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HOUSE BILL 371

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

INTRODUCED BY

Dennis J. Kintigh

AN ACT

RELATING TO CAPITAL FELONY SENTENCING; REINSTATING THE DEATH PENALTY; PROVIDING CAPITAL FELONY SENTENCING PROCEDURES; PROVIDING FOR A SENTENCING HEARING; PROVIDING AN ADDITIONAL AGGRAVATING CIRCUMSTANCE; REQUIRING AUTOMATIC SUPREME COURT REVIEW OF CONVICTION AND SENTENCE; PROVIDING PROCEDURES FOR EXECUTION; REQUIRING EXECUTION BY LETHAL INJECTION; PROHIBITING EXECUTION OF CERTAIN PERSONS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** Section 31-18-14 NMSA 1978 (being Laws 1979, Chapter 150, Section 1, as amended) is amended to read:

"31-18-14. SENTENCING AUTHORITY--CAPITAL FELONIES.--

A. When a defendant has been convicted of a capital felony, the defendant shall be punished by life imprisonment or

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1 death. The punishment shall be imposed after a sentencing  
2 hearing separate from the trial or guilty plea proceeding.  
3 However, if the defendant has not reached the age of majority  
4 at the time of the commission of the capital felony for which  
5 the defendant was convicted, the defendant may be sentenced to  
6 life imprisonment but shall not be punished by death.

7 B. In the event that the death penalty in a capital  
8 felony case is held to be unconstitutional or otherwise  
9 invalidated by the supreme court of the state of New Mexico or  
10 the supreme court of the United States, the person previously  
11 sentenced to death for a capital felony shall be  
12 sentenced to life imprisonment [~~or life imprisonment without~~  
13 possibility of release or parole]."

14 SECTION 2. Section 31-20A-2 NMSA 1978 (being Laws 1979,  
15 Chapter 150, Section 3, as amended) is amended to read:

16 "31-20A-2. CAPITAL FELONY--DETERMINATION OF SENTENCE.--  
17 [~~If a jury finds, beyond a reasonable doubt, that one or more~~  
18 ~~aggravating circumstances exist, as enumerated in Section~~  
19 ~~31-20A-5 NMSA 1978, the defendant shall be sentenced to life~~  
20 ~~imprisonment without possibility of release or parole. If the~~  
21 ~~jury does not make the finding that one or more aggravating~~  
22 ~~circumstances exist, the defendant shall be sentenced to life~~  
23 ~~imprisonment.]~~

24 A. Capital sentencing deliberations shall be guided  
25 by the following considerations:

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1                   (1) whether aggravating circumstances exist as  
2 enumerated in Section 31-20A-5 NMSA 1978;

3                   (2) whether mitigating circumstances exist as  
4 enumerated in Section 7 of this 2011 act; and

5                   (3) whether other mitigating circumstances  
6 exist.

7                   B. After weighing the aggravating circumstances and  
8 the mitigating circumstances, weighing them against each other  
9 and considering both the defendant and the crime, the jury or  
10 judge shall determine whether the defendant should be sentenced  
11 to death or life imprisonment."

12                   SECTION 3. A new section of Chapter 31 NMSA 1978 is  
13 enacted to read:

14                   "[NEW MATERIAL] CAPITAL FELONY--SENTENCING PROCEDURE.--

15                   A. At the conclusion of all capital felony cases  
16 heard by jury, and after proper charge from the court and  
17 argument of counsel, the jury shall retire to consider a  
18 verdict of guilty or not guilty without any consideration of  
19 punishment. In non-jury capital felony cases, the judge shall  
20 first consider a finding of guilty or not guilty without any  
21 consideration of punishment.

22                   B. Upon a verdict by the jury or judge that the  
23 defendant is guilty of a capital felony, or upon the  
24 defendant's plea of guilty to a capital felony, the court shall  
25 conduct a separate sentencing proceeding to determine whether

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1 the defendant should be sentenced to death or life  
2 imprisonment. In a jury trial, the sentencing proceeding shall  
3 be conducted as soon as practicable by the original trial judge  
4 before the original trial jury. In a non-jury trial, the  
5 sentencing proceeding shall be conducted as soon as practicable  
6 by the original trial judge. In the case of the defendant's  
7 plea of guilty to a capital felony, the sentencing proceeding  
8 shall be conducted as soon as practicable by the original trial  
9 judge or by a jury upon demand of a party.

