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## **Double Trouble with Double Description: A Consideration of State v. Montoya and Its Application of the Rule of Lenity**

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# DOUBLE TROUBLE WITH DOUBLE DESCRIPTION: A CONSIDERATION OF *STATE V. MONTOYA* AND ITS APPLICATION OF THE RULE OF LENITY

Ashley Funkhouser\*

## I. INTRODUCTION

In *State v. Montoya*,<sup>1</sup> the New Mexico Supreme Court addressed the issue of whether simultaneously punishing a defendant for shooting at a motor vehicle and voluntary manslaughter for the same action is a violation of double jeopardy. Specifically, the court evaluated the case as a double description case, where “the same conduct results in multiple convictions under different statutes.”<sup>2</sup> Not only did the court hold that Defendant’s two convictions were a violation of the Double Jeopardy Clause of the United States Constitution,<sup>3</sup> overruling *State v. Gonzales*,<sup>4</sup> *State v. Dominguez*,<sup>5</sup> and *State v. Riley*,<sup>6</sup> but it also altered the rule in such a way that future cases that raise double description will most likely be resolved in favor of the defendant.

This note first discusses pertinent double description precedent in New Mexico and the cases that the *Montoya* court overruled.<sup>7</sup> It will then

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\* Class of 2015, University of New Mexico School of Law. I would like to thank Professor George Bach for his guidance and feedback on this article, as well as for his encouragement and consistently positive attitude in general. I would also like to thank Justin Muehlmeier, Chris Dodd, Kevin Holmes, and the staff of the New Mexico Law Review for helping me wrap my head around the concept of double jeopardy. Finally, I’d like to thank my family for always being there.

1. 2013-NMSC-020, 306 P.3d 426.

2. *Id.* ¶ 30 (internal quotation marks omitted).

3. U.S. CONST. amend. V, cl. 2.

4. 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023.

5. 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

6. 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

7. The court gives a lengthy description of several double jeopardy cases to illustrate the history of double jeopardy law in New Mexico. However, these cases are cumulative to my argument, and as such, I have omitted them. These cases include *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228 (holding that the legislature did not intend convictions for felony murder that the underlying predicate felony), *State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456 (convictions for vehicular homicide and child abuse resulting in death is double description when the basis for the convictions was killing a child victim in a drunk driving accident),

recount the court's discussion of important cases in double jeopardy jurisprudence and the rationale behind overruling *Gonzales*, *Dominguez*, and *Riley*. Next, this note looks at the importance of *State v. Varela*,<sup>8</sup> where the court held that convictions for shooting at a dwelling and homicide is a violation of double jeopardy.<sup>9</sup> Finally, this note focuses on the *Montoya* court's emphasis on the rule of lenity in determining whether convictions under separate statutes violate double jeopardy.<sup>10</sup> This note argues that the court could have overruled *Gonzales*, *Dominguez*, and *Riley* by extending the holding from *Varela* without reaching the rule of lenity at all.

Applying the rule of lenity without explicitly stating what is ambiguous about the statutes in question could have a dramatic effect on the future of double jeopardy jurisprudence by limiting the instances in which a defendant may be convicted under multiple statutes.

## II. BACKGROUND

### A. Facts

"This case, like all too many that come before our courts, erupted from a toxic mixture of testosterone and guns," stated Justice Daniels as he began his explanation of *State v. Montoya*.<sup>11</sup> After an altercation involving gunfire between Defendant's friends and another gang,<sup>12</sup> the Defendant and his friends were standing in the driveway of Defendant's parents' home, tending to Defendant's injured brother.<sup>13</sup> A Ford Expedition containing members of the rival gang drove by the Defendant's house, shooting at Defendant and his group again.<sup>14</sup> Defendant ran inside,

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*State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1 (the predicate felony for a felony murder conviction is always subsumed by the felony murder conviction, and the defendant can never be convicted of both), *State v. Cooper*, 1997-NMSC-058, 124 N.M. 277, 949 P.2d 660 (convictions for felony murder and second-degree murder of the same victim violated double jeopardy), and *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655 (multiple conspiracy convictions for conspiracy to commit the same crime violate double jeopardy).

8. 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

9. *Id.* ¶ 1.

10. The rule of lenity is defined as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1449 (9th ed. 2009).

11. *State v. Montoya*, 2013-NMSC-020, ¶ 1, 306 P.3d 426.

12. Some members of Defendant's group belonged to a gang known as the Northside Locos, whereas the members of the other group were in a rival gang, Brewtown. *Id.* ¶ 4.

13. *Id.* ¶ 6.

14. *Id.*

returned with an AK-47, and began shooting at the Expedition.<sup>15</sup> Defendant shot the victim, Diego Delgado, seven times, including one shot to the head.<sup>16</sup> Delgado died as a result of the multiple gunshot wounds.<sup>17</sup>

Defendant was indicted on nine felony counts, including shooting at a motor vehicle resulting in great bodily harm and a homicide count of deliberate first-degree murder or in the alternative, first-degree felony murder.<sup>18</sup> At trial, the district court judge gave the jurors instructions on deliberate first-degree murder, second-degree murder, and voluntary manslaughter.<sup>19</sup> Separately, the judge instructed the jury to consider felony murder.<sup>20</sup> While the judge instructed the jury on the essential provocation element distinguishing second-degree murder from manslaughter, he did not instruct them that lack of sufficient provocation is an element of felony murder.<sup>21</sup> This was an issue because a defendant must be guilty of second-degree murder to be found guilty of first-degree felony murder.<sup>22</sup> During deliberation, the jury asked the district court judge whether it must find Defendant guilty of felony murder if it already found him guilty of manslaughter.<sup>23</sup> The district court judge simply replied, “[e]ach crime charged in the indictment should be considered separately.”<sup>24</sup> Defendant was found guilty of voluntary manslaughter and first-degree felony murder for the felonies of shooting at a motor vehicle and shooting at a motor vehicle resulting in great bodily harm.<sup>25</sup> He was sentenced to life imprisonment for first-degree felony murder.<sup>26</sup>

The district court judge vacated the shooting at a motor vehicle and voluntary manslaughter convictions, reasoning that under New Mexico Supreme Court precedent interpreting the Double Jeopardy Clause, Defendant could not be punished for felony murder and for the lesser-included predicate felony.<sup>27</sup> Defendant appealed his voluntary manslaughter and felony murder convictions directly to the New Mexico

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15. *Id.* ¶ 7.

16. *Id.*

17. *Id.*

18. *Id.* ¶ 8.

19. *Id.* ¶ 9.

