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Adding Charges on Retrial: Double Jeopardy, Interstitialism, and State v. Lynch

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ADDING CHARGES ON RETRIAL: DOUBLE JEOPARDY, INTERSTITIALISM, AND *STATE V. LYNCH*

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I. INTRODUCTION

In *State v. Lynch*,[1] the New Mexico Supreme Court found the New Mexico Constitution's double jeopardy clause[2] provides a greater safeguard than does the Fifth Amendment[3] of the United States Constitution.[4] Following New Mexico's interstitial approach to constitutional analysis,[5] the court analyzed state law only after finding no federal protection.[6] The court held that after a successful appeal of a conviction, retrial cannot proceed on greater charges than the one for which the defendant was originally convicted.[7] This case is one of first impression in New Mexico.[8] While New Mexico double jeopardy law has departed from federal jurisprudence, *Lynch* provides New Mexico's first departure from federal law based on the unique language in the second clause of the New Mexico Constitution, article II, section 15.[9] *Lynch* provides a new and distinctive state protection from double jeopardy[10] but also presents a problem with New Mexico's interstitial approach, because the New Mexico Constitution provides a strong argument for protection but the federal law is less clear.[11]

II. STATEMENT OF THE CASE

On April 15, 1996, Martin Lynch and Richard Gurley engaged in a fistfight that ended in Gurley's death.[12] At the time, Lynch was living with Gurley's wife, from whom Gurley was separated.[13] Lynch and Gurley had a heated telephone conversation earlier that day, after which Gurley and his brother went to Lynch's home.[14] Once there, Gurley "pounded on the door and front windows, yelling for [Lynch]

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1. 2003-NMSC-020, 74 P.3d 73.
2. N.M. CONST. art. II, § 15.
3. U.S. CONST. amend. V.
4. *Lynch*, 2003-NMSC-020, ¶¶ 11, 24, 74 P.3d at 76–77, 80.
5. *See infra* notes 33–35, 233–241, and accompanying text; *see also* State v. Gomez, 1997-NMSC-006, ¶¶ 20–21, 932 P.2d 1, 7.
6. *Lynch*, 2003-NMSC-020, ¶ 13, 74 P.3d at 77.
7. *Id.* ¶ 15, 74 P.3d at 77–78.
8. Only one case has directly addressed the federal issue. That case is *Lowery v. Estelle*, 696 F.2d 333 (5th Cir. 1983), discussed *infra* notes 110–114 and accompanying text. The Supreme Court of the United States has decided that in some circumstances the right to be free from double jeopardy afforded under the United States Constitution is violated by retrial after implied acquittal, *i.e.* when multiple offenses are charged and the jury returns a verdict as to some, but not all, of the charges, but no mistrial is granted. *See infra* note 67 and accompanying text. In *Lynch*, the defendant was not charged with both offenses in his first trial. *See infra* note 17.
9. *See infra* notes 73–75, 155–156, 226, and accompanying text; *see also Lynch*, 2003-NMSC-020, ¶ 41, 74 P.3d at 85 (Maes, C.J., dissenting) (noting only one case, State v. Martinez, 120 N.M. 677, 905 P.2d 715 (1995), has interpreted this language, and it did not provide a departure from federal law).
10. *See* discussion *infra* Part IV.B.
11. *See* discussion *infra* Part V.B.
12. *Lynch*, 2003-NMSC-020, ¶ 2, 74 P.3d at 74–75.
13. *Id.* ¶ 2, 74 P.3d at 74.
14. *Id.* ¶ 2, 74 P.3d at 75.

to come out and fight."[15] Lynch did, and during the altercation that ensued, Lynch fatally stabbed Gurley.[16]

Lynch was charged with second-degree murder.[17] He was tried and convicted by a jury, but his conviction was reversed by the New Mexico Court of Appeals on the ground that the jury should have been instructed on self-defense.[18] On remand, the prosecutor sought to charge Lynch with first-degree murder based on new evidence:[19] the testimony of Ginger Dickinson[20] that Lynch had previously said he was going to kill Gurley "by stabbing him with a single thrust."[21]

Lynch moved to dismiss the first-degree murder charge on the grounds of double jeopardy and prosecutorial vindictiveness.[22] The court denied that motion and subsequently denied two motions for reconsideration of Lynch's double jeopardy claim.[23] Lynch appealed the double jeopardy ruling and the court of appeals certified that question to the New Mexico Supreme Court based on an apparent

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15. *Id.*

16. *Id.*

17. *Id.* ¶ 3, 74 P.3d at 75; *see also* NMSA 1978, § 30-2-1 (1994) (first-degree and second-degree murder). Although the complaint was initially filed as an open count of first-degree murder, Lynch was bound over and charged in the information with second-degree murder, a charge that includes manslaughter. *Lynch*, 2003-NMSC-020, ¶¶ 3, 24, 74 P.3d at 75, 80; *see* State v. Stephens, 93 N.M. 458, 461, 601 P.2d 428, 431 (1979) ("[Defendant] was entitled to an instruction on [a lesser-included offense] if there was some evidence in the record to support it.") (citing State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979)); *see also* UJI 14-210 NMRA 2004.

18. *Lynch*, 2003-NMSC-020, ¶ 4, 74 P.3d at 75.

19. The State did not have a full interview of its new witness until August of 1999, after the reversal of Lynch's original conviction, and a short time before his scheduled retrial. State's Answer Brief at 6, *Lynch* (No. 26,252); Brief in Chief at 5, *Lynch* (No. 26,252). Her testimony concerned a conversation that took place prior to Gurley's death. *Id.* at 7–8; State's Answer Brief at 6, *Lynch* (No. 26,252).

20. Ginger Dickinson was a family friend of sorts: at the time of Gurley's death, Dickinson was dating the stepfather of Lynch's girlfriend. Lynch's girlfriend was also, of course, Gurley's estranged wife. *Lynch*, 2003-NMSC-020, ¶¶ 2, 5, 74 P.3d at 74–75. Her testimony was brought into question in Lynch's brief to the New Mexico Supreme Court on several grounds: the time she came forward, Brief in Chief at 8–9, 26, *Lynch* (No. 26,252); her expressed dislike for Lynch, *id.* at 11, 26; and reliability based on her character, *id.* at 27.

21. *Lynch*, 2003-NMSC-020, ¶ 5, 74 P.3d at 75. Dickinson's testimony was that Lynch asked her for a gun to kill Gurley, and, when she refused, he said he would kill Gurley by stabbing him the way he had learned in prison. Brief in Chief at 8, *Lynch* (No. 26,252); State's Answer Brief at 6, *Lynch* (No. 26,252).

22. *Lynch*, 2003-NMSC-020, ¶ 6, 74 P.3d at 75. The United States Constitution's Due Process Clause protects defendants in criminal cases from prosecutorial vindictiveness, *i.e.*, action by the prosecution taken in retaliation for a defendant's exercise of any right, such as the right to appeal. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 372–85 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 362–65 (1978); Blackledge v. Perry, 417 U.S. 21, 25–32 (1974); Colten v. Kentucky, 407 U.S. 104, 116–17 (1972); North Carolina v. Pearce, 395 U.S. 711, 721 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794, 803 (1989); State v. Brule, 1999-NMSC-026, 981 P.2d 782; State v. Lujan, 103 N.M. 667, 672–74, 712 P.2d 13, 18–20 (N.M. Ct. App. 1985). *See generally* JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT §§ 3.30–.32 (2d ed. 1999). Prosecutorial vindictiveness may be difficult to prove because it requires a showing of improper motive. *Goodwin*, 475 U.S. at 373 (establishing a presumption of vindictiveness in some instances to ameliorate this difficulty). While the majority and the dissent agreed that Lynch's prosecutorial vindictiveness claim was not before the court in this appeal, the dissent reasoned that although double jeopardy protections do not prevent retrial for first-degree murder, due process protections against prosecutorial vindictiveness might apply. *Lynch*, 2003-NMSC-020, ¶¶ 25, 46, 74 P.3d at 81, 86.

23. *Lynch*, 2003-NMSC-020, ¶ 6, 74 P.3d at 75.

contradiction[24] in New Mexico's double jeopardy law.[25] In *State v. Lynch*, the New Mexico Supreme Court thus decided whether the federal or state constitution's double jeopardy clause precludes retrial for a greater degree of the same offense after reversal of a conviction of the lesser degree, when the greater degree was not charged in the original trial.[26] The court held that the state, but not federal, constitution protects Lynch from retrial.[27]

III. BACKGROUND

State v. Lynch deals with the federal Constitution's prohibition against double jeopardy as well as the New Mexico Constitution's double jeopardy clause.[28] Because state constitutions can provide more protections than the Constitution of the United States,[29] federal law should be analyzed separately from state law.[30] States have taken three main approaches to the analysis of state constitutions: (1) the lock-step approach requiring that state constitutional provisions be analyzed as if they are the same as parallel federal provisions;[31] (2) the primacy approach, looking first to state constitutional rights while allowing examination of federal constitutional law as persuasive, but not binding, authority;[32] and (3) the interstitial approach,[33] treating the state constitution as supplemental to the federal and providing state analysis only when there is no federal protection.[34] New Mexico has adopted the interstitial approach requiring that federal constitutional claims be analyzed first, and state claims be analyzed only when federal claims fail.[35]

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24. The court of appeals was concerned because language in *Martinez* stating that double jeopardy "precludes retrial of a greater offense only after an acquittal of that offense," 120 N.M. at 678, 905 P.2d at 716, seems antithetical to the New Mexico Constitution's article II, section 15, prohibition of retrial "for an offense or degree of the offense greater than the one of which he was convicted," N.M. CONST. art. II, § 15. *See also infra* notes 164–173 and accompanying text.

