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# *A Sargasso Sea: Montana's Statutory Double Jeopardy Protections in the Aftermath of* State v. Valenzuela

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# A SARGASSO SEA: MONTANA'S STATUTORY DOUBLE JEOPARDY PROTECTIONS IN THE AFTERMATH OF *STATE V. VALENZUELA*

**Callie Woody***

## I. Introduction

In Montana, criminal defendants are protected from being "twice put in jeopardy of life or limb" for the "same offense" under the United States Constitution,[1] Montana Constitution,[2] and Montana's statutory scheme.[3] Due to a considerable increase in state and federal statutory offenses, double jeopardy protections are exceedingly dependent upon the definition of the "same offense."[4] In *Blockburger v. United States*,[5] the United States Supreme Court articulated its seminal "same offense" test—whether two offenses are the "same" turns on whether each offense requires proof of an element that the other does not.[6] The doctrine of lesser included offenses raises unique double jeopardy concerns. By definition, a lesser included offense ("LIO") includes only the same or less than all the elements of the greater; therefore, the LIO and greater offense are inherently the "same offense" for purposes of double jeopardy.[7]

In *State v. Valenzuela*,[8] the Montana Supreme Court addressed Montana's multiple charges statute, Montana Code Annotated § 46-11-410, and whether sexual assault was an LIO or specific instance of incest under § 46-11-410(2)(a) and (d), respectively.[9] However, the *Valenzuela* Court erroneously conflated the tests provided for under § 46-11-410(2)(a) and (d), underscoring the confusion plaguing Montana's multiple charges statute and the erosion of Montana's statutory double jeopardy protections.

This Comment analyzes two specific subsections of Montana's multiple charges statute, § 46-11-410(2)(a) and (d), suggesting that the Montana

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1. U.S. Const. amend V.

2. Mont. Const. art. II, § 25.

3. Mont. Code Ann. §§ 46-11-410; 46-11-503 (2021).

4. Jane A. Minerly, *The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape*, 82 Temp. L. Rev. 1103, 1105–06 (2009).

5. 284 U.S. 299 (1932).

6. *Id.* at 304.

7. Brown v. Ohio, 432 U.S. 161, 168 (1977).

8. 495 P.3d 1061 (Mont. 2021).

9. *Id.* at 1065, 1067.

Supreme Court's decision in *Valenzuela* misapplied Montana case law by conflating the tests provided for under those subsections. Section II provides background on the same offense test and the doctrine of LIOs. Section III discusses Montana's statutory double jeopardy protections and Section IV discusses the *Valenzuela* decision. Section V analyzes the ramifications of *Valenzuela* on double jeopardy protections in Montana. Section VI concludes that *Valenzuela* perpetuates the confusion surrounding Montana's multiple charges statute to the detriment of criminal defendants. This Comment's analysis is limited to situations where multiple convictions arising out of a single incident are imposed in a single prosecution; it does not delve into subsequent prosecutions, which raise its own double jeopardy concerns.

## II. BACKGROUND

### *A. Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense be twice put in jeopardy of life or limb."[10] The United States Supreme Court has articulated that the Double Jeopardy Clause provides for three constitutional protections:[11] (1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after a conviction; and (3) protection against multiple charges for the same offense.[12] However, the Double Jeopardy Clause's "deceptively plain language" has produced complex judicial precedent—[13] so much so that Justice Rehnquist described double jeopardy case law as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."[14]

### *B. Same Offense*

As Justice Rehnquist wisely observed, the scope of double jeopardy protections "turns upon the meaning of the words 'same offense,' a phrase deceptively simple in appearance but virtually kaleidoscopic in [its] application."[15] Indeed, the definition of same offense has undergone several iterations in double jeopardy jurisprudence. Initially, early common law courts

10. U.S. CONST. amend V.

11. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

12. Minerly, *supra* note 4, at 1105. **R**

13. James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 117 (1995) (quoting Crist v. Bretz, 437 U.S. 28, 32 (1978)).

14. Albernaz v. United States, 450 U.S. 333, 343 (1981).

15. Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J. Dissenting).

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narrowly interpreted what constituted a "same offense," finding the phrase only applied to an "identical act and crime."[16]

Slowly, courts broadened their understanding of the phrase "same offense." In the first American case to confront this question, *Morey v. Commonwealth*,[17] the Court adopted an approach based solely upon the elements of the two offenses.[18] There, the Court upheld indictments for lewd and lascivious cohabitation and adultery on the basis that each offense required proof that the other did not—lewd and lascivious cohabitation required proof that the parties lived together, whereas adultery required proof of unlawful intercourse.[19] Therefore, under *Morey*, "[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."[20]

### *1. Blockburger and the Elements Test*

The United States Supreme Court articulated its landmark "same offense" test in *Blockburger v. United States*.[21] There, the Court held that where the same act or transaction violates two statutory offenses, the defendant may be convicted of both where each requires an element that the other does not.[22] Put another way, the offenses are the same for purposes of double jeopardy where neither requires proof of any additional element. On its face, *Blockburger* created a relatively straightforward test of statutory comparison, requiring courts to focus solely on the elements of each offense as opposed to the evidence presented at trial.[23]

*Blockburger*'s focus on statutory language also necessarily emphasizes consideration of legislative intent.[24] The dispositive question under *Blockburger*, therefore, "is whether the legislature intended to provide for multiple punishments."[25] This has created an "unusual constitutional test," at least on the surface: the constitutional protection found in the "same of-

16. Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L. J. 351, 389–90 (2005).

