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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

NO. 29,338

5 **JOSE GARCIA,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**

8 **William G. Shoobridge, District Judge**

9 Gary K. King, Attorney General

10 Margaret E. McLean, Assistant Attorney General

11 Joel Jacobsen, Assistant Appellate Defender

12 Santa Fe, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 J.K. Theodosia Johnson, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

1 {4} This case presents the same factual and legal scenario considered in *Montoya*.
2 As such, *Montoya* controls and requires that one of the two convictions be vacated.
3 The only question remaining is which conviction should be vacated.

4 {5} *Montoya* notes that the normal procedure is to vacate the conviction that carries
5 the shorter sentence. In *Montoya* the defendant was apparently convicted of shooting
6 at a motor vehicle resulting in great bodily harm—a second degree felony. *Id.* ¶ 56.

7 {6} We have a different situation in this case. Apart from the straight murder
8 theories, Defendant here was charged only with shooting “a firearm from a motor
9 vehicle with reckless disregard for another person.” The jury was not asked to
10 consider any greater or more serious form of the crime. Based on the jury finding of
11 guilty as instructed and in light of the death that ensued, the district court entered a
12 judgment and sentence for shooting at or from a motor vehicle as a third degree
13 felony.

14 {7} Thus, in this case the voluntary manslaughter—a third degree felony—and
15 shooting at or from a motor vehicle carry the same sentence. And, in fact, Defendant
16 was sentenced to identical sentences of six years for each of them. As such *Montoya*'s
17 rationale for choosing which conviction to vacate does not apply here.

18 {8} Given that the sentences are the same, we choose to vacate the conviction for
19 shooting at or from a motor vehicle. We believe that the conviction for voluntary

1 manslaughter—involving as it does the taking of a life—is the more serious crime.

2 *Id.* ¶ 56.

3 {9} In our prior Opinion we also rejected Defendant’s argument that the district
4 court improperly enhanced his punishment for his conviction of shooting from or at
5 a motor vehicle. Given our resolution of the primary double jeopardy issue, this
6 assertion becomes moot.

7 **CONCLUSION**

8 {10} In accordance with *Montoya*, we vacate Defendant’s conviction for shooting at
9 or from a motor vehicle and remand to the district court for re-sentencing.

10 {11} **IT IS SO ORDERED.**

11

12

MICHAEL D. BUSTAMANTE, Judge

13 **WE CONCUR:**

14

CYNTHIA A. FRY, Judge

16

TIMOTHY L. GARCIA, Judge