STATE BAR OF NEW MEXICO
TASK FORCE TO STUDY THE ADMINISTRATION OF THE

DEATH PENALTY IN NEW MEXICO

FINAL REPORT

SUBMITTED TO THE
BOARD OF BAR COMMISSIONERS
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This report is dedicated to the memory of Bill Dixon, a member of the Task Force who performed his work with zeal and unequalled passion until his untimely death before the Task Force completed its work and this report.

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ADEQUACY OF REPRESENTATION

I. Observations and Findings

The defense of an accused person in a case in which the death penalty is a possible sentence differs from the defense of other criminal cases. Most criminal trials focus on whether the defendant did or did not commit the crime. Once that determination is made, the jury's function is at an end and the judge determines the sentence. In New Mexico the law limits the sentence for a particular crime and the discretionary decisions about the sentence that a judge can make .[1]

By contrast, the capital sentencing proceeding usually is a second trial to the same jury that determined the guilt of the Defendant, and the jury, not the judge, decides whether the defendant lives or dies. To obtain the death penalty, the prosecution must prove to the jury the existence of at least one of the statutory aggravating factors.[2] In addition, the prosecution may bring up additional information concerning the victim, the defendant or the crime that was not admissible or was of marginal relevance during the trial that determined guilt or innocence.[3] The defense, on the other hand, has a constitutional right to present any evidence in mitigation that the defense thinks will persuade a jury not to impose a death sentence. [4]

Thus, in developing a defense to the commission of the crime, counsel must also consider the impact that its defense may have on the penalty phase trial.[5] This makes capital litigation extraordinarily complex. As a result, the American Bar Association recommends that counsel in a case in which death is a possible sentence immediately begin two separate and independent investigations. One should focus on the defense for the crime alleged. The second should explore the possible aggravating and mitigating factors that might be presented at a penalty phase trial.[6] The ABA specifically requires that defense counsel undertake both investigations without regard to any statements or admissions the defendant may have made concerning the crime and without regard to a defendant's direction that counsel should not present mitigation evidence.

Two decisions by the prosecution strongly affect the time and cost required to defend a person who is charged with a crime in which death is a possible penalty: whether to pursue the death penalty in a particular case and whether to accept a plea that precludes imposition of the death penalty.[7]

If a defendant has been charged with a crime that includes death as a possible sentence, the case must be treated as a death penalty case until a binding plea agreement or enforceable commitment from the prosecutor precludes seeking the death penalty.[8] In the federal system, this decision is made relatively early and is binding when made because a United States Attorney needs the authorization of the Attorney General in order to seek the death penalty in a particular case.[9] Thus, in the federal system, the defense will know relatively soon whether or not the prosecution will pursue the death penalty. A 1998 study of the costs of representation in federal cases in which death is a possible sentence noted that the average defense cost of cases in which death was authorized was $218,112, while the defense cost in cases in which death was not authorized was $55,772.[10]

In New Mexico, the prosecution is required to give written notice of its intent to seek the death penalty.[11]

[1]The judge can increase or decrease the sentence by one-third based on aggravating or mitigating factors; can determine whether sentences for multiple crimes will be served concurrently or consecutively; and can determine whether some part of the sentence can be suspended.

[2]The aggravating factors are set out in the section of this report dealing with proportionality. The most common ones are murder in the course of a rape, murder in the course of a kidnapping, murder of a witness and murder for hire.

[3]*Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, May 1998 (Federal Death Penalty Cases) at 9 refers to a federal case in which both the prosecution and the defense went to considerable effort and expense to determine precisely how the victim died because it would affect the penalty phase of the trial.

[4] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

[5]American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.7 (February 2003) (ABA Guidelines).

[6]ABA Guidelines, Guideline 10.7

[7]The ABA Guidelines recognize that the decision to accept a plea lies with the client. Guideline 10.9.2. However, the commentary includes the statement that "[i]f no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." ABA Guidelines, Guideline 10.9.2 and Commentary.

[8]ABA Guidelines, History of Guideline 1.1; Federal Death Penalty Cases at 4.

[9]Federal Death Penalty Cases at 4.

[10]Federal Death Penalty Cases at 7. The defense costs of the cases growing out of the Oklahoma City bombings were excluded from consideration in determining these averages. *Id*. at 3 n. 5. By way of comparison, the average cost of prosecuting these cases was $365,296. *Id*. at 18. This figure represents the cost of Department of Justice attorney and non-attorney staff. It does not include an estimated cost of overhead, nor does it include the estimated cost of the services of other law enforcement agencies in investigating the case and the physical evidence. *Id*.

However, as of January 2004, the timing of notice is a matter solely within the discretion of the prosecution, subject only to the requirement that the defense receive notice within sufficient time to prepare for trial. Thus, the possibility of a death sentence and the need to treat the case as a death case can continue for months, even years, without a clear resolution. If the prosecution were forced to make a binding decision on the issue relatively early in the case, it would save significantly on the defense costs of these cases while, most importantly, enhancing the quality of the defense provided.

The prosecution's decision whether or not to accept a plea that precludes a death sentence has a significant financial impact in the federal system. In the federal system, the defense costs in cases that were resolved by a plea averaged $192,333, whereas those resolved by a trial averaged $269,129.[12] And, of course, the prosecution's use of expert witnesses will require that the defense have access to similar experts.

A 1998 federal study of the cost and quality of capital defense in federal court found that the defense of capital cases puts unique strains on defense counsel. First, counsel needs to spend more time with the defendant than in other types of felony cases.[13] In order to effectively represent the defendant, counsel must build the type of relationship in which the defendant will feel able to disclose highly sensitive information such as a history of mental illness, mental retardation or sexual abuse.

Though every attorney should strive for such a relationship with the client, in a capital case disclosure of such evidence can differentiate the effective from the ineffective defense in the penalty phase. This is also important if there is a possibility that the prosecution will offer or accept a plea that will, in effect, mean that the client is never released from prison. A client must trust his attorney utterly to make the gravest of decisions: whether to volunteer for a life in prison.

Moreover, the ABA has noted that defense counsel is sometimes put in the position of attempting to discourage a client from self-destructive behavior or suicidal choices about the defense to be presented.[14] Again, the trust must approach the sacred for the attorney to perform this task. Building such a relationship with a capital defendant taxes defense counsel to the personal, professional and emotional limit.

Second, there are a number of substantive and procedural issues that arise in capital litigation and have not been authoritatively resolved. This increases the amount of time that must be devoted to researching the issues and raising them at trial.[15] This level of special knowledge of issues unique to capital representation means that unique and intensive training becomes the hallmark of any competent capital litigator. This special training must build upon a base of superb writing, research, investigation, advocacy and trial skills. The capital defenders must be the best lawyers and the best trained lawyers in the criminal defense bar, private or public.

Third, jury selection in death cases presents issues not present in other felony cases. Jurors in death cases are questioned concerning their views on the death penalty because jurors who adamantly oppose the death penalty (or believe it appropriate for all murders regardless of circumstances) may not currently sit on the jury for either the guilt or the penalty phase.[16] Thus, selection of a jury in a death case invariably takes longer and is more complex than in other felony cases.[17]

Fourth, the demands of handling a death penalty case frequently preclude acceptance of other employment while the case is being litigated.[18] In the federal system, the defense attorneys who handled these cases were often solo practitioners or partners in small firms. [19] This seems to be true in New Mexico among private lawyers who contract to take capital defense appointments from the New Mexico Public Defender Department.

As capital litigation becomes more specialized, the use of experts by the prosecution and the defense grows. Prosecutors often obtain expertise from other law enforcement agencies that do not charge the prosecution for their services. The defense, however, must pay for the services of all similar experts to assist counsel in preparing to cross-examine the prosecution's expert as well as to develop evidence for the defense. In addition, the ABA recommends defense counsel should consider obtaining the services of a jury consultant.[20]

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[11] *See State v. Coffin*, 1999-NMSC-038, ¶ 45, 128 N.M. 192, 212, 991 P.2d 477, 497 (approving of filing notice of intent to seek death penalty 10 months after charging but before trial).

[12] Federal Death Penalty Cases at 8.

[13] Federal Death Penalty Cases at 14-15; ABA Guidelines, Guideline 10.5 and Commentary. Federal Death Penalty Cases found that counsel spent 9% of their time in consultation with the accused.

[14] ABA Guidelines, Guideline 10.5 and Commentary.

[15] Federal Death Penalty Cases at 15. The report found that defense counsel spent 20% of the time on legal research. In addition, the ABA Guidelines require that in determining whether to raise certain issues, counsel keep in mind the changing nature of the law and the need to preserve issues at the trial level for post-judgment review. ABA Guidelines, Guideline 10.8.

[16] *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *see also Wainwright v. Witt*, 469 U.S. 412 (1985) and *Lockhart v. McCree*, 476 U.S. 162 (1986).

[17] Federal Death Penalty Cases at 16. Federal Death Penalty Cases and the ABA also comment on the increasing importance of jury consultants who can assist counsel in selecting the jury. Federal Death Penalty Cases at 24-25; ABA Guidelines, Guideline 10.10.2 and Commentary.

[18] Federal Death Penalty Cases at 36.

[19] Federal Death Penalty Cases at 36.

In the federal courts, the use of mitigation specialists has become part of the "standard of care" in providing defense services in capital cases.[21] The Task Force considers their use essential to the competent defense of a capital case. The Federal Death Penalty Cases Report indicates that one of the most frequent grounds for setting aside a death sentence imposed by a state court is the failure to prepare and present a mitigation case.[22] In the federal system, twenty percent of defense costs were for experts and investigators, and these costs prove significantly higher for cases in which the prosecution was authorized to seek the death penalty than cases in which it was not.[23]

The Task Force has assembled a series of recommendations designed to address these observations and findings on the adequacy of representation in capital cases in New Mexico state courts. The recommendations aim to address, in the most practical possible ways, the inadequacies in New Mexico's current capital representation system. The Task Force hopes that adoption of these recommendations may minimize, as much a possible, the chances that New Mexico will execute an innocent person or a person who has received inadequate representation. Excellent lawyers remain the best defense against such injustices.

II. Recommendations

The Task Force recommends the following: (A) that attorneys who represent defendants facing a possible death sentence meet certain minimum standards, discussed below; (B) that the Supreme Court or Legislature create an appointing authority to make recommendations for the appointment of counsel for capital defendants who will not be represented by the Public Defender Department; (C) that compensation for attorneys representing people in capital cases, both inside the Public Defender Department Capital Crimes Unit and outside in the private bar match that received by the most skilled attorneys in other specialized areas of the law; and (D) that our Supreme Court consider adapting the current standard used to determine ineffective assistance of counsel to the unique challenges presented by capital sentencing proceedings to strengthen the quality of capital representation and assure that poor lawyering does not lead to wrongful convictions or convictions of the innocent. The Task Force was not unanimous as to the particular standards and criteria to carry out the overall concepts and principles set forth above. To the extent possible, minority perspectives have been incorporated when requested.

A. Minimum Standards or Defense Counsel

The demands of capital litigation make it imperative that two attorneys represent a defendant facing a possible death sentence and a defendant on whom a death sentence has been imposed at each stage of the proceedings – trial, appeal and post-conviction proceedings.[24] The New Mexico Public Defender Department now requires two lawyers at the trial, one on appeal and one on post-conviction proceedings.[25] Also, in order to insure effective assistance of counsel, New Mexico must have minimum standards for capital attorneys' performance.[26] Defense attorneys handling capital cases should meet the following minimum standards.

