge of duty” in the other statutes.<sup>198</sup> This finding unnecessarily equates the phrasing of the “in accordance with” phrase to that of the notice requirements in these other statutes because notice in the New Mexico statute is already addressed by specific language pertaining to police vehicle markings, signals, and orders by police instructing defendants to stop.<sup>199</sup>

The analogizing of these different phrases would be a perfectly acceptable holding by *Padilla* if the language of the aggravated fleeing statute was essentially the same as the language in New Mexico’s misdemeanor evading statute, or if the language were the same as that in the Arizona and Georgia statutes.<sup>200</sup> The language is, however, patently different. The LESPA specifically relates to responsibilities, duties, and procedures New Mexico police must follow.<sup>201</sup>

The *Padilla* majority’s reading of the “in accordance with” phrase of the LESPA narrows the scope of that statute for the purposes of aggravated fleeing.<sup>202</sup> This result is also not an apparent meaning of the statute that can be found in its actual words and phrases.<sup>203</sup>

The New Mexico Legislature chose specifically different language in the aggravated fleeing statute than the language used in the state’s misdemeanor evading

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194. *Id.*

195. *Id.* at 358.

196. *See id.*

197. *See* 2 TORCIA WHARTON’S CRIMINAL LAW § 199 (explaining that assault or battery on a police officer is aggravated only if the defendant knows that “his victim is a police officer”). The *Padilla* majority explored this issue as part of its analysis, as well. The majority reasoned that the issue of appropriately marked police vehicles and sufficient signals to a defendant create scienter on the part of a defendant. *See* *State v. Padilla*, 2008-NMSC-006, ¶ 12, 176 P.3d 299, 302.

198. *Id.* ¶¶ 20–22, 176 P.3d at 304.

199. NMSA 1978, § 30-22-1.1(A) (2003).

200. *Compare* ARIZ. REV. STAT. ANN. § 28-622.01 (1997), *and* GA. CODE ANN. § 40-6-395 (West 2008), *with* NMSA 1978, § 30-22-1 (1981).

201. *See* NMSA 1978, § 29-20-4 (2003).

202. *See Padilla*, 2008-NMSC-006, ¶ 33, 176 P.3d at 306–07.

203. *See* NMSA 1978, §§ 29-20-1 to -4 (2003).

statute.<sup>204</sup> The Legislature could have incorporated the same language to indicate that it still intended to require that police conduct be lawful or in accordance with their lawful duties. But the Legislature did not choose that route. It instead chose to specify that police duties for the purposes of high-speed chases must comport with the LESPA, a set of heightened criteria drafted for the purpose of curbing high-speed chases.<sup>205</sup>

As noted by the Arizona court with regard to the language in that state's statute that links its emergency vehicles statute with its aggravated fleeing statute,<sup>206</sup> the failure by *Padilla* to adequately link the LESPA with the aggravated fleeing statute renders the phrase useless. Put another way, *Padilla* could have reached the same conclusion that it did if the "in accordance with" phrase was deleted in its entirety from the statute. This is a result that violates basic canons of statutory interpretation.<sup>207</sup>

This point raises another consequence of the majority's ruling. When *Padilla* held that the notice requirements of the aggravated fleeing statute were analogous to the generic "lawful duty" provisions of other statutes,<sup>208</sup> the majority neglected to specify that the lawful-duty standard used elsewhere in the statutes should apply to the aggravated fleeing statute, as well.<sup>209</sup> This drafting error leaves New Mexico's trial courts with binding precedent that means they need not even determine whether a police officer's conduct was lawful or in accordance with normal police actions in any way.

As a result of this holding, the aggravated fleeing statute requires even less of police than its unenhanced misdemeanor evading an officer version. This conclusion was very likely not the New Mexico Legislature's intention when it raised the sentencing limits for a defendant fleeing the police in a motor vehicle. Not only does this violate the statutory interpretation principles mentioned previously, but it also violates the common law criminal liability principles raised by the *Padilla* majority itself when it explained its rationale for concluding that "in accordance with" was not an essential element of the aggravated fleeing statute.<sup>210</sup>

The *Padilla* majority's attempt to reconcile the aggravated fleeing statute with the generic principles of criminal law ultimately leads the court to needlessly second-guess the Legislature's purpose in adopting the statute and the LESPA. *Padilla*'s determination to explore certain canons of common law criminal liability comes at the expense of other canons of statutory interpretation. A literal reading of the statute would have been more harmonious with both the LESPA and with the common law principles of criminal liability.

#### D. Implications

As a result of *Padilla*, offenders charged with aggravated fleeing a police officer may no longer raise as a defense the conduct of a police officer either before or

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204. NMSA 1978, § 30-22-1 (2003).

205. See NMSA 1978, § 29-20-4 (2003).

206. See *State v. Schultz*, 597 P.2d 1023 (Ariz. Ct. App. 1979).

207. See *supra* note 161 and accompanying text.

208. *State v. Padilla*, 2008-NMSC-006, ¶ 16, 176 P.3d 299, 303.

209. *Id.* ¶ 44, 176 P.3d at 309.