20. *Id.*

21. *Id.*

22. *Id.* ¶ 15.

23. *Id.* ¶ 10.

24. *Id.*

25. *Id.* ¶ 11.

26. *Id.* ¶¶ 11–12

27. *Id.* ¶ 11; *see also* State v. Frazier, 2007-NMSC-032, ¶¶ 1, 40, 142 N.M. 120, 164 P.3d 1.

Supreme Court.<sup>28</sup> On appeal, the court determined that the felony murder conviction was fundamental error because the jury instructions for felony murder did not include an instruction that lack of provocation distinguishes heat-of-passion voluntary manslaughter from second-degree murder.<sup>29</sup>

As a result of its holding that the jury instructions were flawed, the court had to reinstate Montoya's voluntary manslaughter and shooting at a motor vehicle charges.<sup>30</sup> This raised the issue of whether both convictions could be allowed to stand under the Double Jeopardy Clause.<sup>31</sup>

## B. Legal Background

### 1. Double Description

The Fifth Amendment of the United States Constitution states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."<sup>32</sup> The Double Jeopardy clause applies in two situations—in a second prosecution for the same offense after acquittal or conviction, or multiple punishments for the same offense.<sup>33</sup> When a defendant is charged with multiple violations of the same offense, the case is called a "unit-of-prosecution" case.<sup>34</sup> When a defendant is charged under multiple statutes for conduct that was part of the same act, the case is a "double description" case, the type of case at issue in *Montoya*.<sup>35</sup>

Justices of the U.S. Supreme Court often disagree about how the double jeopardy precedent it has created should be applied.<sup>36</sup> Professor George C. Thomas III<sup>37</sup> states that the efforts of the Supreme Court of the United States to make coherent double jeopardy law in general have

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28. *Montoya*, 2013-NMSC-020, ¶ 12. See also N.M. CONST. art. VI, § 2 (stating that district court judgments imposing a death sentence or life imprisonment are appealed directly to the Supreme Court).

29. *Montoya*, 2013-NMSC-020, ¶¶ 13–21

30. *Id.* ¶ 28.

31. *Id.*

32. U.S. CONST. amend. V, cl. 2.

33. *Montoya*, 2013-NMSC-020, ¶ 23.

34. *Id.* ¶ 30 (citation omitted).

35. *Id.*

36. See 5 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE, § 17.4(b), 87 (3rd ed. 2007).

37. Professor Thomas is a Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers University School of Law. He has written extensively on the subject of criminal procedure, and double jeopardy in particular. The New Mexico Supreme Court has referenced his works in their own opinions. See *State v. Montoya*, 2013-NMSC-020, ¶ 31, 306 P.3d. 426; *Swafford v. State*, 1991-NMSC-043, ¶ 26, 112 N.M. 3, 810 P.2d 1223.

“largely failed,”<sup>38</sup> and that double description is particularly difficult for the United States Supreme Court to work with because there are far more criminal statutes in effect today than there were at the time the constitution was written.<sup>39</sup>

## 2. Legislative Intent

“[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”<sup>40</sup> In *Brown v. Ohio*,<sup>41</sup> the U.S. Supreme Court gave a rationale for deferring to legislative intent, stating that “the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments.”<sup>42</sup> In other words, the Double Jeopardy Clause only prevents courts and prosecutors from imposing greater sentences than the legislature intended; the legislature remains free to punish unitary conduct with multiple statutes if it so desires.<sup>43</sup>

The U.S. Supreme Court created the *Blockburger* test in *Blockburger v. United States*<sup>44</sup> as a way to determine whether a sentence violated double jeopardy, even if Congress intended to impose cumulative sentences with multiple statutes.<sup>45</sup> The *Blockburger* test is as follows:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two punishable offenses or only one [for double jeopardy purposes] is whether each provision requires proof of a fact which the other does not.<sup>46</sup>

The *Blockburger* test is a strict elements test, meaning that the court looks only to the language of the statutes to determine if the statutes are the same for the purposes of double jeopardy.<sup>47</sup> However, the U.S. Supreme Court later decided that *Blockburger* should only be applied to statutory formulation, and therefore only provides half of the answer to

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38. GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 87 (1998).

39. *Id.* at 95.

40. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

41. 432 U.S. 161 (1977).

42. *Id.* at 165.

43. *Id.*

44. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

45. 5 WAYNE R. LAFAYE, *supra* note 36, at 79.

46. *Blockburger*, 284 U.S. at 304.

47. *See State v. Montoya*, 2013-NMSC-020, ¶ 31, 306 P.3d. 426.

the double description issue.<sup>48</sup> The New Mexico Supreme Court takes double description analysis further.<sup>49</sup> First, the statutes must survive the *Blockburger* test, then the court looks for evidence that the legislature intended cumulative punishment.<sup>50</sup> It is this second part, looking at the legislative intent, which changed significantly with *Montoya*.

### 3. The Rule of Lenity

The rule of lenity is “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.”<sup>51</sup> The rationale guiding this rule is that, “if doubt exists about whether the legislature meant to create distinct blameworthiness, courts should presume singular blameworthiness.”<sup>52</sup> Unit of prosecution cases apply the rule of lenity with some regularity, but its application to double description cases is less consistent.<sup>53</sup>

Although the rule of lenity applies to double description cases involving lesser-included offenses, its application to other types of double description cases is less clear.<sup>54</sup> An offense is generally considered a lesser-included offense when “the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense, without regard to the nature of the offenses.”<sup>55</sup> Even though the lesser-included offense doctrine is strikingly similar to the *Blockburger* test, not every double description case in New Mexico involves lesser-included offenses, because New Mexico courts apply both *Blockburger* and a legislative intent analysis to determine whether separate convictions for unitary conduct violate double description.<sup>56</sup>

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48. THOMAS, *supra* note 38, at 101 (meaning that the *Blockburger* test should only consider the actual statutes as opposed to the criminal indictments in individual cases when doing a same offense evaluation).

49. *Montoya*, 2013-NMSC-020, ¶ 29 (“In addition to requiring a narrow and mechanical analysis of generic statutory element, the inquiry calls for a broader and substantially more complex search for indicia of legislative intent in the context of particular cases.” (citation omitted)).

50. *Id.*

51. BLACK’S LAW DICTIONARY 1449 (9th ed. 2009).

52. THOMAS, *supra* note 38, at 149.

53. *Swafford v. State*, 1991-NMSC-043, ¶ 15, 112 N.M. 3, 810 P.2d 1223.

54. *See Id.* ¶ 15 (stating that the application of the rule of lenity to double description cases has been “spotty”).