10 C. In the sentencing proceeding, all evidence  
11 admitted at the trial shall be considered, and additional  
12 evidence may be presented as to the circumstances of the crime  
13 and as to any aggravating or mitigating circumstances pursuant  
14 to Section 31-20A-5 NMSA 1978 and Section 7 of this 2011 act.

15 D. In a jury sentencing proceeding, the judge shall  
16 give appropriate instructions and allow arguments, and the jury  
17 shall retire to determine the punishment to be imposed. In a  
18 non-jury sentencing proceeding, or upon a plea of guilty, where  
19 no jury has been demanded, the judge shall allow argument and  
20 determine the punishment to be imposed."

21 SECTION 4. A new section of Chapter 31 NMSA 1978 is  
22 enacted to read:

23 "[NEW MATERIAL] CAPITAL FELONY CASE HEARD BY JURY--  
24 SENTENCING HEARING--EXPLANATION TO THE JURY.--At the beginning  
25 of a sentencing hearing for a capital felony case, subsequent

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1 to a verdict by the jury that the defendant is guilty of a  
2 capital felony, the court shall explain to the jury that a  
3 sentence of life imprisonment means that the defendant shall  
4 serve thirty years of the sentence before the defendant becomes  
5 eligible for a parole hearing, as provided in Section 31-21-10  
6 NMSA 1978."

7 SECTION 5. A new section of Chapter 31 NMSA 1978 is  
8 enacted to read:

9 "[NEW MATERIAL] COURT SENTENCING.--In a jury sentencing  
10 proceeding in which the jury unanimously finds beyond a  
11 reasonable doubt and specifies at least one of the aggravating  
12 circumstances enumerated in Section 31-20A-5 NMSA 1978 and  
13 unanimously specifies the sentence of death pursuant to Section  
14 31-20A-2 NMSA 1978, the court shall sentence the defendant to  
15 death. When a sentence of death is not unanimously specified,  
16 or the jury does not make the required finding, or the jury is  
17 unable to reach a unanimous verdict, the court shall sentence  
18 the defendant to life imprisonment. In a non-jury sentencing  
19 proceeding and in cases involving a plea of guilty, where no  
20 jury has been demanded, the judge shall determine and impose  
21 the sentence, but the judge shall not impose the sentence of  
22 death except upon a finding beyond a reasonable doubt and  
23 specification of at least one of the aggravating circumstances  
24 enumerated in Section 31-20A-5 NMSA 1978."

25 SECTION 6. Section 31-20A-5 NMSA 1978 (being Laws 1979,  
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1 Chapter 150, Section 6, as amended) is amended to read:

2 "31-20A-5. AGGRAVATING CIRCUMSTANCES.--The aggravating  
3 circumstances to be considered by the sentencing court or jury  
4 pursuant to the provisions of Section 31-20A-2 NMSA 1978 are  
5 limited to the following:

6 A. the victim was a peace officer who was acting in  
7 the lawful discharge of an official duty when [~~he~~] the peace  
8 officer was murdered;

9 B. the victim was a child under eighteen years of  
10 age;

11 [~~B.~~] C. the murder was committed with intent to  
12 kill in the commission of or attempt to commit [~~kidnaping~~]  
13 kidnapping, criminal sexual contact of a minor or criminal  
14 sexual penetration;

15 [~~G.~~] D. the murder was committed with the intent to  
16 kill by the defendant while attempting to escape from a penal  
17 institution of New Mexico;

18 [~~D.~~] E. while incarcerated in a penal institution  
19 in New Mexico, the defendant, with the intent to kill, murdered  
20 a person who was at the time incarcerated in or lawfully on the  
21 premises of a penal institution in New Mexico. As used in this  
22 subsection, "penal institution" includes facilities under the  
23 jurisdiction of the corrections [~~and criminal rehabilitation~~]  
24 department and county and municipal jails;

25 [~~E.~~] F. while incarcerated in a penal institution

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1 in New Mexico, the defendant, with the intent to kill, murdered  
2 an employee of the corrections [~~and criminal rehabilitation~~]  
3 department;

4 [F-] G. the capital felony was committed for hire;  
5 and

6 [G-] H. the capital felony was murder of a witness  
7 to a crime or any person likely to become a witness to a crime,  
8 for the purpose of preventing report of the crime or testimony  
9 in any criminal proceeding or for retaliation for the victim  
10 having testified in any criminal proceeding."