17. 108 Mass. 433 (1871).

18. *Id.* at 434.

19. *Id.* at 435–36.

20. *Id.* at 434.

21. 284 U.S. 299 (1932). *Blockburger* was briefly overturned in Grady v. Corbin, 495 U.S. 508 (1990), but was quickly reinstated by United States v. Dixon, 509 U.S. 688 (1993) as the federal Constitutional test.

22. *Id.* at 304.

23. Illinois v. Vitale, 447 U.S. 410, 416 (1980).

24. Ohio v. Johnson, 467 U.S. 493, 499 (1984).

25. State v. Valenzuela, 495 P.3d 1061, 1067 (Mont. 2021) (citing State v. Close, 246 P.2d 940, 949 (Mont. 1981)).

fense" language is controlled by whether the legislature intended to create two separate offenses.[26]

### C. The Doctrine of Lesser Included Offenses

The doctrine of LIOs developed in early common law and is now widely prevalent throughout the United States criminal justice system.[27] By definition, an LIO is a less serious crime that is necessarily committed during the perpetration of a greater crime.[28] The doctrine entitles a defendant to jury instructions on both the lesser and the greater offense,[29] authorizing a conviction of any crime which is less than, but included within, the charged offense.[30]

#### 1. Defining LIOs

Courts routinely employ one of three tests to determine whether an offense is an LIO of another: the elements test, the pleadings test, and the evidentiary test.[31] The elements test, used in the federal system and in a growing number of states,[32] is the focus of this Comment. As articulated in *Schmuck v. United States*,[33] the elements test provides:

> [O]ne offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no [jury] instruction is to be given [ ].[34]

Under the elements approach, an offense is not an LIO "if the proof of one offense does not invariably require proof of the other."[35] Pursuant to the Court's reasoning in *Schmuck*, "[t]o be necessarily included in the greater offense, the lesser must be such that it is impossible to commit the greater without first having committed the lesser."[36] Like *Blockburger*, the elements approach compares only the statutory elements of the offense without regard to the pleadings or evidence presented at trial.[37] For exam-

26. Shellenberger and Strazzella, *supra* note 13, at 123. R
27. *Id.* at 6.
28. *Id.* at 10.
29. Kyron Huigens, *The Doctrine of Lesser Included Offenses*, U. PUGET SOUND L. REV. 16:185, 186 (1992).
30. Shellenberger and Strazzella, *supra* note 13, at 6. R
31. Minerly, *supra* note 4, at 1108–09. R
32. *Id.* at 1108.
33. 489 U.S. 705 (1989).
34. *Id.* at 716.
35. *Id.* at 717.
36. *Id.* at 719 (quoting House v. State, 117 N.E. 647, 648 (Ind. 1917)).
37. Shellenberger and Strazzella, *supra* note 13, at 10. R

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ple, in Montana, theft[38] is not an LIO of robbery,[39] because theft requires an element unneeded to establish the greater offense of robbery: completion of the theft.[40]

### *2. LIOs, Double Jeopardy, and the "Same Offense"*

The doctrine of LIOs raises important double jeopardy questions,[41] particularly where the question turns on the definition of "same offense." In *Brown v. Ohio*,[42] the United States Supreme Court considered whether prosecution for the LIO of joyriding barred prosecution for the greater offense of auto theft arising from the same transaction.[43] Answering in the affirmative, the Court reasoned that because joyriding required only those elements required for auto theft, auto theft was, "by definition," the "same offense" as joy riding under the *Blockburger* test.[44] Consequently, a conviction for both the greater and lesser offense is barred under the definition of "same offense."[45]

## III. Double Jeopardy Protections in Montana

In Montana, criminal defendants are protected against double jeopardy by the Fifth Amendment,[46] incorporated to the states through the Fourteenth Amendment,[47] and Article II, Section 25 of the Montana Constitution.[48] Beyond these constitutional protections, Montana's statutory scheme offers additional protection against double jeopardy.

Pertinent here is Montana Code Annotated § 46-11-410, which governs situations where multiple charges arise from a single transaction.[49] Montana case law with respect to § 46-11-410, however, is replete with inconsistent and unpredictable analysis of the statute—a concerning trend that threatens to diminish Montana's statutory double jeopardy protec-

38. Mont. Code Ann. § 45-6-301(1)(a) (2021) (The applicable elements of theft are (1) purposely or knowingly; (2) obtaining or exerting unauthorized control; (3) over the property of the owner; (4) with the purpose of depriving the owner of the property).

