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# CRIMINAL LAW: Applying the General/Specific Statute Rule in New Mexico—*State v. Santillanes*

QUENTIN SMITH\*

## I. INTRODUCTION

The United States Constitution<sup>1</sup> and the New Mexico Constitution<sup>2</sup> each grant criminal defendants a double jeopardy protection against multiple punishments for the same offense.<sup>3</sup> The double jeopardy clause functions in this instance “to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the [legislature] intended.”<sup>4</sup> The “general/specific statute rule” is a judicially created canon of construction the court employs to limit prosecutorial discretion by compelling the prosecutor to charge under the more specific of two statutes when conviction under both would violate the Fifth Amendment.<sup>5</sup> In *State v. Santillanes*,<sup>6</sup> the New Mexico Supreme Court attempted to clarify the proper multiple punishment analysis and the application of the “general/specific statute rule.” This Note will set forth the major New Mexico Supreme Court decisions leading up to the *Santillanes* decision, describe the multiple punishment analysis set forth by the *Santillanes* court, identify some inherent problems with that approach, and set forth some potential solutions for addressing those problems.

## II. STATEMENT OF THE CASE

### A. Facts and Trial Court Disposition

On September 28, 1996, Nathan Santillanes was driving his vehicle down Highway 60 in Socorro County with his three children, his girlfriend, and her niece as passengers.<sup>7</sup> Santillanes approached an intersection and attempted to make a left-hand turn. As he was making this turn, an oncoming truck collided with his vehicle. The five passengers in Santillanes’s vehicle were all killed in the collision. At the time of the accident, Santillanes had a blood alcohol content of .15 and he admitted to the police that he had consumed six beers that day.

Santillanes was convicted of five counts of vehicular homicide and four counts of child abuse resulting in death. The district court sentenced him to eighteen years’ imprisonment for each count of child abuse resulting in death and ordered three of these sentences to be served consecutively. Santillanes was also sentenced to twelve years’ imprisonment for each count of vehicular homicide, which the district court

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1. U.S. CONST. amend. V.
2. N.M. CONST. art. II, § 15.
3. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *State v. Pierce*, 110 N.M. 76, 84, 792 P.2d 408, 416 (1990).
4. *Pierce*, 110 N.M. at 84-85, 792 P.2d at 416-17 (quoting *Whalen v. United States*, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring)).
5. See *State v. Cleve*, 127 N.M. 240, 249-50, 980 P.2d 23, 32-33 (1999).
6. 130 N.M. 464, 27 P.3d 456 (2001).
7. All facts in this section are taken from *Santillanes*, 130 N.M. at 467, 27 P.2d at 459.

ordered to be run concurrently with the three consecutive sentences for child abuse resulting in death.

### *B. The Rationale of the Court of Appeals*

The Court of Appeals held that the defendant's convictions for both vehicular homicide and child abuse resulting in death violated the defendant's double jeopardy protection against multiple punishments.<sup>8</sup> By holding that the defendant's double jeopardy rights were violated, the court was next faced with the issue of which convictions to vacate.<sup>9</sup> The court applied the general/specific statute rule and held that vehicular homicide was a more appropriate charge than child abuse resulting in death.<sup>10</sup>

The court first applied the *Swafford* two-step process for determining whether the defendant was properly subjected to multiple punishments for vehicular homicide and child abuse resulting in death.<sup>11</sup> The court found the defendant's conduct to be unitary because at trial the State used the same conduct of driving while intoxicated to establish vehicular homicide and child abuse resulting in death.<sup>12</sup> Next, the court turned its attention to whether the Legislature intended to create separately punishable offenses for the unitary conduct.<sup>13</sup> The court found vehicular homicide and child abuse resulting in death to have different elements, which created a rebuttable presumption in favor of multiple punishments.<sup>14</sup> However, that presumption was "rebutted by the generally accepted notion that one death should result in only one homicide conviction."<sup>15</sup> Therefore, the defendant's convictions for both vehicular homicide and child abuse resulting in death violated his double jeopardy protection against multiple punishments for the same offense.<sup>16</sup>

The defendant argued that under the general/specific statute rule, the court should vacate his child abuse resulting in death convictions.<sup>17</sup> The court, relying on the *Guilez* "preemption analysis," found that the Legislature's enactment of a comprehensive motor vehicle code indicated "a legislative intent to preempt the field."<sup>18</sup> Thus, vehicular homicide, rather than child abuse resulting in death, is the specific offense under which the State was compelled to prosecute.<sup>19</sup> The court also offered additional indicia of legislative intent to support this conclusion and vacated the defendant's convictions for child abuse resulting in death.<sup>20</sup>

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8. *State v. Santillanes*, 128 N.M. 752, 756, 998 P.2d 1203, 1207 (Ct. App. 2000), *rev'd*, 130 N.M. 464, 27 P.3d 456 (2001).

9. *Id.*

10. *Id.* at 757, 998 P.2d at 1208.

11. *Id.* at 755-56, 998 P.2d at 1206-07.

12. *Id.*

13. *Santillanes*, 128 N.M. at 756, 998 P.2d at 1207.

14. *Id.*

15. *Id.* (citing *State v. Cooper*, 124 N.M. 277, 949 P.2d 660 (1997); *State v. Pierce*, 110 N.M. 76, 86, 792 P.2d 408, 418 (1990)).

16. *Santillanes*, 128 N.M. at 756, 998 P.2d at 1207.

17. *Id.*

18. *Santillanes*, 128 N.M. at 757, 998 P.2d at 1208 (quoting *State v. Yarborough*, 122 N.M. 596, 606, 930 P.2d 131, 141 (1996)).

19. *Id.*

20. *Id.* Section 66-8-101.1(C) of the New Mexico Motor Vehicle Code states that where a drunk driver

### III. BACKGROUND

#### *A. The Swafford Test: Protecting Criminal Defendants Against Multiple Punishments*

The New Mexico Supreme Court took the opportunity in *State v. Swafford*<sup>21</sup> to develop a Fifth Amendment test for analyzing claims of multiple punishments. The *Swafford* court was faced with the issue of determining whether a criminal defendant could be convicted of both third-degree sexual penetration and incest when the defendant sexually assaulted his half-cousin.<sup>22</sup> In addressing this issue, the court formulated a two-part test for determining legislative intent to punish. The first part of the inquiry is “whether the conduct underlying the offenses is unitary, *i.e.*, whether the same conduct violates both statutes.”<sup>23</sup> The second part is “whether the legislature intended to create separately punishable offenses.”<sup>24</sup>

The *Swafford* court provided two guiding principles for determining whether the defendant’s conduct was sufficiently unitary to warrant separate punishments. First, the court must look at the “time or space” between the two charged offenses, *i.e.*, if the offenses are sufficiently separated by either time or space, then the offenses cannot be considered unitary.<sup>25</sup> If “time or space” considerations do not resolve the case, then the court must look to the “quality and nature of the acts or to the objects and results involved.”<sup>26</sup> After evaluating these factors, if the court finds that the conduct is not unitary, then the inquiry ends and multiple punishments are authorized.<sup>27</sup>

If the conduct is unitary, however, the inquiry must proceed to whether the Legislature intended multiple punishments for the unitary conduct.<sup>28</sup> In the absence of clear expression, a court must first apply the *Blockburger* elements test.<sup>29</sup> Under this test, if the elements of the two crimes are the same, then multiple punishments are not intended by the Legislature. Conversely, the court stated that if the elements are different, then a rebuttable presumption is created that each of the two statutes

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causes a pregnant woman to suffer a miscarriage or stillborn birth, the crime is a third-degree felony. Likewise, Section 66-8-101 makes the death of an adult caused by a drunk driver a third-degree felony. The *Santillanes* court states that the Legislature could not intend that the death of a child between birth and 18 years of age should result in a greater punishment than the death of an unborn child or adult.

21. 112 N.M. 3, 810 P.2d 1223 (1991).

22. In *Swafford*, the defendant tied his half-cousin to her bed and sexually assaulted her. The defendant was convicted in district court of third-degree sexual penetration and incest for which he received separate, consecutive sentences. On appeal, the defendant argued, *inter alia*, that separate, consecutive sentences for third-degree sexual penetration and incest violated his double jeopardy protection against multiple punishments for the same offense. *Id.* at 6-7, 810 P.2d at 1226-27.