11 SECTION 7. A new section of Chapter 31 NMSA 1978 is  
12 enacted to read:

13 "[NEW MATERIAL] MITIGATING CIRCUMSTANCES.--The mitigating  
14 circumstances to be considered by the sentencing court or the  
15 jury pursuant to the provisions of Section 31-20A-2 NMSA 1978  
16 shall include but not be limited to the following:

- 17 A. the defendant has no significant history of  
18 prior criminal activity;
- 19 B. the defendant acted under duress or under the  
20 domination of another person;
- 21 C. the defendant's capacity to appreciate the  
22 criminality of the defendant's own conduct or to conform the  
23 defendant's own conduct to the requirements of the law was  
24 impaired;
- 25 D. the defendant was under the influence of mental

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1 or emotional disturbance;

2 E. the victim was a willing participant in the  
3 defendant's conduct;

4 F. the defendant acted under circumstances that  
5 tended to justify, excuse or reduce the crime;

6 G. the defendant is likely to be rehabilitated;

7 H. the defendant cooperated with authorities; and

8 I. the defendant's age."

9 SECTION 8. A new section of Chapter 31 NMSA 1978 is  
10 enacted to read:

11 "[NEW MATERIAL] REVIEW OF JUDGMENT AND SENTENCE.--

12 A. The judgment of conviction and sentence of death  
13 shall be automatically reviewed by the supreme court of New  
14 Mexico.

15 B. In addition to other matters on appeal, the  
16 supreme court shall rule on the validity of the death sentence.

17 C. The death penalty shall not be imposed if:

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

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

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

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1 (4) the sentence of death is excessive or  
2 disproportionate to the penalty imposed in similar cases,  
3 considering both the crime and the defendant.

4 D. No error in the sentencing proceeding shall  
5 result in the reversal of the conviction of a capital felony.  
6 If the trial court is reversed on appeal because of error only  
7 in the sentencing proceeding, the supreme court shall remand  
8 solely for a new sentencing proceeding. The new sentencing  
9 proceeding ordered and mandated shall apply only to the issue  
10 of punishment.

11 E. In cases of remand for a new sentencing  
12 proceeding, all exhibits and a transcript of all testimony and  
13 other evidence admitted in the prior trial and sentencing  
14 proceeding shall be admissible in the new sentencing  
15 proceeding, and:

16 (1) if the sentencing proceeding was before a  
17 jury, a new jury shall be impaneled for the new sentencing  
18 proceeding;

19 (2) if the sentencing proceeding was before a  
20 judge, the original trial judge shall conduct the new  
21 sentencing proceeding; or

22 (3) if the sentencing proceeding was before a  
23 judge and the original trial judge is unable or unavailable to  
24 conduct a new sentencing proceeding, then another judge shall  
25 be designated to conduct the new sentencing proceeding and the

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1 parties are entitled to disqualify the new judge on the grounds  
2 set forth in Section 38-3-9 NMSA 1978 before the newly  
3 designated judge exercises any discretion."

4 SECTION 9. A new section of Chapter 31 NMSA 1978 is  
5 enacted to read:

6 "[NEW MATERIAL] PROHIBITION AGAINST CAPITAL PUNISHMENT OF  
7 MENTALLY RETARDED PERSONS--PRE-SENTENCING HEARING.--

8 A. As used in this section, "mentally retarded"  
9 means significantly below average intellectual functioning  
10 existing concurrently with deficits in adaptive behavior. An  
11 intelligence quotient of seventy or below on a reliably  
12 administered intelligence quotient test shall be presumptive  
13 evidence of mental retardation.

14 B. The penalty of death shall not be imposed on any  
15 person who is mentally retarded.

16 C. Upon motion of the defense requesting a ruling  
17 that the penalty of death be precluded under this section, the  
18 court shall hold a hearing, prior to conducting the sentencing  
19 proceeding. If the court finds, by a preponderance of the  
20 evidence, that the defendant is mentally retarded, it shall  
21 sentence the defendant to life imprisonment. A ruling by the  
22 court that evidence of diminished intelligence introduced by  
23 the defendant does not preclude the death penalty under this  
24 section shall not restrict the defendant's opportunity to  
25 introduce the evidence at the sentencing proceeding or to argue

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1 that such evidence should be given mitigating significance. If  
2 the sentencing proceeding is conducted before a jury, the jury  
3 shall not be informed of any ruling denying a defendant's  
4 motion under this section."