1. Minimum standards for Trial Counsel
   a. Lead Trial Counsel ("First Chair"):

      i. Member in good standing of any state bar; and

      ii. Minimum 5 years criminal litigation experience as a licensed attorney; and

      iii. Prior experience as lead or co-counsel in at least 8 felony jury trials that were tried to completion, at least 2 of which were murder prosecutions; and

      iv. Mandatory minimum training of 8 CLE credits per year in areas of substantive law that frequently arise in capital cases. Examples of such areas include: the risks of false testimony by in-custody informants; the risks of false testimony by accomplice witnesses; the dangers of tunnel vision or confirmatory bias; the risks of wrongful convictions in homicide cases; police investigative and interrogation methods; police investigating and reporting of exculpatory evidence; forensic evidence; use of expert witnesses; forensic and medical evidence in the areas of men-

[20]ABA Guidelines, Guideline 10.10.2 and Commentary.
[21]Federal Death Penalty Cases at 51.
[22]Federal Death Penalty Cases at 13.
[23]Federal Death Penalty Cases at 21. In cases in which the death penalty was authorized, the defense spent $51,889 on experts and investigators; in cases in which the death penalty was not authorized, the defense spent $10,094 on experts and investigators.
[24]ABA Guidelines, Guideline 2.1.
[25] New Mexico State Public Defender Department Guidelines for Capital Representation, on file with the Task Force.
[26]The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 1 (2001) ("[Every jurisdiction] should set minimum standards for …[capital] lawyers' performance.") (Mandatory Justice).

tal health, pathology and DNA profiling; and

v. Attend at least one death penalty seminar every year that has been approved by the appointing authority and qualified for New Mexico MCLE credit.

b. Trial Co-counsel ("Second Chair"):

i. Member in good standing of any state bar; and

ii. Minimum eighteen months criminal litigation experience as a licensed attorney; and

iii. Prior experience as lead or co-counsel in at least 8 felony jury trials that were tried to completion; and

iv. Mandatory minimum training of 8 CLE credits per year in areas of substantive law that frequently arise in capital cases. Examples of such areas include: the risks of false testimony by incustody informants; the risks of false testimony by accomplice witnesses; the dangers of tunnel vision or confirmatory bias; the risks of wrongful convictions in homicide cases; police investigative and interrogation methods; police investigating and reporting of exculpatory evidence; forensic evidence; use of expert witnesses; forensic and medical evidence in the areas of mental health, pathology and DNA profiling; and

v. Attend at least one death penalty seminar a year that has been approved by the appointing authority and qualified for New Mexico MCLE credit. This requirement may be met within one year after appointment as co-counsel in a death penalty case or before the first capital trial, whichever comes first.

These standards do not preclude the possibility of a "third chair," a lawyer who does not meet these qualifications but who is under the direct supervision of either lead counsel or second chair. A 1998 study found that use of other lawyers to handle some tasks connected with the case can produce significant cost savings.[27] Permitting third chairs should encourage lawyers to learn capital representation and should encourage the promotion of a pool of qualified capital litigators.

2. Minimum Standards for Appellate Counsel.

a. Lead Appellate Counsel:

i. Member in good standing of any state bar;

ii. At least three years active trial or appellate experience in criminal cases;

iii. Meet either of the following:

(1) Prior experience as lead or co-counsel within the last three years in at least three felony conviction appeals in state or federal court, at least one of which was a death penalty appeal, or

(2) Prior experience in the last three years as lead counsel in the appeal of at least six felony convictions in federal or state court, at least two of which were murder convictions;

iv. Mandatory minimum training of 8 CLE credits per year in areas of substantive law that frequently arise in capital cases. Examples of such areas include: the risks of false testimony by incustody informants; the risks of false testimony by accomplice witnesses; the dangers of tunnel vision or confirmatory bias; the risks of wrongful convictions in homicide cases; police investigative and interrogation methods; police investigating and reporting of exculpatory evidence; forensic evidence; use of expert witnesses; forensic and medical evidence in the areas of mental health, pathology and DNA profiling; and

v. Attend at least one seminar every year that has been approved by the appointing authority and qualified for New Mexico MCLE credit that focuses on appellate representation in death penalty cases.

b. Appellate Co-counsel (Second Name on Brief):

i. Member in good standing of any state bar; and

ii. Minimum 18 months criminal appeals experience; and

iii. Prior experience as lead counsel within the previous eighteen months in the appeal of at least four felony convictions in state or federal court;

iv. Mandatory minimum training of 8 CLE credits per year in areas of substantive law that frequently arise in capital cases. Examples of such areas include: the risks of false testimony by incustody informants; the risks of false testimony by accomplice witnesses; the dangers of tunnel vision or confirmatory bias; the risks of wrongful convictions in homicide cases; police investigative and interrogation methods; police investigating and reporting of exculpatory evidence; forensic evidence; use of expert witnesses; forensic and medical evidence in the areas of mental health, pathology and DNA profiling; and

v. Attend at least one death penalty seminar every other year that is approved by the appointing authority and qualified for New Mexico MCLE credit that focuses on appellate representation in death cases. This requirement may be met within one year after appointment as co-counsel in a death penalty appeal or before the first brief is filed, whichever comes first.

3. Minimum Standard for Post-Conviction Counsel.

a. Lead Post-Conviction Counsel:

i. a member in good standing of any state bar;

[27]Federal Death Penalty Cases at 37-38.

ii. three years criminal litigation experience immediately preceding appointment as post-conviction counsel;

iii. Meet either of the following criteria:

(1) Prior experience as lead counsel in a post-conviction proceeding in a case in which a death sentence was imposed; or

(2) Prior experience as lead counsel in at least five felony jury or bench trials that were tried to completion, at least two of which were first or second degree murder convictions;

iv. Mandatory minimum training of 8 CLE credits per year in areas of substantive law that frequently arise in capital cases. Examples of such areas include: the risks of false testimony by in-custody informants; the risks of false testimony by accomplice witnesses; the dangers of tunnel vision or confirmatory bias; the risks of wrongful convictions in homicide cases; police investigative and interrogation methods; police investigating and reporting of exculpatory evidence; forensic evidence; use of expert witnesses; forensic and medical evidence in the areas of mental health, pathology and DNA profiling;

v. Have attended at least one training or educational program that is approved by the appointing authority and qualified for New Mexico MCLE credit that focuses on trial or post-conviction representation in death penalty cases.

B. Independent Appointing Authority

In addition, the Task Force recommends that there be a mechanism created to make recommendations for appointment of counsel in cases in which the Public Defender Department will not represent the defendant and to monitor compliance with the minimum standards for capital defense counsel. The Public Defender Department should not control this group, although the Department may have a representative in the group. The Capital Representation Plan for the United States District Court for the District of New Mexico has instituted a similar process.[28] Having appointment occur from such a body prevents a conflict of interest in capital cases. To have the body that represents a co-defendant appoint another co-defendant's attorney presents an inherent conflict of interest.[29]

The group should be small, three or four people should be sufficient, to permit them to convene quickly to make appointments. The Task Force recommends that the group include a representative appointed by the New Mexico Public Defender Department who is not an employee of that department; a representative of the Federal Public Defender office in New Mexico; and a representative of the New Mexico Criminal Defense Lawyers Association. No one who is or was, within the last two years, employed by a District Attorney's office or the Attorney General's office shall serve on this group. In addition, active judges of the courts of New Mexico should not sit on this group. The Appointing Authority should adopt standards to assure that there are no conflicts of interest or ethical problems that would prevent its members from serving on the Appointing Authority. The New Mexico State Bar could provide administrative support for this group under order from the New Mexico Supreme Court.

The group should keep a list of private defense attorneys that meet the above criteria and can be appointed to handle capital cases. We refer to this group as the Capital Representation Panel. The group should make its recommendation for appointment within 24-48 hours after a case is identified as involving or possibly involving capital charges.

Though the appointing authority would only make appointments of private counsel, it would have the responsibility of monitoring compliance of all capital public defenders and private attorneys accepting appointments in capital cases with the minimum standards the Task Force recommended above.[30]

The group could make recommendations for appointment two ways. First, the group could consider the current caseloads of attorneys on the list, the areas in which each attorney is particularly strong (or weak) and other factors that may make the appointment of a qualified attorney impractical in a particular case. Or, the group could recommend the next person on the list willing to accept the case. Lawyers already representing a defendant in a case in which a death sentence is a possibility should not normally receive a second appointment until their participation in the first case has ended. The group should have the discretion to decide which method to use in any given case.

If an attorney handling capital cases or eligible to handle capital cases under these standards is determined by a court (trial or appellate) to have provided ineffective assistance of counsel in a criminal case, the appointing authority should promptly investigate the matter and take whatever action it deems appropriate, depending on the circumstances. The options should include suspension from the Capital Representation Panel until corrective measures are taken, additional education or removal from First Chair to Second Chair for a time for purposes of training.

Alternatively, some members of the Task Force thought the appointing authority should automatically suspend the attorney from representing defendants in

[28] Capital Representation Plan for the United States District Court for the District of New Mexico, on file with the Task Force.
[29] Mandatory Justice, *supra* n.26 at 2.
[30] *Id.*

capital cases until the investigation is completed and the authority is confident that the problem has been addressed. This latter possibility presents the problem of what to do if the attorney has a pending capital case and admits no room for the attorney to correct the problem immediately. The appointing authority should adopt procedures for these situations. Of course, these procedures should include written notice to the attorney and an opportunity for the attorney to respond before the panel takes any action.

C. Compensation of Counsel and the Costs of Capital Litigation

The federal government pays defense counsel in capital cases $125 an hour and is likely to pay $150 an hour in the near future.[31] New Mexico Risk Management Division pays experienced attorneys $125 an hour to defend state officers and employees from civil liability.[32] Defense counsel in capital cases should receive similar or greater compensation, commensurate with their expertise and the burden of the work and without caps. New Mexico should eliminate flat fee arrangements in capital cases. Currently the Public Defender Department awards capped fees to private counsel retained by the Department under contract to represent capital defendants because of conflicts of interest or institutional overload.

The American Bar Association and the National Legal Aid and Defender Association recommend that capital counsel should be compensated for actual time and service performed.[33] Flat fees or caps on fees are wholly inappropriate for capital cases: they represent an attempt to hide the true costs of capital litigation at the expense of contract counsel and, ultimately, his or her client.

Funding has often been inadequate for the costs of capital litigation: expert witnesses, investigators, paralegal assistance, and the other myriad costs of litigation.[34] These, too, should be uncapped and reasonably calculated to permit a zealous and complete defense. Defense counsel must receive adequate funding for psychiatric and psychological evaluations, mitigation investigation and other expertise. Without it, New Mexico risks executing the innocent or the mentally retarded or mentally ill, not because the law necessarily permits it but because we have not given defense counsel the tools necessary to prevent such abhorrent injustices.

For example, prosecutors sometimes obtain additional funds for capital cases once the case starts. If the prosecution seeks additional funds, the Task Force agrees that the defense should receive notice so that it may also request adequate funds.

Investigators and expert witnesses should also receive pay at market rates.[35] The Public Defender Department should not control the decision whether to hire an investigator or mitigation expert in cases in which the Public Defender Department represents a co-defendant. The department's internal guidelines should require an experienced investigator and mitigation expert on every case.

D. The Standard for Ineffective Assistance of Counsel Should Reflect the Unique Importance of the Capital Sentencing Process

The Task Force was unanimous on the recommendations in this section. Capital sentencing is unique. Capital defense counsel should always perform at the level of a professionally competent attorney, one with reasonable skills in this specialized area with adequate time and resources to prepare. Yet, the standard for ineffective assistance of counsel is the same for a fourth degree felony and a capital case.[36] The performance of counsel must fall below the standard of a reasonably competent attorney and must also prove to have affected the outcome of the trial.[37]

This standard saddles a defendant with an onerous burden: the defendant must point to specific lapses by counsel.[38] Then, he or she must demonstrate that those lapses fall outside the "wide range of professionally competent assistance."[39] Finally, even if able to meet these two burdens, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[40]

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[31] The Task Force obtained these figures from counsel who receive appointments in capital cases in federal court, including Task Force member Mark Donatelli.

[32] Letter from Risk Management Division to Jerry Todd Wertheim of May 2, 2001, on file with the Task Force.

[33] ABA Guidelines, Guideline 9.1. The Guideline explicitly provides that flat fees, caps on fees and lump-sum contracts are improper in capital cases.

[34] *Id.* at 51 n. 133 (generally describing the need for adequate and independent funding of investigators, research staff and other services necessary to an adequate defense).