23. *Id.* at 13, 810 P.2d at 1233.

24. *Id.*

25. *Id.* at 13-14, 810 P.2d at 1233-34.

26. *Id.* at 14, 810 P.2d at 1234 (citing *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991)).

27. *Id.*

28. *Id.*

29. *Id.*

punish distinct offenses and thus separate punishment under each is not violative of the defendant's protection against double jeopardy.<sup>30</sup>

This rebuttable presumption can be overcome by "other indicia of legislative intent," including, the "language, history, and subject of the statutes."<sup>31</sup> Specifically, a court should look at whether the statutes protect different social norms and achieve different policies.<sup>32</sup> Also, a court should look at the "quantum of punishment," *i.e.*, if one statute has many of the same elements of a base statute and has a greater penalty than the base statute, the Legislature probably did not intend punishment under both statutes.<sup>33</sup> If the presumption can be overcome, then multiple punishments are prohibited; otherwise, the presumption stands that the Legislature intended multiple punishments. Figure 1 summarizes the *Swafford* approach to determining whether the Legislature intends multiple punishments.

The Supreme Court proceeded to apply the test it formulated to determine whether the defendant in *Swafford* should have received multiple punishments for incest and criminal sexual penetration.<sup>34</sup> First, the court found no dispute that the conduct underlying both offenses was the same and thus unitary.<sup>35</sup> The court then applied the *Blockburger* elements test and determined that the two offenses were distinct because each statute contained an element that the other did not, namely that criminal sexual penetration required coercion and incest required a relation between the victim and the offender.<sup>36</sup> Thus, a rebuttable presumption was raised that the Legislature intended multiple punishments. This presumption was not overcome under a "separate evils" inquiry because the court found that the two statutes achieved different policy objectives—the purpose of the criminal sexual penetration statute is to prevent forcible, nonconsensual sexual activity,<sup>37</sup> whereas, the incest statute was designed to prohibit even consensual sexual relations between relatives.<sup>38</sup> Ultimately, the court found that the defendant's receipt of separate punishments for

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30. *Id.* ("[I]f the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses."). The court seems to create a rebuttable presumption that multiple punishments are authorized. However, after identifying the various factors to consider when determining whether this presumption can be overcome, the court cites *State v. McGuire*, 110 N.M. 304, 308, 795 P.2d 996, 1000 (1990), for the proposition that "[u]nless an intent to punish separately can be found...lenity is indicated and, in that event, it is to be presumed the [L]egislature did not intend pyramiding punishments for the same offense." This statement is clearly contradictory to the rebuttable presumption the court had just created by assuming that when the elements of the two crimes are not the same it is presumed that the Legislature did not intend multiple punishments. In application, when the *Swafford* court reached this part of the analysis, it stated that a rebuttable presumption was raised that the Legislature intended multiple punishments. However, rather than merely resting on this presumption, the court seeks out affirmative evidence of the Legislature's intent to authorize multiple punishments. In subsequent cases, the Supreme Court affirmed that the rebuttable presumption created is that the Legislature intended multiple punishments. *See, e.g.*, *State v. Gonzales*, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992) (stating that a rebuttable presumption of separate punishments for murder and shooting into a vehicle was created); *State v. Meadors*, 121 N.M. 38, 51, 908 P.2d 731, 744 (1995) (finding that the rebuttable presumption that the Legislature intended multiple punishments was not overcome).

31. *Swafford*, 112 N.M. at 14, 810 P.2d at 1234.

32. *Id.*

33. *Id.* at 15, 810 P.2d at 1235.

34. *Id.*

35. *Id.*

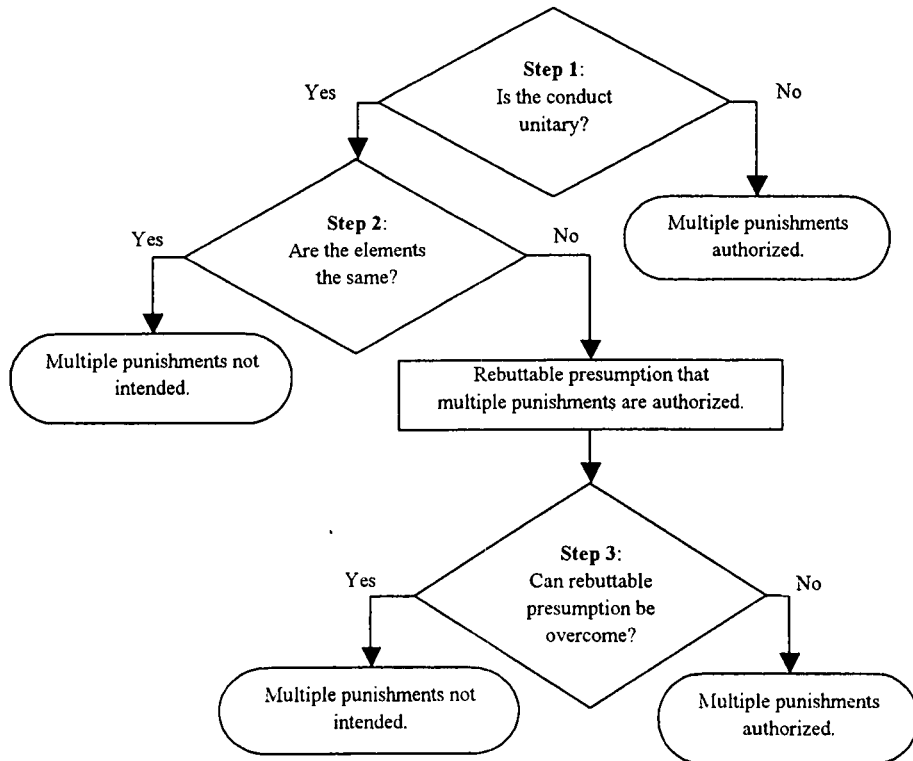
36. *Id.* at 35, 810 P.2d at 1235.

37. *Id.*

38. *Id.* (citing *State v. Hargrove*, 108 N.M. 233, 238, 771 P.2d 166, 171 (1989)).

incest and criminal sexual penetration did not violate his double jeopardy protection against multiple punishments for the same offense.<sup>39</sup>

Figure 1 - *Swafford* Analysis



*B. The General/Specific Statute Rule—A Potential Limitation on Prosecutorial Discretion When Multiple Punishments Are Not Authorized*

The *Swafford* court found that the defendant's double jeopardy rights were not violated and that he could be punished separately under both statutes.<sup>40</sup> However, if the court had found that the Legislature did not intend multiple punishments for two separate statutes, then the court would have been left with the task of determining which statute the Legislature intended to apply to the defendant's conduct. To aid in making this determination, New Mexico courts have developed a canon of construction referred to as the "general/specific statute rule."

The New Mexico Supreme Court first articulated the "general/specific statute rule" in *State v. Blevins*:<sup>41</sup>

39. *Id.*

40. *Id.* at 15-16, 810 P.2d at 1235-36.

41. 40 N.M. 367, 60 P.2d 208 (1936).

Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way...to the extent of any necessary repugnancy...the special statute...will prevail over the general statute, unless it appears that the Legislature intended to make the general act controlling.<sup>42</sup>

The *Blevins* court considered the special statute to be an exception to the general statute, regardless of the order of passage.<sup>43</sup>

In *State v. Cleve*,<sup>44</sup> the Supreme Court felt it was necessary to clarify the application of the general/specific statute rule. In *Cleve*, the defendant shot thirteen deer (five in the abdomen) and he snared two more deer (one died of strangulation and the other of starvation).<sup>45</sup> The State charged the defendant with seven counts of cruelty to animals (relying on the two snared deer and five deer shot in the abdomen) and fifteen counts of unlawful hunting. He was convicted of two counts of cruelty to animals and two counts of unlawful hunting. On appeal, the defendant argued, *inter alia*, that the unlawful hunting statute was a special law that conflicted with the general prohibition of cruelty to animals.<sup>46</sup>

The *Cleve* court articulated the relationship between the double jeopardy protection against multiple punishments for unitary conduct and the general/specific statute rule:

[W]hile the double jeopardy inquiry focuses on whether the Legislature intended to limit a court's discretion in imposing multiple punishments, the general/specific statute rule determines whether the Legislature intended to limit the discretion of the prosecutor in the selection of charges.<sup>47</sup>

The determination of whether the Legislature intends multiple punishments for unitary conduct acts as a prerequisite to an inquiry under the general/specific statute rule.<sup>48</sup> The rationale underlying this sequential approach is that if the Legislature intended to create separately punishable offenses there would be no need to consider the application of the general/specific statute rule because "a legislative intent to create multiple punishments necessarily implies that the Legislature also intended to leave intact the prosecutor's charging discretion."<sup>49</sup> However, if the Legislature did not intend to create separately punishable offenses, one of the convictions would be unconstitutional; therefore, the general/specific statute rule is a canon of construction that may be applied to determine which statute should be vacated.<sup>50</sup>

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42. *Id.* at 368, 60 P.2d at 209.