5 SECTION 10. A new section of Chapter 31 NMSA 1978 is  
6 enacted to read:

7 "[NEW MATERIAL] WARRANT OF EXECUTION UPON JUDGMENT OF  
8 DEATH--TIME OF EXECUTION.--When judgment of death is rendered  
9 by any court of competent jurisdiction, a warrant signed by the  
10 judge and attested by the clerk under the seal of the court  
11 shall be drawn and delivered to the sheriff. The warrant shall  
12 state the conviction and judgment and appoint a day on which  
13 the judgment is to be executed, which shall be not less than  
14 sixty nor more than ninety days from the date of judgment, and  
15 shall direct the sheriff to deliver the defendant, at a time  
16 specified in the warrant but not more than ten days from the  
17 date of judgment, to the warden of the penitentiary of New  
18 Mexico for execution."

19 SECTION 11. A new section of Chapter 31 NMSA 1978 is  
20 enacted to read:

21 "[NEW MATERIAL] STATEMENT OF CONVICTION TO GOVERNOR.--The  
22 judge of the court at which a conviction is had shall,  
23 immediately after the conviction, transmit to the governor, by  
24 mail or otherwise, a statement of the conviction and judgment."

25 SECTION 12. A new section of Chapter 31 NMSA 1978 is

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1 enacted to read:

2 "[NEW MATERIAL] GOVERNOR MAY SUSPEND EXECUTION.--No judge,  
3 court or officer, other than the governor, shall suspend the  
4 execution of a judgment of death, except the warden of the  
5 state prison to whom a person is delivered for execution, in  
6 accordance with the provisions of Sections 13 through 17 of  
7 this 2011 act."

8 SECTION 13. A new section of Chapter 31 NMSA 1978 is  
9 enacted to read:

10 "[NEW MATERIAL] INSANITY OF DEFENDANT--HOW DETERMINED.--  
11 If, after a defendant is delivered to the warden for execution,  
12 there is good reason to believe that the defendant, under  
13 judgment of death, has become insane, the warden shall call  
14 such fact to the attention of the district attorney of the  
15 county in which the state penitentiary is situated. The  
16 district attorney shall immediately file in the district court  
17 of the county a petition, stating the conviction and judgment  
18 and the fact that the defendant is believed to be insane and  
19 asking that the court inquire into the question of the  
20 defendant's sanity. Thereupon, it shall be the duty of the  
21 district court to inquire into the matter and render a  
22 judgment."

23 SECTION 14. A new section of Chapter 31 NMSA 1978 is  
24 enacted to read:

25 "[NEW MATERIAL] DUTY OF DISTRICT ATTORNEY UPON HEARING.--

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1 The district attorney shall attend the hearing on the question  
2 of a defendant's sanity and may produce witnesses and issue  
3 process in the same manner as process is issued for witnesses  
4 to testify before a grand jury. Failure to comply with process  
5 issued shall be punished in like manner as failure to comply  
6 with process issued by the court."

7 SECTION 15. A new section of Chapter 31 NMSA 1978 is  
8 enacted to read:

9 "[NEW MATERIAL] ORDER OF COURT COMMITTING INSANE PERSON TO  
10 HOSPITAL.--The court shall make and cause to be entered an  
11 order reciting the fact of the inquiry and its result. If it  
12 is found that the defendant is insane, the order shall direct  
13 that the defendant be taken to the New Mexico behavioral health  
14 institute at Las Vegas and be kept there in safe confinement  
15 until the defendant's reason is restored."

16 SECTION 16. A new section of Chapter 31 NMSA 1978 is  
17 enacted to read:

18 "[NEW MATERIAL] DUTIES OF WARDEN--PROCEDURE WHEN SANITY IS  
19 RESTORED.--If it is found that the defendant is sane, the  
20 warden shall proceed to execute the judgment as specified in  
21 the warrant. If it is found that the defendant is insane, the  
22 warden shall suspend the execution and transmit a certified  
23 copy of the order to the governor and deliver the defendant,  
24 together with a certified copy of the order, to the  
25 superintendent of the New Mexico behavioral health institute at

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1 Las Vegas. When the defendant's reason is restored, the  
2 superintendent of the institute shall certify that fact to the  
3 governor, who shall thereupon issue to the warden a warrant  
4 appointing a day for the execution of the judgment."

5 SECTION 17. A new section of Chapter 31 NMSA 1978 is  
6 enacted to read:

7 "[NEW MATERIAL] PROCEEDINGS WHEN FEMALE MAY BE PREGNANT.--

8 A. If there is good reason to believe that a female  
9 against whom a judgment of death is rendered is pregnant, such  
10 proceedings shall be had as provided in Section 13 of this 2011  
11 act, except that the court may summon three disinterested  
12 physicians of good standing to inquire into the alleged  
13 pregnancy and examine the defendant and make a written finding  
14 and certificate of their conclusion to be approved by the  
15 court. The provisions of Section 14 of this 2011 act apply to  
16 the proceedings upon such inquiry.