55. JAY A. SIEGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 107 (1969).

56. *State v. Montoya*, 2013-NMSC-020, ¶ 29, 306 P.3d. 426.

In *Whalen v. United States*,<sup>57</sup> the Supreme Court of the United States stated that the rule of lenity should be applied in double jeopardy cases when the matter of legislative intent is “not entirely free from doubt.”<sup>58</sup> In *Whalen*, the court analyzed the statutes of rape and felony murder, determining that the defendant could not be convicted of rape if he is convicted of felony murder.<sup>59</sup> The rape is the predicate felony for the felony murder charge, and is therefore a lesser-included offense.<sup>60</sup> The Court also applied the rule of lenity in *Bell v. United States*,<sup>61</sup> stating that “[i]t may be fairly said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.”<sup>62</sup>

### III. RATIONALE

In *Montoya*, the New Mexico Supreme Court first held that the jury was incorrectly instructed on an essential element of Defendant’s felony murder charge, and that Defendant’s conviction for voluntary manslaughter precluded him from being retried using appropriate jury instructions.<sup>63</sup>

The court then determined that Defendant could not be punished for voluntary manslaughter and shooting at a motor vehicle resulting in great bodily harm when both convictions were based on the same action.<sup>64</sup> The State conceded that Defendant’s culpable conduct was unitary, meaning that Defendant’s single act of shooting was the common factual basis for both the shooting at a motor vehicle and the voluntary manslaughter charge.<sup>65</sup> Because Defendant challenged his conviction under different statutes for unitary conduct, his appeal was treated as a double description case.<sup>66</sup> The court first applied the *Blockburger* test, which determined “in the abstract whether each statutory offense ‘requires proof of a fact which the other does not.’”<sup>67</sup> If the court’s application of the test determines that one statute subsumes another, the statutes are the same for double jeopardy purposes.<sup>68</sup> However, because shooting at a motor

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57. 445 U.S. 684 (1980).

58. *Id.* at 694.

59. *Id.* at 694–96.

60. *Id.* at 710.

61. 349 U.S. 81 (1955).

62. *Id.* at 83.

63. *Id.* ¶¶ 13–27.

64. *Id.* ¶ 54.

65. *Id.* ¶ 30.

66. *Id.*

67. *Id.* ¶ 31 (citation omitted).

68. *Swafford v. State*, 1991-NMSC-043, ¶ 30, 112 N.M. 3, 810 P.2d 1223.

vehicle does not require a death and voluntary manslaughter does not require that one shoot at a motor vehicle, the statutes survived the *Blockburger* test.<sup>69</sup>

The court then had to determine whether the legislature intended separate punishment for unitary conduct under *Swafford v. State*.<sup>70</sup> The court examined “the particular evil sought to be addressed by each offense” and stated that “[i]f several statutes are not only usually violated together, but also seem designed to protect the same social interest, the inference becomes strong that the function of the multiple statutes is only to allow alternative means of prosecution.”<sup>71</sup>

In New Mexico, the test relevant to double description cases comes from *Swafford*.<sup>72</sup> In *Swafford*, the defendant was convicted of third-degree criminal sexual penetration, incest, aggravated assault with intent to commit a felony and false imprisonment.<sup>73</sup> The defendant appealed his convictions on the grounds that the convictions under separate statutes arose from unitary conduct, and was therefore a double description violation of double jeopardy.<sup>74</sup>

*Swafford* discussed the rule of lenity as the court outlined the tests and considerations that go into a double jeopardy analysis.<sup>75</sup> It stated that the Supreme Court of the United States applies the rule of lenity to ambiguous statutes, with the presumption that “the legislature did not intend to fragment a course of conduct into separate offenses.”<sup>76</sup> However, the court in *Swafford* explained that the rule of lenity always applies in “unit of prosecution” cases, but that its application to double description cases is unclear.<sup>77</sup> The court stated that lenity applies “only after the language, structure and legislative history of the statutes at issue raise an indication of leniency.”<sup>78</sup> Ultimately the court rejected including the rule of lenity as an element of the test.<sup>79</sup> *Swafford* went on to state:

The first part of our inquiry asks the question that [U.S.] Supreme Court precedents assume to be true: whether the conduct underly-

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69. *Montoya*, 2013-NMSC-020, ¶ 32.

70. *Id.* (citing *Swafford*, 1991-NMSC-043, ¶ 31).

71. *Swafford*, 1991-NMSC-043, ¶ 32.

72. *See Montoya*, 2013-NMSC-020, ¶ 32.

73. *Id.* ¶ 4.

74. *Id.* ¶ 5.

75. *Id.* ¶¶ 14–15.

76. *Id.* ¶ 8 (citation omitted).

77. *Id.* ¶ 15.

78. *Id.*

79. *See id.* ¶ 25 (stating the test to be used in double description cases, but failing to mention the rule of lenity as part of the test).

ing the offenses is unitary, *i.e.*, whether the same conduct violates both statutes. The second part focuses on the statutes at issue to determine whether the legislature intended to create separately punishable offenses.<sup>80</sup>

In the second part of the test, *Swafford* pointed to the *Blockburger* test, and explained that the court must first determine if the statutes survive the *Blockburger* test as distinct offenses.<sup>81</sup> However, surviving the *Blockburger* test only raises a presumption that the statutes are distinct for the purposes of sentencing; the court must still look at “other indicia of legislative intent”<sup>82</sup> to determine the “particular evil sought to be addressed by each offense.”<sup>83</sup> Such indicia include the language, history, and subject of the statutes.<sup>84</sup> Double description cases have applied this test from *Swafford* and it continues to be the relevant inquiry.<sup>85</sup>

In *State v. Montoya*, the New Mexico Supreme Court overruled *State v. Gonzales* and the two cases that relied on it, *State v. Dominguez* and *State v. Riley*.<sup>86</sup> These three cases all involved shooting at or from a motor vehicle, and some form of homicide.<sup>87</sup> In each opinion, the court applied the test set forth in *Swafford*, where statutes that survive the *Blockburger* strict elements test should be analyzed for the social harm that the legislature intended to address with each statute.<sup>88</sup> Before *Montoya*, the court determined that the legislature intended these statutes to address different social harms, and therefore it was not a violation of double jeopardy for the defendant to be convicted under both statutes.<sup>89</sup>

In *Gonzales*, the defendant appealed on double description grounds because he was convicted of first-degree murder and shooting at a motor vehicle.<sup>90</sup> The court reached its holding in *Gonzales* by using the language from *Swafford*, first determining that the conduct was unitary.<sup>91</sup> It then applied the *Blockburger* test, determining that the statutes survived

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80. *Id.*

81. *Id.* ¶ 30.