43. *Id.* at 368-69, 60 P.2d at 209.

44. 127 N.M. 240, 980 P.2d 23 (1999).

45. All facts in this paragraph are taken from *Cleve*, 127 N.M. at 242, 980 P.2d at 25.

46. *Cleve*, 127 N.M. at 247, 980 P.2d at 30.

47. *Id.* at 250, 980 P.2d at 33.

48. *Id.* at 248-49, 980 P.2d at 31; *see also* *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 694 P.2d 922 (1985) (holding the general/specific statute rule to be inapplicable in determining whether the defendant should have been prosecuted under vehicular homicide or depraved mind murder statute because the legislature intended multiple punishments for the conduct).

49. *Cleve*, 127 N.M. at 251, 980 P.2d at 34.

50. *Id.*

In evaluating the defendant's arguments, the court first compared the elements of the cruelty-to-animals statute with the elements of the unlawful hunting statute. The court concluded that double jeopardy would not prevent convictions for both of these crimes, and, thus, the court did not address the application of the general/specific statute rule to determine whether the unlawful hunting statute was an exception to the cruelty-to-animals statute.<sup>51</sup>

In reaching this conclusion, the *Cleve* court did not end its inquiry. The court addressed whether the overall statutory scheme of the state's hunting and fishing laws preempted the application of the cruelty-to-animals statute with regard to conduct covered by the hunting and fishing statutory scheme. The court found "the manner of hunting substantially and irreconcilably conflicts with the cruelty-to-animals statute."<sup>52</sup> Therefore, the court purported to apply the general/specific statute rule to conclude that "the Legislature, having dealt with the subject of the hunting of game animals more particularly in the game and fish laws, intended to create an exception from the cruelty-to-animals statute for hunting and fishing activity contemplated by game and fish laws."<sup>53</sup>

In *State v. Guilez*,<sup>54</sup> the Supreme Court read its decision in *Cleve* as requiring two distinct approaches in determining whether the general/specific statute rule applies in a given case. The court identified these separate approaches as a "quasi-double-jeopardy analysis" and a "preemption analysis."<sup>55</sup> In *Guilez*, the court was faced with the issue of whether the defendant was properly convicted under both the general child abuse statute and the reckless driving statute.<sup>56</sup> The facts revealed that the defendant had been pulled over at night for driving without his headlights on. The police discovered the defendant's children were passengers who were not wearing their seatbelts and the defendant was noticeably intoxicated.

The *Guilez* court zeroed in on language from *Cleve* as describing the "quasi-double-jeopardy analysis." This analysis begins by comparing the elements of the two crimes.<sup>57</sup> The general/specific statute rule then would apply if the two crimes are the same, in which case the prosecutor is required to charge the defendant under the more specific law absent legislative intent to the contrary.<sup>58</sup> If the elements differed, the court should then "balance the rule of lenity, which favors applying the general/specific statute rule in cases of ambiguity, with the judiciary's longstanding deference to prosecutorial discretion, which favors the exercise of caution before applying the general/specific statute rule."<sup>59</sup> Additionally, the court should look to

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51. *Id.*

52. *Id.* at 254, 980 P.2d at 37.

53. *Id.*

54. 129 N.M. 240, 4 P.3d 1231 (1999), abrogated by *Santillanes*, 130 N.M. 464, 27 P.3d 456.

55. *Guilez*, 129 N.M. at 242-43, 4 P.3d at 1233-34.

56. All facts in this paragraph are taken from *Guilez*, 129 N.M. at 241-42, 4 P.3d at 1232-33.

57. *Guilez*, 129 N.M. at 243, 4 P.3d at 1234.

58. *Id.*; see also *State v. Yarborough*, 120 N.M. 669, 676, 905 P.2d 209, 216 (1995) (stating involuntary manslaughter and unintentional vehicular homicide both require the same act and culpability; therefore, the prosecutor should have charged the defendant with the more specific crime of vehicular homicide).

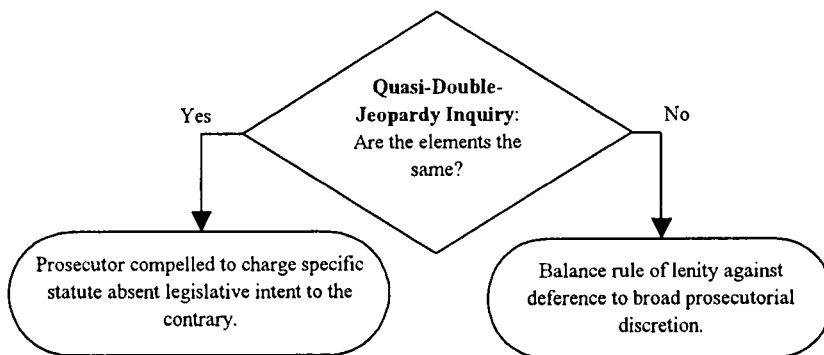
59. *Guilez*, 129 N.M. at 243, 4 P.3d at 1234 (citing *Cleve*, 127 N.M. at 250, 980 P.2d at 33).



the plain language, underlying purposes, and histories of the two statutes to ascertain the Legislature's intent.<sup>60</sup>

In applying the quasi-double-jeopardy analysis, the court first asked whether the defendant's conduct was unitary.<sup>61</sup> The court stated that the conduct supporting child abuse began when the child was put in the car; however, the conduct supporting reckless driving was not established until the defendant continued to drive without properly functioning headlights.<sup>62</sup> Therefore, the court found that the conduct was not unitary, there was no double jeopardy violation, and that it had no occasion to apply the general/specific statute rule under a quasi-double-jeopardy analysis.<sup>63</sup>

Figure 2 - *Guilez* "Quasi-Double-Jeopardy" Approach



The court then performed a "preemption analysis" in which the question was "whether the Legislature intended to create an exception to a general statute by enacting another law dealing with the matter in a more specific way."<sup>64</sup> The emphasis under this analysis was not whether the Legislature intended to limit prosecutorial discretion, but whether the Legislature intended to repeal by implication one statute when it passed another more comprehensive statute.<sup>65</sup> To make this determination, a court must look to the plain language, underlying purposes, and the histories of the two statutes.<sup>66</sup>

In comparing the language of the two statutes, the Court determined that "one could reasonably conclude that reckless driving was designed to be 'regarded as an exception to' child abuse."<sup>67</sup> The court then found that the two statutes have

60. *Id.* at 241, 4 P.3d at 1232 (citing *Cleve*, 127 N.M. at 250-51, 980 P.2d at 33-34).

61. *Id.* at 244, 4 P.3d at 1235 (citing *Swafford*, 112 N.M. at 14, 810 P.2d at 1234).

62. *Id.*

63. *Id.*

64. *Id.*

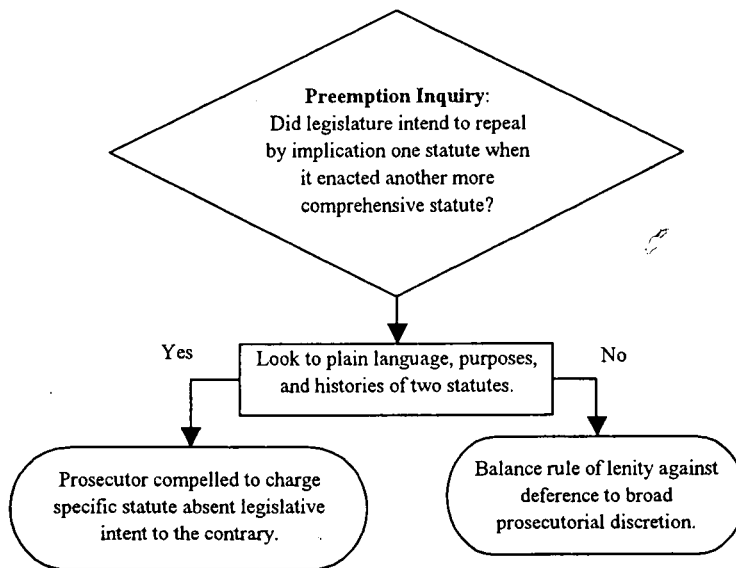
65. *Id.*

66. *Id.* at 244-45, 4 P.3d at 1235-36.