39. Mont. Code Ann. § 45-5-401(1)(a) ("A person commits robbery if in the course of committing a theft he: (a) inflicts bodily injury upon another.").

40. State v. Greywater, 939 P.2d 975, 979 (Mont. 1997).

41. Shellenberger and Strazzella, *supra* note 13, at 3. **R**

42. 432 U.S. 161 (1977).

43. *Id.* at 162.

44. *Id.* at 168 (applying the *Blockburger* test and holding that "[t]he greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense is included in it.").

45. Chris Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 455 (1984).

46. U.S. Const. amend V.

47. Benton v. Maryland, 295 U.S. 784, 794 (1969).

48. Mont. Const. art. II, § 25.

49. Mont. Code Ann. § 46-11-410 (2021).

tions.[50] Of particular concern is the Montana Supreme Court's conflation of the tests provided for under § 46-11-410(2)(a) and (d) in *State v. Valenzuela*.[51]

### *A. The Multiple Charges Statute*

Under § 46-11-410, where the same transaction establishes the commission of more than one offense, the defendant may be prosecuted for each offense, subject to five enumerated exceptions:

> (a) one offense is included in the other;
> (b) one offense consists only of a conspiracy or other form of preparation to commit the other;
> (c) inconsistent findings of fact are required to establish the commission of the offenses;
> (d) the offenses differ only in that one is defined to prohibit a specific instance of the conduct; or
> (e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses.[52]

As discussed above, this Comment will focus its analysis on subsections § 46-11-410(2)(a) and (d).

First, § 46-11-410(2)(a) provides that a defendant may not be convicted of more than one offense where "one offense is included in the other."[53] An "included offense," defined under Montana Code Annotated § 46-1-202(9)(a), is one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged."[54] Together, §§ 46-11-410(2)(a) and 46-1-202(9)(a) establish what this Comment refers to as "the included offense test." Second, § 46-11-410(2)(d) prohibits multiple convictions where "the offenses differ only in that one is defined to prohibit a specific instance of the conduct" of the other.[55] Section 46-11-410(2)(d) establishes what this Comment refers to as the "specific instance of conduct test."

50. *See* State v. Weatherell, 225 P.3d 1256 (Mont. 2010); State v. Matt, 106 P.3d 530 (Mont. 2005); State v. McQuiston, 922 P.2d 519 (Mont. 1996); State v. Sor-Lokken, 805 P.2d 1367 (Mont. 1991); State v. Hall, 728 P.2d 1339 (Mont. 1986).

51. State v. Valenzuela, 495 P.3d 1061 (Mont. 2021).

52. MONT. CODE ANN. § 46-11-410.

53. MONT. CODE ANN. § 46-11-410(2)(a).

54. MONT. CODE ANN. § 46-1-202(9) ("Included offense" means an offense that: (a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged; or (c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission).

55. MONT. CODE ANN. § 46-11-410(2)(d).

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Both § 46-11-410(2)(a) and (d) require an analysis of the charged offenses' statutory elements.[56] Yet, unlike § 46-11-410(2)(a), § 46-11-410(2)(d) turns on whether one offense merely requires proof of a more specific conduct, circumstance, or victim that is general to the elements of the other offense.[57] Montana's sexual assault[58] and incest[59] statutes are illustrative of this concept. The offenses share the first two elements—knowledge and sexual contact—but differ on the third element: the victim. Specifically, while sexual assault prohibits knowing sexual assault of any person,[60] incest prohibits knowing sexual contact of a family member[61]—in other words, a more specific victim of sexual assault.[62]

### *B. Included Offense: A Codification of the* Blockburger *Same Elements Test?*

As it stands now, whether Montana's included offense test in §§ 46-11-410(2)(a) and 46-1-202(9)(a) codified *Blockburger* has generated significant confusion in the Montana Supreme Court. For example, in *State v. Close*,[63] the Montana Supreme Court unambiguously held that "[§ 46-11-410[64] of the Montana Code Annotated] is merely a codification of the *Blockburger* test."[65]

The Court reversed course in *State v. Beavers*,[66] finding that because the definition for "included offense" in § 46-1-202(9)(a)[67] provides a clear statutory analysis, *Blockburger* "may unnecessarily confuse the issue."[68] The *Beavers* Court thus diverged from *Close*, instructing that § 46-1-202(9)(a) was to be applied without reference to *Blockburger*.[69]

Despite *Beavers*' clear instruction, it has proven difficult to divorce *Blockburger* from §§ 46-11-410(2)(a) and 46-1-202(9)(a). For example, the Court in *Valenzuela,* without reference to *Beavers*, found that §§ 46-11-410(2)(a), 46-1-202(9)(a), and *Blockburger* were considered "identical"

