

HOUSE BILL 7

52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SPECIAL SESSION, 2016

INTRODUCED BY

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This document incorporates amendments adopted by the House Appropriations and Finance Committee during its consideration of this measure. It is a tool to show the amendments in context and is not to be used for introduction, amendment or substitution.

AN ACT

RELATING TO CAPITAL FELONY SENTENCING; REINSTATING THE DEATH PENALTY; PROVIDING SENTENCING PROCEDURES; PROVIDING MITIGATING CIRCUMSTANCES; REQUIRING AUTOMATIC REVIEW OF CONVICTION AND SENTENCE BY THE SUPREME COURT; PROVIDING PROCEDURES FOR EXECUTION; PROHIBITING EXECUTION OF CERTAIN PERSONS; REQUIRING EXECUTION BY LETHAL INJECTION.

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; life imprisonment without the possibility of release or parole;

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or death. The punishment shall be imposed after a sentencing hearing separate from the trial or guilty plea proceeding. If the defendant has not reached the age of eighteen years at the time of the commission of the capital felony for which the defendant was convicted, the defendant may be sentenced to life imprisonment or life imprisonment without the possibility of release or parole but shall not be punished by death.

B. In the event that the sentence of death in a capital felony case is held to be unconstitutional or otherwise invalidated by the supreme court or the United States supreme court, the person previously sentenced to death for a capital felony shall be sentenced to [~~life imprisonment or~~] life imprisonment without possibility of release or parole."

SECTION 2. Section 31-18-23 NMSA 1978 (being Laws 1994, Chapter 24, Section 2, as amended) is amended to read:

"31-18-23. THREE VIOLENT FELONY CONVICTIONS--MANDATORY LIFE IMPRISONMENT--EXCEPTION.--

A. When a defendant is convicted of a third violent felony, and each violent felony conviction is part of a separate transaction or occurrence, and at least the third violent felony conviction is in New Mexico, the defendant shall, in addition to the sentence imposed for the third violent felony conviction when that sentence does not result in death, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant

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to the provisions of Section 31-21-10 NMSA 1978.

B. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violent felony conviction, pursuant to the provisions of Section 31-18-24 NMSA 1978.

C. For the purpose of this section, a violent felony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent felony conviction.

D. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent felony for the purposes of the Criminal Sentencing Act if that crime would be considered a violent felony in New Mexico.

E. As used in the Criminal Sentencing Act:

(1) "great bodily harm" means an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body; and

(2) "violent felony" means:

(a) murder in the first or second degree, as provided in Section 30-2-1 NMSA 1978;

(b) shooting at or from a motor vehicle

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resulting in great bodily harm, as provided in Subsection B of Section 30-3-8 NMSA 1978;

(c) kidnapping resulting in great bodily harm inflicted upon the victim by the victim's captor, as provided in Subsection B of Section 30-4-1 NMSA 1978;

(d) criminal sexual penetration, as provided in Subsection C or D or Paragraph (5) or (6) of Subsection E of Section 30-9-11 NMSA 1978; and

(e) robbery while armed with a deadly weapon resulting in great bodily harm as provided in Section 30-16-2 NMSA 1978 and Subsection A of Section 30-1-12 NMSA 1978."

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

"31-20A-2. CAPITAL FELONY--DETERMINATION OF SENTENCE.--

A. If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, as enumerated in Subsection A of Section 31-20A-5 NMSA 1978, the defendant shall be sentenced to life imprisonment without possibility of release or parole. If the jury does not ~~[make the finding]~~ find that one or more of the aggravating circumstances enumerated in that subsection exist, the defendant shall be sentenced to life imprisonment.

B. If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, as enumerated in

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Subsection B of Section 31-20A-5 NMSA 1978, the jury shall determine whether the defendant shall be sentenced to death or life imprisonment without the possibility of release or parole. The determination pursuant to this subsection shall be guided by the following considerations:

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

(2) whether mitigating circumstances exist as enumerated in Section 8 of this 2016 act; and

(3) whether other mitigating circumstances exist.

C. With respect to a defendant who was younger than eighteen years at the time of commission of the capital felony for which the defendant was convicted, if a jury finds that an aggravating circumstance as enumerated in Subsection A or B of Section 31-20A-5 NMSA 1978 exists, the sentencing court or jury shall consider the defendant's age at the time of commission of the capital felony as a mitigating factor and shall determine whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of release or parole."

SECTION 4. Section 31-20A-5 NMSA 1978 (being Laws 1979, Chapter 150, Section 6, as amended) is amended to read:

"31-20A-5. AGGRAVATING CIRCUMSTANCES.--

A. The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of

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Subsection A of Section 31-20A-2 NMSA 1978 are limited to the following:

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

~~B.]~~ (1) the murder was committed with intent to kill in the commission of or attempt to commit [~~kidnaping~~] kidnapping, criminal sexual contact of a minor or criminal sexual penetration;

~~[C.]~~ (2) the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

~~[D.]~~ (3) 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 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;~~

~~F.]~~ (4) the capital felony was committed for

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hire; and

[6-] (5) 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.

B. The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Subsection B of Section 31-20A-2 NMSA 1978 are limited to the following:

(1) the victim was a peace officer who was acting in the lawful discharge of an official duty when the peace officer was murdered;

(2) the victim was a child under the age of eighteen years; and

(3) while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee or a contractor of the penal institution.

C. For the purpose of this section, "penal institution" includes facilities under the jurisdiction of the corrections department and county and municipal jails."

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

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

A. At the conclusion of all capital felony cases

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heard by a jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to life imprisonment, life imprisonment without the possibility of release or parole, or death. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before either the original trial jury or a jury empaneled for the purpose of sentencing. In a nonjury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or a jury. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances, pursuant

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to Section 31-20A-5 NMSA 1978 and Section 8 of this 2016 act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed."

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

"[NEW MATERIAL] CAPITAL FELONY CASE HEARD BY JURY-- SENTENCING HEARING--EXPLANATION BY COURT TO JURY.--At the beginning of a sentencing hearing for a capital felony case, subsequent to a verdict by the jury that the defendant is guilty of a capital felony, the court shall explain to the jury that a sentence of life imprisonment means that the defendant shall serve thirty years of the sentence before the defendant becomes eligible for a parole hearing, as provided in Section 31-21-10 NMSA 1978."

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

"[NEW MATERIAL] COURT SENTENCING.--In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Subsection B of Section 31-20A-5 NMSA 1978 and unanimously specifies the sentence of death

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pursuant to Subsection B of Section 31-20A-2 NMSA 1978, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified or the jury does not make the required finding or is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment without the possibility of release or parole in accordance with Section 31-20A-2 NMSA 1978. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence; provided that the judge shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Subsection B of Section 31-20A-5 NMSA 1978."

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

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

- A. the defendant has no significant history of prior criminal activity;
- B. the defendant acted under duress or under the domination of another person;
- C. the defendant's capacity to appreciate the

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criminality of the defendant's own conduct or to conform the defendant's own conduct to the requirements of the law was impaired;

D. the defendant was under the influence of mental or emotional disturbance;

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

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

G. the defendant is likely to be rehabilitated;

H. the defendant cooperated with authorities; and

I. the defendant's age."

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

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

A. A judgment of conviction and sentence of death shall be automatically reviewed by the supreme court.

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

C. A sentence of death shall not be imposed if:

(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

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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.

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

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

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

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

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(3) if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, another judge shall be designated to conduct the new sentencing proceeding and the parties are entitled to disqualify the new judge on the grounds set forth in Section 38-3-9 NMSA 1978 before the newly designated judge exercises any discretion."

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

"[NEW MATERIAL] PROHIBITION AGAINST CAPITAL PUNISHMENT OF ~~MENTALLY RETARDED~~ PERSONS WITH AN INTELLECTUAL DISABILITY-- PRESENTENCING HEARING.--

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

B. A sentence of death shall not be imposed on any person ~~who is mentally retarded~~ with an intellectual disability.

C. Upon a motion of the defense requesting a ruling that a sentence of death be precluded pursuant to this section, the court shall hold a hearing, prior to conducting the sentencing proceeding pursuant to Section 7 of this 2016 act.

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If the court finds, by a preponderance of the evidence, that the defendant ~~is mentally retarded~~ has an intellectual disability, it shall sentence the defendant to life imprisonment without the possibility of release or parole. A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude a sentence of death pursuant to this section shall not restrict the defendant's opportunity to introduce the evidence at the sentencing proceeding or to argue that the evidence should be given mitigating significance. If the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion pursuant to this section."

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

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

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Mexico for execution."

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

"[NEW MATERIAL] JUDGE TO TRANSMIT STATEMENT OF CONVICTION.--The judge of a court in which a defendant was convicted and sentenced to death shall, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment."

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

"[NEW MATERIAL] GOVERNOR MAY SUSPEND EXECUTION.--Only the governor may suspend the execution of a judgment of death, except that the warden of the penitentiary of New Mexico to whom a defendant is delivered for execution may suspend the execution of a judgment of death in accordance with the provisions of Sections 14 through 18 of this 2016 act."

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

"[NEW MATERIAL] INSANITY OF DEFENDANT--HOW DETERMINED.-- If, after a defendant is delivered to the warden for execution, there is good reason to believe that the defendant, under judgment of death, has become insane, the warden shall call that fact to the attention of the district attorney of the county in which the state penitentiary is situated. The district attorney shall immediately file in the district court

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of the county a petition, stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the court inquire into the question of the defendant's sanity. It shall be the duty of the district court to inquire into the question and render a judgment."