67. *Id.* at 245, 4 P.3d at 1236 (citing *Blevins*, 40 N.M. at 368, 60 P.2d at 209).

different purposes.<sup>68</sup> Finally, the histories of the two statutes were compared and the court concluded that the Legislature has steadily increased the penalty for child abuse, while providing no extra protection for children under the reckless driving statute.<sup>69</sup> After evaluating these factors, the court held that the reckless driving statute did not specifically preempt the child abuse statute nor did the Motor Vehicle Code preempt it in general.<sup>70</sup> Thus, the *Guilez* court concluded that the defendant could be convicted of both child abuse and reckless driving.

Figure 3 - *Guilez* "Preemption" Approach



#### IV. RATIONALE OF THE SUPREME COURT

On certiorari review, the State did not challenge the determination by the Court of Appeals that Santillanes's convictions for both vehicular homicide and child abuse resulting in death violated his double jeopardy protection against multiple punishments. The sole issue before the *Santillanes* court was determining which of these two conflicting crimes must be vacated. In addressing this issue, the court established the analytical framework for the application of the general/specific statute rule, held the general/specific statute rule to be inapplicable in this case, and applied a modified rule of merger to vacate the defendant's convictions for vehicular homicide and reinstate the defendant's convictions for child abuse resulting in death.

68. *Id.* (stating, "The child abuse statute was designed to give greater protection to children than adults" and "the reckless driving statute punishes conduct that might harm either a member of the general public or any property").

69. *Id.*

70. *Id.* at 246, 4 P.3d at 1237.

### A. The General/Specific Statute Rule—Establishing a Particular Analytical Framework

In *Santillanes*, the Supreme Court began its discussion by rejecting the *Guilez* finding that application of the general/specific statute rule required two separate independent analyses. The court held that the determination of whether the general/specific statute rule applies in a given case does not require independent “preemption” and “quasi-double-jeopardy” analyses.<sup>71</sup> The court stated that “[t]he primary goal of the general/specific statute rule is to determine legislative intent in the context of potentially conflicting laws.”<sup>72</sup> More precisely, in criminal cases, the goal of the rule is to “determine whether the Legislature intends to punish particular criminal conduct under a specific statute instead of a general statute.”<sup>73</sup> A preemption analysis focusing on whether the specific criminal statute is an exception to the general statute would be subsumed by the relevant inquiry, which is whether the Legislature intended particular conduct to be prosecuted under one statute rather than another.<sup>74</sup>

The court then set forth a particular analytical framework for applying the general/specific statute rule to potentially conflicting statutes in criminal cases.<sup>75</sup> The starting point for this framework is the double jeopardy protection analysis relating to multiple punishments,<sup>76</sup> because a legislative intent to create multiple punishments necessarily implies a legislative intent to leave prosecutorial charging discretion intact.<sup>77</sup> The question is “whether the Legislature intended to create multiple punishments for the two relevant crimes, even if the defendant was only charged with or convicted of one of the two crimes at issue.”<sup>78</sup>

The court explicitly stated that the double jeopardy prohibition against multiple punishments analysis and the general/specific statute rule require independent inquiries.<sup>79</sup> A finding that the underlying conduct forming the basis for both convictions is not unitary does not foreclose “a further inquiry into a legislative intent to create multiple punishments for purposes of the general/specific statute rule.”<sup>80</sup> The court found that it erred in *Guilez* in this respect by foreclosing inquiry into the legislative intent to create multiple punishments for purposes of the general/specific statute rule once it found that the conduct was not unitary and thus

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71. *State v. Santillanes*, 130 N.M. 464, 469, 27 P.3d 456, 461 (2001) (“[T]hese labels inaccurately suggest that there must be two independent analyses undertaken in every case to determine whether the general/specific statute rule applies; this approach is unwarranted under our prior cases.”).

72. *Id.* (citing *State v. Cleve*, 127 N.M. 240, 980 P.2d 23 (1999)).

73. *Id.* (citing *Blevins*, 40 N.M. at 369, 60 P.2d at 210; *Cleve*, 127 N.M. 240, 980 P.2d 23).

74. *Id.* (citing *Cleve*, 127 N.M. 240, 980 P.2d 23).

75. *See id.* at 469-71, 27 P.3d at 461-63.

76. *Id.* at 469, 27 P.3d at 461.

77. *Id.* at 470, 27 P.3d at 462. The court noted that this inquiry must be conducted regardless of whether a double jeopardy inquiry is necessary.

78. *Id.* at 469, 27 P.3d at 461 (citing *Blevins*, 40 N.M. at 368, 60 P.2d at 209). This inquiry is the second prong of the *Swafford* test. *See State v. Swafford*, 112 N.M. 3, 27, 810 P.2d 1223, 1232 (1991). The court finds that there is no need to apply the first prong of the *Swafford* test, whether the conduct is unitary, but rather it must determine whether the conduct forming the basis of the prosecution under the general statute should have been prosecuted under the specific statute. *Santillanes*, 130 N.M. at 470, 27 P.3d at 462.

79. *Santillanes*, 130 N.M. at 469, 27 P.3d at 461.

80. *Id.*

not a violation of the defendant's protection against double jeopardy.<sup>81</sup> Instead, the court should have focused on the basis of conviction under the general statute to determine whether the Legislature intended to punish the conduct under the more specific statute.<sup>82</sup> Under the first inquiry, if the Legislature did not intend to create separately punishable offenses for the same conduct, the second inquiry becomes "whether the Legislature intended to limit the charging discretion of the prosecutor."<sup>83</sup>

The *Santillanes* court states that each of the two inquiries should be answered under the same framework. First, the *Blockburger* elements test should be applied to determine whether each statute requires proof of an additional fact that the other does not.<sup>84</sup> If the elements are the same, the general/specific statute rule compels the prosecutor to charge under the specific statute unless the legislature clearly intends otherwise.<sup>85</sup> Conversely, if the elements differ, two rebuttable presumptions are created. First, it is presumed that the Legislature intended for multiple punishments.<sup>86</sup> Second, it is further presumed that the Legislature intended to leave prosecutorial discretion intact.<sup>87</sup> Each of these presumptions may be overcome by other indicia of legislative intent.<sup>88</sup> The court states that most cases will be resolved using this framework; however, certain exceptional cases may require additional analysis.<sup>89</sup>

The general/specific statute rule, according to the court, should be used flexibly in order to achieve the ultimate goal of ascertaining legislative intent.<sup>90</sup> However, always serving as a backdrop is the broad charging discretion of the prosecutor.<sup>91</sup> Therefore, the court explicitly required "clear evidence of intent by the Legislature to limit prosecutorial discretion" before applying the general/specific statute rule.<sup>92</sup> Thus, the framework adopted by the *Santillanes* court for determining whether the general/specific statute rule applies in a given case is as follows:

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81. *Id.* at 470, 27 P.3d at 462.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 470-71, 27 P.3d at 462-63.

86. *Id.* at 471, 27 P.3d at 463.