82. *Id.* ¶ 31.

83. *Id.* ¶ 32.

84. *Id.* ¶ 31.

85. *See Montoya*, 2013-NMSC-020, ¶ 32 (citing *Swafford v. State*, 1991-NMSC-043, ¶ 32).

86. *Id.* ¶ 2.

87. *Id.* ¶¶ 35, 37, 38.

88. *State v. Gonzales*, 1992-NMSC-003, ¶ 6, 113 N.M. 221, 824 P.2d 1023; *State v. Dominguez*, 2005-NMSC-001, ¶ 5, 137 N.M. 1, 106 P.3d 563; *State v. Riley*, 2010-NMSC-005, ¶ 35, 147 N.M. 557, 226 P.3d 656 (relying on *Gonzales* and *Dominguez*).

89. *Gonzales*, 1992-NMSC-003, ¶ 12.

90. *Id.* ¶ 4.

91. *Id.* ¶ 8.

*Blockburger* because shooting at a motor vehicle does not require that a person die, and first-degree murder does not require that the victim die because he was shot in a vehicle.<sup>92</sup> Therefore, each statute required proof of a fact that the other did not.<sup>93</sup> Finally, it determined that the social harm that the legislature intended to prevent with the shooting at a motor vehicle statute was property damage and bodily injury, whereas first-degree murder was intended to prevent unlawful killings.<sup>94</sup> Thus, because the statutes addressed different social harms and neither statute subsumed the other, convictions under both shooting at a motor vehicle and first-degree murder were permitted.<sup>95</sup> *Gonzales* remained the applicable legal rule for similar statutes, controlling the decisions in *Dominguez* and *Riley*.<sup>96</sup>

In *Dominguez*, the defendant was convicted of “shooting at or from a motor vehicle” and voluntary manslaughter.<sup>97</sup> The *Dominguez* court extended the reasoning from *Gonzales*, holding that convictions for both shooting at a motor vehicle and voluntary manslaughter did not violate double jeopardy.<sup>98</sup>

Finally, in *Riley*, the court reaffirmed its holding in *Gonzales* that shooting at a motor vehicle and first-degree murder convictions for unitary conduct did not violate double jeopardy.<sup>99</sup> The court elected to follow *stare decisis* and held that the convictions were permissible because the defendant did not offer any reasons to depart from the precedent.<sup>100</sup> However, the court did not do much to defend its holdings in *Gonzales* and *Dominguez*, it merely stated that the cases were still valid, and it did not have a good reason to overturn them.<sup>101</sup>

The decisions in *Dominguez* and *Riley* were sharply divided, and the dissents in those opinions indicated a shift in the court’s position on the validity of the holding of *Gonzales*.<sup>102</sup> The dissents also suggested a growing consensus among the justices that *Gonzales*, *Dominguez*, and *Riley* should be overruled.<sup>103</sup> Justice Bosson’s dissent in *Riley* was practically an

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92. *Id.* ¶ 10.

93. *Id.*

94. *Id.* ¶ 12.

95. *Id.*

96. *State v. Riley*, 2010-NMSC-005, ¶ 35; *State v. Dominguez*, 2005-NMSC-001, ¶¶ 8, 16.

97. *Dominguez*, 2005-NMSC-001, ¶ 1.

98. *Id.* ¶ 26.

99. *Riley*, 2010-NMSC-005, ¶ 35.

100. *Id.* ¶ 35.

101. *Id.* ¶¶ 34–35.

102. *State v. Montoya*, 2013-NMSC-020, ¶ 37, 306 P.3d. 426.

103. *Id.* ¶¶ 37–38.

invitation to defense attorneys to specifically challenge the holdings in *Gonzales*, *Dominguez*, and *Riley*, indicating that the court would welcome the opportunity to reconsider them.<sup>104</sup> Justice Bosson got his wish in *Montoya*, where the Defendant finally argued specific reasons for overruling *Gonzales*.<sup>105</sup>

In the years since *Gonzales*, the court addressed the double description issue using the *Swafford* analysis in cases that involved statutes other than the statutes considered in *Gonzales*, *Dominguez*, *Riley*, and *Montoya*.<sup>106</sup> The *Gonzales* line was one of the few where the court found no double description issue, making it difficult to reconcile with the double jeopardy jurisprudence as a whole.<sup>107</sup>

One case of particular importance to the *Montoya* court was *State v. Contreras*, in which the court decided for the first time that convictions for felony murder and the underlying predicate felony violated double description.<sup>108</sup> *Montoya* also noted that *State v. Frazier* greatly expanded the holding of *Contreras*, because it held that the legislature did not intend convictions for both felony murder and the predicate felony under any circumstances, so there was no need to evaluate this issue on a case-by-case basis.<sup>109</sup> Further, *Montoya* recognized that in *State v. Cooper*, the court held that a defendant could not be punished for felony murder and the second-degree murder that the felony murder is predicated on.<sup>110</sup> Finally, *Montoya* stated that the decisions in *Cooper* and *State v. Santillanes*<sup>111</sup> “substantially eroded” the reasoning underlying *Gonzales*, because in each case the statutes passed the *Blockburger* test and were still found to be a violation of double jeopardy if a defendant was convicted for unitary conduct under both.<sup>112</sup>

In *Varela*, the court determined that convictions for shooting at a dwelling and felony murder violated double jeopardy.<sup>113</sup> In *Varela*, the court determined that shooting at a trailer and killing the person inside was unitary, thus requiring an analysis of the legislative intent behind the

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104. *Riley*, 2010-NMSC-005, ¶ 45 (Bosson, J., concurring in part and dissenting in part).

105. *Montoya*, 2013-NMSC-020, ¶ 39.

106. *Id.* ¶ 41.

107. *Id.* ¶ 52.

108. *State v. Contreras*, 1995-NMSC-056, ¶ 19, 120 N.M. 486, 903 P.2d 228.

109. *Montoya*, 2013-NMSC-020, ¶ 42.

110. *Id.* ¶ 43 (citing *State v. Cooper*, 1997-NMSC-058, ¶¶ 53, 63, 124 N.M. 277, 949 P.2d 660).

111. 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456.

112. *Montoya*, 2013-NMSC-020, ¶ 43.