25. *Lynch*, 2003-NMSC-020, ¶ 7, 74 P.3d at 75.

26. *Id.* ¶¶ 1, 3, 74 P.3d at 74–75.

27. *Id.* ¶¶ 11, 21, 74 P.3d at 77, 79; *see infra* notes 91–94 and accompanying text.

28. *Lynch*, 2003-NMSC-020, ¶ 8, 74 P.3d at 75–76; *see supra* note 26 and accompanying text. While the decision in *Lynch* is supported by examination of a New Mexico statute, *see infra* notes 184–194 and accompanying text, it is based primarily on the New Mexico Constitution's double jeopardy clause, N.M. CONST. art. II, § 15, *see infra* notes 157–163 and accompanying text.

29. State *ex rel.* Serna v. Hodges, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

30. Brennan, *supra* note 29; JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-3(c) (2d ed. 1996).

31. *See generally* FRIESEN, *supra* note 30, § 1-6(b). The lockstep approach was formerly New Mexico's approach. State v. Gomez, 1997-NMSC-006, ¶ 16, 932 P.2d 1, 6.

32. FRIESEN, *supra* note 30, § 1-6(a).

33. This approach is also called the "supplemental" or "independent" method to constitutional analysis. *Id.* § 1-6(c) n.189.

34. *Id.* § 1-6(c).

35. *Gomez*, 1997-NMSC-006, ¶¶ 20–21, 932 P.2d at 7.

A. *The Fifth Amendment of the Federal Constitution*

Prohibition of double jeopardy existed in common law England[36] and continues today, albeit with many modern developments.[37] The Fifth Amendment of the U.S. Constitution[38] provides that no person "shall...be subject for the same offence to be twice put in jeopardy of life or limb."[39] The Fourteenth Amendment[40] incorporated the Fifth and made it applicable to the states.[41] The federal courts have interpreted the constitutional freedom from double jeopardy to include three basic types of protections: (1) "against a second prosecution for the same offense after acquittal";[42] (2) "against a second prosecution for the same offense after conviction";[43] and (3) "against multiple punishments for the same offense."[44] The policy underlying all areas of double jeopardy law is the same:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[45]

Federal precedent has become quite complex,[46] but three lines of cases provide some insight into the problem presented in *Lynch*. Those cases involve (1) retrial after conviction,[47] (2) retrial after mistrial,[48] and (3) retrial after appeal.[49]

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36. The roots of double jeopardy may be "traced to Greek and Roman times." Benton v. Maryland, 395 U.S. 784, 795 (1969); *see also* Whalen v. United States, 445 U.S. 684, 728–29 (1980) (Rehnquist, J., dissenting) (roots of double jeopardy may be traced "back to the days of Demosthenes").

37. *See generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 29:1 (3d ed. 1996).

38. U.S. CONST. amend. V.

39. *Id.*

40. *Id.* amend. XIV, § 1.

41. *Benton*, 395 U.S. at 794.

42. Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 306 (1984) (citing Illinois v. Vitale, 447 U.S. 410, 415 (1980)); *accord Pearce*, 395 U.S. at 717 (citing Green v. United States, 355 U.S. 184 (1957); United States v. Ball, 163 U.S. 662 (1896)).

43. *Lydon*, 466 U.S. at 306 (citing *Vitale*, 447 U.S. at 415); *accord Pearce*, 395 U.S. at 717 (citing *In re* Nielsen, 131 U.S. 176 (1889)).

44. *Lydon*, 466 U.S. at 307 (citing *Vitale*, 447 U.S. at 415); *accord Pearce*, 395 U.S. at 717 (citing United States v. Benz, 282 U.S. 304, 307 (1931); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); United States v. Adams, 362 F.2d 210 (6th Cir. 1966); Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964)).

45. *Green*, 355 U.S. at 187–88.

46. *Whalen*, 445 U.S. at 699 (Rehnquist, J., dissenting) ("[The double jeopardy clause] seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions...are replete with *mea culpa's* occasioned by shifts in assumptions and emphasis.").

47. *See infra* Part III.A.1. *Lynch* did not address this line of cases, but the cases concern analogous situations: in order to prevent a chilling effect on the right to appeal, *see infra* text accompanying note 135, double jeopardy protections after appeal should be essentially the same as those before appeal, to the extent that is consistent with public policy concerns. *See infra* notes 135–148 and accompanying text.

48. *See infra* Part III.A.2. This line of cases is also relevant, though in a more limited way. The differentiation between mistrial initiated by the defense and that initiated by the prosecution or the court is particularly enlightening with respect to two cases the *Lynch* court examines: *Montana v. Hall*, 481 U.S. 400 (1987), *see infra* notes 115–124 and accompanying text, and *State v. Martinez*, 120 N.M. 677, 905 P.2d 715 (1995), *see infra* notes 82–89, 164–173, and accompanying text.

49. *See infra* Part III.A.3. *Lynch* focused on this line of cases, *see infra* notes 106–108 and accompanying text, and they are perhaps the most directly on point.

1. Retrial after Conviction

It was established early in precedent that for the purposes of double jeopardy, the "same offense" does not mean merely violation of the same statute.[50] *Blockburger v. United States*[51] established the "same evidence" test: if proof of each statutory violation "requires proof of a fact which the other does not," the offenses are separate.[52] *Brown v. Ohio*,[53] applying the *Blockburger* "same evidence" test, held that, "if two offenses are the same,"[54] they must be charged in one proceeding as double jeopardy will preclude a second trial.[55] Conviction of a greater offense is barred after conviction of a lesser-included offense, just as conviction of a lesser-included offense is barred after conviction of a greater offense, because these different charges are considered one offense for double jeopardy purposes.[56]

2. Retrial after Mistrial

Retrial of the same offense, however, is not barred after a mistrial in many circumstances.[57] *United States v. Perez*[58] established the current rule: when a mistrial is declared as a matter of "manifest necessity," retrial does not violate double jeopardy under the federal Constitution.[59] Courts have looked at many factors to determine when a manifest necessity exists,[60] but the question of most importance for our current purposes is which party prompted the mistrial.[61] Generally, when the

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50. COOK, *supra* note 37, § 29:37.

51. 284 U.S. 299 (1932).

52. *Id.* at 304. This test was originally applied to cumulative sentencing considerations but was later adopted to determine when multiple proceedings are precluded. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b) (1999).

53. 432 U.S. 161 (1977).

54. *Id.* at 166. In *Brown*, the Court found that joyriding ("operating a vehicle without the owner's consent") was a lesser-included offense of auto theft, because "auto theft consists of joyriding with the [additional element of] intent permanently to deprive the owner of possession." *Id.* at 167. Since proof of auto theft necessitates proof of joyriding, they are the same offense for the purposes of double jeopardy. *Id.*

55. *Id.* at 166. There may be exceptions to this rule for special circumstances: when the greater offense could not be brought at the time of the first trial because an element had not yet occurred or when the defendant successfully opposed consolidation of the charges. *Id.* at 165–69 nn.5–7; Jeffers v. United States, 432 U.S. 137 (1977). *See generally* COOK, *supra* note 37, § 29:37. Another exception may be made for the discovery of new evidence after the first trial, despite the use of due diligence. *Brown*, 432 U.S. at 169 n.7. *See generally* COOK, *supra* note 37, § 29:37. These exceptions have been addressed only rarely; in New Mexico, they have been discussed but never applied. *See, e.g.*, State v. Manzanares, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983) (noting existence of "necessary facts" exception but focusing on another exception for the jurisdictional inability of magistrate courts to hear felony cases); *see also* Brief in Chief at 24–25, *Lynch* (No. 26,252) (listing New Mexico cases that recognize but do not apply the "necessary facts" exception).

56. *Brown*, 432 U.S. at 168–69, 166.

57. *See generally* COOK, *supra* note 37, §§ 29:15–:24.

58. 22 U.S. (9 Wheat.) 579 (1824).

59. *Id.* at 580.

60. Factors include, but are not limited to: (1) prejudice to the defendant, *see, e.g.*, Lovato v. New Mexico, 242 U.S. 199, 201 (1916); (2) court consideration of alternatives, *see, e.g.*, United States v. Jorn, 400 U.S. 470, 486–87 (1971); (3) the reason for granting the mistrial, *see, e.g.*, Arizona v. Washington, 434 U.S. 497, 507–13 (1978); and (4) whether the defendant has consented and, thus, waived double jeopardy protections, *see, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 672–79 (1982). *See generally* COOK, *supra* note 37, §§ 29:15–:24.