87. *Id.*

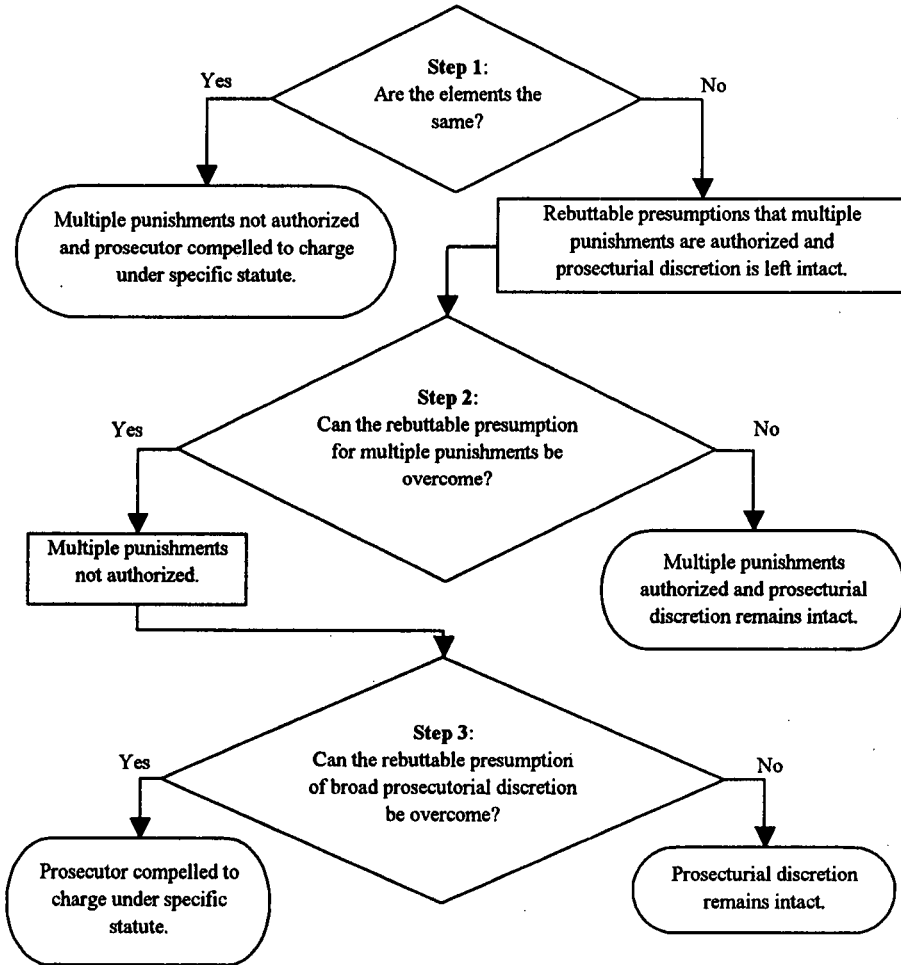
88. These "other indicia of legislature intent" include (1) the language of the statutes, (2) the purposes of the statutes, (3) the histories of the statutes, and (4) "whether the violation of one statute will normally result in the violation of another." See *State v. Cleve*, 127 N.M. 240, 251-52, 980 P.2d 23, 33-34 (1999).

89. The court holds out *Cleve* as an exceptional case in which additional analysis was required. To resolve *Cleve*, the court had to go beyond the typical elemental analysis to determine "whether the authorization of particular conduct in one group of statutes resulted in an irreconcilable conflict with the apparent criminalization of the same conduct in another statute." *Santillanes*, 130 N.M. at 471, 27 P.3d at 463. It is unclear whether the situation in *Cleve* is the only type of exceptional case or if other types of exceptional cases may require a yet unforeseen additional analysis. The court, though, again stated that the "preempting the field" analysis undertaken in *Guilez* was not a proper analysis within the general/specific statute rule, but rather more properly invokes the rule of repeal by implication. *Id.*

90. *Id.* at 472, 27 P.3d at 464.

91. *Id.* (relying on *State v. Brooks*, 117 N.M. 751, 755, 877 P.2d 557, 561 (1994), for the proposition that the State "has broad discretion in charging").

92. *Id.* at 473, 27 P.3d at 465.

Figure 4 - *Santillanes* Framework

***B. Applying the Framework—The General/Specific Statute Rule Is Held to Be Inapplicable to the Separate Offenses of Vehicular Homicide and Child Abuse Resulting in Death***

The *Santillanes* court began its analysis by accepting the conclusion of the Court of Appeals that the elements of vehicular homicide and child abuse resulting in death differ under the *Blockburger* elements test.<sup>93</sup> The court also agreed with the determination by the Court of Appeals that the presumption in favor of multiple punishments was overcome "by the generally accepted notion that one death should

93. *Id.*

result in only one homicide conviction.”<sup>94</sup> Finally, the court addressed whether the presumption in favor of broad prosecutorial discretion could be overcome.

The court began this analysis by finding that violation of one of the statutes does not normally result in violation of the other.<sup>95</sup> Additionally, the two crimes have different purposes—vehicular homicide is intended to punish conduct that places the general public at risk of death, regardless of the age of the victim; whereas, the child abuse statute is intended to give greater protection to children than adults.<sup>96</sup> The final factor considered was the history of the child abuse statute, which also indicated a legislative intent to expand protection for children.<sup>97</sup> The court, in considering these indicia of legislative intent, found it to be clear that “the Legislature did not intend to limit the discretion of the prosecutor in charging an individual who caused the death of a child in a manner that meets the elements of both crimes with the violation of either [child abuse resulting in death] or [vehicular homicide] when the crime occurred during the operation of a vehicle.”<sup>98</sup> Thus, the court concluded that the general/specific statute rule was inapplicable in this case, and the prosecutor’s charging discretion remained intact to charge the defendant with child abuse resulting in death and/or vehicular homicide.<sup>99</sup>

### *C. Effect of a Multiple Punishment Violation When the General/Specific Statute Rule Is Inapplicable*

Once the *Santillanes* court found the general/specific statute rule to be inapplicable in limiting the prosecutor’s charging discretion, it still needed to determine which of the defendant’s convictions—vehicular homicide or child abuse resulting in death—should be vacated to keep from violating the defendant’s double jeopardy protection against multiple punishments.<sup>100</sup> The court considered two separate doctrines as possible judicial solutions to this determination. First, the Court turned to the “rule of merger” as clearly articulated in *Pierce*:

The rule of merger precludes an individual’s conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where defendant is convicted of one or more offenses which have merged into the greater offense he [or she] may be punished for only one.<sup>101</sup>

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94. *Id.* (quoting *State v. Santillanes*, 128 N.M. 752, 756, 998 P.2d 1203, 1207 (Ct. App. 2000), *rev’d*, 130 N.M. 464, 27 P.3d 456 (2001)).

95. *Id.* at 474, 27 P.3d at 466.

96. *Id.*

97. *Id.* Additionally, the court rejected the determination made by the Court of Appeals that the Legislature could not have intended the death of a child by motor vehicle to be a greater offense than the death of an adult or fetus. In making this rejection, the court notes that Section 66-8-101.1 makes it a third-degree felony to cause a miscarriage or stillbirth as a result of a felony; whereas, causing the death of an adult or child during the commission of a felony is a capital offense under Section 30-3-7(A). The court cites these and other statutes as evidence that the Legislature intended heightened protection for children. *Id.* at 474-75, 27 P.3d at 466-67.

98. *Id.* at 474, 27 P.3d at 466.

99. *Id.* at 475, 27 P.3d at 467. It is important to note that while the prosecutor may charge both child abuse resulting in death and vehicular homicide, convictions for both would violate the defendant’s double jeopardy protection against multiple punishments. *Id.*

100. *Id.*

101. *Id.* (quoting *State v. Pierce*, 110 N.M. 76, 86-87, 792 P.2d 408, 418-19 (1990)).

In general, the rule of merger requires the lesser-included offense to be vacated to remedy the problem of impermissible multiple punishments.<sup>102</sup> However, the court recognized that vehicular homicide and child abuse resulting in death cannot be characterized as lesser-included and greater-inclusive offenses because they each contain different elements.<sup>103</sup> Despite this recognition, the court nonetheless found that child abuse resulting in death is a greater offense than vehicular homicide; thus, vehicular homicide merged into the convictions for child abuse resulting in death.<sup>104</sup> The factors the court used to create this modified rule of merger are the quantum of punishment<sup>105</sup> and the separate mens rea requirements<sup>106</sup> for each of the two crimes.

