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

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Respondent,

4 v.

No. 32,605

5 **CHRISTOPHER FRANCO,**

6 Defendant-Petitioner.

7 **ORIGINAL PROCEEDING ON CERTIORARI**

8 **Kenneth H. Martinez, District Judge**

9 Bennett J. Baur, Acting Chief Public Defender

10 J.K. Theodosia Johnson, Assistant Appellate Defender

11 Santa Fe, NM

12 for Petitioner

13 Gary K. King, Attorney General

14 Joel Jacobsen, Assistant Attorney General

15 Santa Fe, NM

16 for Respondent

17 **DISPOSITIONAL ORDER REVERSING IN PART AND AFFIRMING IN**
18 **PART**

1 {1} This certiorari petition having come before the full Court, and each member of
2 the Court having studied the briefs and being otherwise fully informed on the issues
3 and applicable law; and

4 {2} The members of the Court having concluded that there is no reasonable
5 likelihood that either a decision or an opinion from this Court would materially
6 advance the law of this state; and

7 {3} The members of the Court having agreed to invoke this Court's discretion under
8 Rule 12-405(B)(3) NMRA to dispose of a case by order, decision, or memorandum
9 opinion rather than formal opinion;

10 **IT IS THEREFORE ADJUDGED THAT:**

11 {4} Defendant raises three issues on certiorari review. First, Defendant argues that
12 his convictions for both shooting at a motor vehicle resulting in great bodily harm and
13 voluntary manslaughter violate double jeopardy. Second, Defendant argues that the
14 trial court erred in refusing to instruct the jury on involuntary manslaughter. Third,
15 Defendant argues that the trial court abused its discretion by both its alleged
16 inappropriate comments during sentencing and its sentencing of Defendant to thirty
17 years' incarceration.

18 {5} The double jeopardy argument raised by Defendant is controlled by our recent
19 opinion in *State v. Montoya*, 2013-NMSC-____, ___ P.3d ___ (No. 32,279, May 16,
20 2013). In *Montoya*, we held that current New Mexico jurisprudence precludes
21 cumulative punishment for the offenses of shooting at a motor vehicle causing great

1 bodily harm and the homicide resulting from the penetration of the same bullet into
2 the same person. *Id.* ¶¶ 2, 54. In this case, Defendant shot three times at a vehicle that
3 was being driven in reverse in an effort to strike him. One of the bullets injured the
4 driver and ultimately resulted in the driver's death. Therefore, as in *Montoya*, the
5 Double Jeopardy Clause protects Defendant against being punished both for the
6 voluntary manslaughter of the driver and for causing great bodily harm to the driver
7 by shooting at a motor vehicle, where both convictions were premised on the unitary
8 act of shooting the driver. Because the conviction carrying the least punishment must
9 be vacated, in this case the voluntary manslaughter conviction must be vacated. *Id.*
10 ¶ 56.

11 {6} With respect to the jury instruction and sentencing issue raised by Defendant,
12 we agree with the analysis of the Court of Appeals and do not find any error. In our
13 original memorandum of court action, we sought to only grant Defendant's petition
14 for writ of certiorari on the double jeopardy issue. However, due to inadvertence, the
15 parties were not notified that we only intended to grant certiorari on the one issue. We
16 have therefore reviewed the briefing, but remain unpersuaded by Defendant's
17 remaining arguments.

18 {7} Therefore, we affirm in part and reverse in part. This matter is remanded to the
19 trial court to vacate the voluntary manslaughter conviction and to resentence
20 Defendant accordingly.

21 {8} **IT IS SO ORDERED.**

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PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice