

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
FOR THE DISTRICT COURTS AND UNIFORM JURY INSTRUCTIONS - CRIMINAL**

The Supreme Court is considering whether to adopt proposed amendments to the Rules of Criminal Procedure for the District Courts and Uniform Jury Instructions - Criminal.

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before November 16, 2009, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

5-704. Death penalty; sentencing.

A. **Notice of intent.** In any case in which the state seeks the death penalty, the state shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of death. Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent.

B. **Pre-trial review of state penalty proceeding evidence.** No later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Capital defense counsel.** The defendant in a death penalty case must be represented by at least two (2) attorneys, one of whom meets the minimum standards set forth in this paragraph for first-chair capital defense attorneys and another who meets the minimum standards set forth in this paragraph for first-chair or second-chair capital defense attorneys.

(1) The minimum standards for first-chair capital defense attorneys are:

- (a) member in good standing of the New Mexico Bar;
- (b) a minimum of five (5) years active criminal litigation experience as a licensed attorney immediately preceding appointment;
- (c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion, at least two of which were murder prosecutions; and
- (d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit.

(2) The minimum standards for second-chair capital defense attorneys are:

- (a) member in good standing of the New Mexico Bar;
- (b) a minimum of three (3) years active criminal litigation experience as

a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit. This requirement may be met within one (1) year after appointment as second-chair counsel in a death penalty case.

The district court shall require any attorney who enters an appearance as trial counsel in a death penalty case to show that the attorney is a qualified capital defense attorney in accordance with the requirements of this paragraph. If the district court determines that the defendant is not represented by two (2) qualified capital defense attorneys, at least one of whom is qualified to act as first chair, the district court, in the case of indigent defendants, shall order the New Mexico Department of the Public Defender to appoint one or more qualified attorneys to ensure that the defendant is represented as required by this paragraph. In the case of a defendant who has retained private counsel, the district court shall order the New Mexico Department of the Public Defender to appoint an attorney who is qualified as a first-chair capital defense attorney to assist the privately retained defense attorney.

D. Separate trial and sentencing juries optional.

(1) If the defendant is charged with an offense which may be punished upon conviction by the penalty of death, the procedure set forth in Section 31-20A-1 NMSA 1978 shall govern unless the defendant at least sixty (60) days before the scheduled trial date elects, by written notice filed with the court, to have two separate juries for trial and sentencing as provided in Subparagraph (2) of this paragraph.

(2) If the defendant elects to have separate trial and sentencing juries under Subparagraph (1) of this paragraph, a trial jury shall be impaneled to determine whether the defendant is innocent or guilty of the capital felony offense and any other charged non-capital offenses. The jury shall be selected and instructed in the same manner as any other jury selected and instructed to determine the innocence or guilt of a defendant charged with non-capital felony offenses. If the trial jury finds the defendant guilty of a capital felony offense that may result in a sentence of death, a second jury shall be selected in accordance with Paragraph E of this rule to determine whether the defendant shall be sentenced to death or life imprisonment.

(3) At the sentencing hearing, the state may present evidence relevant to any aggravating factor permitted to be considered under Section 31-20A-5 NMSA 1978. The defendant may present evidence relevant to any mitigating factor, including but not limited to those factors enumerated in Section 31-20A-6 NMSA 1978. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of this paragraph, information presented to the sentencing jury may include portions of the trial transcript and exhibits as designated by the parties and admitted by the court. The state and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The parties may make opening statements and closing arguments, including a rebuttal closing argument by the state.

E. Individual sequestered voir dire. For the selection of jurors for the single jury permitted under the procedure set forth in Section 31-20A-1 NMSA 1978 or for the separate sentencing jury permitted under Subparagraph (2) of Paragraph D of this rule, voir [V]oir dire shall be conducted by questioning individual prospective jurors on death penalty issues out of the presence of any other prospective juror. The court may also permit individual sequestered voir dire of prospective jurors on other issues.

[E]E. Alternate jurors. If the defendant is charged with an offense which may be

punished upon conviction by the penalty of death and a single jury is used for trial and sentencing, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict, but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of Paragraph D of this rule, alternate jurors for the trial jury and the sentencing jury shall be impaneled and discharged in accordance with Rule 5-605 NMRA.

[F]G. **Jury deliberations.** In any case in which the state seeks the death penalty and a single jury is used for trial and sentencing, if the jury convicts the defendant of first-degree murder, the court will proceed with the sentencing proceeding. The jury shall consider the aggravating and mitigating circumstances at the same time or separately. If the defendant has elected the two-jury procedure under Paragraph D of this rule, and if the trial jury convicts the defendant of first-degree murder, the trial jury shall then be discharged and a sentencing jury shall be selected as permitted by this rule. The court will then proceed with the sentencing proceeding and the sentencing jury shall consider the aggravating and mitigating circumstances at the same time or separately.

[G]H. **Bifurcated proceedings.** Upon request of a party, the court shall bifurcate the issues of aggravating circumstances and mitigating circumstances in the following order:

(1) aggravating circumstances determination. The sentencing jury will first determine if one or more of the statutory aggravating circumstances charged in the indictment or information exist. The aggravating circumstance evidence shall be presented to the jury as follows:

- (a) the state shall submit evidence of aggravating circumstances;
- (b) the defense may submit its evidence;
- (c) the state may submit any evidence in rebuttal;
- (d) the defense may submit evidence in surrebuttal.

(2) sentencing stage. If the sentencing jury returns a finding that the state has proven the existence of at least one aggravating circumstance beyond a reasonable doubt:

- (a) the defense may submit evidence of mitigating circumstances;
- (b) the state may submit its evidence;
- (c) the defense may submit any evidence in rebuttal;
- (d) the state may submit evidence in surrebuttal.

[H]I. **Polling of sentencing jury.** If the sentencing jury returns a verdict that the defendant should be sentenced to death, the court shall poll each juror to assure that the juror agrees with sentence of death.

[I]J. **Record of proceedings.** All proceedings under this rule, whether conducted in open court, at bench conferences or in chambers, shall be recorded verbatim.

[J]K. **Disability of judge.** In any felony case in which the defendant may be punished by the penalty of death, if the judge, who has presided over the trial or accepted a guilty plea, is unable to preside over a sentencing proceeding to determine the sentence to be imposed by reason of absence, death, sickness or other disability, any other judge regularly sitting in or assigned to the court may conduct a sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Prior to conducting a sentencing proceeding, a substitute judge shall file a certificate that he read or heard the evidence and examined the exhibits.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; as amended by Supreme Court Order _____, effective _____.]

Committee Commentary. — This rule was drafted to comply with the legislative directive that the Supreme Court promulgate rules to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has

commenced. *See* note to Section 31-20A-6 NMSA 1978. *See* Laws 1979, Chapter 150, Section 11.

Paragraph [E] F of this rule is the same as Rule 5-605 NMRA, except alternate jurors in certain felony cases will not be discharged at the time the regular jurors retire to deliberate, but rather will be kept under the same conditions as the regular jurors. Alternate jurors in capital felony cases may not participate in the deliberation of the verdict even if a regular juror is no longer able to participate. It is believed that alternate juror participation in the deliberation of the verdict may be unconstitutional in that the deliberation of the other eleven jurors may have progressed to a stage that the alternate juror would have little voice in the verdict. *See* commentary to American Bar Association Standard 2.7, Standard Relating to Trial by Jury.

Subsection B of Section 31-20A-1 NMSA 1978 requires that the sentencing proceeding be commenced as soon as practicable after the verdict. Paragraph B of this rule, requiring the court to commence the death penalty sentencing proceeding immediately after the guilt phase of the trial, was deleted as part of the 2004 amendments.

[Commentary, as amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; as amended by Supreme Court Order _____, effective _____.]