The second doctrine the court examined and ultimately rejected is the "rule of lenity," which counsels, "criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute."<sup>107</sup> Thus, the rule of lenity becomes applicable when persistent doubt about the Legislature's intent lingers even after applying the *Blockburger* elements test and looking at the other indicia of legislative intent.<sup>108</sup> The court found the rule of lenity to only be applicable in the context of assessing legislative intent to create multiple punishments, not in determining which conviction to vacate as a result of impermissible multiple punishments.<sup>109</sup> Thus, the court ultimately concluded that vehicular homicide is a lesser offense than child abuse resulting in death; therefore, it merged into child abuse resulting in death.<sup>110</sup>

## V. ANALYSIS AND IMPLICATIONS

The New Mexico Supreme Court has stated that the primary goal of the general/specific statute rule is to ascertain legislative intent when multiple punishments are not authorized. By characterizing the application of the general/specific statute rule as a necessary limitation on the charging discretion of the prosecutor, the *Santillanes* court fails to see the potential application of the general/specific statute rule and the rule of lenity in all cases that present a multiple punishment violation. These two canons of statutory construction have the potential to be applied hand-in-hand to assist courts in determining which of two conflicting statutes to vacate when punishment under both would constitute a violation of the defendant's double jeopardy protection.

Once a court finds the general/specific statute rule applicable in light of the defendant's conduct, it is often faced with the daunting and unguided task of determining which statute is specific. The New Mexico Supreme Court has yet to

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102. *Id.* at 476, 27 P.3d at 468.

103. *Id.* (relying on a *Blockburger* elements analysis appearing earlier in the opinion to reach this conclusion).

104. *Id.*

105. *Id.* at 477-78, 27 P.3d at 468-69 (finding that child abuse resulting in death is a greater offense than vehicular homicide because child abuse resulting in death is a first-degree felony punishable by 18 years mandatory imprisonment, while vehicular homicide is merely a third-degree felony not requiring a mandatory sentence).

106. *Id.* at 477, 27 P.3d at 469 (finding that "the Legislature's view of the seriousness of these two offenses cannot be determined by the applicable mens rea," but nonetheless stating that the lesser mens rea requirement for child abuse resulting in death indicates that the Legislature views the crime as a greater offense).

107. *Id.* at 478, 27 P.3d at 470 (quoting *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994)).

108. *Id.*

109. *Id.*

110. *Id.* at 479, 27 P.3d at 471.

lay down workable standards for making this determination. In order to clarify the application of the general/specific statute rule, the court should develop workable standards for determining which of two conflicting statutes is the specific statute.

*A. Determining the Applicability of the General/Specific Statute Rule*

The Supreme Court has repeatedly asserted that the primary goal in applying the general/specific statute rule is to ascertain legislative intent when presented with conflicting statutes.<sup>111</sup> In *Santillanes*, the court is particularly concerned by the prospect of applying the general/specific statute rule in a manner that limits the prosecutor's discretion.<sup>112</sup> The *Santillanes* court finds the general/specific statute rule inapplicable because it could find no clear evidence of intent by the Legislature to limit prosecutorial discretion.<sup>113</sup> However, in characterizing the general/specific statute rule as a necessary limitation on the prosecutor's discretion, the court fails to utilize a potential broader application of the rule—"assist[ing] courts more generally in determining whether the Legislature intended to create an exception to a general statute by enacting another law dealing with the matter in a more specific way."<sup>114</sup>

As the *Santillanes* court indicated, the prosecutor's charging discretion must remain broad because "it is the [prosecutor] who is elected by the people of this state to decide [the] very question of what charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico."<sup>115</sup> One of the traditional functions of the general/specific statute rule is "to scrutinize the propriety of a single charge of one crime as opposed to a different crime."<sup>116</sup> This scrutiny must take place regardless of whether the defendant's double jeopardy protection is implicated.<sup>117</sup> However, this inquiry should only arise when the elements of the two crimes are essentially the same, because "[a]n identity in elements demonstrates that the Legislature did not intend to punish separately under the two statutes for the same conduct and intended to limit prosecutorial discretion."<sup>118</sup>

Conversely, when each statute contains an element that the other does not, then it is presumed that multiple punishments are authorized and the prosecutor has broad discretion to charge the defendant under both statutes.<sup>119</sup> This presumption is

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111. See *State v. Cleve*, 127 N.M. 240, 247, 980 P.2d 23, 30 (1999); see also *Santillanes*, 130 N.M. at 469, 27 P.3d at 461.

112. *Santillanes*, 130 N.M. at 472, 27 P.3d at 464 ("[C]ourts should apply the general /specific statute rule guardedly to the extent that it operates to restrict the charging discretion of the prosecutor.").

113. *Id.* at 475, 27 P.3d at 467 ("[W]e conclude that the general/specific statute rule does not apply in this case, and the prosecutor retained the discretion to charge Defendant with either vehicular homicide or child abuse resulting in death, or both.").

114. *Cleve*, 127 N.M. at 252-53, 980 P.2d at 35-36.

115. *Santillanes*, 130 N.M. at 472, 27 P.3d at 465.

116. *Id.* at 469, 27 P.3d at 461 (quoting *Cleve*, 127 N.M. at 250, 980 P.2d at 27).

117. The *Santillanes* court finds that an analysis of the general/specific statute rule must apply even if the defendant was only charged with or convicted of one of the two crimes. *Id.* This is because a legislative intent to authorize multiple punishments necessarily implies that the Legislature also intended to leave prosecutorial discretion intact. *Id.*

118. *Id.* at 471, 27 P.3d at 463.

119. *Id.* Despite the necessity of granting broad charging discretion to the prosecutor, it is important to note that this broad grant of discretion can potentially result in unconstitutional disparities between similarly situated defendants. Therefore, the discretion is not entirely unlimited. See *State v. Chavez*, 77 N.M. 79, 82, 419 P.2d 456,



necessary because the prosecutor should have the broad discretion to charge any offense “[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute.”<sup>120</sup> Additionally, when the elements of the two statutes differ, the prosecutor must be given broad charging discretion because the prosecutor is in the position of knowing what elements he can or cannot prove. Thus, when each statute contains an independent element, it should be presumed that the Legislature has created multiple punishments and does not intend to limit the prosecutor’s discretion.

The *Santillanes* court found that for the general/specific statute rule to apply when each statute contains an element that the other does not, a defendant must overcome each of two presumptions. First, he must show that the Legislature did not intend multiple punishments.<sup>121</sup> Second, he must show that the Legislature also intended to limit the charging power of the prosecutor.<sup>122</sup> Only if he can overcome each of these two presumptions does the general/specific statute rule apply. Notwithstanding the difficulty in overcoming each of these presumptions, requiring the defendant to overcome a presumption in favor of prosecutorial discretion before applying the general/specific statute rule defeats a potentially broader function of the general/specific statute rule—assisting the courts in determining which of two conflicting statutes must be vacated when the Legislature did not intend multiple punishments.

If the defendant is able to show that the Legislature did not intend multiple punishments but cannot show that the Legislature intended to limit prosecutorial discretion, then the court is faced with determining which of the two conflicting statutes must be vacated. In order to make this determination, the *Santillanes* court crafts a modified rule of merger whereby the lesser offense merges into the greater offense.<sup>123</sup> This modified rule of merger is based on a faulty premise and fails to address the predominant inquiry, which is determining which statute the Legislature intends to apply to the exclusion of the other. The underlying premise is derived from *Pierce*,<sup>124</sup> in which the Supreme Court found child abuse resulting in death to be a lesser-included offense of first-degree murder based on the facts; therefore, it vacated the defendant’s conviction for child abuse resulting in death. This result was necessary because of the unique nature of greater-inclusive and lesser-included offenses—“[w]here one statute includes all elements of another statute and differs from the lesser-included statute by virtue of an additional element, we can infer that the Legislature intended the more inclusive statute to cover instances in which the

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458 (1966) (stating [that the Supreme Court] “no longer subscribe[d] to th[e] view which would permit law enforcement authorities to subject one person to the possibility of greater punishment than another who has committed an identical act. This would do violence to the equal protection clauses of our state and federal constitutions.”); *but see* State v. Davis, 129 N.M. 773, 777, 14 P.3d 38, 42 (Ct. App. 2000) (distinguishing *Chavez* on the grounds that it involved two virtually identical statutes and finding no equal protection violation in the absence of a showing that prosecutorial discretion has in fact been exercised based on constitutionally impermissible grounds).

120. *Santillanes*, 130 N.M. at 472, 27 P.3d at 464 (quoting State v. Ogden, 118 N.M. 234, 240-41, 880 P.2d 845, 851-52 (1994)).