56. *Valenzuela*, 495 P.3d at 1075 (Sandefur, J. Dissenting).
57. *Id.* at 1078 (Sandefur, J. Dissenting).
58. MONT. CODE ANN. § 45-5-502.
59. MONT. CODE ANN. § 45-5-507.
60. MONT. CODE ANN. § 45-5-502(1).
61. MONT. CODE ANN. § 45-5-507(1).
62. *Valenzuela*, 495 P.3d at 1082 (Sandefur, J. Dissenting).
63. 623 P.2d 940 (Mont. 1981).
64. Previously MONT. CODE ANN. § 46-11-502 (1989).
65. *Close,* 623 P.2d at 950; *see also* State v. Greywater, 939 P.2d 975, 997–98 (Mont. 1997); State v. Smith, 916 P.2d 773, 778–79 (Mont. 1996) (writing that the traditional test to determine whether an offense is a lesser included offense was articulated in *Blockburger*).
66. 987 P.2d 371 (Mont. 1999).
67. Previously MONT. CODE ANN. § 46-1-202(8)(a) (1989).
68. *Beavers*, 987 P.2d at 377.
69. *Id.*

tests under Montana precedent.[70] Similarly, in the 2022 decision of *State v. Brown*,[71] the Montana Supreme Court asserted, again without reference to *Beavers*, that Montana employs *Blockburger* to determine whether an offense is an LIO under § 46-1-202(9)(a).[72] *Brown* cited to *State v. Castles*,[73] a decision published two years before *Beavers*.

Moreover, it is difficult to distinguish the plain language of §§ 46-11-410(2)(a) and 46-1-202(9)(a) from that of *Blockburger*. Rather, under a plain reading of both tests, where an offense requires an additional element other than the one charged, it is both not an "included offense" under §§ 46-1-202(9)(a) and 46-11-410(2)(a), nor is it the "same offense" under *Blockburger*. Consequently, the Court's attempts to distinguish *Blockburger* from Montana's included offense analysis is largely futile; at the very least, the statute parallels the analysis and protections provided for under *Blockburger*.

### *C. Erosion of the Specific Instance of Conduct Test*

The Montana Supreme Court is similarly unclear in its application of § 46-11-410(2)(a) and (d). Specifically, while early case law applied two distinct tests with respect to § 46-11-410(2)(a) and (d), the Court's recent jurisprudence conflates the included offense test under §§ 46-11-410(2)(a) and 46-1-202(9)(a) with the specific instances of conduct test under § 46-11-410(2)(d).[74]

#### *1. Early Application*

The Montana Supreme Court has had remarkably little opportunity to interpret § 46-11-410(2)(d). Yet prior to 2010, where the Court did address § 46-11-410(2)(d), it applied the test separately and apart from § 46-11-410(2)(a).

First, in *State v. Hall*,[75] the Court analyzed whether the defendant may be charged with both sexual assault and incest arising out of a single transaction.[76] There, the Court faced the question of whether the subject variant

70. State v. Valenzuela, 495 P.3d 1061, 1067 (Mont. 2021); *see also* Valenzuela, 495 P.3d at 1074 (Sandefur, J. Dissenting) ("At a minimum, §§ 46-11-410(1), (2)(a), 46-1-202(9)(a) . . .codify the constitutional *Blockburger* same elements test.").

71. 2022 WL 4152865.

72. *Id.* at *3 (citing State v. Castles, 948 P.2d 688, 691 (Mont. 1997)).

73. *Castles*, 948 P.2d 688.

74. *See* State v. Weatherell, 225 P.3d 1256 (Mont. 2010); State v. Matt, 106 P.3d 530 (Mont. 2005); State v. McQuiston, 922 P.2d 519 (Mont. 1996); State v. Sor-Lokken, 805 P.2d 1367 (Mont. 1991); State v. Hall, 728 P.2d 1339 (Mont. 1986).

75. 728 P.2d 1339 (Mont. 1986).

76. *Id.* at 1341.

for incest[77]—knowing sexual contact with a stepchild less than 18—and felony sexual assault[78]—knowing sexual contact with a victim less than 14 and an offender three years older—differed only in that one is defined to prohibit a specific instance of such conduct, and the other defined to prohibit a "designated kind of conduct generally," respectfully.[79] The Court identified that while the first two elements of each offense were identical, the third element defined the victim: Hall's 12-year-old stepchild.[80] Consequently, the "designated kind of conduct generally" referred to sexual assault of anyone, whereas the specific instance of such conduct referred to the sexual assault of defendant Hall's stepchild.[81] Therefore, the Court concluded that convictions for both offenses violated double jeopardy under the specific instance of conduct test.[82]

In *State v. Sor-Lokken*,[83] the Court concluded that the defendant's convictions for incest and sexual assault did not run afoul of double jeopardy under the specific instance of conduct test.[84] The Court found that because the victim was 15 and above the age of consent, the assault implicated a different subvariant of sexual assault than that at issue in *Hall*— knowing sexual contact *without consent*.[85] The subvariant at issue in *Sor-Lokken* therefore amounted to more than a specific type of conduct generally prohibited by the other offense; consequently, unlike *Hall*, the Court concluded the defendant's convictions for both offenses did not violate double jeopardy under the specific instance of conduct test.[86]

Finally, in *State v. McQuiston*,[87] the defendant raised double jeopardy arguments under both Montana Code Annotated § 46-11-410(2)(a) and (d).[88] The Court, without significant explanation, rejected both arguments, finding that incest[89] was neither an included offense of sexual intercourse

77. MONT. CODE ANN. § 45-5-507 (2021).

78. MONT. CODE ANN. § 45-5-502.

79. State v. Valenzuela, 495 P.3d 1061, 1076 (Mont. 2021) (Sandefur, J. Dissenting) (citing *Hall*, 728 P.2d at 1340–42).