[35] Mandatory Justice, *supra* n.26 at 2.

[36] *Williams v. Taylor*, 529 U.S. 420 (2000) (reaffirming application of standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984) to evaluate ineffective assistance of counsel in capital cases).

[37] *State v. Trujillo*, 2002-NMSC-005, ¶ 36, 131 N.M. 709, 723, 42 P.3d 814, 828 (citing *Strickland*).

[38] *Id.*

[39] *Id.*

The last prong, in particular, presents particular possibilities for unfairness to the capital defendant. Though courts may well develop a reasonable sense of what constitutes an ineffective lawyer's work, this last prong forces the defendant to prove the nearly impossible. For example, counsel may not have investigated the defendant's background for presentation of mitigating factors in the sentencing phase. In that phase the jury weighs aggravating and mitigating factors in a quest to decide whether the defendant should receive a sentence of death.[41] Trying to prove the effect of that which was not done presents an insurmountable burden, making ineffective assistance of counsel, as a practical matter, unreviewable.

To rectify this, the Task Force recommends that the New Mexico Supreme Court adopt a new standard for ineffective assistance of counsel in New Mexico state court capital cases. Courts should presume ineffective assistance of counsel if counsel (1) did not present any mitigation evidence; (2) had a conflict of interest in the case; or (3) suffered impairment from substance abuse, serious illness, or similar factors during either phase of the trial.

Some members of the Task Force thought that only substantial impairment of performance should create a presumption. The Task Force thought that the failure to provide mitigation evidence should not necessarily create a presumption of ineffectiveness. Perhaps a procedure by which defense counsel is required to proffer his or her reasons for failing to put on mitigation evidence, in camera and under seal, would provide a record for review of these decisions by appellate and post-conviction courts. The court could then decide whether the reasons given are sufficient to prevent a shifted burden; if not, the court could apply the presumption in favor of the defendant.

Similarly, once the defendant establishes that counsel's performance fell below the minimum standard of professional competence, either by presumption or proof, the burden should shift to the state to demonstrate that the outcome of the trial was not affected by the attorney's ineffective performance. This procedure should achieve an indisputable goal for every capital case: competent lawyering for a person who faces the ultimate punishment.

[40] *Id.*
[41] Capital Felony Sentencing Act, NMSA 1978, § 31-20A-2 (1979).

PROPORTIONALITY

I. INTRODUCTION: WHAT IS "PROPORTIONALITY?"

In 1972, the United States Supreme Court decided *Furman v. Georgia*, 408 U.S. 238 (1972). There was no majority opinion in *Furman*. However, *Furman*, in essence, invalidated all the death sentence statutes in the country because they gave juries unrestricted discretion to determine whether a defendant should be put to death. One of the concerns voiced by Justice White at the time was this:

> The death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Furman, 408 U.S. at 313 (White, J., concurring). New Mexico responded to *Furman* by making the death penalty the mandatory sentence for all persons convicted of first-degree murder. Laws 1973, ch. 109 § 2. However, in 1976, the United States Supreme Court held that mandatory death sentences violated the Eighth Amendment.[1] Thus, the New Mexico Supreme Court held that New Mexico's mandatory death sentence statute was unconstitutional.[2]

In *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases[3] the Supreme Court upheld a number of statutes adopted after *Furman*. Again, there was no majority opinion. However, it was apparent that the justices favored several devices for avoiding arbitrariness. One was a statutory definition of objective aggravating factors that must be proven in order to subject a defendant to the possibility of a death sentence. A second favored device to protect against arbitrary imposition of the death penalty was mandatory appellate review of all death sentences. A third was what has come to be known as comparative proportionality review. Reduced to its simplest terms, comparative proportionality review is designed to see "that two criminal defendants of similar background, in the same jurisdiction, who commit factually identical or similar murders" get the same sentence, whether the sentence is a life sentence or the death penalty.[4]

In response to *Gregg v. Georgia*, New Mexico has adopted, by statute, all three of these devices to protect against the arbitrary imposition of the death penalty. State law now limits the imposition of the death penalty to certain situations, referred to as aggravating circumstances. *See* NMSA 1978, § 31-20A-5 (1981).[5] The New Mexico Supreme Court is required by statute to automatically review all convictions that result in death sentences. *See* NMSA 1978, § 31-20A-4(A) (1979). As part of this review, the Court is required to specifically rule on the validity of the death sentence. § 31-20A-4(B). The same statute requires the Court to overturn a death sentence if it determines that "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Section 31-20A-4(C)(4).

Ultimately, the United States Supreme Court determined that proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). However, the New Mexico statutes still require proportionality review.

Our report on this issue is broken down into five sections. Section I discusses some of the concerns raised nationally about proportionality in charging and sentencing, with specific attention to the factors of race, ethnicity and geographic location. Section II discusses the factors that New Mexico's district attorneys consider in deciding whether to seek the death penalty in a particular case.

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[1] *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[2] *State v. Rondeau*, 89 N.M. 408, 410-12, 553 P.2d 688, 670-72 (1976).

[3] *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976).

[4] Note, A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases, 73 Iowa L. Rev. 719, 719 (1988).

[5] A. The victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered; B. the murder was committed with intent to kill in the commission of or attempt to commit kidnapping, criminal sexual contact of a minor or criminal sexual penetration; C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico; D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department [corrections department] and county and municipal jails; E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department]; F. the capital felony was committed for hire; and G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

Section III addresses proportionality review as practiced since *Gregg*. Section IV discusses proportionality review as conducted by the New Mexico Supreme Court. Section V contains our recommendations.

II. National Concerns

There have been a number of developments in the last twenty years that have contributed to renewed concern about the death penalty in the United States. Two particular problems have received significant attention: concern that the imposition of the death penalty is affected by race and a more general concern that the death penalty is imposed arbitrarily.

As of January 1, 2003, there were 3,692 people on death rows in the United States. Persons of color (Black, Hispanic, Native American and Asian) accounted for 2,030 or 55% of the people on death row. In addition, 3,640, or over 99%, were men.[6] In New Mexico there were two White, non-Hispanic, men on death row as of January 1, 2003. From 1979, when the death penalty was reinstated, to January 1, 2003, fifteen men have been sentenced to death. Seven of those men were persons of color: two were African-American, one was Native American and four were Hispanic.

In addition, some states have done studies in an effort to determine what factors make it more or less likely that an individual defendant will receive the death penalty. These studies have found that the race of the defendant and the race of the victim affect whether a particular defendant convicted of first-degree murder will be sentenced to die. The most famous study was done by Professor David Baldus and is discussed in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Professor Baldus and his colleagues collected and analyzed data on 2000 murder cases that occurred in Georgia during the 1970s. These 2000 cases included cases in which the death penalty was not sought or was not obtained. The analysis showed that a defendant who killed a white victim was four times more likely to receive the death penalty than a defendant who killed a black victim. *McCleskey*, 481 U.S. at 286. In addition, the study showed that the death penalty was imposed in 22% of the cases in which the defendant was black and the victim was white, 8% of the cases in which the defendant and the victim were both white; 1% of the cases in which the defendant and the victims were both black, and 3% of the cases involving white defendants and black victims. *McCleskey*, 481 U.S. at 286.

Professor Baldus and his colleagues also found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of the cases involving white defendants and white victims, 15% of the cases involving black defendants and black victims, and 19% of the cases involving white defendants and black victims. *McCleskey*, 481 U.S. at 287.

Since the Baldus study, a study of murder convictions in North Carolina during the 1990s found that defendants whose victims were white were 3.5 times more likely to be sentenced to death than those whose victims were not white.[7] Similar statistical disparities exist in Virginia.[8] A review of the death penalty cases filed in federal courts by the United States Department of Justice during the years 1995 to 2000 found that 72% of the cases approved for prosecution as death penalty cases involved non-white defendants.[9]

On the national level, it is also clear that geography plays a role in determining whether a particular defendant will be sentenced to death. The death penalty is a legitimate sentencing option in 38 states, as well as the federal courts and the United States military. Among those 38 states, some states are more likely to sentence defendants to death and to execute them than others. Moreover, within a particular state it appears that whether a jurisdiction is relatively rural or relatively urban may affect the likelihood that a prosecutor seeks the death penalty in a particular case. However, this research shows no consistent trend. Thus, for example, in Nebraska it appears that prosecutors in rural areas were less likely to seek the death penalty than their urban counterparts, while in New York prosecutors in rural areas were more likely to seek the death penalty.[10] The study of the federal death penalty also showed that some districts were more likely to seek the death penalty than others.[11]

There are also concerns that socio-economic factors play a significant role in the imposition of the death penalty. A study commissioned by the Nebraska legislature and released in August of 2001, found that even when the crimes are similar, a defendant is four times more likely to receive the death penalty if the victim was wealthy than if the victim was poor.[12]

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[6]National Association for the Advancement of Colored People, *Death Row, U.S.A*, January 1, 2003.

[7] Prof. Jack Boget and Dr. Isaac Unah, *Race and the Death Penalty in North Carolina: An Empirical Analysis: 1993-1997*.

[8]American Civil Liberties Union, *Unequal, Unfair, and Irreversible: The Death Penalty in Virginia*, (2000) at 29-33.

[9]*The Federal Death Penalty System: A Statistical Survey (1988-2000)* (Federal Statistical Survey) at 24.

[10]*The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Amended Final Report, Executive Summary*, at 21 (*Nebraska Executive Summary*); Capital Defender Office, *Capital Punishment in New York State: Statistics from Six Years of Representation* at 3.

[11]*Federal Statistical Survey*, at 12 (40 of the 94 federal districts had never sought the death penalty in a particular case).

[12]*Nebraska Executive Summary*, *supra* n.10 at 25.

III. Information on Proportionality in Charging in New Mexico

The Task Force's Proportionality Subcommittee was asked to examine, among other things, the factors that affect the decision whether to seek the death penalty in particular cases. The Subcommittee began its examination of this issue by sending questionnaires to the current and former district attorneys, asking them to tell us the factors they consider when deciding whether to seek the death penalty in a particular case. A copy of the questionnaire is Appendix A.

By November of 2001, the Subcommittee had received responses from thirteen district attorneys or former district attorneys, representing ten of the State's thirteen judicial districts. The responses were then tabulated. Appendix B is a copy of the tabulated answers. The Task Force recognizes that our methodology and analysis do not rise to the level that a social scientist would demand in order to draw conclusions from the data. However, we think some tentative conclusions can be drawn from the responses.

A. General Issues

Only five district attorneys indicated that the death penalty had been an issue in the election campaign. Since two of those responses involved the same campaign, it seems fair to say that the death penalty is not usually an issue in political campaigns for district attorney.

The responses do not seem to show an obvious relationship between the number of first-degree/open murder cases in a judicial district and the number of cases in which the prosecution seeks the death penalty. The results suggest that there may be an inverse correlation, meaning that the districts with relatively few first-degree murder cases seem to be more likely to seek the death penalty. However, given the different time periods covered, and in the absence of more information concerning reported homicides in the particular districts during the particular time periods, the Task Force did not think any particular importance could or should be attached to this data. In addition, in New Mexico it appears that prosecutors in relatively rural areas are more likely to seek the death penalty than prosecutors in urban areas.

The respondents agreed that it was more expensive to prosecute death penalty cases, although most of them could not say how much more expensive. Only one of the ten respondents could recall a death penalty case in which the defendant was represented by retained rather than appointed counsel. In that case, the respondent indicated the defendant ran out of money to pay counsel and eventually received appointed counsel. These rather isolated facts tend to indicate that the vast majority of the defendants in these cases are poor. They do not, however, without more data, confirm or dispel concerns that socio-economic factors may be affecting the imposition of the death penalty.

B. Factors Most Likely to Affect The Decision to Pursue the Death Penalty in a Particular Case

The questionnaire also asked each district attorney to indicate the factors considered most or least important in determining whether to seek the death penalty in a particular case. None of the respondents had written criteria for making this decision. Thus, the decision seems to be made case by case in each district attorney's office.