113. *State v. Varela*, 1999-NMSC-045, ¶ 40, 993 P.2d 1280, 128 N.M. 454.

shooting at a dwelling statute.<sup>114</sup> If the legislature did not intend for death to be used as a substitute for “great bodily harm,” then it would have been error for the court to use shooting at a dwelling as a basis for a felony murder conviction.<sup>115</sup> The court looked to the social harm that the legislature sought to prevent by outlawing shooting at a dwelling.<sup>116</sup> The court then concluded that felony murder subsumed the elements of shooting at a dwelling; therefore, Varela’s convictions for both offenses violated double jeopardy.<sup>117</sup>

In *Varela*, the court examined NMSA 1978, Section 30-3-8(A) (1993), which defines the offenses of shooting at a dwelling or occupied building.<sup>118</sup> The first provision of the statute prohibits shooting at a dwelling or occupied building, and the court interpreted that as the legislature seeking to prevent that very action.<sup>119</sup> The next three scenarios the statute addresses are: (1) shooting at a dwelling that does not cause any great bodily harm, (2) shooting at a dwelling that causes injury, and (3) shooting at a dwelling that causes great bodily injury.<sup>120</sup> The court stated that it would be absurd to construe the statute to not include situations in which the victim dies, and held that a shooting at a dwelling in which the victim dies is covered by one of the three levels of punishment laid out in the statute.<sup>121</sup>

The Montoya court stated that *Varela* is important to its analysis because *Varela* recognized that death is part of the harm that the legislature intended to prevent in outlawing drive-by shootings.<sup>122</sup> It reached that conclusion by recognizing that the analysis in *Varela* is applicable to *Montoya* because it interpreted different provisions of the same statute.<sup>123</sup> The *Montoya* court explained that this analysis of the legislature’s intent is supported by the way that the shooting at or from a motor vehicle

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114. *Id.* ¶ 40.

115. *Id.* ¶ 38.

116. *Id.* ¶¶ 11–13.

117. *Id.* ¶ 40.

118. *Id.* ¶ 13.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Montoya*, 2013-NMSC-020, ¶ 45.

123. *Id.* ¶ 44. The *Dominguez* court rejected the argument that *Varela* had implicitly overturned *Gonzales*. *State v. Dominguez*, 2005-NMSC-001, ¶ 9, 137 N.M. 1, 106 P.3d 563 (reasoning that because the definition of great bodily harm used by the *Varela* court was available at the time that *Gonzales* was decided as well, and the court still determined that the elements of first-degree murder and shooting at a motor vehicle resulting in great bodily harm were different, *Gonzales* was still controlling; the *Montoya* court does not explain how it refutes this logic.)

statute is structured, paralleling assaultive crimes (which modify the sentence imposed based on the harm done) as opposed to property damage crimes (which modify the sentence imposed based on the value of the property taken).<sup>124</sup>

Next, the *Montoya* court discussed several cases where the court overruled double description jurisprudence where it previously found that convicting the defendant under two statutes for unitary conduct was constitutional. In *State v. Gutierrez*, the court held that robbery of a car and the armed robbery of its keys violated double jeopardy.<sup>125</sup>

*Gutierrez* introduced the concept of the modified *Blockburger* approach for statutes that are “vague and unspecific” or “written with many alternatives.”<sup>126</sup> Under this approach, the court looks at the state’s legal theory, without looking at the particular facts of the case, to determine whether convictions under separate statutes violate double jeopardy.<sup>127</sup> The reviewing court looks to the charging documents and jury instructions, not just the statute’s text.<sup>128</sup> In *Gutierrez*, the state charged the defendant under the auto burglary statute as well as the general robbery statute, arguing that the “anything of value” element of the statute was satisfied when the defendant took the car owner’s car keys.<sup>129</sup> The court found that the “anything of value” language was sufficiently vague to trigger the rule of lenity and prevent convictions under both the auto theft and general robbery statute.<sup>130</sup>

The court also applied this theory in another important double description case, *State v. Swick*.<sup>131</sup> In *Swick*, the court overruled its decision in *State v. Armendariz*.<sup>132</sup> *Armendariz* held that convictions for aggravated battery and attempted murder based on unitary conduct were not a violation of double jeopardy for three reasons: the aggravated battery and attempted murder statutes addressed different social harms, neither state indicated that they were different ways of committing the same crime, and the two crimes are not necessarily violated at the same moment in time.<sup>133</sup> In *Swick*, the court pointed to *Armendariz*’s reliance on

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124. *Id.* ¶ 45 (stating that assaultive crimes have gradations based on the degree of harm inflicted on the person and property damage crimes have gradations based on the value of the property damaged).

125. 2011-NMSC-024, ¶ 60, 150 N.M. 232, 258 P.3d 1024.

126. *Gutierrez*, 2011-NMSC-024, ¶ 48 (quotation omitted).

127. *See id.* ¶ 58.

128. *State v. Swick*, 2012-NMSC-018, ¶ 21, 279 P.3d 747.

129. *Gutierrez*, 2011-NMSC-024, ¶ 52, 60.

130. *Id.* ¶ 59.

131. 2012-NMSC-018, 279 P.3d 747.

132. 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

133. *Id.* ¶ 25.

*Gonzales*, asserting that both cases applied *Blockburger*'s strict elements test without due consideration of the substantive sameness analysis set forth in *Swafford*.<sup>134</sup> However, the *Armendariz* court recognized that the legislature may not have intended cumulative punishment because attempted murder is punished by a much greater sentence than aggravated battery.<sup>135</sup> The court in *Swick* concluded that this observation about the severity of the sentences leaves the legislative intent unclear, and as a result modified *Blockburger* applied.<sup>136</sup>

Another important aspect of *Swick* is that it stated when a statute is "vague and unspecific," the court must analyze the State's legal theory to determine if each charge requires proof of a fact which the other does not.<sup>137</sup> *Swick* explains that the statute for attempted murder is a "vague and unspecific" statute because many forms of conduct can support the "began to do an act which constituted a substantial part of the murder" element.<sup>138</sup>

*Swick* held that when the legislative intent is still unclear after a thorough examination, the rule of lenity should apply, and any ambiguity should be resolved in favor of the defendant.<sup>139</sup> The *Swick* court applied the rule of lenity because "reasonable minds can differ as to the Legislature's intent in punishing these two crimes."<sup>140</sup>

The *Montoya* court noted *State v. Gutierrez*'s adoption of the modified *Blockburger* approach, and stated that it was critical because it "exemplified how the Court has been 'rethinking some of the underpinnings of [its] double jeopardy jurisprudence.'"<sup>141</sup> It also recognized that the modified *Blockburger* approach was followed in *Swick*.<sup>142</sup>

Finally, though it was a unit of prosecution case as opposed to a double description case, *Montoya* discusses *State v. Gallegos*.<sup>143</sup> *Montoya* stated that the underlying rationale behind trying to punish an act as op-

134. *State v. Montoya*, 2013-NMSC-020, ¶ 49, 306 P.3d. 426.