80. *Hall*, 728 P.2d at 1341.

81. *Id.*

82. *Id.*

83. 805 P.2d 1367 (Mont. 1991).

84. *Id.* at 1373.

85. *Id.* (emphasis added).

86. *Id.*

87. 922 P.2d 519 (Mont. 1996).

88. *Id.* at 525.

89. MONT. CODE ANN. § 45-5-507 (2021).

without consent[90] under § 46-11-410(2)(a), nor was it a specific instance of sexual intercourse without consent under § 46-11-410(2)(d).[91]

*2. The* State v. Weatherell *Decision*

*State v. Weatherell*[92] marks the Court's inexplicable shift to a single standard under Montana Code Annotated § 46-11-410(2)(a) and (d). There, defendant Weatherell was charged with assault on a minor,[93] criminal endangerment,[94] and partner or family member assault ("PFMA")[95] after striking his girlfriend's two-year-old son.[96] Weatherell pled guilty to the PFMA and moved to dismiss the remaining charges, arguing in pertinent part that they violated double jeopardy under § 46-11-410(2)(a) and (d).[97] In stark contrast to the precedent discussed above, the Court held, for the first time, that Montana case law employed a "single standard" under § 46-11-410(2)(a) and (d).[98] That standard, according to the *Weatherell* Court, required an analysis of each element to determine whether it included an element that the other did not[99]—in short, the included offense test. Curiously, the *Weatherell* Court cited to *Matt*, *McQuiston*, *Sor-Lokken*, and *Hall*—none of which, as illustrated above, stand for the proposition that § 46-11-410(2)(a) and (d) employ a single standard.[100]

Six years after *Weatherell*, the Court in *State v. Hooper*[101] analyzed § 46-11-410(2)(a) and (d) under *Weatherell*'s single standard, concluding that "where each offense requires proof of a 'fact' which the other does not, there cannot be a specific instance of conduct which is included in the other offense."[102] In *State v. Brandt*,[103] the Court again employed *Weatherell*'s single standard, finding that the defendant's convictions for theft by embezzlement and fraudulent practices[104] violated § 46-11-410(2)(a) and (d) be-

90. MONT. CODE ANN. § 45-5-503.

91. *McQuiston*, 922 P.2d at 525 (stating that "[i]ncest is not an 'included offense' of sexual intercourse without consent, nor, under the facts of this case, is it a 'specific instance' of the conduct proscribed by § 45-5-503, MCA").

92. 225 P.3d 1256 (Mont. 2010).

93. MONT. CODE ANN. § 45-5-212.

94. MONT. CODE ANN. § 45-5-207.

95. MONT. CODE ANN. § 45-5-206.

96. *Weatherell,* 225 P.3d at 1257.

97. *Id.* at 1258.

98. *Id.* at 1259.

99. *Id.*

100. *See* State v. Matt, 106 P.3d 530, 532–33 (Mont. 2005); State v. McQuiston, 922 P.2d 519, 525 (Mont. 1996); State v. Sor-Lokken, 805 P.2d 1367, 1373 (Mont. 1991); State v. Hall, 728 P.2d 1339, 1341–42 (Mont. 1986)).

101. 386 P.3d 548 (Mont. 2016).

102. *Id.* at 551–52.

103. 460 P.3d 427 (Mont. 2020).

104. MONT. CODE ANN. § 30-10-301(1) (2021).

cause theft by embezzlement[105] "is included within and a specific instance" of fraudulent practices.[106]

## IV. The Valenzuela Decision

### A. Factual Background

In April 2011, C.J.V. informed his kindergarten teacher that his biological father, Carlos Valenzuela, had touched him inappropriately.[107] Law enforcement and the Montana Department of Health and Human Services investigated the report.[108] However, the investigation closed after C.J.V. recanted and said the incident had never occurred.[109] In September 2012, Valenzuela was sentenced to prison for an unrelated Sexual Intercourse Without Consent conviction, and C.J.V. and his mother moved to Idaho.[110] In 2017, when C.J.V.'s mother planned to visit Valenzuela, C.J.V. resisted and told his mother the 2011 incident had in fact occurred.[111] C.J.V.'s mother subsequently filed a report with Idaho law enforcement, who transferred the investigation back to Beaverhead County Police Department in Montana.[112]

In 2018, the state of Montana charged Valenzuela with sexual assault and incest for the 2011 incident.[113] At trial, C.J.V. testified that Valenzuela had touched his penis, over his underwear, on a single occasion in 2011.[114] C.J.V. indicated that Valenzuela had threatened to hurt him if he told anyone, and that C.J.V. had recanted in 2011 out of fear.[115] The jury found Valenzuela guilty of sexual assault and incest.[116] Valenzuela was sentenced to serve two concurrent sentences of 100 years in Montana State Prison with credit of 438 days served and a 40-year parole restriction.[117]