The Task Force is concerned that there are no written criteria to guide these decisions. In the absence of a written policy, it is possible that the public or segments of the public may perceive decisions about whether to pursue the death penalty in a particular case to be arbitrary or otherwise unreasonable. While we recognize the organizational differences, the federal government requires prosecutors to file a report with the Attorney General on each case in which a defendant is charged with a death-eligible crime. The report discusses the theory of liability, the evidence, including evidence of aggravating and mitigating factors, and the defendant's background and criminal history. The policy contemplates that counsel for the defendant will have an opportunity to present information, including mitigating factors, to the prosecutor. The determination whether to seek the death penalty in a particular case is based primarily on an assessment of the aggravating and mitigating factors. The policy also prohibits seeking the death penalty for the purpose of obtaining a more desirable negotiating position.[13]

The Task Force was most interested in the factors considered by the district attorneys in determining whether or not to seek the death penalty. The following conclusions are based on the average score for each factor.

The factors that the majority of respondents considered most important tended to relate to characteristics of the victim. The age of the victim was considered very important by most of the respondents. The Task Force thinks that this means that when the victim is a child, a district attorney is more likely to seek the death penalty. In addition, many respondents considered the number of victims to be an important factor. One respondent indicated that the race/ethnicity of the

[13]The entire policy is set out in the Department of Justice, *Criminal Resource Manual* at Sections 9-10.010 to 9-10.100. Document is available on the Internet at www.usdoj.gov.

victim was important if the crime appeared to be racially motivated. Two other respondents also considered the race/ethnicity of the victim to be important. The Task Force is not sure how to interpret these two responses. There are several possibilities: (1) the respondents reversed the numerical rankings used in the questionnaire; (2) the qualification put forward by one respondent in fact applies to all three; or (3) two respondents consider race/ethnicity of the victim to be appropriate and significant in their decision making. In fact, as we discussed above, studies done in other states have found that the race/ethnicity of the victim is a significant factor in determining whether a prosecutor seeks the death penalty and whether the defendant is sentenced to death.

Other factors are considered to be less important. The opinions of the victim's family and of the law enforcement officers who investigated the case were the next most important factors overall and received about equal weight from the respondents. Next in significance were resource issues. These included availability of personnel, financial resources and experts. However, one judicial district rated this as the most important issue, which might have raised the overall ranking of the issue.

Equally interesting are the factors that were ranked of little or no importance in deciding whether to seek the death penalty. Only three of the respondents indicated that the amount of publicity the crime had received had any influence on the decision. One former district attorney indicated that, in retrospect, he thought he was initially influenced to seek the death penalty in a particular case by the publicity. In that case, the prosecutor later withdrew the death penalty from consideration. Factors relating to the defendant – age, number of defendants, race/ethnicity and probable identity of defense counsel – did not play a significant role in the decision-making. However, one respondent mentioned the prior criminal history of the defendant as a factor.

In addition, a number of the respondents commented that the suffering of the victim, the generally severe or aggravated nature of the crime and the impact of the crime on the community were factors. The questionnaire had not included questions about these factors.

C. Conclusion

The characteristics of the victim appear to exert considerable influence on the decision to seek the death penalty in a particular case. Apart from that, the responses show that different district attorneys consider different criteria in determining whether to seek the death penalty in a particular case. Thus, the Task Force thinks it is fair to say that an important factor in determining whether a particular defendant faces the death penalty is the attitude of the particular district attorney towards seeking the death penalty.

IV. Proportionality Review in the Courts Generally

Proportionality review is meant to answer the fun A fundamental question posed by Justice White in *Furman*: is there a principled way to distinguish the few cases in which the death penalty is imposed from the many cases in which it is not? Or, to put it another way, do similar defendants who commit similar crimes receive similar sentences? Analytically, there are three determinations that must be made by every court that does proportionality review. First, the court must define the "universe" of cases from which the comparison cases will be drawn. Second, the court must determine the particular characteristics of the case under review that should be used to determine what cases are similar enough to be used for comparison. Third, the court must determine the standards for determining whether a particular death sentence is proportional in light of the sentences in similar cases.

A. The Universe of Cases from Which Comparison Cases Are Drawn

This is a subject that has received considerable attention from courts and academe over the last twenty years. In the early 1980s the National Center for State Courts (NCSC) received funding from the National Institute of Justice to "design and test methods for providing appellate courts with the capacity to conduct effective reviews of the comparative excessiveness of death sentences."[14] The Proportionality Review Project (PRP) assembled a task force composed of state Supreme Court administrative staff from Louisiana, New Jersey and South Dakota, a prosecutor, a public defender, a law professor, a statistician, a private attorney and a social scientist. In addition, a number of observers and consultants from other states participated in the project.[15] The results were published and made available to other states.

The NCSC recommended that the universe of cases be defined as "all cases in which the indictment included a death-eligible charge, and a homicide conviction was obtained."[16] This included convictions as a

[14]*Evaluation of Proportionality Review Procedures of Death Penalty Cases in State Appellate Courts: Final Report*, Nov. 1985 (Evaluation).
[15]Evaluation at 7.
[16]*Comparative Proportionality Review in Death Sentence Cases: Project Issue Paper* at 8 (Project Issue Paper).
[17]Project Issue Paper at 8.
[18]Project Issue Paper at 9.
[19]Project issue paper at 9.

result of a plea and life sentences resulting from the absence of aggravating factors. In addition, the NCSC recommended that cases in which the conviction or sentence is reversed should be dropped from the pool, regardless of the grounds for reversal, and should be placed back in the pool based on the result obtained after the retrial, if the Defendant is again convicted of a homicide, or re-sentencing.[17] The NCSC recognized that the practices of the states in keeping records would also have a significant impact on defining the universe.[18] Thus, it recommended that the universe include all post-Furman cases, but also cautioned that "the distortion created by inaccurate and spotty information is likely to be greater than that which may result from limiting the pool to more recent sentencing decisions . . . ."[19]

The NCSC indicated that there were at least two reasons to expand the universe as they had defined it. First, when there is a concern that particular types of victims or defendants are treated differently from the inception of the case, it may be necessary to expand the universe by using police report data for all homicides. Second, when there is a concern about the exercise of prosecutorial discretion, the pool of cases could include all murder indictments.[20] The United States Department of Justice adopted this approach when it instituted a protocol that required the United States Attorneys to report to the Department all such cases, without regard to whether the death penalty was actually sought in the case.[21] In addition, it is being used in New York, Georgia and Washington.[22]

Other states have defined the universe more narrowly. One possibility is all cases in which the defendant was convicted of a capital crime – in New Mexico, first-degree murder – and was sentenced to either life or death. This approach under-represents the number of cases that result in life sentences because it does not capture cases in which a defendant pled to a life sentence and cases in which the defendant was convicted of a lesser homicide charge. Moreover, if the sample is limited to cases in which the conviction and sentence have already been upheld on appeal, the sample will not include the most recent cases, including those of co-defendants.

Other jurisdictions have defined the universe of cases even more narrowly. Some courts have defined the universe of cases as only those cases in which a sentencing authority actually considered whether to impose the death penalty, regardless of the sentence actually imposed. The primary criticism of this approach is that it under-represents similar cases that result in life sentences but for one reason or another did not proceed to a penalty trial. The result is a review that is artificially skewed toward determining sentences to be proportionate. As we discuss below, this is similar to the method adopted by the New Mexico Supreme Court for proportionality review.

The narrowest category defines the universe as cases in which the death sentence was actually imposed and upheld on appeal. Jurisdictions that limit the universe to cases in which a death sentence was actually imposed necessarily use the precedent-seeking method, discussed below, to determine proportionality.

B. What is a "Similar" Case?

This question deals with determining which cases in the pool are similar to the one under review, "considering both the crime and the defendant."[23] In general, the courts have taken two approaches on this issue. The two are not mutually exclusive, and in fact some courts seem to combine factors of both. One approach focuses on whether the cases are factually similar. For example, if the death sentence to be reviewed was meted out for an armed robbery in which two persons, one of whom was a police officer, were killed, the comparison cases could be those that were armed robberies, with two victims, one of whom was a police officer. The critical issue in this approach is deciding which factual issues should be used to find similar cases. The aggravating circumstances required by statute are often used as the facts in this type of analysis. The difficulty with this approach is that even in populous states with larger numbers of homicides, it is difficult to find factually similar cases.[24] As we will discuss, New Mexico considers a case similar to the one being examined if the aggravating circumstance(s) are the same.

The second approach focuses on what commentators refer to as the defendant's culpability, by which they mean a balancing of the aggravating and mitigating factors.[25]

C. What Makes a Particular Death Sentence Proportionate or Disproportionate?

Defining the universe or pool from which to draw cases and the factors that make one case similar to another are tools that set the stage for the ultimate inquiry: where does the Court draw the line between proportionate (appropriate) and disproportionate (excessive) applications of the death penalty? Courts en-

[20]Project Issue Paper at 9.
[21]See footnote 13 above.
[22]The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (Pre-publication Draft, June 2001) at 32.
[23]NMSA 1978, § 31-20A-4(C)(4) (1979).
[24]Project Issue Paper at 4; *supra* n.4 at 729.
[25]Evaluation at 13.
[26]The terminology is taken from Van Duizend, R., *Comparative Proportionality Review in Death Sentence Cases, What? How? Why?*, State Court Journal 9, 10 (1984).

trusted with this determination seem to have taken one of three approaches, characterized as (1) the reasonableness approach; (2) the precedent-seeking approach; and (3) the frequency approach.[26]

The reasonableness approach turns on generalized notions of reasonableness, which are in turn based on the particular court's values, experience and general familiarity with prior cases. The criteria used to determine the reasonableness of a death sentence in a particular case are not usually specified. This approach has several features that limit its usefulness. First, because it depends on the collective experience of a particular court at a particular time, the determination of reasonableness will change over time, which may lead to inconsistent results. Second, the approach does not articulate particular factors that will be used to determine whether a particular death sentence is excessive. Thus, the parties are uncertain what information needs to be presented or how it will be evaluated. In the absence of a clearly articulated analytical framework, the decisions can appear to be arbitrary.

The second approach is the precedent-seeking approach. This approach is used by all the courts that have limited the universe of cases to those in which the death penalty was imposed. It has been severely criticized by the NCSC because it fails to address the basic issue – whether there is a meaningful difference between the few cases in which a death sentence is imposed and the many in which it is not.[27] This criticism has been echoed by other commentators over the years.[28] In practice, this approach reduces the question of proportionality to the question of whether anyone else has ever been sentenced to death under similar circumstances.

Moreover, some commentators express concern that courts adopting this standard are using it to ratify jury decisions without seriously addressing the responsibility entrusted to them. A review of state supreme court decisions from 1976 to 1987 showed that courts that adopted this approach identified a death sentence as disproportionate in only one case – a case in which there were no similar cases in which a defendant had been sentenced to death.[29] At least one court has held a death sentence to be proportionate even though there were no similar cases in which a defendant had been sentenced to death.[30] By contrast, during the same period of time, the reasonableness approach and the frequency approach resulted in identifying and vacating as disproportionate thirty-two death sentences.[31]

In the view of the NCSC, the precedent-seeking approach fails to recognize the significant difference between the function of the jury that sentences a defendant and the function of the highest court in a State in conducting proportionality review. When a defendant is sentenced to death, the jury has found that the crime involves one of the aggravating factors and that the defendant deserves to die. This determination is reviewed on appeal largely to determine whether the evidence in the record, viewed in the light of the jury's decision, supports the finding that an aggravating factor was proved. However, the jury is not asked, and, in our view, should not be asked, to determine whether a death sentence for this particular defendant is warranted given the sentences meted out for similar crimes. This is an entirely different question that is entrusted to the highest court of states that perform this type of review.

The third approach is the frequency approach. This method examines the frequency with which defendants have been sentenced to death for "similar" crimes. The NCSC suggested that this approach is likely to yield three groups of cases: (1) a small group of "extreme cases" in which defendants are sentenced to death as often as 4 out of every 5 cases; (2) a small group of cases in which defendants are sentenced to death as infrequently as one out of every 40 or 50 cases; and (3) the vast majority of cases, in which a defendant is sentenced to death in 1 out of every 4 or 2 out of every 5 cases. The NCSC thought that cases in the first two categories were easily characterized as appropriate (for the first category) and excessive (for the second category). However, the NCSC recognized that defining the difference between appropriate and excessive is a critical judicial function that can be guided but not controlled by these definitions.

V. New Mexico Proportionality Review

This section is broken into two subsections: (A) the standard announced by the New Mexico Supreme Court as applicable to proportionality review and (B) the application of the standard since 1979.

A. The Standard for Proportionality Review

The New Mexico legislature has required the New Mexico Supreme Court to automatically review all judgments of conviction and sentences of death. The legislature has stated that the death penalty,

shall not be imposed if:

[27]Evaluation at 12.

[28]Van Duizend, *supra* n.26 at 11; *Supra* n.4 at 730-34; *State v. Marshall*, 613 A.2d 1059, 1070-73 (N.J. 1992) (rejecting the argument that the universe of cases should be limited to those cases in which a death sentence was imposed), *superseded by statute as recognized in State v. Cobb*, 633 A.2d 498 (Conn. 1995).

[29]*Supra* n.4 at 738 & n.154. The one reversal was *Coleman v. State*, 378 So. 2d 640 (Miss. 1979).

[30]*State v. Rhines*, 548 N.W. 2d 415 (S.D. 1996); Note, *The Outlier Case: Proportionality Review in State v. Rhines*, 42 S.D.L. Rev. 194 (1997).

[31]*Supra* n.4 at 738 & n.161.

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. NMSA 1978, Section 31-20A-4(C) (1979).

In 1983, the New Mexico Supreme Court established guidelines for proportionality review:

[W]e adopt the following guidelines for review under this Section.

1. We will review this issue only when raised on appeal.

2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the *same aggravating circumstance(s)*.[n. 11 It is the duty of the defendant's attorney to supply the Court with information of similar cases. Such information is of public record. §§ 14-3-1 through 14-3-25, NMSA 1978 (Orig. & Cum. Supp. 1981).]

3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and received *either* the death penalty *or* life imprisonment and whose conviction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.

4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate. *State v. Garcia*, 99 N.M. 771, 780, 664 P.2d 969, 978 (1983) (emphasis in the original).

The Court acknowledged that "such a review should not be, or appear to be, merely the subjective views of an individual Justice; rather the Justices have a duty to review the case on an objective level." *Garcia*, 99 N.M. at 780, 664 P.2d at 978. In closing the Court stated:

Proportionality *review* in New Mexico is first and foremost directed to the particular circumstances of a crime and the specific character of the defendant. In our duty to *review* the determination by the jury, we will not retry the case for what may be a better result. *Garcia*, 99 N.M. at 781, 664 P.2d at 979 (emphasis in the original).

When one compares the requirements of the statute to the *Garcia*

standard, one notes differences between the two. The statute makes review mandatory; *Garcia* says that review will be conducted only on request. The statute imposes responsibilities on the Supreme Court; *Garcia* imposes the responsibility on the defense to raise the issue and to supply comparison cases. The most striking aspect, however, is the disparity that seems to exist between the legislature's view of the Court's role and the Court's view of its role. If the legislature wanted the Court to review death cases in the same way it reviews other cases, there was no need to adopt a statute.

There is a tension between reviewing the jury's determination and determining proportionality. The proportionality issue is not presented to the jury, nor, in the view of the Task Force, should it be. The Supreme Court has made it clear that it is the only entity that can hear and decide proportionality issues. *State v. Clark*, 1999-NMSC-035, ¶¶ 29-32, 128 N.M. 119, 990 P.2d 793; *State v. Wyrostek*, 117 N.M. 514, 873 P.2d 260 (1994). Similarly, while *Garcia* refers to consideration of mitigating factors, it is difficult to understand how this works in practice because the jury does not formally find the existence of mitigating factors in the way that it does aggravating factors. This issue is discussed further in the next section.

The *Garcia* standard, however, does not fully answer the central question of proportionality as posed by Justice White: whether there is a real difference between the many cases in which the death penalty is not imposed and the few cases in which it is. This is best illustrated by example. Suppose that 30 people killed someone in the course of a kidnapping this year. However, for one reason or another, the prosecutors seek the death penalty in only ten cases. Of those ten cases, five plead to first-degree murder in exchange for a life sentence. Thus, five start trial as death penalty cases. In two of the five cases the jury does not convict of first-degree murder. Three cases then go to a penalty phase, during which the jury must find whether the aggravating factor exists beyond a reasonable doubt. In one case, the jury, for whatever reason, finds that the State has not proved the aggravating factor. In the second case, the jury finds the State has proved the aggravating factor but does not agree to sentence the defendant to death, perhaps because of mitigating factors. In the third, the jury finds the aggravating factor and sentences the defendant to death. Under the *Garcia* standard, the Court would only consider the two cases in which the jury found the aggravating factor. The Court's decision would not address, much less answer, the question of whether there is a significant difference between the case in which the defendant was sentenced to death and the other twenty-eight cases of killings during a kidnapping.

With the benefit of twenty years of experience with these issues nationally, it becomes apparent that the *Garcia* standard may set an overly restricted definition of the universe of cases. If one uses something similar to the NCSC standard to define the universe,

the universe in the above example would be the 30 cases, minus whatever cases did not result in a conviction, by trial or plea, for first-degree murder. In the example above, this would be a universe of no more than 28 cases and perhaps less, depending on the outcome of the twenty cases in which the prosecution did not seek the death penalty. On the other hand, if the universe is defined as only those cases in which the jury actually considered whether or not to impose the death penalty, the universe is 5 cases, meaning all the cases that went to a penalty phase. If the universe is limited to all cases in which the jury found the aggravating circumstance, the universe is 2 cases. If the universe is only two cases, a casual observer might think that half the defendants convicted of killing during a kidnapping are sentenced to death. However, the casual observer would be wrong. In fact, in this example, only 1 out of 30, or roughly 3.3% of the cases, resulted in a sentence of death.

A similar criticism can be made of using the jury's finding of an aggravating circumstance as the characteristic that defines what is a "similar" case. On the one hand, this is a logical approach. However, given the number of aggravating circumstances and the relatively small number of capital cases that proceed to a penalty phase trial every year, the net result is that even after twenty years there are only a handful of "similar" cases to be considered. For example, in the case of *State v. Treadway*, S.Ct. No. 26218, there were only two cases that met the *Garcia* standard and could be used for comparison.[32]

B. Application of the Standard to Particular Cases

The New Mexico Supreme Court has characterized itself as using the "precedent seeking" approach discussed above. *State v. Clark*, 1999-NMSC-035, ¶ 74, 128 N.M. 119, 990 P.2d 793. However, an examination of the cases in which the Court has considered the proportionality of a death sentence suggests the Court may be using some modification of this standard, even though the Court has consistently rejected defense challenges to the *Garcia* standard. In fact, the Court has held sentences to be proportionate even when there are no other cases in which the defendant was sentenced to death. This suggests that either the Court is using a reasonableness approach or it has created an unspoken presumption that a death sentence is always proportionate. Moreover, although the Court has consistently rejected defense challenges to the *Garcia* standard, it has not applied the standard consistently over time.

Garcia itself is a case in point. In *Garcia*, the defendant argued that his co-defendant had been sentenced to life and thus his death sentence was disproportionate. The Supreme Court disagreed, citing the fact that Garcia, rather than his co-defendant, started the altercation and was the first to turn on the victim. Thus, the Court indicated that even though there was no apparent precedent for the death penalty, it was not disproportionate because in the Court's view the defendant sentenced to death was the more culpable of the two.

The first case to apply the *Garcia* standard was *State v. Gilbert*, 100 N.M. 392, 402-403, 671 P.2d 640, 650-51 (1983). In *Gilbert*, the defendant was convicted of two counts of first degree murder and other crimes. The jury found three aggravating circumstances: murder in the course of a kidnapping, murder in the course of a criminal sexual penetration and murder of a witness. In *Gilbert*, the Court addressed proportionality even though it had not been argued on appeal. The Court stated: "In comparing this case with *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983), and *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983), we find that Defendant's sentence of death for the murders of Kenn and Noel Johnson was neither excessive nor disproportionate." *Gilbert*, 100 N.M. at 402-03, 671 P.2d at 650-51. However, Hutchinson and Simonson had both received life sentences, not the death penalty. In addition, *Hutchinson* involved one victim but the same three aggravating factors as *Gilbert*. On the other hand, Simonson involved two convictions for first degree murder, but only one aggravating circumstance: murder of a witness.

The next case in which the Court was called upon to determine the proportionality of a death sentence was *State v. Cheadle*, 101 N.M. 282, 681 P.2d 708 (1983). Cheadle was convicted of one count of first-degree murder and other crimes. The jury found two aggravating circumstances: murder in the course of a kidnapping and murder of a witness. The Court considered as comparison cases *Simonson*, *Hutchinson* and *Gilbert*. The Court acknowledged that the facts, circumstances, crimes, and defendants were different, but determined, without explanation, that Cheadle's death sentence was not excessive or disproportionate.

Similarly, in *State v. Guzman*, 100 N.M. 756, 676 P.2d 1321 (1984), the defendant was convicted of one count of first degree murder and several other crimes and was sentenced to death. The jury found three aggravating circumstances: murder in the course of a kidnapping, murder in the course of a criminal sexual penetration and murder of a witness. The Court restated the *Garcia* standard and identified the comparison cases as *Simonson*, *Hutchinson*, *Gilbert* and *Cheadle*. The Court stated, again without explanation, that the death sen-

[32]Mr. Treadway's death sentence was overturned by the New Mexico Supreme Court in 2002, based on the Court's determination that there was not substantial evidence to support the jury's finding of the aggravating circumstance of killing a witness.

tence imposed on Guzman was not excessive or disproportionate. *Guzman* involved the same three aggravating factors as *Gilbert* and *Hutchinson*. However, the Court used two cases – *Simonson* and *Cheadle* – that involved only two aggravating circumstances. Either the Court did not use the *Garcia* standards by including cases that did not have all the same aggravating factors, or the Court imposed a "general reasonableness" test on the matter.

The inconsistency was again apparent in *State v. Compton*, 104 N.M. 683, 692, 726 P.2d 837 (1986). In *Compton*, the defendant was convicted of one count of first-degree murder. The jury found the aggravating circumstance of the killing of a peace officer. Compton had been sentenced to death. The Court compared Compton's case to *State v. Montoya*, 101 N.M. 424, 684 P.2d 510 (1984), and decided that the death sentence meted out to Compton was not disproportionate. However, in *Montoya*, which also involved only the aggravating circumstance of killing a peace officer, the defendant had been sentenced to life. The Court distinguished the *Montoya* case by pointing out that Compton had ambushed the victim. The Court also held in *Compton* that the defendant did not have to know that the victim was a peace officer in order to be sentenced to death for killing a peace officer.

In the past, the Court has turned away challenges to the *Garcia* standard. In *State v. Clark*, 108 N.M. 288, 311, 772 P.2d 322, 345 (1989), *overruled on other grounds*, *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990), the defendant argued that the pool of cases considered for proportionality review should be broadened to include cases in which the death penalty could have been sought but was not, cases in which the prosecution indicated it would seek the death penalty but then accepted a plea to a non-capital offense, and cases in which the death penalty was sought but the jury refused to find an aggravating circumstance. *Clark*, 108 N.M. at 311, 772 P.2d at 345.

The Supreme Court rejected the challenge, stating that Clark had not shown that his death sentence would be disproportionate if such an expanded pool was used, and reminding the defendant that it was his responsibility to provide the Court with the necessary information. Clark's death sentence was later reversed by the Court and the matter remanded for re-sentencing because the jury had not been given accurate information on the amount of time Clark would have to serve before he would be eligible for parole. *Clark v. Tansy*, 118 N.M. 486, 882 P.2d 527 (1994).