135. *State v. Armendariz*, 2006-NMSC-036, ¶ 25, 140 N.M. 182, 141 P.3d 526.

136. *Swick*, 2012-NMSC-018, ¶ 29. The modified *Blockburger* test announced in *Gutierrez* effectively overruled *Armendariz*. See *id.* ¶ 19.

137. *Id.* ¶ 12 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

138. *Id.* ¶ 25.

139. *Id.* ¶ 30.

140. *Id.* (citation omitted).

141. *Montoya*, 2013-NMSC-020, ¶ 47 (citing *State v. Gutierrez*, 2011-NMSC-024, ¶¶ 73–74, 76, 78, 150 N.M. 232, 258 P.3d 1024 (Bosson, J., specially concurring)).

142. *Id.* ¶ 49. This is, perhaps, one of the strangest aspects of the *Montoya* opinion. The court discusses the very recently applied modified-*Blockburger* approach it used in *Swick*, and then does nothing to apply it to the facts of *Montoya*.

143. *Id.* ¶ 46.

posed to violations of multiple statutes, as the court did in *Gallegos*, “set a new course for the future application of double jeopardy principles.”<sup>144</sup>

The court in *Montoya* noted that the strict mechanical elements test has faded away over the course of New Mexico double jeopardy jurisprudence and a substantive sameness analysis replaced it.<sup>145</sup> In keeping with this transition, the court in *Montoya* overruled *Gonzales* and the cases that follow it.<sup>146</sup>

The court concluded that the changes in double jeopardy jurisprudence made the decision in *Gonzales* “so unworkable as to be intolerable.”<sup>147</sup> It stated that:

Applying [the precedents considered] and the rule of lenity, we can no longer conclude that the Legislature intended that this defendant should receive more than the maximum punishment it determined appropriate for either a drive-by shooting or a completed homicide, taking into consideration the relationship between the statutory offenses and their common commission by unitary conduct, the identical social harms to which they are directed, and their use by the State in this case to impose double punishment for the killing of the victim.<sup>148</sup>

Although the court stated the factors considered, it did not clearly detail the analysis it went through to reach a conclusion on many of those points: the relationship between the offenses, their use by the State,<sup>149</sup> or why the rule of lenity applies.<sup>150</sup>

The court also held that circumstances justified overruling *Gonzales*, *Dominguez*, and *Riley*.<sup>151</sup> The court addressed the notion that either party may have justifiably relied on *Gonzales* and would be unfairly prejudiced should the opinion be overruled.<sup>152</sup> Because the double description issue is one that is only raised in post-conviction situations, the State, which

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144. *Id.* (quoting *State v. Gallegos*, 2011-NMSC-027, ¶ 1, 149 N.M. 704, 254 P.3d 655).

145. *Id.*

146. *Id.* ¶ 54.

147. *Id.* ¶ 52.

148. *Id.*

149. It is somewhat surprising that, given the recent express adoption of the “modified Blockburger” approach by *Swick*, that the Court does not do a more thorough analysis of the charging documents to determine legislative intent in *Montoya*.

150. *Montoya*, 2013-NMSC-020, ¶ 52.

151. *Id.* ¶ 53.

152. *Id.*

would be the party relying on *Gonzales* to its detriment, cannot be said to actually be relying on the decision.<sup>153</sup>

As a result of the court's decision to overrule precedent and disallow multiple convictions for the same action, the court determined that the more severe punishment, shooting at a motor vehicle, should be reinstated.<sup>154</sup> The court determined, in keeping with other jurisdictions and its holding in *State v. Swick* that the conviction with the shorter sentence should be vacated to avoid a double jeopardy violation.<sup>155</sup> Voluntary manslaughter is a third-degree felony requiring six years imprisonment,<sup>156</sup> whereas shooting at a motor vehicle resulting in great bodily harm is a second-degree felony calling for fifteen years imprisonment when it results in the death of a human being.<sup>157</sup> The court imposed the greater sentence because the court determined it is unacceptable for one to escape punishment for a crime simply because he also violated a statute with a lesser punishment.<sup>158</sup> Regardless of which is considered the more serious crime, the court must choose to reinstate the one the legislature designated a more severe punishment.<sup>159</sup>

Finally, the court discussed Defendant's claim that he was denied the right to an impartial jury, determining that he received a fair trial,<sup>160</sup> and Defendant's claim that he received ineffective assistance of counsel holding that there was an insufficient record for the court to determine the claim.<sup>161</sup>

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153. *Id.*

154. *Id.* ¶ 55.

155. *Id.*

156. NMSA 1978, § 30-2-3(A) (1994); NMSA 1978, § 31-18-15(A)(7) (2007).

157. NMSA 1978, § 30-3-8(B) (1993); NMSA 1978, § 31-18-15(A)(4).

158. *Montoya*, 2013-NMSC-020, ¶ 56.

159. *Id.*

160. *Id.* ¶¶ 57–63. Defendant's ex-girlfriend, Elizabeth, testified at the trial that she knew a person on the jury, Ms. Romero, who was friends the mother of her current boyfriend. Elizabeth stated that Ms. Romero was biased against the Defendant for his appearance, telling Elizabeth's boyfriend's mother that the Defendant looked "scary." Ms. Romero was removed from the jury, but Defendant raised concerns that she influenced other jurors. The court held that there was no "preliminary showing that [he or she] has competent evidence that material extraneous to the trial actually reached the jury," so Defendant's right to a fair trial was not violated. *Id.*

161. *Id.* ¶ 64. Defendant claimed that he received ineffective assistance of counsel because his attorney was using suspected of using cocaine during the trial, that the attorney failed to object to the flawed jury instructions and the allegedly biased juror, and that as a result he did not receive a fair trial. *Id.*

## IV. ANALYSIS

After the extensive evaluation of double description jurisprudence, the *Montoya* court did very little to actually apply the rules it laid out. In fact, discussion of many of the cases seemed almost random, particularly because the court did not then apply the legal analysis gleaned from those cases to the issues in *Montoya*: The court did not apply the modified *Blockburger* approach it adopted in *Gutierrez* and *Swick*. It also did not explain what is vague about the statutes at issue in *Montoya* (a necessary finding in order for the rule of lenity to apply).