Valenzuela appealed to the Montana Supreme Court, arguing that sexual assault is an included offense of incest, and that convictions for both offenses arising from a single incident violated his statutory and constitutional protections against double jeopardy.[118] The Montana Supreme Court

105. Mont. Code Ann. § 45-6-301(6).
106. *Brandt*, 460 P.3d at 434.
107. State v. Valenzuela, 495 P.3d 1061, 1064 (Mont. 2021).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Valenzuela*, 495 P.3d at 1064–65.
114. *Id.* at 1065.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

affirmed the District Court, holding that Valenzuela's convictions did not violate Montana's double jeopardy protections.[119]

### *B. Justice McKinnon's Majority Opinion*

Justice McKinnon's majority opinion held that Valenzuela's convictions for incest and sexual assault did not violate Montana's constitutional and statutory double jeopardy protections under *Blockburger* and Montana's multiple charges statute.[120]

Justice McKinnon first analyzed whether Valenzuela's convictions violated § 46-11-410(2)(a) and (d).[121] Citing to *Weatherell*, Justice McKinnon reasoned § 46-11-410(2)(a) and (d) were "identical tests" that employed a "single standard."[122] According to Justice McKinnon, that test required a determination of whether one offense is an "included offense" of the other; meaning, an offense that is "established by proof of the same or less than all the facts required to establish the commission of the offense charged."[123] Consequently, where each offense required an element the other did not, "there cannot be a specific instance of conduct which is included in the other offense."[124]

Justice McKinnon then turned to *Blockburger* to address the constitutional and statutory double jeopardy issues, finding that "both § 46-11-410(a) and (d), MCA, and *Blockburger* require this Court to determine whether the statutory elements for sexual assault are the same or less than incest or—alternatively—whether each offense requires proof of an additional element."[125] Sexual assault[126] required proof that a person: (1) knowingly (2) subjects another person to (3) any sexual contact (4) without consent.[127] Alternatively, incest[128] required proof that a person: (1) knowingly (2) marries, cohabits with, has sexual intercourse with, or has sexual contact with (3) an ancestor, descendant, brother or sister of the whole or half blood, or any stepson or stepdaughter.[129] Under the *Blockburger* test, Justice McKinnon held that sexual assault was not an included offense of incest, and thus not barred by double jeopardy under § 46-11-410(2)(a) and

119. *Valenzuela*, 495 P.3d at 1069.
120. *Id.*; MONT. CODE ANN. §§ 46-11-410, 46-1-202(9) (2021).
121. *Valenzuela*, 495 P.3d at 1067.
122. *Id.* (citing State v. Weatherell, 225 P.3d 1256, 1259 (Mont. 2010)).
123. *Id.* at 1067–68 (citing *Weatherell*, 225 P.3d at 1259) (quoting MONT. CODE ANN. § 46-1-202(9)).
124. *Id.* at 1068 (quoting State v. Hooper, 836 P.3d 548, 552) (citing *Weatherell*, 225 P.3d at 1259).
125. *Id.*
126. MONT. CODE ANN. § 45-5-502(1).
127. *Valenzuela*, 495 P.3d at 1068.
128. MONT. CODE ANN. § 45-5-507(5)(1).
129. *Valenzuela*, 495 P.3d at 1068.

(d), because each offense required an element which the other did not.[130] Specifically, sexual assault required without consent, whereas incest required sexual contact with a descendent.[131]

Justice McKinnon bolstered her *Blockburger* analysis with an examination of legislative intent.[132] Justice McKinnon determined that the legislature intended for sexual assault and incest to address two separate policies—protecting individuals from nonconsensual sex and protecting minors from parental relationships, respectively.[133] Therefore, conviction for both offenses was proper.[134]

Finally, the *Valenzuela* majority overruled the Court's previous decision in *State v. Hall*.[135] Justice McKinnon explained *Hall* erred in its conclusion that sexual assault was an included offense of incest by misapplying the *Blockburger* approach.[136] Notably, Justice McKinnon did not reference *Hall*'s analysis and decision with respect to § 46-11-410(2)(d).