Clark was sentenced to death a second time. The jury found two aggravating circumstances: murder during the course of a kidnapping and murder of a witness. In his appeal from that sentence, Clark argued that the Supreme Court should adopt the frequency approach to proportionality. *State v. Clark*, 1999-NMSC-035, ¶ 75, 128 N.M. 119, 990 P.2d 793 (*Clark III*). The Court rejected this argument on the ground that it could not find a single state that used the frequency approach. *Id.*

The Court then determined that the death sentence imposed on Clark should be compared to *Guzman* (three aggravating circumstances; death sentence), *Gilbert* (three aggravating circumstances; death sentence), *Hutchinson* (same two aggravating circumstances; life sentence) and *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990). In *McGuire*, the defendant was convicted of one count of first-degree murder and two other crimes. The jury found two aggravating circumstances: murder during the course of a kidnapping and murder of a witness. The jury sentenced McGuire to life in prison.

The Court rejected the argument that *Cheadle* should also be included because Cheadle's death sentence, although affirmed on direct appeal, was later overturned due to ineffective assistance of counsel. The Court acknowledged that the only comparison cases in which the defendant was sentenced to death, *Guzman* and *Gilbert* involved additional aggravating circumstances. However, it decided that Clark's death sentence was justified because the victim was nine years old.

Similarly, in *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, the defendant was convicted of one count of first degree murder and two other crimes. The jury found two aggravating circumstances: murder in the course of a kidnapping and murder of a witness. Allen was sentenced to death. The Court again rejected the defendant's argument that the *Garcia* standard should be expanded. *Allen*, 2000-NMSC-002, ¶ 111. In addition, based on *Clark III*, the Court determined that the death sentence was warranted because the evidence of mitigating circumstances was "not compelling" and the seventeen-year-old victim was a minor. In fact, in *Allen*, the only evidence of mitigating circumstances presented by the defendant was a brief statement defendant made to the jury and a stipulation as to his age (34 at time of trial). *Allen*, 2000-NMSC-002, ¶ 81.

The *Garcia* standard also requires the Court to consider the mitigating factors, a holding that the Court recently reaffirmed in *State v. Jacobs*, 2000-NMSC-026, ¶¶ 61-62, 129 N.M. 448, 10 P.3d 127. In spite of this

[33] *Guzman*, 100 N.M. at 761, 676 P.2d at 1326, refers to the defendant's "extensive mental and emotional problems;" *Clark*, 108 N.M. at 310, 772 P.2d at 344, devotes a paragraph to discussing the evidence of mitigating circumstances. However, this evidence is not referred to in the opinion upholding his second death sentence. On the other hand, the opinion upholding the second death sentence treats the fact that the defendant would be 86 before he was released even if he was sentenced to life as a mitigating circumstance. *Clark*, 1999-NMSC-035, ¶ 7. In addition, the Court affirmed the trial court's decision to exclude certain evidence that the defendant characterized as mitigating evidence. *Clark*, 1999-NMSC-035, ¶¶ 24-25. *Allen*, 2000-NMSC-002, ¶ 81 refers to the fact that the only evidence of mitigation presented was a brief statement by the defendant and his age. In addition, the defendants in *Simonson* and *Gilbert* had raised insanity defenses that were rejected by the jury.

requirement, only five opinions refer to anything that could be considered a mitigating circumstance. Even these opinions do not discuss the mitigating circumstances in enough detail to allow the mitigating circumstances in one case to be compared to the mitigating circumstances in a future case.[33]

From this discussion, it seems that over time the Court has been struggling with the *Garcia* standard and that this struggle has led to some apparent inconsistencies. Perhaps of more concern, however, is that even after twenty years, there are still unresolved issues about how the *Garcia* standard applies to particular cases. For example, some cases suggest that the Court will only consider cases with the same aggravating circumstance, meaning that when the jury finds three aggravating circumstances, the comparison cases must have all three aggravating circumstances. Other cases suggest that the Court will consider a case as a comparison case as long as the two cases have one aggravating circumstance in common, without attempting to distinguish between cases based on the number of aggravating circumstances found.

When there are no cases with the same aggravator that have resulted in a death sentence, the Court has affirmed the death sentence by pointing to circumstances that, in its view, distinguish it from the case in which a life sentence was imposed. However, the distinguishing factors change from case to case. In *Garcia* and *Compton*, the court articulated a rationale under which those defendants were more culpable than the defendants in the comparison case. In *Cheadle* and *Clark* the Court acknowledged that the comparison cases were significantly different from the case under review but upheld the death sentence. In *Cheadle*, the Court did not advance a rationale to justify its decision. In *Clark*, the Court pointed to the fact that the victim was a minor. In fact, the victim in that case was nine years old. Later, the Court justified a death sentence in *Allen* by pointing out that the victim was a minor. However, the victim in *Allen* was seventeen years old.

Finally, many cases simply state a conclusion — that the death penalty is not excessive or disproportionate — without explaining the process that led the Court to its conclusion. This makes it difficult for lawyers or the public to understand the basis for the conclusion.

VI. Recommendations of the Task Force

A. The Task Force recommends that the New Mexico Association of District Attorneys (NMADA) develop a list of internal guidelines stating factors that should and should not be considered in deciding whether to seek the death penalty in any particular case. These internal guidelines should neither be construed as granting additional due process rights nor form the basis for additional motions challenging the death penalty. The NMADA has already acted on this recommendation.

B. The Task Force recommends that the Supreme Court take responsibility for acquiring data from this point forward on all first-degree or open murder prosecutions. This would allow the creation of a database concerning homicide prosecutions from this point forward. The district courts already file regular caseload reports with the Administrative Office of the Courts. The Task Force recommends the data include:

1. the defendant's name and race or ethnicity; the name and race or ethnicity of the victim (or each victim);
2. the year of the incident; the county and judicial district in which the incident occurred;
3. the county and judicial district of the trial or sen tencing proceeding if different from the county of the incident; the names of the prosecution and defense attorneys at trial;
4. the charges against the defendant (all of them, not just the murder charges);
5. the possible aggravating circumstance(s), if any, that would make the defendant eligible for the death penalty;
6. any mitigating circumstances in the record; whether the state filed a notice of intent to seek the death penalty and, if it did, the date the notice was filed;
7. whether there was a plea agreement as to either the charges or the sentence and, if there was, the terms of the agreement;
8. whether the case went to trial, and, if it did, the out come of the trial on all charges; whether the case went to a penalty phase hearing and, if it did, the aggravating circumstance(s) alleged and the aggravating circumstance(s), if any, found by the jury and any mitigating circumstances presented to the jury;
9. the sentence imposed (on all charges);
10. whether there was an appeal and, if there was, the names of the appellate lawyers and the outcome of the appeal;
11. whether there were post-conviction proceedings and, if there were, the names of the lawyers and the outcome of the proceedings;
12. similar information about any retrial or re-sentencing proceedings that might have taken place.

C. There should be an effort to seek funding for a comprehensive proportionality study. The Task Force did not take a position on specifically what organization should seek such funding or from what funding sources. The purpose of the study would be to determine, as far as possible, whether similar defendants committing similar crimes receive similar sentences.

TRIAL PRACTICE

The Trial Practice Subcommittee examined the trial procedures in death penalty cases to determine if the trial process worked fairly in death penalty cases and to recommend changes that would make the trial process more fair. The Subcommittee developed recommendations that were then brought to the Task Force. Based on the work of the Subcommittee, the Task Force makes the following recommendations. All recommendations were unanimously approved by the Task Force with the exception of the fourth recommendation, which a majority of the members approved.

I. A CERTIFIED COURT REPORTER SHOULD TAKE AND TRANSCRIBE A WRITTEN TRANSCRIPT OF ALL PROCEEDINGS IN CAPITAL CASES IN ADDITION TO THE TAPE RECORDING MADE BY THE TAPE MONITOR. COUNSEL FOR BOTH THE DEFENSE AND THE STATE SHOULD RECEIVE BOTH WRITTEN TRANSCRIPTS AND TAPE RECORDED TRANSCRIPTS OF THE PROCEEDINGS

The Task Force unanimously recommends written transcripts of death penalty trials, in addition to the present system of recording the trial on audio tape. There are advantages and disadvantages to both methods of making a record of a trial. By using both methods, the adverse effects of the disadvantages can be kept to a minimum while the advantages can ensure a fairer trial, as well as appeal and post-conviction proceeding.

There are advantages to the use of audio tapes: they cost the court and the parties less than a written transcript and some attorneys and judges who work with the tapes on appeal feel they get a more complete understanding of the trial by listening to tapes.

On the other hand, taped transcripts also have disadvantages. Some district courts are not wired to record bench conferences. When a case is tried in one of those courts, the taped transcript does not include the substance of discussions and arguments made at the bench, which can be a significant problem on appeal. In addition, portions of a taped transcript can be inaudible, unintelligible, or simply difficult to hear because of noise in the courtroom or mechanical failure of the recording equipment. And of course, listening to taped transcript of a trial takes almost as much time as the trial took initially.

In addition, the written transcript will identify who is speaking, will not include gaps caused by noise interference or equipment failure, and will include matters discussed at the bench or out of the hearing of the jury. Written transcripts are in many ways easier to work with, if only because one can read through a week-long trial much quicker than one can listen to it. However, written transcripts can also include unintelligible passages, or inaccurate transcriptions or translations of what was said or who said it. Therefore, the Task Force recommends that both a written transcript and a tape-recorded transcript of the trial be prepared in all death penalty cases.

II. THE SURVIVORS OF THE DECEDENT / VICTIM IN A CAPITAL CASE SHALL BE ACCORDED RESPECT AND THEIR WISHES CONSIDERED REGARDLESS OF THEIR VIEWS ON THE DEATH PENALTY

At present, the friends and relatives (survivors) of a murder victim receive assistance from victim advocates associated with the district attorneys' offices. The Task Force survey has shown that district attorneys vary in the extent to which they consider the wishes of the victim's survivors in reaching a decision to seek the death penalty in a particular case. The quality and kind of assistance survivors receive probably also varies throughout the state's district attorneys' offices. Survivors' wishes also vary. Some survivors want the perpetrator to face the death penalty; others strongly oppose such a penalty.

The Task Force recognizes that some survivor assistance programs have gone far above and beyond the call of duty to assist survivors. However, there have also been instances in other jurisdictions in which survivors' views as to whether the death penalty was appropriate affected the services that they received from the prosecuting attorney's office. The Task Force unanimously agrees that this should not happen in New Mexico. Survivors should receive services and referrals to services from victim assistance advocates or coordinators without regard to the survivor's desire that the defendant face or not face the death penalty. Survivors must undertake the task of recovery from the brutal tragedies that brought them into contact with the legal system. The legal case, from the perspective of prosecution or defense, should not dictate the approach of the survivor's advocate.

III. THE JURY INSTRUCTION ON MITIGATING CIRCUMSTANCES SHOULD BE AMENDED TO INCLUDE AS A MITIGATING CIRCUMSTANCE "ANY SPECIFIC CONCERN NOT RISING TO THE LEVEL OF A REASONABLE DOUBT AS TO YOUR UNDERLYING VERDICT OF GUILT"

The Task Force is concerned that the relationship between the guilt/innocence phase of the trial and the penalty phase may confuse jurors. Some jurors reportedly believe that once the jury determines a person to have committed the offense, they must ignore any lingering doubts during the sentencing phase. The law permits consideration of such doubts, and the Court

should instruct jurors that they may consider their doubts as a mitigating circumstance. The Task Force recommends that the Supreme Court add this mitigating circumstance to the list of mitigating circumstances in UJI 14-7029 NMRA 2003: "Any specific concern not rising to the level of a reasonable doubt as to your underlying verdict of guilt."

IV. JURORS WHO OPPOSE THE DEATH PENALTY UNDER ALL CIRCUMSTANCES ON RELIGIOUS GROUNDS WHEN A DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER SHOULD BE ALLOWED TO SERVE ON THE JURY THAT DETERMINES GUILT OR INNOCENCE, EVEN THOUGH THEY MAY HAVE TO BE REPLACED ON THE JURY THAT MAY HAVE TO DETERMINE THE SENTENCE.