In *Montoya*, the court emphasized that the rule of lenity applies “in cases of ambiguity because reasonable minds can differ as to the Legislature’s intent in punishing the [ ] two crimes.”<sup>162</sup> In *Montoya*, the court must have concluded that the two such statutes Defendant was charged under were ambiguous because it stated that the rule of lenity applied.<sup>163</sup> However, the court did not explain how the statutes are ambiguous. Without this determination, the court does not have a justification for applying the rule of lenity.

The court anchored its use of the rule of lenity by relying on *Swick*.<sup>164</sup> However, the statutes in *Swick* were much more vague than the statutes in *Montoya*, and the court failed to specifically explain what is vague about shooting at a motor vehicle or voluntary manslaughter. Further, the court did not need to use the rule of lenity to overturn *Gonzales*, *Dominguez*, and *Riley*. By doing so, the court created a scenario in which it will be extremely difficult for the State to overcome a double description challenge to convictions based on unitary conduct.

Justice Chavez explained in his special concurrence in *Frazier* that if the offenses are the same and the language is ambiguous, then the rule of lenity applies.<sup>165</sup> However, *Frazier* is distinguishable from *Montoya* because *Montoya* did not involve lesser-included offenses. In *Montoya*, the offenses do not merge in the traditional way that lesser-included offenses merge with a greater offense. Rather, the court explains one conviction given by the jury should have been vacated by the judge for the purposes of sentencing.<sup>166</sup> The problem with thinking about *Montoya* as a lesser-included offense case once the felony murder charges are dismissed is easy to illustrate by analyzing the statutes in question. If the court finds

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162. *Id.* ¶ 51 (citation omitted) (internal quotation marks omitted).

163. *Id.* ¶ 52.

164. *Id.* ¶ 51 (citing *State v. Swick*, 2012-NMSC-018, ¶ 30).

165. *State v. Frazier*, 2007-NMSC-032, ¶ 52, 142 N.M. 120, 164 P.3d 1 (Chavez, C.J., specially concurring).

166. *Montoya*, 2013-NMSC-020, ¶ 54.

that voluntary manslaughter is a lesser-included offense of shooting at a motor-vehicle, then it essentially places more importance on a crime that society may view as less serious.<sup>167</sup> On the other hand, if the court finds that shooting at a motor vehicle is a lesser-included offense of voluntary manslaughter, it places more importance on a crime that carries a much shorter jail sentence.<sup>168</sup> Either approach leads to an odd result, indicating that *Montoya* did not concern the theory of lesser-included offenses, and the court needed an alternative justification for applying the rule of lenity.

Although the court clearly explained why the rule of lenity should apply in *Swick*, its application to *Montoya* is less clear. In fact, the court does not explicitly state in *Montoya* that the statutes are ambiguous; it merely states that an application of other double description precedents and the rule of lenity requires that *Gonzales* and the cases that follow from it must be overruled.<sup>169</sup> Thus, the major change in *Montoya* is not so much the application of the rule of lenity as it is the court's treatment of legislative intent. Recognizing that their decision on what the legislature intended in *Gonzales* was wrong would have been sufficient to overrule it. Applying the holding from *Varela* to *Montoya* and carefully addressing the reasons for overruling precedent would have been enough for the court to reach the same holding as it did.<sup>170</sup>

By noting the absurdity of interpreting the shooting at or from a motor vehicle and shooting at a dwelling statute as not including death as a social harm that the legislature intended to prevent, the *Varela* court swiftly dealt with the ambiguity issue that *Montoya* asserted makes the rule of lenity so necessary.<sup>171</sup> In fact, the court in *Varela* analyzed a statute

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167. *See id.* ¶ 56.

168. *Id.* (stating that third-degree voluntary manslaughter carries a sentence of six years' imprisonment, and second-degree shooting at a motor vehicle carries a sentence of fifteen years' imprisonment).

169. *Id.* ¶ 52.

170. The *Dominguez* court addressed the idea of applying *Varela* instead of *Gonzales*, and dismissed it vigorously by explaining that the same statutory definition of great bodily harm used in *Varela* was available at the time that *Gonzales* was decided, and yet the court still held that first-degree murder was distinct from shooting at a motor vehicle resulting in great bodily harm. *State v. Dominguez*, 2005-NMSC-001, ¶ 9, 106 P.3d 563. The court's position on the importance of *Varela* is vastly different in *Montoya* than it was in *Dominguez*, but the *Montoya* court did not address why it now places more importance on the analysis of the statutes in *Varela* than it does on the analysis in *Gonzales*. This may be one reason why it could not simply rely on *Varela*, and relied on the rule of lenity to bolster its decision to overrule *Gonzales*, *Dominguez*, and *Riley*.

171. *See Varela*, 1999-NMSC-045, ¶ 13.

that is vaguer than the statutes in *Montoya* (felony murder), making the *Montoya* court's application of the rule of lenity is even more suspicious.

The similarity of the statute in *Varela* to the one in *Montoya* makes it logical to apply the same rationale when reconsidering the shooting at a motor vehicle statute in *Montoya*.<sup>172</sup> Finding that convictions for shooting at a motor vehicle and homicide is a violation of double jeopardy is a simple task once the court finds that death is a social harm that the legislature intended to prevent in passing the shooting at a dwelling statute. Because the statutes in *Varela* and *Montoya* are essentially the same statute, just different subsections of that statute, one can conclude that they address the same social harm. Furthermore, in applying this analysis the court eliminates the ambiguity that the rule of lenity is intended to resolve.

*Montoya* gives defendants an additional opportunity to prove that conviction under two statutes for a unitary act is a violation of double jeopardy. As early as *Swafford*, the defendant had two opportunities to do so.<sup>173</sup> First, the court uses the *Blockburger* test to see if one statute subsumes another.<sup>174</sup> Next, if the statutes survive *Blockburger*, the court may still invalidate a conviction on double description grounds based on its interpretation of legislative intent.<sup>175</sup> After *Montoya*, if there is even the slightest question as to what the legislature intended, the rule of lenity will apply, thereby resolving the issue in favor of the defendant.<sup>176</sup> The court could have resolved the issue on the second step by applying *Varela* and ending the inquiry. Instead, it applied the rule of lenity, for reasons that are not entirely clear.

It is possible that *Montoya* is intentionally vague in its application of the rule of lenity in order to create a consistent rule for all double description cases, not just cases involving shooting at a motor vehicle and homicide. The court stated that it has struggled to reconcile those specific statutes with the rest of double description jurisprudence,<sup>177</sup> and the trend is clearly toward finding multiple punishments for unitary conduct under two statutes unconstitutional. However, the court did not explain why it matters that its jurisprudence regarding these particular statutes be in line with the trend. If double description inquiries are going to be conducted on a case-by-case analysis involving the facts of the case and legislative

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172. *State v. Montoya*, 2013-NMSC-020, ¶ 44, 306 P.3d. 426.