61. *See, e.g.*, United States v. Dinitz, 424 U.S. 600, 611–12 (1976). *See generally* COOK, *supra* note 37, §§ 29:18–:20.

defendant creates the need for mistrial, retrial does not constitute double jeopardy.[62] Similarly, when the defendant requests a mistrial or consents to such, retrial may proceed without double jeopardy implications, because consent is a waiver of double jeopardy protections.[63]

3. Retrial after Appeal

Generally, retrial after reversal of the same offense is permitted because an appeal is considered to be a waiver of double jeopardy protections with respect to the charge appealed.[64] Retrial is not permitted, however, when the reversal is on the ground of insufficiency of the evidence.[65] A finding that the evidence was insufficient for conviction is essentially a finding of acquittal.[66] While reversal on appeal for grounds other than insufficiency of the evidence permits retrial, that retrial is sometimes restricted to the charge appealed; when the jury in the first trial was silent on one of multiple charges, the silence is sometimes taken as an implied acquittal of that charge.[67]

B. The New Mexico Constitution and Double Jeopardy Statute

The first Bill of Rights promulgated in New Mexico, often called the Kearny Bill of Rights,[68] prohibited double jeopardy with language different from the United States Constitution but having the same import.[69] The New Mexico Constitution was drafted in 1910,[70] and, like most state constitutions,[71] it contains a double jeopardy provision.[72] Unlike most,[73] however, its language is significantly different from that of the federal Constitution.[74] The New Mexico Constitution provides:

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62. *Dinitz*, 424 U.S. at 611.

63. *Jorn*, 400 U.S. at 485.

64. *Ball*, 163 U.S. at 672; *see also* Price v. Georgia, 398 U.S. 323, 328 (1970); Green v. United States, 355 U.S. 184, 191–92 (1957). *See generally* COOK, *supra* note 37, § 29:27.

65. Burks v. United States, 437 U.S. 1, 16–18 (1978). *See generally* COOK, *supra* note 37, § 29:28.

66. *Burks*, 437 U.S. at 16.

67. *See, e.g.*, *Price*, 398 U.S. at 328–29; *Green*, 355 U.S. at 190–91; *see also infra* notes 129–136 and accompanying text.

68. Brigadier General Stephen Watts Kearny led the U.S. troops into Santa Fe in August of 1846 after he dissuaded Mexican forces from offering resistance and remained in New Mexico to establish the first territorial government. ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1–6 (1968). The Kearny Bill of Rights was part of the Kearny Code, a set of laws issued by General Kearny in September of 1846 that incorporated both Mexican and U.S. law. *Id.* at 4–5.

69. KEARNY BILL OF RIGHTS, cl. 8 (1846) ("[N]o person after having once been acquitted by a jury can be tried a second time for the same offense.").

70. CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION: A REFERENCE GUIDE 12–13 (1996). On January 6, 1912, President Taft signed a proclamation that made New Mexico a state. LARSON, *supra* note 68, at 304 (1968). Before the 1910 constitution, state constitutions were drafted in 1872 and 1889, and each contained language essentially the same as the federal Constitution's prohibition against double jeopardy. *Lynch*, 2003-NMSC-020, ¶ 33, 74 P.3d at 82 (Maes, C.J., dissenting). The timing of the 1910 draft, and its relation to *Green v. United States*, 355 U.S. 184 (1957), and *Trono v. United States*, 199 U.S. 521 (1905), is discussed *infra* notes 209–212, 222–223, and accompanying text.

71. N.M. CONST. art. II, § 15; RICHARD B. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 15:13 (1982).

72. N.M. CONST. art. II, § 15.

73. *Id.* art. II, § 15; FRIESEN, *supra* note 30, § 12-7 n.197 and accompanying text.

74. *Compare* N.M. CONST. art. II, § 15 *with* U.S. CONST. amend. V.

> No person shall...be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.[75]

Because the New Mexico Constitution contains language not present in the federal Constitution, it may be interpreted more broadly under New Mexico's interstitial approach.[76]

In addition to article II, section 15, New Mexico has long had a statutory protection from double jeopardy. In 1963, the New Mexico legislature enacted a major revision of the New Mexico Criminal Code.[77] Included was section 30-1-10,[78] a statute much like article II, section 15 of the New Mexico Constitution, but with minor differences:[79]

> No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.[80]

The differences between article II, section 15 and section 30-1-10, though minor, must be construed as providing more expansive protections than those afforded under article II, section 15.[81]

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75. N.M. CONST. art. II, § 15.

76. *Gomez*, 1997-NMSC-006, ¶¶ 20–21, 932 P.2d at 7. The *Gomez* court listed three grounds for deviation from the federal constitution, "a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics," *id.* ¶ 19, but expressly declined to hold that those are the only grounds for departure. *Id.* ¶ 23 n.3. Because the third reason for divergence is met, *i.e.*, the New Mexico Constitution's unique language, the *Lynch* court did not decide whether other grounds would suffice. *Lynch*, 2003-NMSC-020, ¶ 14, 74 P.3d at 77.

77. *See* Act of Mar. 25, 1963, ch. 303, § 1-10, NM Laws 1963, 832 (adopting a new criminal code, including NMSA 1978, § 30-1-10 (1963)).

78. NMSA 1978, § 30-1-10 (1963).

79. The first sentence of section 30-1-10 substitutes "crime" for "offense" but is otherwise the same as New Mexico's constitution. The second is new—there is no constitutional equivalent. This sentence seems at first like an appropriate procedural embellishment on article II, section 15, but given the prominence of the waiver theory in double jeopardy jurisprudence, it may convey more than procedure. *See infra* note 227 and accompanying text. The third sentence is largely the same, but the statute substitutes "complaint" for "affidavit" and "crime" for "offense" and, more notably, deletes the language "upon which any person is convicted," while adding the word "originally." For a discussion of some of these differences, see *infra* notes 184–194 and accompanying text.

80. NMSA 1978, § 30-1-10 (1963) (originally enacted as NMSA 1953, § 40A-1-10 (1963)). Prior to 1963, New Mexico had a former jeopardy statute (NMSA 1941, § 42-705 (repealed 1963)) that prohibited a second indictment for the same offense after acquittal, but that statute had no specific language relevant in Lynch's situation.

81. Omission of words presumably indicates a change in meaning. *See generally* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (6th ed. 2000). Because statutes cannot limit the constitution, section 30-1-10 must have expanded the double jeopardy protections provided by article II, section 15. *See also* N.M. Taxation & Revenue Dep't v. Whitener, 117 N.M. 130, 134, 569 P.2d 829 (N.M. Ct. App. 1993) ("The State cannot restrict an individual's constitutional rights by statute.") (citing State v. Barber, 108 N.M. 709, 710–11, 778 P.2d 456, 457–58 (N.M. Ct. App. 1989)); State v. Santillanes, 96 N.M. 482, 486, 632 P.2d 359, 363 (N.M. Ct.

State v. Martinez[82] is the only case to interpret the third sentence of section 30-1-10.[83] *Martinez* was a standard mistrial case,[84] but the court discussed double jeopardy in very expansive terms.[85] The court held that double jeopardy principles do not preclude retrial after mistrial when that mistrial was requested by the defendant.[86] The *Martinez* holding is wholly consistent with federal jurisprudence on retrial after mistrial.[87] However, the *Martinez* court also posited that state double jeopardy protections "preclude[] retrial of a greater offense only after an acquittal of that offense."[88] The New Mexico Court of Appeals certified *Lynch* to the New Mexico Supreme Court because this language seems contrary to the plain meaning of article II, section 15.[89]

IV. RATIONALE AND ANALYSIS

In an opinion written by Justice Minzner,[90] the New Mexico Supreme Court, in *State v. Lynch*, decided that retrial for first-degree murder would not violate the federal Double Jeopardy Clause because first-degree murder was not charged in the first trial.[91] It went on to find, however, that the unique language in New Mexico's double jeopardy statute[92] and constitutional provision[93] does preclude retrial for first-degree murder under these circumstances.[94] Chief Justice Maes,[95] writing for the dissent, agreed with the majority's federal analysis[96] but disagreed with the court's state analysis.[97]

A. The Majority's Federal Law Analysis

In keeping with New Mexico's interstitial approach to constitutional analysis,[98] the majority began with the federal Fifth Amendment Double Jeopardy Clause. Had the court applied a lock-step analysis, as it had in the past,[99] or had the court found

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App. 1980) ("The legislature, by statute, may not diminish a right expressly provided by the constitution.") (citing State v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), *overruled on other grounds by* Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986)).

82. 120 N.M. 677, 905 P.2d 715 (1995).

83. *Lynch*, 2003-NMSC-020, ¶ 41, 74 P.3d at 85 (Maes, C.J., dissenting).

84. *See Martinez*, 120 N.M. at 678, 905 P.2d at 717.

85. *See id.* at 678–79, 905 P.2d at 717–18.

86. *Id.* at 679, 905 P.2d at 717.

87. *See supra* notes 57–63 and accompanying text.

88. *Martinez*, 120 N.M. at 678, 905 P.2d at 716.

89. *Lynch*, 2003-NMSC-020, ¶¶ 1, 7, 74 P.3d at 74–75; *see supra* notes 24–25 and accompanying text.

90. Justice Bosson and Justice Chavez joined Justice Minzner's opinion. *Lynch*, 2003-NMSC-020, 74 P.3d 73.

91. *Lynch*, 2003-NMSC-020, ¶ 11, 74 P.3d at 77; *see also supra* note 17; *infra* notes 98–148 and accompanying text (majority's federal rationale and analysis).

92. NMSA 1978, § 30-1-10 (2003); *see supra* notes 77–81 and accompanying text.

93. N.M. CONST. art. II, § 15; *see supra* notes 71–75 and accompanying text.

94. *Lynch*, 2003-NMSC-020, ¶¶ 14, 26, 74 P.3d at 77, 81; *see also supra* notes 75 and 80 and accompanying text; *infra* Part IV.B (majority's state rationale and analysis).