This recommendation passed both the Trial Practice Subcommittee and the Task Force as a whole by a one-vote margin.

One of the ways in which "death is different" is in jury selection. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and cases elaborating it,[1] the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venire [members] for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In so holding, the Court affirmed that persons could be excluded from the jury if they would automatically vote against the death penalty without regard to the evidence, or if their attitude towards the death penalty would prevent them from making an impartial decision as to the defendant's guilt. *Id.* at 523.

Thus, under *Witherspoon*, a venire person who, for religious reasons, could not vote for the death penalty is stricken from the jury because he or she cannot follow the law and the instructions of the court. In recent years, potential jurors and religious leaders have objected to this practice on First Amendment grounds.[2] They contend that the practice of removing them for cause from both phases of the trial burdens their right to free exercise of religion under the First Amendment.

The courts or legislature can lift this burden. When the Court seats jurors for trial, the panel includes a number of alternates who may participate in the decision if a primary juror cannot because of disability of some type. The Court could allow those who oppose the death penalty based on religious conscience to serve on the jury that determines the guilt or innocence of the crime. If that jury finds the defendant guilty of first-degree murder, and the case proceeds to a penalty phase, alternate death-qualified jurors can replace those jurors who could not follow the instructions of the Court in a penalty phase trial because of religious conscience. Those alternates will have heard the evidence in the guilt phase of the trial.

Members of the Task Force who disagreed with this recommendation advanced a number of concerns. First, they took the position that the purpose of the Task Force is to insure fairness to the defendant and thus the recommendation is not relevant to the work of the Task Force. Second, they argued that the law does not require this. Third, they expressed a concern that jurors seated as a result of this recommendation would be more likely to acquit. Fourth, they took the position that those whose religious beliefs would require them to impose the death penalty on all those convicted of first degree murder should also be allowed to sit on the jury during the guilt-innocence phase of the trial.

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[1] *Accord State v. Clark*, 1999-NMSC-035, ¶ 7, 128 N.M. 119, 990 P.2d 793. For a discussion of the standard used to determine whether a juror was properly disqualified under *Witherspoon*, see *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

[2] A copy of the Petition for Writ of Superintending Control, N.M. S. Ct. No. 26,073 (November 22, 1999) which exhaustively describes the legal basis for the objections, is on file with the Task Force.

POST-CONVICTION

I. With the advent of the Antiterrorism and Effective Death Penalty Act, the state habeas proceeding is the only forum for the presentation of new facts post-conviction

After conviction and imposition of the death penalty and if the Supreme Court affirms the conviction and the sentence of death, a capital case returns to the district court for post-conviction review.[1] With the advent of the Antiterrorism and Effective Death Penalty Act, the state habeas proceeding has become critical to assuring that the defendant has received effective assistance of counsel and otherwise has not had his constitutional rights violated in the imposition of the death penalty.[2] Under AEDPA, the federal court, once a vital forum for the examination of death penalty convictions, relies upon the facts as developed in the state habeas proceeding for its own review. The state habeas corpus proceeding has become the only place in which a person facing the death penalty can present new facts bearing on whether the conviction should be upheld.

The Task Force finds that effective post-conviction review depends, as does so much in capital litigation, on the quality of the counsel. A post-conviction capital defense attorney must possess a gamut of skills, from an ability to guide the investigation of complex facts to the skill to write at the highest level. Therefore, the Task Force makes its most trenchant recommendations on post-conviction review in the Adequacy of Representation section of this report. That section outlines how capital representation, including post-conviction representation, can reach the high level of competence attorneys, as a profession, should demand in the most important cases tried in our courts.

II. Our current statute on DNA testing, though a good one, should be improved

DNA evidence has proven critical on post-conviction review in exonerating certain defendants from crimes.[3] Capital defendants in New Mexico should have access to DNA testing where they make a claim of actual innocence. The New Mexico Legislature largely achieved this goal when enacting NMSA 1978, § 31-1A-2 (2003). This statute outlines a procedure that allows all persons convicted of felonies, including those facing a death sentence, to petition the court and have evidence that may exonerate them subjected to DNA testing.[4]

The new statute works well to assure that DNA testing is available in those capital cases where it may prevent the execution of the innocent. It corrects many of the issues found in earlier versions of the statute. The Task Force has a few recommendations for improvements to the statute.

First, the Task Force believes the exceptions to preserving of evidence after the appeal time expires range too widely and may not give sufficient guidance to law enforcement. NMSA 1978, § 31-1A-2(M). The Legislature may wish to examine these exceptions to assure that they do not impair the proper preservation of evidence. This proves particularly true because the law sunsets in 2006. If the statute disappears, the requirement to preserve DNA evidence will as well—an unacceptable possibility. The Legislature would take the best course by removing the sunset provision for capital offenses and tightening the preservation exceptions.[5] One way to correct the problem of preservation would be to exempt capital cases from the application of 31-1A-2(M); another would be to require law enforcement to ap-

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[1] *See* Rule 5-802 NMRA 2003(F) (procedure for habeas corpus petition in death penalty case).

[2] *See, e.g., Woodford v. Garceau*, 538 U.S. 202 (2003) ("Our cases make clear that AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application") (citations omitted).

[3] Presentation of Barry Scheck on DNA and post-conviction review, on file with the Task Force.

[4] On July 20, 2003, The National District Attorneys Association adopted the following resolution endorsing the use of DNA testing to establish the guilt or innocence of the accused, including the accused in capital cases:

WHEREAS, the National District Attorneys Association, representing America's local prosecutors, believes in a truth-based justice system; and

WHEREAS, DNA testing is a powerful tool for determining the truth in criminal cases; and

WHEREAS, DNA technology is the most reliable forensic technique for identifying and prosecuting criminals when biological evidence of the crime is available; and

WHEREAS, local prosecutors strongly support DNA testing as a means of identifying and apprehending criminals and proving the guilt or innocence of suspects and

Defendants;

THEREFORE BE IT RESOLVED, that the National District Attorneys Association adopts the attached POLICY POSITIONS ON DNA TECHNOLOGY; and

BE IT FUTHER RESOLVED, that the National District Attorneys Association rescinds the POLICY POSITIONS ON DNA TECHNOLOGY previously adopted on July 22, 2001 in Boston, Massachusetts (2001.04SUM)

National District Attorneys Association Policy Positions on DNA Technology and the Criminal Justice System, available at http://www.ndaa-apri.org/issues/dna_forensics.html (resolution and all policies are available).

[5] In October of 2003, the revised Innocence Protection Act was introduced in Congress, and the House has overwhelmingly passed the statute. If passed, it will create similar a right to federal court DNA hearings on innocence similar to the state procedure. The evidence preservation requirements and other procedures of the two statutes will then have to be made consistent. A summary of the statute and analysis may be found at http://justice.policy.net/proactive/newsroom/release.

ply for a court order (with notice to defense counsel of record) before disposing of evidence pursuant to subsection M.

To assure the efficacy of the statute, the Legislature should consider the creation of two commissions as has been recommended by Barry Scheck, founder of the Innocence Project, and as has been implemented in some states. The first possible commission, a Forensic Science Commission, would set standards for the collection and preservation of evidence that potentially yields DNA for testing. It would also provide training to law enforcement in proper evidence collection and preservation. Without statewide standards through such a commission, evidence that can exonerate a capital defendant might go uncollected or might be inadequately preserved. The effectiveness of § 31-1A-2 in preventing conviction of the innocent diminishes.

The second possible commission is an "Innocence Commission." This commission, which should properly consist of representatives from prosecution, the defense bar and the community, would have authority to review and investigate claims of actual innocence. The statute currently contemplates the court making such a review, and of course this is perfectly appropriate. Some states, however, have found it advantageous to have a commission to screen and investigate these vital claims. This permits examination of these often technical cases by a body that has developed an expertise in investigations rooted in DNA evidence.

Because of the small number of capital cases brought in New Mexico relative to larger states, a specialized Innocence Commission may be important to adequate review in these complex cases, where courts may infrequently confront DNA evidence. In a small state such as ours, however, such a commission may prove impractical or unnecessary. The Legislature may determine, after a thorough review of the alternatives, that the current system based on judicial review would function best.

III. The Rules of Criminal Procedure Committee should review the attorney general's recommendations for amendment of Rule 5-802 in capital cases

The Task Force has examined Rule 5-802 NMRA 2003, which governs post-conviction petitions for habeas corpus. It found that the current rule embodies some important changes for review in capital cases. The rule has a separate section on a specific procedure for capital cases.[6] It provides for early appointment of post-conviction counsel to permit the investigation of the facts related to the habeas corpus petition, which is vital after AEDPA.[7] If the capital defendant has post-conviction counsel appointed according to our recommendations on adequacy of representation, this should do much to assure capable post-conviction counsel joins the defense early enough to do a good job.

At the time of the adoption of these changes, the Attorney General's Office made suggestions for separating Rule 5-802 into three rules, including a separate rule on capital petitions. The Attorney General drafted these new rules to address issues her office has seen in defending capital convictions on post-conviction review.[8] These rule changes have not been reviewed by the Rules of Criminal Procedure Committee.

The Task Force has not undertaken a detailed review of these proposals and makes no recommendations on the Attorney General's proposed rules. Given the Attorney General's stake in post-conviction litigation, however, the Task Force does believe that it would be appropriate for the Supreme Court's Rules of Criminal Procedure Committee to review her proposals on capital litigation to determine whether justice warrants further revisions to the procedures for habeas corpus review of capital cases. ■

[6] *Supra* n. 1.

[7] *Id.*

[8] The Task Force attaches a copy of the Attorney General's proposals as Appendix C. These proposals do not address problems that arise in discovery disputes in post-conviction capital litigation and the Rules of Criminal Procedure Committee may wish to address it.

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March 12, 2001

Dear District Attorney,

In addition to being a deputy district attorney, I am currently serving on a State Bar Task Force that is investigating the administration of the death penalty in New Mexico. Since there is no statewide source of information concerning capital cases, the task force has decided to ask the district attorneys to provide information directly to us. We realize that you are extremely busy and so we have tried to make this as simple as possible. We would like you to answer the following questions for us. We have set this up in a format that you can simply fill out and send back. If you have any questions or need additional information, please do not hesitate to contact me at 827-5000 extension 151.

1. What year did you first become District Attorney in your judicial district?

   How many terms have you served since?

   Were they consecutive?

   Was the death penalty an issue during the campaign (or any of the campaigns, if you have served more than one term)?

2. Did you work for the office of district attorney before you were elected District Attorney?

   If so, to the extent that you can, it would be helpful to us if you could share what you know about these issues based on the entire time that you have been with the office. If you did not, but are aware of your predecessor's stance on these issues, we would appreciate knowing about that.

3. For purposes of these questions, we consider a case to have been a death penalty case if it was noticed as a death penalty case at any time during the proceedings, not just if it was tried

APPENDIX "A"

as a death penalty case.

a. Have any cases been prosecuted as death penalty cases in the time you have been with your office? Yes _____ No _____

If the answer was yes, how many cases have been handled as death cases?

How many other first degree or open murder cases have you prosecuted?

In addition, if there have been cases prosecuted as death cases, we would appreciate it if you would fill out the enclosed form for each such case.

Who makes the decision whether to seek the death penalty in a case?

What criteria do you use to determine whether a case should be prosecuted as a death case?

If the criteria have been reduced to writing, we would appreciate receiving a copy.