173. *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223

174. *Id.*

175. *Id.*

176. *See Montoya*, 2013-NMSC-020, ¶ 52.

177. *Id.* ¶ 34.

intent, it does not follow that the court should be influenced by its decisions involving other statutes and very different fact patterns.

If there is a way to violate two statutes with just one action, double description comes into play. The court should not allow the fact that it has disallowed multiple punishments for many double description scenarios to influence how it will rule on a specific double description issue, because the inquiry is a fact-specific analysis that turns on how the conduct in each case violates the statutes. The Uniform Statute and Rule Construction Act provides guidance for courts in interpreting statutes.<sup>178</sup> In addition to considering the text of the statute, courts may look to the judicial construction of the same or a similar statute.<sup>179</sup> However, the rule requires courts to look to the language and construction of “similar” statutes.<sup>180</sup> In other words, courts should not use interpretations of the embezzlement statute<sup>181</sup> to justify a novel reading of the kidnapping statute,<sup>182</sup> because the two statutes are completely different. The same should hold for double description—the court should not allow its conclusions about whether charges under one set of statutes violate double description to influence its conclusion about a different set of statutes. Each combination of statutes should be considered individually, influenced only by cases where the same statutes were at issue. Although this might lead to different methods of determination depending on the crime charged, each combination of statutes is unique enough that such individualization might be desirable.

*Montoya* overturned *Gonzales*, *Dominguez*, and *Riley*, three opinions that grew increasingly unpopular as the court developed its double description jurisprudence.<sup>183</sup> However, it also set the stage for future double description cases, sending the message that multiple punishments for unitary conduct will be looked upon with disfavor by the court, to the extent that it will be nearly impossible to prove that the legislature intended for a defendant to be convicted under two statutes for a single action.

## V. IMPLICATIONS

The “shooting at a motor vehicle” and “homicide” statutes are commonly violated together, particularly in the context of gang-related vio-

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178. NMSA 1978, § 12-2A-1 (1997).

179. NMSA 1978, § 12-2A-20(B)(2) (1997).

180. See NMSA 1978, § 12-2A-20 (1997).

181. NMSA 1978, § 30-16-8 (2007).

182. NMSA 1978, § 30-4-1 (2003).

183. *Montoya*, 2013-NMSC-020, ¶ 52.

lence as seen in *Montoya*.<sup>184</sup> Therefore, the holding in *Montoya* changes the potential outcome for many criminal prosecutions in the future. Although the defendant likely will still be charged with both homicide and shooting at or from a motor vehicle (as double description is an issue that is considered post-conviction), the defendant will not be required to serve sentences for both convictions that a jury may impose. Overall, defendants will be looking at less serious consequences than they were before *Montoya* was decided.

The most important takeaway from *Montoya*, however, is that it indicates the future of double description jurisprudence in New Mexico.<sup>185</sup> The dissents in the cases leading up to *Montoya*<sup>186</sup> as well as the holdings in double description cases with statutes unrelated to *Montoya* indicate a trend towards a more liberal application of the double description rule. The majority of the double description cases discussed in *Montoya* have held that it is a violation of double jeopardy to convict the defendant of both offenses he was charged with. In the future, the court may interpret legislative intent in such a way that precludes punishment for both offenses charged whenever possible. When applying the rule of lenity, it is difficult to imagine that there are many circumstances in which the legislative intent is so clear that double description will be permissible.<sup>187</sup>

The fact that the court does not explain why the statutes in *Montoya* are vague opens the door for defendants to challenge any number of statutes for double description violations. *Montoya* overruled three cases that gave courts guidance on how to interpret the shooting at a motor vehicle and homicide statutes without giving clear instructions on how those statutes should now be interpreted. Furthermore, the precise role of the rule

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184. *See id.* ¶¶ 34, 36.

185. *See, e.g.*, *State v. Sisneros*, 2013-NMSC-049, ¶39, 314 P.3d 665 (citing *Montoya* for the proposition that one conviction must be vacated when convictions for homicide and shooting at a motor vehicle both stem from the same act of shooting the victim); *State v. Olsson and Ballard*, 2014-NMSC-\_\_\_\_, ¶ 2, No. 33,226 (Apr. 21, 2014) (holding that the legislature's definition of the unit of prosecution for possession of child pornography is ambiguous and that the rule of lenity therefore only allowed prosecution of the defendants for one count each).

186. *See State v. Dominguez*, 2005-NMSC-001, ¶¶ 28–42, 137 N.M. 1, 106 P.3d 563 (Bosson, C.J., concurring in part and dissenting in part, Chavez, J., dissenting); *State v. Riley*, 2010-NMSC-005, ¶¶ 39–49, 147 N.M. 557, 226 P.3d 656 (Chavez, C.J., specially concurring, Bosson, J., concurring in part and dissenting in part, Daniels, J., specially concurring).

187. *But see Swafford v. State*, 1991-NMSC-043, ¶ 36, 112 N.M. 3, 810 P.2d 1223 (holding that the legislature intended to impose separate punishments for violations of criminal sexual penetration and incest statutes).

of lenity continues to be unclear, though it is obvious that the court intends to incorporate it into the double description analysis.

## VI. CONCLUSION

Double description is a complicated area of law that troubles courts across the nation as criminal statutory schemes become increasingly complex. As legislatures create laws that outlaw very specific activity, courts struggle to interpret when legislatures intended for the defendant to be punished under each statute he violated, even when the conduct was unitary.

*Montoya* limits the circumstances in which the State may secure convictions for defendants under more than one statute for unitary conduct. However, *Montoya* does not explain how shooting at a motor vehicle and voluntary manslaughter remain vague after a thorough examination of legislative intent, thus opening the door for the rule of lenity to apply to many more statutes without really explaining what is ambiguous about them. In fact, a closer look at *State v. Varela* indicates that the statutes at issue in *Montoya* are not vague at all, and shows how the court could have reached the result it wanted without addressing the rule of lenity.

*Montoya* has the potential to change the course of double jeopardy jurisprudence in New Mexico. Although it may be construed narrowly and only apply to shooting at a motor vehicle and voluntary manslaughter, it is clear from the court's complete explanation of double description cases that it will apply broadly. *Montoya* makes a bold assault on multiple punishments, is sure to be persuasive in future cases, and will aid the court in narrowing double description as much as possible.