121. *Id.* at 471, 27 P.3d at 463.

122. *Id.*

123. *See id.* at 476-77, 27 P.3d at 468-69.

124. 110 N.M. 76, 792 P.2d 408 (1990).

additional element was present."<sup>125</sup> However, in *Santillanes*, the offenses of child abuse resulting in death and vehicular homicide cannot be characterized as greater-inclusive and lesser-included offenses because each statute contains an element that the other does not.<sup>126</sup> When viewing the rule of merger under its correct lens, it becomes apparent that it should play no role in assisting the court in determining which conviction to vacate when each offense includes an element that the other does not. Merger under this instance sheds no light on the Legislature's intent. In summary, "a general use of the concepts of 'greater' and 'lesser' offenses ought not replace a detailed inquiry into legislative intent in analyzing a double jeopardy issue."<sup>127</sup>

In contrast, the general/specific statute rule has real potential value in assisting the court to determine the Legislature's intent. After a double jeopardy violation has been found, the question should not focus on whether the Legislature intended to limit prosecutorial discretion but rather should focus on whether the Legislature has enacted a law dealing with the defendant's conduct in a more specific manner.<sup>128</sup> If one of the two conflicting statutes addresses the defendant's conduct in a more specific manner than the other, then absent clear legislative intent to the contrary, it should be presumed that the Legislature intended for the defendant's conduct to be punished under the more specific statute.<sup>129</sup> The special statute should be applied because the Legislature is presumed to have been focused on the special statute.<sup>130</sup> Thus, the general/specific statute rule has the potential to be used as a canon of construction for determining which conviction the Legislature would intend to be vacated when double jeopardy prevents both convictions from standing.<sup>131</sup> Of course

125. *Santillanes*, 130 N.M. at 482, 27 P.3d at 474 (Minzner, J., dissenting).

126. Even the *Santillanes* majority concedes that vehicular homicide and child abuse resulting in death cannot be characterized as greater-inclusive and lesser-included offenses. However, the majority states that in *Pierce* the rule of merger was applied to the convictions of child abuse resulting in death and deliberate-intent murder even though those two offenses did not meet the traditional test for merger. *Id.* at 476, 27 P.3d at 468. In taking this position, the majority mischaracterizes the application of the rule of merger in *Pierce*. The distinction between the two offenses in *Pierce* was that deliberate-intent murder requires proof that the killing was perpetrated with deliberate intent, whereas child abuse resulting in death did not require that the intent to kill be deliberate. *Pierce*, 110 N.M. at 86, 792 P.2d at 418. Therefore, under the facts of that case, child abuse resulting in death was actually considered to be a lesser-included offense of deliberate-intent murder. *See id.*

127. *Santillanes*, 130 N.M. at 482, 27 P.3d at 474 (Minzner, J., dissenting).

128. *See* State v. Guilez, 129 N.M. 240, 244, 4 P.3d 1231, 1235 (1999).

129. *See, e.g.*, State v. Arellano, 123 N.M. 589, 591, 943 P.2d 1042, 1044 (Ct. App. 1997):

[T]he theory of the general/specific statute rule is that, if the specific statute was enacted later, it was intended to carve out an exception to the general statute; if the specific statute was enacted earlier, it was intended to remain an exception unless it was repealed in general words or by implication....

State v. Blevins, 40 N.M. 367, 369-70, 60 P.2d 208, 210 (1936) ("[T]he general statute is not operative as to the special kinds of property described in the special statute...."); State v. Yarborough, 120 N.M. 669, 905 P.2d 209 (1995) (finding that the Legislature intended to preempt involuntary manslaughter by enacting a more comprehensive motor vehicle code); State v. Cleve, 127 N.M. 240, 250, 980 P.2d 23, 33 (1999) ("[A]n inquiry under the general/specific statute rule should always focus primarily on whether the Legislature intended that the specific law operate as an exception to the general law....").

130. *See Cleve*, 127 N.M. at 247, 980 P.2d at 30:

[The general/specific statute rule] in effect treats the special law as an exception to the general law because the Legislature is presumed not to have intended a conflict between two of its statutes and because the Legislature's attention is more particularly drawn to the relevant subject matter in deliberating upon the special law.

131. *See Yarborough*, 120 N.M. at 669, 905 P.2d at 209 (stating that when two statutes apply to the same

the court must not make this determination in a vacuum. The general/specific statute rule is merely a starting point for the broader determination of actual legislative intent. If it becomes clear by assessing "other indicia of legislative intent" that the Legislature intends for the defendant's conduct to be punished under the general statute, then the defendant must be punished under the more general statute.<sup>132</sup>

Also, if insurmountable ambiguity persists regarding the intended scope of a criminal statute, the rule of lenity applies so that ambiguity is interpreted in the defendant's favor.<sup>133</sup> This rule serves the purpose of "striking the appropriate balance between the [L]egislature, the prosecutor, and the court defining criminal liability."<sup>134</sup> In *Santillanes*, the Supreme Court stated that "unlike a determination of whether the Legislature intended multiple punishments for a single offense, the rule of lenity does not apply to a determination of which conviction to vacate as a result of impermissible multiple punishments."<sup>135</sup> However, in dismissing the rule of lenity as a tool of statutory construction, the *Santillanes* court failed to see its potential value in ascertaining the Legislature's intent when the application of two conflicting statutes remains ambiguous.<sup>136</sup> In such a case of ambiguity, the Supreme Court has repeatedly asserted that the ambiguous statutes must be interpreted in favor of the defendant.<sup>137</sup> However, the rule of lenity should be resorted to only in "those situations in which reasonable doubt persists about [the] statute's intended scope even after resort to language and structure, legislative history, and motivating policies of [the] statute."<sup>138</sup> Although the rule of lenity is ultimately a last resort for a court seeking to determine the Legislature's intent, a judicial application of the rule of lenity does not foreclose the Legislature from making its intent more clear. If the Legislature disagrees with the court's application of the rule of lenity, then the Legislature certainly has the power to clarify its intention.<sup>139</sup> In this regard, the rule of lenity in ambiguous situations is the best way to flesh out the Legislature's intent.<sup>140</sup>

Ultimately, the determination of which of two conflicting statutes to vacate following a double jeopardy violation is one of legislative intent. The general/specific statute rule and the rule of lenity have the potential power to assist courts in determining legislative intent that the *Santillanes* court failed to recognize.

criminal conduct, the special statute should control); see also *Arellano*, 123 N.M. at 591, 943 P.2d at 1044 ("The purpose of [the general/specific statute rule] is to implement the intent of the legislature....").

132. See *Santillanes*, 130 N.M. at 471, 27 P.3d at 463 ("The general/specific statute rule should not be applied in a manner that ignores other rules of statutory construction ....").

133. *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d. 845, 853 (1994).

134. *Santillanes*, 130 N.M. at 478, 27 P.3d at 470 (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

135. *Id.*

136. See *State v. Landgraf*, 121 N.M. 445, 454, 913 P.2d 252, 261 (Ct. App. 1996) ("Since legislatures often produce little evidence of their intent regarding multiple punishment, the rule of lenity is often an appropriate tool of statutory construction in such contexts.").

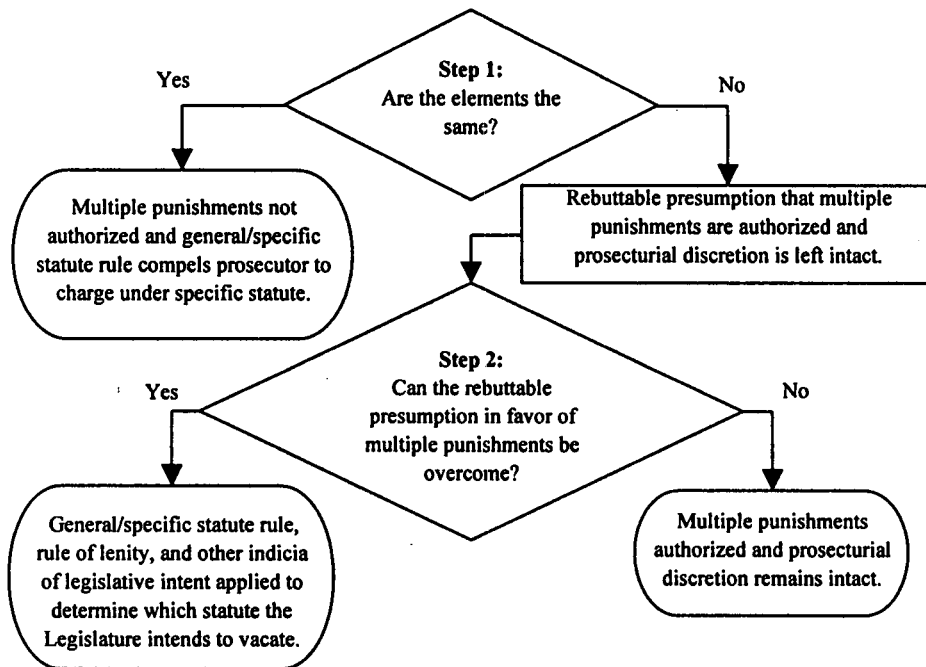
137. See, e.g., *Ogden*, 118 N.M. at 242, 880 P.2d at 853.