95. Justice Serna joined in the dissent. *Lynch*, 2003-NMSC-020, 74 P.3d at 81.

96. *Lynch*, 2003-NMSC-020, ¶ 28, 74 P.3d at 81 (Maes, C.J., dissenting).

97. *Id.*; *see also infra* Part IV.C (dissent's rationale and analysis).

98. *See supra* notes 30–35 and accompanying text (discussing *Gomez* and New Mexico's interstitial approach to constitutional analysis).

99. *See State v. Gomez*, 1997-NMSC-006, ¶ 16, 932 P.2d 1, 6.

a federal protection,[100] the entire opinion would have been devoted to federal jurisprudence. Instead, the *Lynch* court devoted the vast majority of its opinion to New Mexico law but also provided a basic overview of federal double jeopardy and cited several federal cases.[101]

Despite the fact that Supreme Court cases have interpreted the three traditional double jeopardy protections to expand beyond areas clearly encompassed by the wording of the protections,[102] the *Lynch* court's federal analysis was strictly limited to the three protections and was discussed in very general terms.[103] Retrial for first-degree murder will not put Lynch at risk of multiple punishments because he will not be punished for both first-degree and second-degree murder; even if both charges are brought in his second trial, Lynch cannot be convicted of both and, thus, will not be punished for both.[104] Although Lynch was originally convicted of second-degree murder, his protection from retrial after conviction will not be violated by a charge of first-degree murder because his conviction was reversed.[105] Finally, the court found no violation of Lynch's protection from retrial after acquittal, focusing on the doctrine of implied acquittal.[106]

The court reasoned that there was no implied acquittal because first-degree murder was not charged in the first trial.[107] Absent multiple punishments, an unreversed conviction, or an acquittal, either express or implied, the court declined to find that retrial would constitute double jeopardy under the federal Constitution.[108] The court also reasoned that, since retrial in this instance will "not greatly increase the expense or ordeal associated with trial," there is no policy reason to prevent retrial.[109]

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100. While the *Lynch* court found no federal double jeopardy protection, a closer analysis shows it could have found otherwise. *See infra* notes 137–148 and accompanying text.

101. *See Lynch*, 2003-NMSC-020, 74 P.3d 73.

102. Double jeopardy law has become increasingly complex and detailed and analysis limited to the three main protections is not comprehensive. Crist v. Bretz, 437 U.S. 28, 32 (1978) (language in Fifth Amendment is "deceptively plain" and "has given rise to problems both subtle and complex"). Retrial may be prohibited in some instances despite the lack of either conviction or acquittal, as when the prosecutor voluntarily dismisses a charge after the jury is empanelled. *Id.* at 38 (citing Illinois v. Somerville, 410 U.S. 458, 467 (1973)). On the other hand, if each of dual sovereigns imposes a punishment on a defendant, double jeopardy is not implicated, although the defendant will suffer multiple punishments. *E.g.*, Abbate v. United States, 359 U.S. 187, 192 (1959) (citing Moore v. Illinois, 55 U.S. (14 How.) 13, 19 (1852) ("[Every citizen] may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either....[E]ither or both may (if they see fit) punish such an offender.")).

103. *Lynch*, 2003-NMSC-020, ¶ 10, 74 P.3d at 76. The three protections are against retrial after acquittal, against retrial after conviction, and against multiple punishments for one offense. *See supra* text accompanying notes 42–44.

104. *Lynch*, 2003-NMSC-020, ¶ 10, 74 P.3d at 76.

105. *Id.* (citing United States v. Ewell, 383 U.S. 116, 123 (1966) (no double jeopardy when "the new indictments occurred only after the vacation of the previous convictions")).

106. *Id.* (citing Montana v. Hall, 481 U.S. 400, 403–04 (1987); Serfass v. United States, 420 U.S. 377, 391 (1975) (quoting Kepner v. United States, 195 U.S. 100, 133 (1904)); Green v. United States, 355 U.S. 184, 191 (1957); Lowery v. Estelle, 696 F.2d 333, 340–42 (5th Cir. 1983)).

107. *Id.*

108. *Id.* ¶¶ 9, 11, 74 P.3d at 76.

109. *Id.* (citing, as an example, United States v. Scott, 437 U.S. 82, 90–91 (1978)).

The *Lynch* court cited *Lowery v. Estelle*[110] for the proposition that offenses are only impliedly acquitted when they are charged in the first trial.[111] *Lowery*, the first and only case to address the specific federal constitutional issue raised in *Lynch*, held that there was no federal double jeopardy violation when a greater offense was newly charged on retrial after Lowery's successful appeal of the lesser-included offense.[112] The jury in the first trial had not been instructed on the higher degree, so the court found no implied acquittal.[113] The *Lowery* court found that a "predicate to a finding of acquittal...is a determination that the fact-finder had a full opportunity to return a verdict" on that charge.[114]

Lynch also cited *Montana v. Hall*[115] as an analogy to show the lack of implied acquittal.[116] In *Hall*, the Supreme Court was confronted with somewhat similar circumstances to those in *Lynch*. *Hall* allowed retrial for the same offense[117] after reversal on appeal on the ground that the defendant was charged with violation of a statute not yet in effect at the time of the offense.[118] Hall was first charged with sexual assault, but he moved for dismissal, arguing that incest was a more appropriate charge.[119] When the trial court granted Hall's motion, the prosecution substituted an incest charge for the original sexual assault charge.[120] The incest statute Hall was charged under, however, was not in effect at the time of the crime, so his conviction was reversed on appeal, along with a Montana Supreme Court finding that retrial for sexual assault would constitute double jeopardy.[121] The *Hall* Court indicated in a footnote that there was no implied acquittal because the second charge was not brought in the first trial.[122] Instead, the Court held that retrial is

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110. 696 F.2d 333 (5th Cir. 1983).

111. *Lynch*, 2003-NMSC-020, ¶ 10, 74 P.3d at 76.

112. *Lowery*, 696 F.2d at 335.

113. *Id.* at 340–41 (citing *Green*, 335 U.S. 184).

114. *Id.* at 341. Interestingly, a finding that the jury did not have a full opportunity to return a verdict does not preclude a finding of double jeopardy absent appeal. *See supra* note 55. The *Lowery* court's proposition that on retrial after appeal any charge can be brought so long as it was not acquitted in the first trial is questionable. *Lowery* relied on *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977), and *Wilson v. Meyer*, 665 F.2d 118 (7th Cir. 1981), for its assertion that "[r]eprosecution can proceed on the same or a different statutory violation, regardless of whether that statutory violation is considered to be the same or a separate offense." *See Lowery*, 696 F.2d at 340. *Hardwick* involved the addition of charges that did not constitute the same offense under the "same evidence" test. 558 F.2d at 297–98. It found no double jeopardy violation because "[t]rial on the *added* counts could not amount to double jeopardy unless those *added* counts were the 'same offense' as the *original* counts." *Id.* at 297. Notably, in both *Lowery*, 696 F.2d 333, and *Lynch*, 2003-NMSC-020, 74 P.3d 73, the charges added are the same offense as the original counts. In *Wilson*, the court held that the defendant "should not be required to waive his valid claim of former jeopardy as to the nolle prossed felony murder count in order to secure reversal of his conviction under a separate intent murder count" and did not allow the additional charge to be added on retrial. 665 F.2d at 124–25.

115. 481 U.S. 400 (1987) (per curiam).

116. *Lynch*, 2003-NMSC-020, ¶ 10, 74 P.3d at 76.

117. The Court assumed without deciding that the two statutes charged constituted the same offense, rather than greater and lesser-included offenses. *Hall*, 481 U.S. at 405 n.4.

118. *Id.* at 404.

119. *Id.* at 401.

120. *Id.*

121. *Id.* at 401–02.

122. *Id.* at 403 n.1. The implied acquittal doctrine was created by *Green*, 355 U.S. 184. While *Hall* chose to distinguish *Green* because both charges were not brought in the initial trial, there are several other ways the facts in *Hall* are different. The *Hall* court could have distinguished *Green* on the ground that the offenses were the same, not "distinct and different" as required by the *Green* court. *See infra* note 131. The *Hall* court could have distinguished *Green* on the grounds that the defendant was at fault in necessitating the retrial. *United States v. Scott*

permitted after reversal because of a defect in the charging instrument.[123] The Court found the defendant's initiation of the error to be of the utmost importance to its analysis.[124]

The *Hall* Court reasoned that a contrary holding would result in an absolute bar on prosecution of this defendant for any offense, despite the clear criminality of his conduct.[125] The Court declined to find such expansive double jeopardy protections.[126] The main impetus for the decision in *Hall* is entirely absent in *Lynch*. In *Lynch*, the Defendant did not cause the error, and a finding that double jeopardy principles preclude retrial for first-degree murder would not prevent retrial and conviction for second-degree murder.[127] Additionally, in *Lynch* the prosecution is not seeking to remedy a defect in the charging instrument by charging the Defendant under an equivalent statute but rather is attempting to add an entirely new and greater charge on remand, despite the availability of an adequate charge that does not implicate double jeopardy.[128]

Green v. United States[129] was also cited by the *Lynch* court and is of primary importance in this Note's analysis of federal double jeopardy protections against retrial after reversal of another offense. The *Green* Court's creation of the implied acquittal doctrine constituted a great change in double jeopardy law.[130] *Green* held that conviction of one offense when multiple offenses are charged is an implied acquittal of the charged offenses on which the jury was silent but no mistrial was granted.[131] Double jeopardy precludes retrial after appeal on all acquitted offenses,

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reasoned that *Green* could not apply when the retrial was necessitated because "of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Scott*, 437 U.S. 82, 96 (1978). In *Scott*, the defendant had successfully sought to keep two charges from going to the jury on the ground of preindictment delay, and the prosecution appealed to have those charges reinstated. *Id.* at 84. Notably, this situation is parallel to one of the *Brown v. Ohio*, 432 U.S. 161 (1977), exceptions discussed *supra* note 55, when the defendant successfully avoids consolidation of the charges.