210. See *id.* ¶¶ 11-13, 176 P.3d at 302.

during a high-speed chase, even if it could be established that an officer acted beyond the scope of his discretion under the LESPA.<sup>211</sup> Additional *Padilla* results include the facts that penalties for offenders are lengthened, the burden of proof required of prosecutors to prove the requisite elements of aggravated fleeing is lowered, and legislative safeguards meant to police the state's police forces are blunted.

### E. Penalties

Prior to the adoption of the aggravated fleeing an officer statute, the penalty for running from the police in a vehicle was no more than six months confinement in a county jail, and/or a fine of up to \$500.<sup>212</sup> The aggravated fleeing statute exposes a defendant to as many as eighteen months in prison and/or a fine of up to \$5,000.<sup>213</sup> Although *Padilla* does not create these increased penalties, the court's ruling more readily subjects a defendant to the increased penalties for what is substantially the same behavior as the misdemeanor charge of evading/resisting.<sup>214</sup>

### F. Burden of Proof

By reading out of the aggravated fleeing statute the instruction that the state prove an officer's conduct was in accordance with the LESPA, the holding in *Padilla* lowers the burden of proof by which the state must prove an offender guilty of aggravated fleeing.<sup>215</sup> As an aggravated crime, aggravated fleeing is an enhancement of the state's existing evading statute, which appears in the statutory section immediately prior to the aggravated fleeing statute. Although the authorities speak of an aggravated crime as being one that carries stiffer penalties because the crime has been made worse by certain circumstances, *Padilla* enables prosecutors to obtain conviction by way of proof that is actually lower than what is required for the unenhanced evading statute.

This lower burden is reflected in the state's existing jury instructions for evading and its recently adopted instructions for felony fleeing. Presently, the state's uniform jury instructions require that for a jury to convict a defendant of evading, the state must prove beyond a reasonable doubt that, in part, an officer was acting within his lawful duties. Newly enacted instructions based on the *Padilla* ruling, however, contain no such requirement;<sup>216</sup> the issue of the officer's conduct has been effectively wiped out of the statute. Although the aggravated fleeing statute directs police to conduct pursuits in accordance with the LESPA, the jury instructions now used for aggravated fleeing do not contain the lower instruction that police conduct themselves within their lawful duties.<sup>217</sup>

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211. *Id.* ¶ 33, 176 P.3d at 307.

212. NMSA 1978, § 31-19-1 (1981); *see also supra* text accompanying note 46.

213. *See supra* note 42 and accompanying text.

214. *See Padilla*, 2008-NMSC-006, ¶ 44, 176 P.3d at 309 (Chávez, C.J., dissenting).

215. *Id.* ("To prove the misdemeanor, the prosecution must prove beyond a reasonable doubt that the officer was in the lawful discharge of his or her duties, but such a showing is not required under the majority construction of aggravated fleeing.").

216. *See* UJI 14-2217 NMRA.

217. *See* UJI 14-2215 NMRA.

### G. Reduced Safeguards

The Legislature linked the aggravated fleeing statute to the LESPA for the singular purpose of protecting the public from becoming unwitting victims of unnecessary police chases. *Padilla* severs the link between these statutes and leaves in its place a minimal check on police conduct that rests entirely in the hands of the police themselves.<sup>218</sup> The ruling effectively limits the original breadth of these statutes because it removes from juries the power to determine factually whether police conduct comports with state law. In one sense, *Padilla* legitimizes the conduct of the police during high-speed car chases simply because the police are police.

## VI. CONCLUSION

In *Padilla*, the Supreme Court of New Mexico held that the phrase “in accordance with the provisions of the [LESPA]” is not an essential element of the crime of aggravated fleeing.<sup>219</sup> Although prosecutors who brought charges against Felipe Padilla did not show whether police were acting within guidelines mandated by the LESPA,<sup>220</sup> Padilla was given a felony sentence based on evidence that would not have supported a similar misdemeanor conviction.

The *Padilla* holding exposes an unsavory elasticity in the state’s canons of statutory interpretation that permits inconsistent results among the appellate courts. *Padilla* rejects the statutory interpretation of the court of appeals, which had previously found that exclusion of police conduct as a statutory element of aggravated fleeing tended to defeat the Legislature’s purpose of creating a framework of law that protects the public from the dangers of high-speed police chases.<sup>221</sup> Here, the elasticity within the canons of statutory interpretation serves only to beguile the primary purpose of the canons—to effectuate the will of the Legislature.

By lowering the proof required to convict an offender of aggravated fleeing, *Padilla* subverts the intentions of the New Mexico Legislature. The point is lost now. New jury instructions have been published codifying the *Padilla* majority’s holding. Nonetheless, lawmakers should amend the state’s aggravated fleeing statute to make clear their intentions to link police conduct to the dangers presented by a fleeing suspect.

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218. See *Padilla*, 2008-NMSC-006, ¶¶ 28, 33, 176 P.3d at 305, 307.

219. *Id.* ¶ 34, 176 P.3d at 307.

220. See *State v. Padilla*, 2006-NMCA-107, ¶¶ 7–8, 142 P.3d 921, 926.

221. *Id.* ¶ 13, 142 P.3d at 927.