138. *State v. Anaya*, 123 N.M. 14, 24, 933 P.2d 223, 233 (1996).

139. See *id.* at 25, 933 P.2d at 234 (stating that the judiciary is not a legislative body and it is the duty of the Legislature to clarify its intent).

140. If the Legislature remains silent following the court's application of the rule of lenity, then it should be presumed that the Legislature has acquiesced to its application. However, if the Legislature responds, then its intent should be clear in future cases. In this way, applying the rule of lenity forces the Legislature to make its intent clear.

Figure # 5 - Modified Framework



### *B. Applying the General/Specific Statute Rule—Developing Workable Standards for Determining Which Statute Is Specific*

Finding that the general/specific statute rule should apply in a given case does not end the court's inquiry. Once the court finds that the general/specific statute rule applies, the court must still determine which of two applicable statutes is the more specific statute for the defendant's conduct. Often this inquiry can be rather difficult because the New Mexico Supreme Court has yet to lay down a workable standard for determining which of two competing statutes is specific and which is general.<sup>141</sup> In the absence of a workable standard, courts may disproportionately and arbitrarily find the statute with the greatest punishment to be the one that is the most specific.<sup>142</sup>

141. See *State v. Cleve*, 127 N.M. 240, 251, 980 P.2d 23, 34 (1999) (“[I]t may be difficult in some circumstances to determine which of two laws can be characterized as specific...however, this difficulty does not preclude application of the rule...[a]s with the interpretation of all statutes, courts should resort to traditional means of ascertaining legislative intent.”). Legislative intent should control this inquiry. *Id.* However, when legislative intent cannot be found by resorting to traditional means of ascertaining legislative intent (such as the language, histories, and purposes of the statutes), the courts should develop canons of construction that assist in determining which statute is specific.

142. To some degree the difficulty in determining which statute is specific—vehicular homicide or child abuse resulting in death—may have contributed to the Supreme Court in *Santillanes* finding the general/specific statute rule to be inapplicable. By finding the rule to be inapplicable, the *Santillanes* court may have been evading this difficult question of determining which of the two conflicting statutes is more specific as to the defendant's

The Kansas Supreme Court has adopted a standard in which “[a] statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is specific.”<sup>143</sup> This standard has the potential to resolve many conflicts that the court is facing, particularly those in which two statutes prohibit the same particular conduct but create a separate offense based on either the status of the offender, the victim, or a particular object.

This standard would not seem to apply in a situation where the conflict between the two statutes is created by the manner in which each statute is violated. For example, in *State v. Gabaldon*,<sup>144</sup> the defendant’s act of coerced fellatio violated the provisions of the criminal sexual penetration statute and the criminal sexual contact statute. Therefore, the conflict between the statutes was created by the manner in which the act was committed rather than the status of the offender or victim. The Court of Appeals in *Gabaldon* found the criminal sexual penetration statute to be the specific statute because it specifically prohibited a touching of the penis with the tongue or lips, whereas the criminal sexual contact statute more generally prohibited a touching of intimate parts.<sup>145</sup> Thus, a potential canon in applying the general/specific statute rule is that the statute specifically forbidding the defendant’s particular conduct is the special statute, while the one prohibiting the defendant’s conduct as part of a class of broader conduct is the general statute.

If this potential canon of construction is applied to the facts in *Santillanes*, the general/specific statute rule would dictate that the defendant’s convictions of child abuse resulting in death should be vacated. The act committed by the defendant in *Santillanes* violates the provisions of both the vehicular homicide statute and the child abuse resulting in death statute. However, the defendant’s particular conduct—reckless driving—is more specifically covered under the vehicular homicide statute.<sup>146</sup> Reckless driving would only be a part of a class of broader conduct that is covered under the child abuse resulting in death statute.<sup>147</sup>

Ultimately, the following two potential standards for applying the general/specific statute rule could be utilized: (1) a statute relating to particular persons or things of a class is specific, while a statute relating to persons or things is a general law,<sup>148</sup> and

conduct. The attraction of the rule of merger, although inappropriate in multiple punishment analyses, is its ease of application. It is relatively easy to determine which of two conflicting offenses is greater; whereas, with no workable standards in place, it may be much more difficult to determine which statute is more specific regarding the defendant’s conduct.

143. *State v. Williams*, 829 P.2d 892, 897 (Kan. 1992) (applying the standard to find that the State was compelled to charge the defendant with “aggravated incest” when the alleged victim was his 14-year-old step-daughter rather than charging him with “indecent liberties with a child”).

144. 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

145. *Id.* at 94, 582 P.2d at 1307.

146. *See State v. Santillanes*, 130 N.M. 464, 480, 27 P.3d 456, 472 (2001) (Minzner, J., dissenting):

[T]he greater specificity of the vehicular homicide statute demonstrates to me that the Legislature focused on the conduct of which Defendant has been convicted when it enacted the vehicular homicide statute. We have no indication, based on the language of the child abuse statute, that the Legislature focused on the conduct when it enacted the child abuse statute.

147. *See generally id.* at 480-81, 27 P.3d at 472-73 (Minzner, J., dissenting) (finding the statutory language, purpose, and history of the child abuse resulting in death statute to indicate that the Legislature did not intend for the child endangerment language of that statute to be broadly construed so as to encompass the death of a child resulting from a driving offense).

148. A comparison of the battery statute (N.M. STAT. ANN. § 30-3-4 (1997 Repl.)) with the child abuse statute

(2) a statute specifically forbidding the defendant's particular conduct is specific, while a statute that prohibits the defendant's conduct as part of a class of broader conduct is a general law.<sup>149</sup> These standards and/or additional workable standards would help clarify the manner in which the general/specific statute rule is applied.

## VI. CONCLUSION

The New Mexico Supreme Court in *Santillanes* attempted to clarify the application of the general/specific statute rule. However, the court formulated an unduly limited application that fails to utilize a potential function of the general/specific statute rule—assisting courts in determining which of two conflicting statutes must be vacated when the Legislature did not intend multiple punishments. Additionally, the *Santillanes* court further dismissed the potential value of applying the rule of lenity in multiple punishment cases when the intent of the Legislature remains insurmountably ambiguous. Finally, in clarifying the application of the general/specific statute rule the Supreme Court still has yet to create workable standards for determining which of two competing statutes is specific and which is general. The development of workable standards would potentially reduce unnecessary disparity and make the application of the general/specific statute rule more lucid.

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(N.M. STAT. ANN. § 30-6-1 (1997 Repl.)) can shed light on the application of this standard. It is not difficult to imagine a defendant's unitary conduct violating each of these separate statutes when an adult hits a child. However, under this standard, child abuse would be the more appropriate charge because that statute deals with children as a particular class of persons; whereas, the battery statute relates generally to any person.

149. A comparison of the embezzlement statute (N.M. STAT. ANN. § 30-16-8 (1997 Repl.)) with the computer fraud statute (N.M. STAT. ANN. § 30-45-3 (1997 Repl.)) helps make the application of this standard more lucid. A defendant who accesses a computer to embezzle money violates each of these statutes. However, the computer fraud statute is more specific to the defendant's conduct than the general embezzlement statute. Thus, if convictions under each of these statutes would violate the defendant's double jeopardy protection against multiple punishments, the embezzlement conviction should be vacated and the computer fraud conviction should stand.