

<b>STATE V. MONTOYA</b>
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**STATE OF NEW MEXICO,**  
Plaintiff-Appellee,  
v.  
**BENJAMIN MONTOYA,**  
Defendant-Appellant.

No. 33,773

COURT OF APPEALS OF NEW MEXICO

June 23, 2016

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Briana H.  
Zamora, District Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, Steven H. Johnston, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, J. K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

**JUDGES**

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, JONATHAN B. SUTIN, Judge

**AUTHOR:** MICHAEL D. BUSTAMANTE

**MEMORANDUM OPINION**

**BUSTAMANTE, Judge.**

{1} This is Defendant's second appeal in this case. The details of his trial are contained in the Supreme Court's opinion in his first appeal and need not be repeated.

See *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426. The Supreme Court vacated Defendant's conviction for felony murder and remanded for entry of an amended sentence reflecting only his conviction for shooting at a motor vehicle. *Id.* ¶¶ 56, 65. On remand the district court imposed a sentence of fifteen years for a second degree felony resulting in the death of a human being for the offense of shooting at a motor vehicle resulting in great bodily harm (death). The district court suspended two years "on condition of probation and parole."

{2} Defendant now appeals arguing that sentencing him under NMSA 1978, Section 31-18-15(A)(4) (2007, amended 2016) for his conviction under NMSA 1978, Section 30-3-8(B) (1993) constitutes double jeopardy. This is the same argument we rejected in *State v. Franco*, 2016-NMCA-, ¶¶ 17-34, P.3d (No. 33,392, June 14, 2016. For the reasons noted in *Franco*, we reject it here.

{3} Defendant's sentence is affirmed.

{4} **IT IS SO ORDERED.**

**MICHAEL D. BUSTAMANTE, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Chief Judge**

**JONATHAN B. SUTIN, Judge**