

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE  
FOR THE DISTRICT COURTS  
PROPOSAL 2019-011**

**March 4, 2019**

The Rules of Criminal Procedure Committee has recommended the adoption of new Rule 5-705 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 3, 2019**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**[NEW MATERIAL]**

**5-705. Life imprisonment without possibility of release or parole.**

A. **Notice of intent.** In any case in which the state seeks life imprisonment without the possibility of release or parole, the state shall file a notice of intent to seek life imprisonment without the possibility of release or parole within ninety (90) days after arraignment in district court. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of life imprisonment without the possibility of release or parole. Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent.

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

C. **Bifurcated proceeding upon motion.** Upon motion and a showing of prejudice, the court may bifurcate the issues of guilt of the defendant and whether one or more aggravating circumstances exist under Section 31-20A-5 NMSA 1978. If the court bifurcates the proceedings,

it must also determine whether the same jury that decides guilt will also decide whether one or more aggravating circumstances exists. A motion for bifurcated proceeding must be filed at least ninety (90) days prior to trial. The court's decision on the motion shall be issued no later than ten (10) days prior to trial.

D. **Procedures for proceeding that has not been bifurcated.** If the proceeding is not bifurcated, the trial jury shall determine by a special verdict whether one or more aggravating circumstances exist beyond a reasonable doubt.

E. **Procedures for bifurcated proceedings.** If the court bifurcates the issues of guilt of the defendant and whether one or more aggravating circumstances exist, the court shall proceed as follows:

(1) A trial jury shall be impaneled to determine whether the defendant is guilty of an offense for which the sentence imposed may be life without the possibility of release or parole.

(2) If the trial jury finds the defendant guilty of an offense that may result in a sentence of life without the possibility of release or parole, the same jury or a second jury, as determined by the court under Paragraph C of this rule, shall determine whether one or more aggravating circumstances exist beyond a reasonable doubt. The court shall permit the state and the defendant to present evidence and argument relating to the presence or absence of one or more aggravating circumstances.

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee Commentary.** — This rule follows the repeal of the death penalty in 2009, *see* 2009 N.M. Laws, ch. 11, §§ 5-7, and sets forth procedures for cases in which a defendant faces a possible sentence of life imprisonment without the possibility of release or parole. *See* NMSA 1978, § 31-20A-2 (2009).

The Supreme Court held in *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, that defendants facing a possible sentence of life imprisonment without the possibility of release or parole were not entitled to the heightened procedural protections that are afforded to defendants facing a possible death sentence, including a hearing comparable to that provided for under Rule 5-704 (B) NMRA, *id.* ¶¶16-19, and bifurcated proceedings on issues of guilt and aggravated circumstances as provided for under Rule 5-704 (H). *Id.* ¶¶ 20-22. Given the significant liberty interest implicated for a defendant facing a sentence of life imprisonment without parole, this rule provides for some of the heightened procedural protections contemplated by Rule 5-704.

Under Paragraph B, a defendant who moves for a pretrial determination on whether there is probable cause to believe that one or more aggravated circumstances exist is entitled to a hearing on that issue. A defendant is not entitled, as a matter of course, to bifurcated proceedings on the issues of guilt and whether one or more aggravating circumstances exist; “[w]hether bifurcated proceedings are appropriate must be determined by the court on a case-by-case basis.” *Chadwick-McNally*, 2018-NMSC-018, ¶¶ 21-22.

Under Paragraphs (D) and (E)(2), if a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without the possibility of release or parole. *Id.* ¶ 25. Mitigation is not permitted. *Id.* “If the jury does not find that one or more aggravating circumstances exist, then the defendant shall be sentenced to life imprisonment.” *Id.* (quoting § 31-20A-2).

[Adopted by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

FROM: SECOND JUDICIAL DISTRICT COURT, CRIMINAL DIVISION  
SUBJECT: Comments on Proposed Changes to Rules of Criminal Procedure and UJI  
TO: Supreme Court Rules of Criminal Procedure Committee; Supreme Court Committee for the Improvement of Jury Service in New Mexico  
DATE: April 3, 2019

Pursuant to the New Mexico Supreme Court's request for comments on a variety of recently-proposed Rule changes, the Criminal Judges in the Second Judicial District Court ("the Second") thank the Supreme Court for the opportunity to provide comments and offer suggestions as to: (1) Rule 5-705 NMRA (adding procedures for when the state asks for life imprisonment without possibility of release or parole (LWOP)), and; (2) Form 5-913C NMRA (mandatory juror questionnaire for criminal cases).