123. *Hall*, 481 U.S. at 404 (citing, as an example, United States v. Ball, 163 U.S. 662, 672 (1896)). *See supra* Part III.A.3. An indictment, information, affidavit, or criminal complaint may function as a charging instrument, as evidenced by the language in both article II, section 15, *see supra* note 75 and accompanying text, and section 30-1-10, *see supra* note 80 and accompanying text. In this Note, the term "indictment" is used generally to encompass any charging instrument.

124. *Hall*, 163 U.S. at 403. While this is not a mistrial case, it is nonetheless consistent with the policy underlying retrial after mistrial when caused by the defense. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 513 (1978) (retrial must be permitted "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage"); COOK, *supra* note 37, § 29:18 ("When a mistrial is necessitated by the behavior of the accused, retrial will not be barred by the protection against double jeopardy. The same is true when the mistrial is occasioned by the actions of defense counsel.").

125. *Hall*, 481 U.S. at 403–04.

126. *Id.* at 404.

127. *See Lynch*, 2003-NMSC-020, ¶¶ 4, 26, 74 P.3d at 75, 81.

128. *Id.* ¶ 5, 74 P.3d at 75.

129. 355 U.S. 184 (1957).

130. *Id.* at 197. Prior to *Green*, *Trono v. United States*, 199 U.S. 521, 533 (1905), held that appeal of any conviction waives all double jeopardy protections the defendant had with respect to the entire judgment. Without expressly overruling *Trono*, the *Green* Court limited *Trono*'s holding to cases arising within the Philippine Islands, making *Trono* effectively useless as precedent. *Green*, 355 U.S. at 197.

131. *Green*, 355 U.S. at 190–91. This is true regardless of whether the charges are the same offense under the "same evidence" test. The Court found that it did not matter whether the offense impliedly acquitted is included in the appealed offense so long as the offenses are "distinct and different." *Green*, 355 U.S. at 194 n.14 (stating

whether that acquittal is express or implied.[132] *Green* justified its conclusion with two independent rationales.[133] First, the Court reasoned that when the jury has a full opportunity to consider both offenses and convicts on only one, the intent of the jury is clearly acquittal of the other offense.[134] Second, the Court concluded that under such circumstances the defendant should not be punished for appealing because permitting retrial of an acquitted offense would have a significant chilling effect on the defendant's right to appeal.[135] *Green* reasoned that courts should not force a defendant to "barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment."[136]

Application of the two *Green* rationales to the facts in *Lynch* produces two contrary results. If the holding in *Green* is that the intent of the jury governs,[137] retrial for first-degree murder will not violate Lynch's double jeopardy protections.[138] While the *Lynch* court did not expressly adopt this reading, its opinion makes clear that it considered the intent of the jury to be the most important aspect of *Green*. If, on the other hand, the holding in *Green* is that a defendant does not waive double jeopardy protections for charges not appealed,[139] the result may be entirely different. If Lynch waived his double jeopardy protection for only the charge he appealed,[140] his double jeopardy protection for first-degree murder ought to remain unchanged by his appeal.

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that second-degree murder may not be a lesser offense included in felony first-degree murder but that "[i]t is immaterial"). *Contra* CHARLES H. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE § 23.6 (1978).

132. *Green*, 355 U.S. at 188, 190–91.

133. Most cases relying on *Green* have utilized both grounds. *See, e.g.*, Price v. Georgia, 398 U.S. 323, 328 (1970) ("A majority of the [Green] Court rejected the argument that by appealing...[one] conviction...the petitioner had 'waived' his plea of former jeopardy with regard to [another]...charge....[T]he Court considered the first jury's verdict of guilty on [one]...charge to be an 'implicit acquittal' on [another]...charge...."). When both offenses are charged in the first trial, as is usually the case, either ground is sufficient to preclude retrial on the charge about which the jury was silent. It is only rarely that the prosecution seeks to add a charge on remand, as it did in *Lynch*. In such cases, only the second rationale is sufficient for a finding of double jeopardy. Some analyses have focused on one or the other of these rationales. *Compare* WHITEBREAD, *supra* note 131, § 23.6 ("The state should be required to prosecute a greater offense and all of its lesser included offenses in one proceeding.") *and* COOK, *supra* note 37, § 29:32 ("If the conviction is overturned, any reprosecution usually will be limited to charges not greater than those on which the conviction was obtained."), *with* LAFAVE ET AL., *supra* note 52, § 25.4(d), at 686 (stating that *Green* may depend on full jury consideration of the greater offense).

134. *Green*, 355 U.S. at 190–91.

135. *Id.* at 193–94. Absent appeal, retrial on these charges would be governed by *Brown*, 432 U.S. 161. *See supra* notes 53–56 and accompanying text. Retrial would be unlikely given the facts of *Green*; there is no new evidence and the defendant could have been convicted in the first trial. The defendant also did not prevent both charges being brought in the first trial. *See supra* note 55 (exceptions to the double jeopardy principle that charges constituting one offense must be brought in one trial).

136. *Green*, 355 U.S. at 193. Although this reasoning seems to hinge on the increased level of punishment, the Supreme Court of the United States has held that the degree of penalty is not generally a double jeopardy issue. North Carolina v. Pearce, 395 U.S. 711, 721 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794, 803 (1989). There is an exception made for the death penalty when initially rejected in a separate hearing during which the prosecution must prove an additional fact or facts. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

137. *See supra* text accompanying note 134.

138. No jury has had an opportunity to consider the first-degree murder charge, because it was not brought in the first trial. *Lynch*, 2003-NMSC-020, ¶ 4, 74 P.3d at 75.

139. *See supra* note 135 and accompanying text.

140. Second-degree murder. *See supra* note 17.

The *Lynch* analysis does not do justice to the complexity of the problem and the applicable federal law. The court did not note the alternate rationale in *Green*. A close analysis of *Green* might have led the *Lynch* court in an entirely different direction. Had the *Lynch* court been convinced that the doctrine of implied acquittal is dependant not on jury intent but rather on the expectation of the defendant in making the choice to appeal, Lynch's appeal would not have changed his protection from double jeopardy. Thus, the court would have had to examine federal precedent governing retrial on a greater offense after a first trial on a lesser-included offense.

Absent his appeal, Lynch's double jeopardy protection would have been analyzed under the *Brown v. Ohio*[141] Court's holding that defendants cannot be charged under a second statute for the same offense[142] after an initial trial, but the *Lynch* court did not address *Brown*.[143] Lynch likely could not have been tried for first-degree murder under *Brown* had he not appealed.[144] *Brown* did note several possible exceptions,[145] including one for discovery of new evidence not found prior to the first trial despite the use of due diligence, which might have pertained, had the *Lynch* court applied *Brown*.[146]

A more thorough analysis of federal law might have produced a different result. Policy considerations, such as preservation of the defendant's right to appeal, generally support a finding that retrial for first-degree murder in *Lynch* would constitute double jeopardy.[147] The main thrust of *Green* supports this conclusion: "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense [is]...in plain conflict with...double jeopardy."[148]

The *Lynch* court's analysis was not necessarily incorrect. The only directly on-point federal precedent, *Lowery*, supports the *Lynch* court's conclusion. However, Supreme Court precedent allows an alternate holding when carefully examined. The *Lynch* court did not closely examine federal law, but its meticulous analysis of New Mexico law may present a reason. Had the *Lynch* court been convinced that a federal protection existed, New Mexico's interstitial approach would have prevented any examination of state law at all.

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141. 432 U.S. 161 (1977).

142. *See supra* notes 52–56 and accompanying text (explaining greater and lesser-included offenses).

143. *See supra* notes 53–56 and accompanying text.

144. *See supra* notes 51–56 and accompanying text. Under the "same evidence" test adopted by *Brown*, 432 U.S. at 166, the first-degree and second-degree murder charges against Lynch are the same offense and must be brought together in one trial, as a trial on one will preclude later trial on the other.

145. *See supra* note 55.

146. *See supra* note 55. There is some doubt as to whether the *Brown* exception would have applied absent appeal. The court in *Lynch* did not discuss due diligence. *Lynch*, 2003-NMSC-020, 74 P.3d 73. There is very little case law applying this exception, and it was not fully argued in *Lynch*. *Cf.* State v. Volpato, 102 N.M. 383, 696 P.2d 471 (1985) (motion for new trial based on new evidence discovered after the first trial despite the use of due diligence may be granted when a number of conditions are met, including that the evidence must be material, not cumulative, and not discoverable by due diligence prior to the trial).

147. *See supra* text accompanying note 135.

148. *Green*, 355 U.S. at 193–94.