17 B. If it is found that the female is not pregnant,  
18 the warden shall execute the judgment. If it is found that the  
19 female is pregnant, the warden shall suspend execution of the  
20 judgment and transmit a certified copy of the finding and  
21 certificate to the governor. When the governor receives from  
22 the warden a certificate that the female is no longer pregnant,  
23 the governor shall issue to the warden a warrant appointing a  
24 day for the execution of the judgment."

25 SECTION 18. A new section of Chapter 31 NMSA 1978 is

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1 enacted to read:

2 "[NEW MATERIAL] JUDGMENT OF DEATH REMAINING BUT NOT  
3 EXECUTED--NO APPEAL FROM ORDER OF COURT.--If for any reason a  
4 judgment of death has not been executed and remains in force,  
5 the court in which the conviction is had, on the application of  
6 the district attorney of the county in which the conviction is  
7 had, shall order the defendant to be brought before it, or if  
8 the defendant is at large, a warrant for the defendant's  
9 apprehension may be issued. When the defendant is brought  
10 before the court, it shall inquire into the facts and, if no  
11 legal reason exists against the execution of the judgment,  
12 shall issue an order that the warden of the penitentiary of New  
13 Mexico, to whom the sheriff is directed to deliver the  
14 defendant, execute the judgment at a specified time. The  
15 warden shall execute the judgment accordingly. From an order  
16 directing and fixing the time for the execution of a judgment,  
17 as herein provided, there is no appeal."

18 SECTION 19. A new section of Chapter 31 NMSA 1978 is  
19 enacted to read:

20 "[NEW MATERIAL] PUNISHMENT OF DEATH--HOW INFLICTED.--The  
21 manner of inflicting punishment of death shall be by  
22 administration of a continuous, intravenous injection of a  
23 lethal quantity of an ultra-short-acting barbiturate in  
24 combination with a chemical paralytic agent. Any reference in  
25 the statutes relating to the means of execution shall be

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1 construed to mean execution by lethal injection as provided in  
2 this section."

3 SECTION 20. A new section of Chapter 31 NMSA 1978 is  
4 enacted to read:

5 "[NEW MATERIAL] PLACE OF EXECUTION--DIRECTION OF WARDEN.--  
6 The warden of the penitentiary of New Mexico shall provide a  
7 suitable and efficient room or place closed from public view,  
8 within the walls of the penitentiary of New Mexico, and therein  
9 provide all necessary appliances requisite for carrying into  
10 execution the death penalty. In each individual case of a  
11 death sentence pronounced in this state, the punishment of  
12 death shall be inflicted under the direction of the warden in  
13 the room or place provided for that purpose."

14 SECTION 21. A new section of Chapter 31 NMSA 1978 is  
15 enacted to read:

16 "[NEW MATERIAL] WHERE JUDGMENT IS EXECUTED--WHO MAY BE  
17 PRESENT.--A judgment of death shall be executed within the  
18 walls of the penitentiary of New Mexico, and the execution  
19 shall be under the supervision and direction of the warden of  
20 the penitentiary. The warden of the penitentiary of New Mexico  
21 shall be present at the execution and shall invite the presence  
22 of a physician, the attorney general and at least twelve  
23 reputable citizens to be selected by the warden. The warden  
24 shall, at the request of the defendant, permit such ministers,  
25 priests, rabbis, imams or other religious leaders or teachers,

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1 not exceeding two, as the defendant may name, and any person,  
2 relative or friend, not to exceed five, to be present at the  
3 execution, together with such peace officers as the warden may  
4 think expedient, to witness the execution. No persons, other  
5 than those mentioned in this section, shall be present at the  
6 execution, nor shall any person under the age of eighteen be  
7 allowed to witness the execution."

8 SECTION 22. A new section of Chapter 31 NMSA 1978 is  
9 enacted to read:

10 "[NEW MATERIAL] RETURN OF WARDEN.--After the execution,  
11 the warden shall make a return upon the death warrant to the  
12 court that rendered the judgment, showing the time, mode and  
13 manner in which the warrant was executed."

14 SECTION 23. APPLICABILITY.--The provisions of this act  
15 apply to capital felonies committed on or after July 1, 2011.

16 SECTION 24. EFFECTIVE DATE.--The effective date of the  
17 provisions of this act is July 1, 2011.