**Rule 5-705:**

1. The State's deadline to give notice that it intends to ask for LWOP should be no later than when the mandatory case status conference, see LR2-308(F)(2), is conducted, rather than within 90 days of arraignment as proposed. Having the deadline for notice match the status conference deadline allows for any issues raised by the intent to ask for LWOP to be addressed in the scheduling order, see LR2-308(F)(5), which is issued at the status conference. These matching deadlines will help ensure that the scheduling order in the case is reasonable for both parties, and will help reduce any adverse impact that LWOP notice could have on the defendant's investigation, for example, the ability to conduct thorough interviews, as well as the defendant's case strategy and ability to obtain experts.

a. As LR2-308 is a local pilot rule, the Second understands that outside of Bernalillo County the 90-day deadline may be sufficient. On the other hand, the Second is concerned that the 90-day deadline currently in the Rule would necessitate numerous continuances—something which LR2-308 was specifically designed to limit. The Second supports the goals of LR2-308—including the timely disposition of cases—and supports the limitation on continuances contained therein. We therefore suggest that the new Rule could alternatively provide that the deadlines set forth therein can be modified as part of any scheduling order after input from the parties. That would ensure it is clear that judges in the Second are permitted to modify the deadlines as necessary to comply with LR2-308; it would also allow judges throughout the rest of the state to modify the deadlines to address issues specific to their local jurisdiction. The current draft of the Rule allows judges to expand the time limit for good cause; it does not specifically allow a judge to shorten the deadline imposed in the Rule.

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2. The deadlines for (a) a hearing on whether probable cause exists to believe aggravated circumstances exist that justify a request for LWOP, and (b) filing and deciding a motion for a bifurcated trial, should be earlier than the proposed deadlines of no later than 90 days prior to trial and no less than 10 days prior to trial to decide a motion to bifurcate. Moving these deadlines to earlier points in a case's timeline will help reduce any impact on jury selection from the State's intent to ask for LWOP. Many LWOP cases will be high profile and the attendant press coverage, if LWOP itself becomes an issue in the press, could lead to more prospective jurors being struck due to their exposure to the coverage.

a. As above, an alternative would be to specify within the Rule that a judge may shorten deadlines, after a hearing, as part of the case scheduling order.

**Form 9-315C (Jury Questionnaire):**

The Second is concerned that the proposed changes could increase the amount of time parties spend in-person during voir dire asking general questions instead of making focused inquiries based upon the general information gleaned through the questionnaire. For example, the parties may inquire generally about military service or where else a prospective juror has lived (city, state, or country) besides the juror's current address, both of which the current questionnaire inquires, and are omitted from the proposed questionnaire. Several of the questions omitted in the new jury questionnaire are questions that the parties are likely to inquire about regardless of whether they are on the questionnaire itself.

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April 3, 2019

Dear Mr. Moya,

As the President of the New Mexico Criminal Defense Lawyers Association (NMCDLA), I am submitting the following comments on proposed rule changes 2019-003, 005, 009, and 011.

**Proposal 2019-003 - Mandatory joinder of delinquent acts in delinquency proceedings [Rule 10-212 NMRA]**

NMCDLA strongly supports mandatory joinder in delinquency proceedings. Piecemeal prosecutions of juveniles should be clearly prohibited in the rules of procedure.

**Proposal 2019-005 - Juror questionnaires [Forms 4-602C and 9-513C NMRA]**

Jury selection is the most important part of trial. Parties must be allowed to gather as much information as needed from potential jurors to determine potential bias and to use preemptory strikes.

NMCDLA does not support removing any information gathering from juror questionnaires. NMCDLA is especially concerned with the proposal to eliminate the following questions, which will impede the parties' ability to get relevant information from jurors and slows down the jury selections process:

14) What other jobs have you had?

This information is frequently relevant to jury selection especially when a potential juror's former job involved social work, medical care, therapy, and/or working with drug/alcohol addiction.

19 & 20) Questions about spouses and children.

Information about a person's spouse and children helps parties uncover potential connections the juror might have with a witness or someone else connected to the case.

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27) Have you or any member of your immediately family been the victim of a crime?

If a close family member has been a victim of a crime, that is information both sides need. Frequently potential jurors with those experiences have bias either against the defendant or the prosecution. This information frequently leads to follow up questions in jury selection that reveals bias.

34) Is there any reason you could not serve as a juror?

This is the only open question on the form that freely calls for jurors to express any bias. It frequently leads to successful cause excusals. It is very important to allow jurors to express bias on a form, rather than requiring they do so in a public jury selection.

**Proposal 2019-009 - Preference for summons [Rule 5-208 NMRA]**

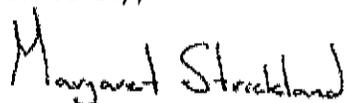
NMCDLA supports a preference for summons when practicable, especially for lower level offenses where there has been no probable cause determination, like there is in felony cases.

**Proposal 2019-011 - Life without the possibility of release or parole procedures [New Rule 5-705 NMRA]**

NMCDLA supports these procedural protections for defendants facing life without the possibility of parole, the highest penalty one can face in New Mexico Courts.

Please feel free to contact me with any questions.

Sincerely,



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