B. The Majority's State Law Rationale

Under New Mexico's interstitial approach,[149] the *Lynch* court's finding that the Fifth Amendment does not prevent the state from retrying Lynch for first-degree murder requires the court to then consider the state law double jeopardy claim.[150] In adopting the interstitial approach, *State v. Gomez*[151] required a party seeking state constitutional analysis in a case of first impression to preserve its claim by noting grounds for an independent state claim in trial court.[152] *Gomez* listed three grounds for departure[153] but expressly declined to hold that other grounds would not be sufficient.[154] The *Lynch* court justified its state analysis on the unique language in the New Mexico Constitution[155] and found the state claim had been preserved because this unique language was discussed in the Defendant's motion for reconsideration of his double jeopardy claim.[156]

1. No Conflict Between Article II, Section 15 and *State v. Martinez*

Noting first that the state constitution does provide Lynch protection against prosecution for first-degree murder in this case, the court found that the applicable constitutional provision is not "clear and unambiguous."[157] The court found the phrase "again be tried" to be ambiguous.[158] In both the New Mexico Constitution, article II, section 15[159] and section 30-1-10,[160] this phrase refers to retrial, prohibited in specific instances. The *Lynch* court found that there are two possible interpretations: (1) the same charge must be tried again in a subsequent trial to implicate double jeopardy[161] or (2) a second trial must occur to implicate double jeopardy, regardless of whether identical charges are brought in the second trial.[162] The court agreed with the latter interpretation.[163]

The *Lynch* court reasoned that this reading of article II, section 15[164] is in harmony with the holding in *Martinez*,[165] despite the confusion caused by *Martinez* dictum.[166] The court reasoned that while in *Martinez* there was a "manifest

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149. *See supra* notes 31–35 and accompanying text.

150. *Lynch*, 2003-NMSC-020, ¶¶ 8, 11, 74 P.2d at 75–77.

151. 1997-NMSC-006, 932 P.2d 1.

152. *Id.* ¶ 23, 932 P.2d at 8.

153. "A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* ¶ 19, 932 P.2d at 7; *see supra* note 76.

154. *Gomez*, 1997-NMSC-006, ¶ 23 n.3, 932 P.2d at 8.

155. The New Mexico Constitution has broader language prohibiting double jeopardy than does the United States Constitution. *See supra* note 74 and accompanying text. Unique language in the state constitution is one of the approved grounds for deviation from federal constitutional law. *See supra* note 153.

156. *Lynch*, 2003-NMSC-020, ¶¶ 13–15, 74 P.2d at 77–78.

157. *Id.* ¶ 15, 74 P.3d at 78.

158. *Id.* ¶¶ 15–16, 74 P.3d at 78.

159. N.M. CONST. art. II, § 15; *see also supra* note 75 and accompanying text.

160. NMSA 1978, § 30-1-10 (1994); *see also supra* note 80 and accompanying text.

161. *Lynch*, 2003-NMSC-020, ¶ 16, 74 P.3d at 78. Argued by the prosecution, this construction was rejected by the *Lynch* court. *Id.*

162. *Id.*

163. *Id.*

164. N.M. CONST. art. II, § 15; *see* discussion *supra* note 75 and accompanying text.

165. *Lynch*, 2003-NMSC-020, ¶ 17, 74 P.3d at 78; *see* discussion *supra* notes 82–89 and accompanying text.

166. *State v. Martinez*, 120 N.M. 677, 678, 905 P.2d 715, 716 (1995). The court of appeals certified *Lynch*

necessity"[167] for mistrial that created a strong public interest in retrial,[168] there is no such policy requiring a first-degree murder charge in the present case.[169] The *Lynch* court further considered the *Martinez* defendant's suggestion of mistrial to constitute a waiver of double jeopardy claims, but Lynch's appeal of second-degree murder was not a waiver of double jeopardy protections against retrial for first-degree murder.[170] Retrial after mistrial has long been allowed under both the United States Constitution and the New Mexico Constitution, especially when the mistrial is suggested by the defendant.[171] Furthermore, the court reasoned that while the state is entitled to a verdict on all charges presented in one prosecution, as it was in *Martinez*, here the prosecution is not entitled to fail to bring all applicable charges and then add an additional charge after losing on appeal.[172] In distinguishing *Lynch* from *Martinez*, the court focused on the difference between mistrial and appeal in terms of public policy.[173]

While courts have found a strong public interest in punishing crime,[174] the interest in ensuring conviction of the greatest possible charge is significantly less. There is also a strong public interest in protecting defendants from double jeopardy.[175] This constraint on the prosecution is not too severe; the State must simply bring all charges in one trial.[176] The prosecution should not benefit from its own error—either in failing to bring all charges in one trial or in the trial error that necessitated reversal on appeal.[177]

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based on an apparent contradiction between article II, section 15 and the *Martinez* dictum that double jeopardy is precluded "only after an acquittal of that offense." *Id.* The *Martinez* court cited *State v. Sneed*, 78 N.M. 615, 617, 435 P.2d 768, 770 (1976), to support this proposition. *Sneed* was an early New Mexico double jeopardy case that stands for the simple proposition that retrial after reversal on appeal generally does not violate double jeopardy. *Id.* at 616–17, 435 P.2d at 769–70. In *Sneed*, the defendant argued that he could not be retried for first-degree murder after a reversal of his prior conviction for first-degree murder on the grounds that some admitted evidence was improper. *Id.* The court in *Sneed* relied on *State v. Nance*, 77 N.M. 39, 44, 419 P.2d 242, 244 (1966) (retrial after reversal on appeal on grounds of procedural error is not double jeopardy), and held that double jeopardy was not implicated. *Id.* The *Sneed* court also stated that the defendant was not "acquitted of a crime or a greater degree of the crime at a prior trial," indicating that, if such had been the case, the result would have been different. *Id.* *Sneed* does not state, however, that double jeopardy is only implicated by acquittal. *Id.* *Martinez* improperly overstated the holding in *Sneed*, as the court in *Lynch* asserted. *Lynch*, 2003-NMSC-020, ¶ 17, 74 P.3d at 78.

167. *See supra* Part III.A.2.

168. *See, e.g.*, United States v. Jorn, 400 U.S. 470, 480–81 (1971); Wade v. Hunter, 336 U.S. 684, 689 (1949); United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

169. *Lynch*, 2003-NMSC-020, ¶ 18, 74 P.3d at 78.

170. *See id.* ¶ 18, 74 P.3d at 78–79.

171. *See supra* note 63 and accompanying text.

172. *Lynch*, 2003-NMSC-020, ¶ 19, 74 P.3d at 79.

173. *Id.* ¶ 18, 74 P.3d at 78-79.

174. *See, e.g.*, United States v. Tateo, 377 U.S. 463, 466 (1964) ("It would be a high price indeed for society to pay were every accused granted immunity from punishment [following a reversible procedural error]."); *Wade*, 336 U.S. at 689 (policy underlying double jeopardy must sometimes be "subordinated to the public's interest in fair trials designed to end in just judgments").

175. *See, e.g.*, Price v. Georgia, 398 U.S. 323, 331 (1970) ("To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.").

176. *See infra* Part V.A.

177. In Lynch's case, the reversible error was in the refusal of the court to give a self-defense instruction. *Lynch*, 2003-NMSC-020, ¶ 4, 74 P.3d at 75. Failing to bring all charges in the first trial was a prosecution error. While the state argued it could not have convicted Lynch for first-degree murder without Ginger Dickinson's testimony, the responsibility for finding her testimony prior to the first trial lies with the prosecution. Furthermore, the state in *Lynch* admitted that it had evidence enough to bring a first-degree murder charge in the first trial but chose not to go to a grand jury for strategic reasons. Brief in Chief at 7, *Lynch* (No. 26,252).

Instead of relying on *Martinez*, the *Lynch* court cited a New Mexico case establishing principles governing retrial after conviction absent appeal.[178] *State v. Manzanares*[179] noted that New Mexico courts most often use the "same evidence" test[180] to determine when a second trial for another charge will constitute double jeopardy.[181] *Manzanares* also posited that there may be instances when retrial on a greater charge after a first trial on a lesser-included offense is not prohibited, such as when the first trial occurs before "all of the facts necessary to prove the offense exist."[182] The *Lynch* court found that *Manzanares* may apply to cases involving appeals, despite the fact that the parallel federal precedent, *i.e. Brown v. Ohio*,[183] was not a part of *Lynch*'s federal analysis.

2. Support Found in Section 30-1-10

The *Lynch* court supported its conclusion with an examination of New Mexico's double jeopardy statute.[184] The court began by pointing out the differences between the New Mexico Constitution and the statute: the omission of "upon which any person has been convicted" and the addition of the word "originally" in the statute.[185] In Lynch's situation, there were two criminal informations, one in the first trial and an amended information filed on remand.[186] The *Lynch* court reasoned that the phrase "indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense,"[187] seems to require that the first indictment have multiple charges.[188] The language in section 30-1-10, on the contrary, "indictment, information or complaint charges different crimes or different degrees of the same crime"[189] can apply to the indictment on remand, and, thus, there is no requirement that multiple charges be brought in the first trial.[190] The *Lynch* court reasoned that the addition of the word "originally" in section 30-1-10 also supports that conclusion because it emphasizes that the conviction took place in the first trial, without adding parallel emphasis to the indictment.[191] If the legislature had wanted to limit the court's consideration to the first indictment, it could have done so by adding the word "originally" in the first clause.