### *C. Justice Sandefur's Dissenting Opinion*

Justice Sandefur, joined by Justice Gustafson, provided a strong dissent. Justice Sandefur argued the Court improperly conflated the § 46-11-410(2)(a) included offense test with the more stringent specific instance of conduct test outlined in § 46-11-410(2)(d).[137] Although Justice Sandefur concurred that the charges' distinct elements satisfied *Blockburger* and § 46-11-410(2)(a), he found the convictions violated § 46-11-410(2)(d).[138]

Justice Sandefur conducted a sweeping analysis of *Hall*, *Sor Lokken*, *McQuiston*, and *Matt*, finding Montana case law consistently applied separate tests under § 46-11-410(2)(a) and (d) until the Court's erroneous 2010 decision in *Weatherell*.[139] According to Justice Sandefur, Montana precedent therefore did not support the majority's "single standard" proposition.[140] Rather, Justice Sandefur found Valenzuela's convictions for sexual assault and incest violated double jeopardy under the distinct test required by § 46-11-410(2)(d).[141] Under § 46-11-410(2)(d), Justice Sandefur reasoned that incest merely pertained to sexual contact with a victim of a more

130. *Id.* at 1069.
131. *Id.* at 1068.
132. *Id.* at 1066.
133. *Id.* at 1069.
134. *Id.* at 1070.
135. *Valenzuela*, 495 P.3d at 1069.
136. *Id.*
137. *Id.* at 1082 (Sandefur, J. Dissenting).
138. *Id.* (Sandefur, J. Dissenting).
139. *Id.* at 1075–82 (Sandefur, J. Dissenting).
140. *Id.* at 1077 (Sandefur, J. Dissenting).
141. *Valenzuela*, 495 P.3d at 1082 (Sandefur, J. Dissenting).

specific type and age differential than the more general offense of sexual assault.[142] Accordingly, Justice Sandefur concluded Valenzuela's conviction of sexual assault violated Montana's "greater" double jeopardy protection under § 46-11-410(2)(d).[143]

## V. ANALYSIS

*Valenzuela* represents the culmination of over two decades of inconsistent decisions concerning Montana's multiple charges statute. The "single standard" employed by *Valenzuela*—whether an offense requires an element the other does not—is taken directly from §§ 46-11-410(2)(a) and 46-1-202(9)(a).[144] In other words, the singular test to determine whether an offense violates § 46-11-410(2)(a) and (d) is simply the included offense test under §§ 46-11-410(2)(a) and 46-1-202(9)(a). This marks a significant shift because, as discussed above,[145] the included offense test under §§ 46-11-410(2)(a) and 46-1-202(9)(a) represents an identical analysis to that required under *Blockburger*. Consequently, the concerns that arise with *Blockburger* necessarily also arise with §§ 46-11-410(2)(a) and 46-1-202(9)(a).

### A. *Criticisms of* Blockburger *and the Same Elements Test*

Double jeopardy is a constitutional restraint only on the courts and prosecutors; the legislature is free to define crimes and to fix punishments.[146] Notably, *Blockburger* was decided in an era where most crimes originated from relatively few common law offenses.[147] Yet, in the modern era, state legislatures have become "offense factories" churning out increasingly narrow, new offenses.[148] This hyperactivity has created an overabundance of statutory crimes—many of which are unnecessary and often inconsistent.[149] *Blockburger*'s focus on the offenses' elements, therefore, fails to account for these progressively complex and voluminous criminal codes.[150]

The sheer number and specificity of offenses contained in modern-day criminal codes have, unsurprisingly, resulted in several crimes differing

142. *Id.* (Sandefur, J. Dissenting).
143. *Id.* (Sandefur, J. Dissenting).
144. *Id.* at 1067 (citing State v. Weatherell, 225 P.3d 1256, 1259 (Mont. 2010) (quoting MONT. CODE ANN. § 46-1-202(9) (2021)).
145. *Supra* Section III B.
146. Brown v. Ohio, 432 U.S. 161, 165 (1977).
147. Minerly, *supra* note 4, at 1122. **R**
148. Paul H. Robinson and Michael T. Cahill, *The Accelerating Degradation of American Criminal* Codes, 56 HASTINGS L. J. 633, 634 (2005).
149. *Id.* at 635.
150. Minerly, *supra* note 4, at 1122. **R**

only slightly from one another.[151] For example, the criminal code in Illinois contained a provision covering theft of all things of value; however, the legislature added special provisions criminalizing specific circumstances, including library theft or delivery-container theft.[152] Consequently, a defendant who stole a computer from the library could be charged and convicted with both theft and library theft. The risk here is perhaps apparent—the *Blockburger* elements test becomes increasingly difficult to satisfy as criminal codes are drafted with increased specificity, where any combination of offenses is likely to contain an element the other lacks.[153]

### *B. Statutory Analysis*

A statutory analysis of § 46-11-410 provides little clarity beyond a plain reading of the statute. In 1973, the Montana Criminal Code created a comprehensive double jeopardy statutory scheme, which both codified certain existing federal and state protections and expanded protections above the constitutional floor.[154] This original scheme included the exact language of what is now Montana Code Annotated § 46-11-410.[155] However, legislative intent is largely silent with respect to § 46-11-410(2)(d). Indeed, the legislative session laws from 1973 are void of any specific discussion of § 46-11-410(2)(d).[156] The absence of any clear indication of legislative intent only exacerbates the confusion surrounding Montana's multiple charges statute and the specific instance of conduct test.