To what extent do you consider any of the following factors in determining whether to seek the death penalty in a particular case. Please rank the importance of each factor on a scale of one through five, with one being most important and five being least important or not considered at all:

a. the number of victims	1 2 3 4 5
b. the age of the victim(s)	1 2 3 4 5
c. the race or ethnicity of the victim	1 2 3 4 5
the number of defendants	1 2 3 4 5
d. the age of the defendant	1 2 3 4 5
d. the race or ethnicity of the defendant	1 2 3 4 5
the identity or probable identity of the defense attorney	1 2 3 4 5
e. the amount of publicity that the crime has received	1 2 3 4 5
f. the opinions of the law enforcement officers that investigated the crime	1 2 3 4 5
g. the opinions of the family of the victim(s)	1 2 3 4 5
i. Office resources available at the time	1 2 3 4 5
availability of personnel	1 2 3 4 5
financial resources	1 2 3 4 5
Whether assistance is available from the Attorney General's capital crimes division?	1 2 3 4 5
Availability of expert witnesses	1 2 3 4 5

h. Particular details of the crime (please specify)

j. Other factors that you consider (please specify)

Do you think that it costs your office more in time and money to prosecute a case as a death case?

If yes, have you ever tried to estimate how much more? Please give us your best estimate.

Can you remember any death cases in which the defendant was represented by retained counsel? Yes _____ No _____

If yes, please tell us the name of the defendant(s) and the attorney(s) if you recall.

Is there anything else you would like to say about this subject that we have not asked about but you think we should know?

Thank you very much for taking the time to complete this questionnaire. I realize that this is very time consuming. However, to accurately review these issues, the task force feels that it is essential we receive information from New Mexico's District Attorneys.

Sincerely,

James Anthony Julian

James Anthony Julian
Deputy District Attorney

FOR EACH CASE THAT HAS BEEN TREATED AS A DEATH PENALTY CASE AT ANY TIME, PLEASE TELL US:

The age and race of the defendant and the victim(s) at the time of the crime.

The aggravating factor that made the case a death case:

Other charges that were filed against the defendant in addition to the murder charge:

At what point in the proceeding did the case become a death case?

Was the case tried as a death case? Yes _____ No _____

If not, why not?

If the case began trial as a death penalty case, did the jury convict the defendant of first degree murder?

If not, did the jury convict the defendant of anything, and, if so, what?

If it was tried as a death case:

a) did the jury sentence the defendant to death?

b) if not, did the jury find any aggravating circumstances?

Responses of Current and Former District Attorneys

Questions	1st Valdez	2nd Brandnbrg	3rd Valdez	3rd Martinez	6th Foy	7th Wellborn	8th Paternastr	8th Gallegos	9th Harris	10th Reeves	11th Price	11th Tucker	12th Key
Year became DA	1993	2001	1992-96	1997	1996	2001	1997-2000	2001	1990	2001	1997-00	2001	1995
Was DP an issue	Yes	Discussed	Yes	Yes	Not really	No	No	No	No	No	Yes	No	No
How many prose-cuted as DP	4	2	1	1	0	0	3	2	2	0	8 since 1991	4	1
How many M1/open have you prosecuted	Unknown	130 pending	16-20	45	10-20		6+	5	9	0	15	?	20
Does it cost more to prosecute as DP	Yes	Yes	Yes	Yes	Don't know	Yes	Yes	No	Yes		Yes	Yes	Yes
How much			2-3x			35%	Can't recall				$30,000		
Any DP cases with retained counsel			1	n.a.		No	No	No	No		No	No	No
Who makes decision with what input			DA LE involved	DA Senior Pros		DA Deputy DA	DA only	DA	DA	DA Statute only	DA Pros atty LE officer	Prosecutor Victim	Trial atty
Comments								Law fair as is. Should include other aggravating factors-victims, young children, prosecutors, & judges					

DA=District Atty
DP=Death penalty
LE=Law enforcement officers who conducted the investigation
M1=Murder 1
OP=Opinion
Victim=Victim's family

Factors Considered in Determining Whether to Seek the Death Penalty in a Particular Case

Factors 1=most important 5=least/not important

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	1st	2nd	3rd	3rd	6th	7th	8th	8th	9th	10th	11th	11th	12th	Avg.s
	Valdez	Brandnbrg	Valdez	Martinez	Foy	Wellborn	Paternastr	Gallegos	Harris	Reeves	Price	Tucker	Key	
# of victims			2	1		4	2	3	2		2	2	3	2.33
age of victim(s)			2	1		1	2	2	2		1	3	2	1.78
race/ethnicity victim(s)			5	5		5	2	4	5		1 if racially motivated	1	4	3.88
# of defendants			5	3		5	3	4	5		4	1	4	3.78
age of defendant(s)			5	3		5	4	4	5		4	2	3	3.89
race/ethnicity defendt's			5	5		5	5	5	5		5	1	5	4.56
who Defense Atty is			5	5		5	5	5	5		5	1	5	4.56
amt of publicity			3	5		5	5	3	5		5	2	5	4.22
opinion of LE investigator(s)			2	4		4	3	2	3		2	3	3	2.89
opinion of victim's family			4	4		4	1	2	2		2	4	3	2.89
resources available			4	4		3	1	2	5		3	3	4	3.22
personnel			4	4		3	1	2	5		3	2	4	3.11
financial			4	4		3	1	2	5		3	2	4	3.11
AG cap crimes div			5	5		3	3	1	5		4	1	5	3.56
experts			5	4		3	2	2	5		3	3	2	3.22
Details	DP was		outrage	Defendant's		severity of	nature of	seriousness		only criteria	strength of	strength of	brutality,	
	deterent in			prior crime		crime	conduct			set forth	case, likeli-	case	victim's	
Other	NM Prison		impact on	history		doesn't see	suffering			by	hood jury		suffering	
	Riot-no		community			juries as	concealment			statute	will impose			
	guards					willing	possible				death, victim			
	killed					to impose DP	defenses				feelings/			
							& quality of				manner			
							investigation				of death			
											(torture/rape)			

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5-803. Habeas Corpus; persons sentenced to death.

A. **Scope of rule.** This rule governs the procedure for filing a petition for a writ of habeas corpus by a prisoner who has been sentenced to death. A petition for writ of habeas corpus under this rule is limited to a collateral attack on the prisoner's conviction and sentence. The petition must allege one or more of the following: (1) the conviction or sentence violate the constitution or laws of the State of New Mexico or of the United States, and the violation could not have been raised on direct appeal; (2) the district court did not have jurisdiction to impose the sentence; (3) the sentence was not authorized by law. This rule shall be the exclusive rule governing these actions in this State.

B. **Appointment of counsel.** Within thirty (30) days after the Supreme Court issues the mandate affirming a sentence of death, the district court in which the sentence was imposed shall find on the record whether the prisoner is indigent.

(1) If the court finds the prisoner indigent, the court shall promptly appoint counsel to represent the prisoner in proceedings pursuant to this rule (Rule 5-803, NMRA). The court shall only appoint counsel who meet the requirements of eligibility for appointment set forth in Sub-section C of this rule (Rule 5-803(C), NMRA).

(2) If the prisoner seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the prisoner is able to competently decide whether to accept or reject the appointment and whether the prisoner understands the consequences of the decision to reject the appointment. A prisoner shall not be permitted to reject the appointment of counsel unless the court finds the prisoner is competent to make the decision to reject the appointment and the prisoner understands the consequences of rejecting the appointment.

(3) If the court finds the prisoner is not indigent, the court shall not appoint counsel. If after appointing counsel the court determines the prisoner is not indigent, appointed counsel shall

APPENDIX "C"

be allowed to withdraw.

C. **Standards for Appointment of Counsel.** To be eligible for appointment to represent a prisoner in proceedings under this rule (Rule 5-803, NMRA), an attorney

(1) shall have been a member in good standing of the New Mexico State Bar for at least five years immediately preceding the appointment;

(2) shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment;

(3) shall have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed within three years immediately preceding the appointment, and shall have experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings; and

(4) shall have attended and successfully completed, within two years prior to the appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.

(5) With the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in sub-sections C(1) through (4) of this rule, providing that the attorney's experience, stature and record enable the court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with a lawyer who does meet the standards set forth in this rule.

(6) Counsel appointed to represent a prisoner in proceedings under this rule shall not have represented the prisoner at trial or on the direct appeal therefrom, unless the prisoner and counsel

expressly request continued representation.

(7) The ineffectiveness or incompetence of any counsel, whether or not counsel was appointed, during proceedings under this rule (Rule 5-803, NMRA) shall not be a ground for relief in a subsequent proceeding under this rule, or on appellate review of the disposition in a proceeding under this rule.

D. **Compensation for appointed counsel and payment of reasonable litigation expenses.** As to any counsel appointed as provided in this rule (Rule 5-803, NMRA), the Public Defender shall provide counsel with reasonable compensation and shall provide reasonable and necessary litigation expenses, as authorized under NMSA 1978, § 31-15-7 (1987).

E. **Stay of execution.** If the court appoints counsel, within seven (7) days of the appointment, counsel shall file with the district court a notice of intent to file a petition for writ of habeas corpus. If the court does not appoint counsel, within fourteen (14) days of the court's order finding the prisoner is not indigent or allowing the prisoner to refuse the appointment of counsel, the prisoner shall file with the district court a notice of intent to file a petition for writ of habeas corpus. A notice of intent to file a petition for writ of habeas corpus shall be served on the respondent and on the district attorney of the county in which the defendant was convicted. Following the filing of a notice of intent to file a petition for writ of habeas corpus, the district court shall stay the execution pending further proceedings under this rule. The stay shall remain in effect until disposition of the petition, or until the time for filing a petition has expired, whichever occurs first.

F. **Time for filing a petition.** A petition for writ of habeas corpus under this rule (Rule 5-803, NMRA) must be filed within one-hundred eighty (180) days after either

(1) appointment of counsel;

(2) the prisoner rejects the appointment of counsel and the court finds the prisoner is

competent to reject appointment of counsel and understands the consequences of rejecting appointment of counsel; or

(3) the court finds the prisoner is not indigent.

G. **Time for filing a response**. The respondent shall file a response to the petition within one hundred eighty (180) days after service of the petition.

H. **Extension of time.** For good cause shown, the district court may grant an extension of time to file a petition or a response, provided that the aggregate of all extensions granted by the district court for each party may not exceed ninety (90) days. For good cause shown, the Supreme Court may grant an extension of time to file a petition or a response.

I. **Petition**. The petition shall contain the following:

(1) the respondent's name and title. The respondent is the petitioner's immediate custodian, who has the power to produce the petitioner in court and has the power to discharge the petitioner from custody if the petition is granted;

(2) the name of the place where the petitioner is confined or restrained;

(3) a list of all appeals taken or prior petitions filed, including the style, the case number, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding, and an explanation of why the claim now being raised was not raised in any prior proceedings or how the current claim differs from any earlier claim;

(4) a concise statement of the facts and law upon which the petition is based; and

(5) a concise statement of the relief sought.

J. **Papers attached to petition**. The following shall be attached to the petition:

(1) any opinion, decision or order indicating any court's ruling on the validity of the petitioner's conviction or sentence;

(2) a certificate of service showing service on the respondent and the district

attorney for the county in which the petition is filed.

K. **Venue.** A petition shall be filed in the court in which the petitioner was convicted.

L. **Procedure.** Within ninety (90) days after the response is filed, the court shall dispose of the petition without hearing, after briefing and oral arguments, or after an evidentiary hearing. The rules of evidence do not apply to evidentiary hearings held under this rule. If the court does not dispose of the petition within ninety (90), the writ of habeas corpus shall be deemed denied.

M. **Procedure on petition remanded by the Supreme Court.** If a petition for a writ of habeas corpus is filed in the Supreme Court, the Court may remand the petition to the district court. If a petition is remanded by the Supreme Court, the district court shall proceed according to this rule (5-802, NMRA).

N. **Appeal.** Within thirty (30) days after the district court's decision:

(1) If the district court grants the writ, the State may appeal as of right pursuant to the Rules of Appellate Procedure;

(2) If the district court denies the writ or dismisses the petition, the petitioner may seek review in the Supreme Court by writ of certiorari;

(3) If the Supreme Court does not grant the petition within thirty (30) days, the petition for a writ of certiorari shall be deemed denied and the clerk shall enter an appropriate order.

State Bar of New Mexico
Task Force to Study the Administration of the Death Penalty in New Mexico

FINAL REPORT

2004 State Bar of New Mexico