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178. *Lynch*, 2003-NMSC-020, ¶ 19, 74 P.3d at 79 (citing State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983) (allowing a felony trial in district court after a misdemeanor trial in magistrate court because the latter court did not have jurisdiction over the felony)).

179. 100 N.M. 621, 674 P.2d 511 (1983).

180. *See supra* Part III.A.1.

181. 100 N.M. at 622, 674 P.2d at 512 (citing Owens v. Abram, 58 N.M. 682, 684, 274 P.2d 630, 631 (1954)).

182. *Id.* at 622, 674 P.2d 511, 512 (citing Diaz v. United States, 223 U.S. 442 (1912)).

183. 432 U.S. 161 (1977); *see supra* notes 141–146 and accompanying text.

184. *Lynch*, 2003-NMSC-020, ¶ 21, 74 P.3d at 79.

185. *Id.* ¶ 22, 74 P.3d at 79–80; *see supra* note 79.

186. *Lynch*, 2003-NMSC-020, ¶¶ 3, 5, 74 P.3d at 75.

187. N.M. CONST. art. II, § 15.

188. *Lynch*, 2003-NMSC-020, ¶ 22, 74 P.3d at 80.

189. NMSA 1978, § 30-1-10 (1994).

190. *Lynch*, 2003-NMSC-020, ¶ 22, 74 P.3d at 80.

191. *Id.*

The *Lynch* court also noted that section 30-1-10 was enacted in place of a previous double jeopardy statute[192] that "emphasized a prior acquittal, unlike the current statute or constitutional provision."[193] The current statute was enacted to expand the rights provided under the prior statute and under the New Mexico Constitution.[194]

3. The Holding in *Lynch* and a Broader View

State v. Lynch held that both article II, section 15 and section 30-1-10 protect a defendant from retrial on a greater charge not brought in the first trial *when multiple charges were included in the first indictment* and conviction of a lesser-included offense was reversed on appeal.[195] In dicta,[196] the *Lynch* court expanded its interpretation to include defendants charged with only one offense in the first indictment.[197] The court reasoned that article II, section 15, not just section 30-1-10, protects a defendant from double jeopardy when the first indictment has only one charge,[198] despite the fact that article II, section 15 refers to a situation wherein "the indictment...upon which any person is convicted charges different offenses or different degrees of the same offense."[199] The court in *Lynch* stated that an initial indictment with only one charge would be just as much a bar to future prosecution of a higher count as an initial indictment charging multiple offenses,[200] noting that if a "[d]efendant were only charged with second-degree murder, and no lesser-included offenses such as manslaughter, this would not operate to remove him from the protections of the constitution because Article II, Section 15 refers to plural charges."[201] Without this interpretation, Article II, Section 15 would apply rather arbitrarily only to defendants initially charged with multiple offenses, regardless of whether the greater charge was brought in the first trial.[202] The court chose to apply both section 30-1-10 and Article II, Section 15 to defendants charged with one offense in their first trial despite the seemingly contrary constitutional language and the seemingly adequate statutory protection.[203]

From a policy standpoint, it is reasonable to grant defendants protection regardless of the number of initial charges. Since section 30-1-10 seems designed for that very purpose, it may have been enacted to clarify or expand the protections in article II, section 15. The *Lynch* court's holding is justified by the language of

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192. NMSA 1941, § 42-705 (1854, repealed 1963).
193. *Lynch*, 2003-NMSC-020, ¶ 23, 74 P.3d at 80.
194. *See supra* note 81 and accompanying text.
195. *Lynch*, 2003-NMSC-020, ¶¶ 15, 21, 74 P.3d at 78–79.
196. Because Lynch was initially charged with an open count of second-degree murder, a charge that includes manslaughter, *see supra* note 17, this statement cannot be other than dicta.
197. *Lynch*, 2003-NMSC-020, ¶ 24, 74 P.3d at 80.
198. *Id.*
199. N.M. CONST. art. II, § 15.
200. *Lynch*, 2003-NMSC-020, ¶ 24, 74 P.3d at 80.
201. *Id.*
202. For example, a defendant first charged with only reckless driving would not be protected on remand after appeal from a charge of reckless homicide. However, if the same defendant were initially charged with both reckless driving and resisting arrest in the first trial, article II, section 15 would apply and prevent retrial for reckless homicide after appeal. *See id.*
203. *Lynch*, 2003-NMSC-020, ¶ 24, 74 P.3d at 80–81.

section 30-1-10 as well as common sense and public policy, although it seems unnecessary to rely on article II, section 15 when section 30-1-10 provides adequate protection from double jeopardy.

C. Rationale of the Dissent

The dissent focused its analysis on the intent of the framers of the New Mexico Constitution, looking primarily at historical facts including New Mexico's movement toward statehood and the drafting of its constitution.[204] Although Chief Justice Maes concurred with the majority's federal constitutional analysis, her dissent reasoned that the prosecution was not barred from charging Lynch with first-degree murder on remand in this case by either the New Mexico Constitution, article II, section 15 or section 30-1-10.[205]

The *Lynch* dissent began with the history of New Mexico from 1846, when the Kearny Bill of Rights was promulgated,[206] until 1910, when the Constitution was drafted.[207] The dissent pointed out the similarity between the language of the federal double jeopardy provision and that in the first two drafts of the state constitution.[208] Chief Justice Maes then reasoned that the new language in the 1910 Constitution was meant to reject the United States Supreme Court's then recent decision in *Trono v. United States*,[209] which held that a defendant's appeal of any one conviction constitutes a waiver of double jeopardy protections against retrial for offenses acquitted in the first trial.[210] Because *Green* effectively overruled *Trono*[211] when it created the implied acquittal doctrine, the dissent reasoned that there is no longer a need to interpret the New Mexico Constitution more broadly than the federal Constitution on the question of double jeopardy.[212]

The dissent did not note that section 30-1-10 was adopted six years after *Green* was decided.[213] It is possible that in adopting section 30-1-10 in 1963 the legislature intended to espouse the holding in *Green*, especially given that the Fifth Amendment was not applicable to the states at that time.[214] Another interpretation, however, is that section 30-1-10 was adopted to express dissatisfaction at the limitations in *Green*.[215] The fact that section 30-1-10 also contains language that is entirely new[216] indicates that the New Mexico legislature, in adopting section 30-1-10, intended to provide more expansive state double jeopardy protections.[217]

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204. *Id.* ¶¶ 28–47, 74 P.3d at 81–86 (Maes, C.J., dissenting).
205. *Id.* ¶¶ 28, 45, 74 P.3d at 81, 86 (Maes, C.J., dissenting).
206. *See supra* note 68.
207. *Lynch*, 2003-NMSC-020, ¶¶ 31–33, 74 P.3d at 81–83 (Maes, C.J., dissenting).
208. *Id.* ¶ 32, 74 P.3d at 82 (Maes, C.J., dissenting); *see supra* note 70.
209. 199 U.S. 521 (1905).
210. *Lynch*, 2003-NMSC-020, ¶¶ 34–36, 74 P.3d at 83–84 (Maes, C.J., dissenting).
211. *See supra* note 130.
212. *Lynch*, 2003-NMSC-020, ¶ 37, 74 P.3d at 84 (Maes, C.J., dissenting).
213. *Compare* Green v. United States, 355 U.S. 184 (1957), *with* NMSA 1978, § 30-1-10 (1994).
214. Benton v. Maryland, 395 U.S. 784, 794 (1969) (finding the double jeopardy clause of the Fifth Amendment is applicable to the states).
215. *Green* may be interpreted as applying only when the jury has a full opportunity to consider the impliedly acquitted charge. *See supra* note 134 and accompanying text.
216. *See supra* note 79.
217. *See supra* note 81.

The dissent went on to reason that the judiciary cannot expand constitutional rights beyond the intent of the framers,[218] but that rubric has little force in instances such as this, where the intent of the framers is so unclear.[219] The dissent considered there to be no meaningful difference between retrial after reversal on grounds other than insufficiency of the evidence and retrial after mistrial for purposes of double jeopardy.[220] It would adopt *Martinez* as controlling precedent and find no greater protections based on New Mexico's unique language than those provided under the Fifth Amendment as interpreted by *Green*.[221]

Rather than addressing the New Mexico Constitution as written, the dissent speculated as to the intent of the framers almost a hundred years ago and their possible reaction to a case decided by the Supreme Court of the United States, without any substantiation in the historical record.[222] The dissent's finding that the framers of the New Mexico Constitution intended to adopt the holding in *Green* is incongruous given the fact that *Green* was decided several decades later.[223] There is no reason to assume that the framers would have chosen to remedy the problems they saw with federal double jeopardy jurisprudence using the method later developed in *Green*. Unlike the drafters of the 1910 New Mexico Constitution, the New Mexico legislature of 1963 may have seen the holding in *Green*, however; if intent is the guidepost it should have been the history behind section 30-1-10 that was discussed.