Montana's multiple charges statute reflects the Model Penal Code § 1.07[157] verbatim. However, like Montana's legislative session laws, the Model Penal Code similarly offers little discussion of the specific instance of conduct test. The drafters of the Model Penal Code instead provide only an example: the same conduct cannot result in multiple convictions under a general statute prohibiting lewd conduct and a specific statute prohibiting indecent exposure.[158] The Model Penal Code instructs that, absent legislative intent to the contrary, courts may fairly assume the legislature did not

151. *Id.*

152. Robinson and Cahill, *supra* note 148, at 637 (comparing 720 Ill Comp. Stat. 5/16-1 (2003) (general theft offense), *with* 5/16A-3(a) (retail theft), 5/16B-2(a) (library theft), *and* 5/16 E-3(a)(1) & (4) (delivery-container theft)). R

153. *Id.* (comparing 720 Ill Comp. Stat. 5/16-1 (2003) (general theft offense), *with* 5/16A-3(a) (retail theft), 5/16B-2(a) (library theft), *and* 5/16 E-3(a)(1) & (4) (delivery-container theft)).

154. State v. Valenzuela, 495 P.3d 1061, 1072 (Mont. 2021) (Sandefur, J. Dissenting).

155. *See* § 95-1711, R.C.M. (1973).

156. 1973 Mont. Laws ch. 513, R.C.M. § 95-1711 (1947) (redesignated as §§ 46-11-410, 46-11-503, 46-11-504).

157. Model Penal Code § 1.07 (1985).

158. Model Penal Code § 1.07 cmt. (2)(d).

intend for multiple convictions where one statute prohibits a more specific instance of another.[159]

Beyond legislative intent, a plain reading of § 46-11-410 clearly illustrates that § 46-11-410(2)(a) and (d) impose disjunctive limitations. The defendant cannot be charged for both offenses where "(a) the offense is included in the other, *or* . . . (b) where the offenses differ only in that one is defined to prohibit a specific instance of the conduct."[160]

### *C. A Nod to Other Jurisdictions*

Several other jurisdictions include both included offense and specific instance of conduct subsections in their multiple charges statutes.[161] For example, Georgia, like Montana, lacks a robust application and analysis of the specific instance of conduct test. Where Georgia has encountered the specific instance of conduct provision, it has done so separately and apart from the included offense analysis. For example, in *Johnson v. State*,[162] Georgia addressed whether theft by taking and motor vehicle theft differed only in that theft by taking is defined to prohibit a designated kind of conduct generally—theft of any property—and motor vehicle theft to prohibit a specific instance of such conduct—theft of a motor vehicle.[163] Answering in the affirmative, the Court found the defendant's conviction of theft by taking barred conviction of theft of a motor vehicle under the specific instances of conduct prohibition.[164]

### *D. Beyond* Valenzuela: *The Unclear Future of Double Jeopardy Protections in Montana*

*Valenzuela* falls victim to the confusion plaguing the Montana Supreme Court's application of § 46-11-410(2)(a) and (d). First, the *Valenzuela* Court found that, in direct contrast to *Beavers*, Montana precedent employs "identical" tests under *Blockburger* and §§ 46-11-410(2)(a) and 46-202(9)(a).[165] *Valenzuela* underscores the difficulty of divorcing *Blockburger* from §§ 46-11-410(2)(a) and 46-202(9)(a), highlighting the concern that Montana's included offense test fails to adequately protect criminal defendants in light of increasingly complex criminal codes.

159. *Id.*

160. MONT. CODE ANN. § 46-11-410(a), (d) (2021) (emphasis added).

161. ARK. CODE ANN. § 5-1-110(a)(4); COLO. § 18-1-408(1)(d); GA. § 26-506(a)(2); HAW. § 701-109(1)(d); MO. § 556.041(3); N.J. § 2C:1–8(a)(4).

162. 130 Ga. App. 134, 136 (Ga. 1973).

163. *Id.* at 137.

164. *Id.*

165. State v. Valenzuela, 495 P.3d 1061, 1067 (Mont. 2021).

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Second, by perpetuating *Weatherell*'s conflation of the tests provided for under § 46-11-410(2)(a) and (d), the Court's decision in *Valenzuela* forecloses any additional protections afforded under the specific instances of conduct test. This creates clear risks for defendants like Valenzuela, who may be convicted for a closely related offense that passes the less restrictive *Blockburger* elements test and its parallel found in § 46-11-410(2)(a),[166] but whose conviction fails the more restrictive specific instance of conduct test.

## VI. Conclusion

Statutory double jeopardy protections are puzzling at best, and *Valenzuela* highlights the Montana Supreme Court's inconsistency in its application of § 46-11-410(2)(a) and (d). By merging the specific instances of conduct test under § 46-11-410(2)(d) with the included offense test under §§ 46-11-410(2)(a) and 46-1-202(9)(a), the Court has contributed to the "Sargasso Sea"[167] of double jeopardy protections in Montana, eroding the protections statutorily afforded to criminal defendants under § 46-11-410(2)(d). Consequently, criminal defendants are increasingly exposed to the issues plaguing *Blockburger* and Montana's parallel included offense test.

166. Hoffheimer, *supra* note 16 at 366. **R**

167. Albernaz v. United States, 450 U.S. 333, 343 (1981).

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