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

"[NEW MATERIAL] DUTY OF DISTRICT ATTORNEY UPON INQUIRY AND HEARING.--The district attorney shall attend a hearing provided for in Sections 14 and 18 of this 2016 act, and may produce witnesses before the court, for which purpose the district attorney may issue process in the same manner as process is issued for witnesses to testify before the grand jury. Failure to comply with process issued may be punished in a like manner as failure to comply with process issued by the court."

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

"[NEW MATERIAL] ORDER OF COURT COMMITTING INSANE PERSON TO HOSPITAL.--The court shall make and cause to be entered an order reciting the fact of the inquiry made pursuant to Section 14 of this 2016 act and its result. If it is found that the defendant is insane, the order shall direct that the defendant be taken to the New Mexico behavioral health institute at Las Vegas and kept there in safe confinement until the defendant's sanity is restored."

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

"[NEW MATERIAL] FINDINGS OF INQUIRY--DUTIES OF WARDEN--PROCEDURE WHEN SANITY IS RESTORED.--If it is found that the defendant is sane, the warden shall proceed to execute the judgment as specified in the warrant. If it is found that the defendant is insane, the warden shall suspend the execution and transmit a certified copy of the order provided for in Section 16 of this 2016 act to the governor and deliver the defendant, together with a certified copy of the order, to the superintendent of the New Mexico behavioral health institute at Las Vegas. When the defendant's sanity is restored, the superintendent of the institute shall certify that fact to the governor, who shall then issue to the warden the governor's warrant appointing a day for the execution of the judgment."

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

"[NEW MATERIAL] PROCEEDINGS WHEN FEMALE DEFENDANT MAY BE PREGNANT--DUTY OF DISTRICT ATTORNEY.--

A. If there is good reason to believe that a female defendant who was sentenced to death is pregnant, the warden shall call that fact to the attention of the district attorney of the county in which the state penitentiary is situated. The district attorney shall immediately file in the district court of the county a petition, stating the conviction and judgment

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and the fact that the defendant may be pregnant and asking that the court inquire into the question of the defendant's pregnancy. It shall be the duty of the district court to inquire into the question and render a judgment. The court may summon three disinterested physicians of good standing in their profession to inquire into the alleged pregnancy. The physicians shall, ~~in the presence of the court, but with closed doors, if requested by the defendant,~~ examine the defendant, hear any evidence that may be produced and make a written finding and certificate of their conclusion, to be approved by the court. The provisions of Section 15 of this 2016 act apply to the proceedings provided in this subsection.

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

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

"[NEW MATERIAL] JUDGMENT OF DEATH REMAINING IN FORCE BUT NOT EXECUTED--NO APPEAL FROM ORDER OF COURT.--If for any reason

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a judgment of death has not been executed and remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, shall order the defendant to be brought before it, or if the defendant is at large, a warrant for the defendant's apprehension may be issued. When the defendant is brought before the court, the court shall inquire into the facts and, if no legal reason exists against the execution of the judgment, shall issue an order that the warden of the penitentiary of New Mexico, to whom the sheriff is directed to deliver the defendant, execute the judgment at a specified time. The warden shall execute the judgment accordingly. There is no appeal from an order, as provided herein, directing and fixing the time for the execution of a judgment."

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

"[NEW MATERIAL] PUNISHMENT OF DEATH--HOW INFLICTED.--The manner of inflicting punishment of death shall be by administration of ~~a continuous,~~ an intravenous injection of a lethal ~~quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent~~ substance into the convicted person in a quantity sufficient to cause death. Any reference in the statutes relating to the means of execution shall be construed to mean execution by lethal injection as provided in this section."

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

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

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

"[NEW MATERIAL] WHERE JUDGMENT IS EXECUTED--WHO MAY BE PRESENT.--A sentence of death shall be executed within the walls of the penitentiary of New Mexico, and the execution shall be under the supervision and direction of the warden of the penitentiary. The warden of the penitentiary of New Mexico shall be present at the execution and shall invite the presence of a physician, the attorney general and at least twelve reputable citizens to be selected by the warden. The warden shall, at the request of the defendant, permit such religious leaders or teachers, not exceeding two, as the defendant may name, and any person, relative or friend, not to exceed five, to be present at the execution, together with such peace

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officers as the warden may think expedient, to witness the execution. No persons, other than those mentioned in this section, shall be present at the execution, nor shall any person under the age of eighteen be allowed to witness the execution. The identities of the persons designated to conduct the execution are confidential and not subject to public disclosure."

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

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

SECTION 24. APPLICABILITY.--The provisions of this act apply only to capital felonies committed on or after the effective date of this act. Nothing contained in the provisions of this act shall be construed to alter in any way the execution of a sentence of death imposed for a crime committed before the effective date of this act.