V. IMPLICATIONS

A. Double Jeopardy in New Mexico

From the time of its initial ratification, the New Mexico Constitution's double jeopardy clause has contained unique language not found in the Fifth Amendment.[224] Until now, the second clause of article II, section 15 and the corresponding third sentence of section 30-1-10 have not been held to provide greater protections

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218. *Lynch*, 2003-NMSC-020, ¶ 39, 74 P.3d at 84 (Maes, C.J., dissenting) (quoting Bd. of Educ. v. Robinson, 57 N.M. 445, 450, 259 P.2d 1028, 1031–32 (1953) (quoting Bd. of Comm'rs v. State, 43 N.M. 409, 417, 94 P.2d 515, 520 (1939) ("The court has no power by construction to enlarge the scope of constitutional provisions beyond their intent....") (citing La Follette v. Albuquerque Gas & Electric Co.'s Rates, 37 N.M. 57, 60, 17 P.2d 944, 946 (1932) ("Courts will not enlarge the scope of...constitutional provisions beyond their intent."))))). These cases, however, address not a theoretical intent of the framers of the constitution, but an understanding that the framers must have intended what the plain language of the constitution meant in common parlance; the court may not interpret constitutional provisions in a way at odds by the clear intent of the framers as expressed by the constitution's plain language. Both *Robinson*, 57 N.M. 445, 259 P.2d 1028, and *Bd. of Comm'rs*, 43 N.M. 409, 94 P.2d 515, found unconstitutional the use of borrowed money for building *improvements* given the N.M. CONST. art. IX, §§ 10–11, prohibition on borrowing money for any purpose but building *construction*.

219. Furthermore, New Mexico legislators may create statutory rights beyond those provided by the constitution, as discussed *supra* notes 213–217 and accompanying text.

220. *Lynch*, 2003-NMSC-020, ¶ 44, 74 P.3d at 85 (Maes, C.J., dissenting). *But see supra* notes 171–177 and accompanying text.

221. *Lynch*, 2003-NMSC-020, ¶¶ 37, 43, 74 P.3d at 84-85 (Maes, C.J., dissenting).

222. *Id.* ¶ 36–37, 74 P.3d at 84–85 (Maes, C.J., dissenting). The dissent reasoned that the recent Supreme Court of the United States decision in *Trono* was the driving force behind New Mexico's unique constitutional language, but no direct evidence was cited. *See supra* notes130, 209–212, and accompanying text.

223. Green v. United States, 355 U.S. 184 (1957).

224. *See supra* notes 73–75 and accompanying text.

than those granted by the United States Constitution.[225] *State v. Lynch*, however, may open the door to more expansive interpretations of New Mexico's double jeopardy jurisprudence.[226] The second sentence of section 30-1-10,[227] for instance, has not yet been interpreted by any New Mexico court. When it is construed, it may provide greater protections than those already in place.[228]

Prosecutors rarely seek to add additional charges on remand; generally, the State will charge all applicable offenses at once.[229] While *Lynch* seems to foreclose the possibility that New Mexico prosecutors will ever be able to bring greater charges on remand, the court may choose to develop exceptions in the future. Indeed, the *Lynch* court's citation to *State v. Manzanares*[230] may indicate a willingness to make exceptions, since *Manzanares* discusses limitations to a parallel rule. If the New Mexico Supreme Court later chooses to make exceptions, it may look to *Manzanares* and *Brown v. Ohio*[231] for guidance.

Even if no exceptions are fashioned, the holding in *Lynch* is not too harsh on prosecutors. If the State cannot, or does not, charge all offenses in the first trial, it can, on remand, prosecute the charges of which the defendant was originally convicted, unless the reversal was based on insufficiency of the evidence and thus constitutes an acquittal.[232] The holding in *Lynch* protects the right of defendants to appeal and simplifies double jeopardy law in New Mexico by allowing the same rule to govern retrial regardless of whether the defendant has appealed.

B. Interstitialism and State Sovereignty

The court in *Lynch* did not depart from New Mexico's interstitial approach to constitutional analysis as first set out in *Gomez*.[233] Nonetheless, its application in *Lynch* is interesting because the federal question was fairly difficult to decide[234] and

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225. *See supra* note 9.

226. While New Mexico has provided greater protections in some areas of double jeopardy, it has not done so based on the New Mexico Constitution's unique language. *See, e.g.*, State v. Nunez, 2000-NMSC-013, 2 P.3d 264; State v. Breit, 1996-NMSC-067, ¶ 16, 930 P.2d 792, 797 (reasoning that *State v. Day*, 94 N.M. 753, 617 P.2d 142 (1980), provides greater double jeopardy protections than those under federal law in *Oregon v. Kennedy*, 456 U.S. 667 (1982)).

227. NMSA 1978, § 30-1-10 (1994) ("The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment."). This language may become particularly relevant because much double jeopardy jurisprudence relies on a theory of waiver, such as the ability to retry a defendant after reversal on appeal or after a defendant-requested mistrial. Kepner v. United States, 195 U.S. 100, 131 (1904) ("When...a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent...."); *see supra* note 64 and accompanying text.

228. *See Nunez*, 2000-NMSC-013, ¶ 25, 2 P.3d at 274 ("The non-waiver provision is especially significant because federal case law expressly denies a similar interpretation of the Fifth Amendment."); *see also supra* note 79.

229. As evidence for this, we may look to the scarcity of precedent directly on-point to the issue raised in *Lynch*. *See supra* text accompanying notes 110–114.

230. 100 N.M. 621, 674 P.2d 511 (1983); *see supra* notes 178–183 and accompanying text.

231. 432 U.S. 161, 165–69 nn.5–7; *see supra* note 55.

232. Indeed, Martin Lynch eventually pled guilty to voluntary manslaughter on January 23, 2004.

233. *Lynch*, 2003-NMSC-020, ¶¶ 8, 13–14, 74 P.3d at 75–77 (citing State v. Gomez, 1997-NMSC-006, ¶ 22, 932 P.2d 1, 8).

234. The lack of consistent precedent alone makes the federal question a close one. Further, the decision made must contradict explicit statements made in dicta by the Supreme Court of the United States regardless of its outcome. *Compare* Green v. United States, 355 U.S. 184, 193 (1957) ("The law...does not place the defendant in such an incredible dilemma [of waiving double jeopardy protections] as the price of a successful appeal."), *with*

because the state question, while not clear or indisputable, presents a solid basis for independent analysis. Interstitialism provides greater judicial efficiency when there is a federal protection but may have the opposite effect when federal law is unclear, as it was in *Lynch*.[235] Interstitialism may also serve the dual purposes of unifying state and federal law and utilizing federal judicial resources by frequent reliance on federal law.[236] However, when state constitutional language is markedly different from federal law, federal analysis does not help to decide the state question.

Lynch was more efficient and will have greater precedential value because it resolved this question on state grounds.[237] Had *Lynch* been decided on federal grounds, the unique language of article II, section 15 would still have no certain application, and its meaning would still be unclear.[238] Had the court been convinced that there was a federal protection, as it might have been,[239] the state question would not have been reached and this case could have been appealed to the Supreme Court of the United States on the federal question, eventually making its way back to the New Mexico Supreme Court for a determination of the state question.[240] When a strong state argument exists and the federal question is closer, New Mexico courts would better achieve judicial efficiency by deciding on both state and federal grounds.[241]

The dissent's reaction to the question raised by *Lynch* is perhaps even more troubling than the majority's application of New Mexico's interstitial approach.[242] Despite the very different language in the New Mexico Constitution, the dissent reasoned that article II, section 15 ought to be interpreted as an adoption of *Green* and nothing more. The dissent ignored the specific language of both article II, section 15 and section 30-1-10 to make this argument.[243] If the dissent's reasoning had been adopted by the court, it would have been nothing less than a reversion to the lockstep approach expressly rejected by New Mexico law.[244]

VI. CONCLUSION

State v. Lynch established a double jeopardy protection based on the New Mexico Constitution, and, in doing so, *Lynch* safeguarded the defendant's right to

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Montana v. Hall, 481 U.S. 400, 403 n.1 (1987) ("[T]here would have been an implied acquittal only if the jury had been presented with [both] charges.").

235. *See Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

236. *See id.* ¶ 21, 932 P.2d at 7–8 (citing State v. Gutierrez, 116 N.M. 431, 436, 863 P.2d 1052, 1057 (1993); State v. Hunt, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring)).

237. *See* Michael B. Browde, State v. Gomez *and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387, 406–09 (1998).

238. Prior to *Lynch*, this language had not been applied in any case. *See supra* note 9 and accompanying text. The state question would not have been reached absent a finding of no federal protection. *See supra* notes 149–150 and accompanying text.

239. *See supra* notes 141–148 and accompanying text.

240. *See* Browde, *supra* note 237.

241. *Id.*

242. For discussion of that reaction, *see supra* Part IV.C.

243. While the dissent does contain a large section entitled "The Plain Language of Article II, Section 15," it does not contain a discussion of plain language so much as a summary of existing precedent, namely *State v. Martinez*, 120 N.M. 677, 905 P.2d 715 (1995).

244. *See Gomez*, 1997-NMSC-006, 932 P.2d 1; *supra* notes 31–35 and accompanying text.

appeal without unduly restricting a prosecutor's ability to seek convictions on appropriate charges and opened the door to further expansive interpretations of New Mexico's protections from double jeopardy. Beyond the narrow confines of double jeopardy law, *Lynch* also serves as an example of how the New Mexico Supreme Court may apply the interstitial approach to constitutional analysis when the New Mexico Constitution seems more likely to provide protection than does the federal Constitution. Ultimately, the *Lynch* court decided correctly; New Mexico should not, and now does not, allow prosecutors to add a greater charge on remand after a conviction of a lesser-included offense is reversed on appeal.