

EMBOURED
First Judicial District Court

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

JUN - 8 2007

Santa Fe, Rio Arriba &
Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

NO. **D-0101-CR-200400521**
D-0101-CR-200400522

STATE OF NEW MEXICO,
Plaintiff,

vs.

JESUS AVILES DOMINGUEZ,
Defendant,

and

STATE OF NEW MEXICO,

vs.

DANIEL GOOD,
Defendant.

**ORDER PARTIALLY GRANTING AND
PARTIALLY DENYING MOTION TO DISMISS**

THIS MATTER came before the Court upon the filing of the Defendants' Motion to Dismiss the Death Penalty and the Court having reviewed the motion, authorities, exhibits and having held a hearing to submit expert testimony, finds as follows:

1. The venue for this trial is proper and is not contested by the parties hereto.
2. Upon any conviction of first degree murder in this case, the State has elected to seek the death penalty as a aggravating sentence herein and this matter has been certified as death penalty qualified pursuant to NMSA §31-20A-1 et.seq. (1978).

3. Defendants are challenging the constitutionality of the New Mexico Capital Felony Sentencing Act, NMSA §31-20A-1 et.seq. (1978).

4. Defendants factually rely upon the recent results of the Capital Jury Project, the testimony of Dr. Wanda Foglia and Dr. William J. Bowers, as well as the numerous other projects and studies submitted to the Court for review. The State has questioned the terminology/interpretations of the Capital Jury Project and the expert opinions of Dr. Foglia and Dr. Bowers. The State has not presented any of its own witnesses or other evidence for review by the Court.

5. The legal basis for Defendants' constitutional challenge to the New Mexico Capital Felony Sentencing Act, NMSA §31-20A-1 et.seq. (1978), arises from the authority established by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny.

6. It is undisputed by the parties that the qualitative difference of death from all other forms of punishment requires a correspondingly greater degree of scrutiny by the Court in cases involving a capital sentencing determination. See *Turner v. Murray*, 476 U.S. 28 (1986).

7. The Capital Jury Project was an extensive multi-year project covering 14 states and the collection of post-sentencing survey data from over 1,200 actual death penalty jurors (in 354 capital trials). The 14 states selected are responsible for approximately 76% of the individuals on death row as of June 2002 and approximately 79% of individuals executed between 1977 and September 2002. The project was funded by the National Science Foundation and similar sources. The reliability of the data and methodology used in the Capital Jury Project has been evaluated, approved and re-approved within the scientific community. The Capital Jury Project researched the decision making process of actual jurors during the course of their trials and identified specific points during trial and specific influences regarding how actual jurors reached

their final sentencing decisions. The United States Supreme Court had made it clear that social science research and studies of capital sentencing schemes must use actual jurors from capital punishment trials. See *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1987), *Lockhart v. McCree*, 476 U.S. 162, 171 (1986); *McCleskey v. Kemp*, 41 U.S. 279 (1987).

8. The State of New Mexico was not included withing the fourteen states covered by the Capital Jury Project, but Dr. Foglia and Dr. Bowers identified the consistency of New Mexico's capital sentencing scheme with several other states included in the project. The findings and results from the Capital Jury Project are applicable nationwide pursuant to the opinions of Dr. Foglia and Dr. Bowers.

9. The Capital Jury Project identified several unresolved problems existing in the current statutory capital sentencing schemes of the fourteen states studied, which include the following:

- a. Premature death penalty decision making by the jury;
- b. Failure of the jury selection process to remove a large number of death biased jurors;
- c. Failure by jurors to comprehend and/or follow death penalty instructions;
- d. Erroneous beliefs amongst jurors that the death sentence is required;
- e. Evasion of responsibility for the decision imposing the death penalty; and
- f. Racism in the determination and imposition of the death penalty.

10. The problems identified by the Capital Jury Project were reasonably consistent throughout the fourteen states included within the study, despite several differences in the statutory structure and legal procedure used by each of the states to effectuate its capital sentencing scheme.

11. Dr. Foglia and Dr. Bowers testified and provided expert opinions that in their analysis and interpretation of the results from the Capital Jury Project, the following significant statistical problems are identified with regard to existing capital sentencing schemes:

- a. Approximately 50% of all jurors absolutely thought they knew what punishment should be given during the evidentiary (guilt) phase of trial and prior to the start of the sentencing phase (30% absolute for imposing the death penalty and 20% absolute for not imposing the death penalty). These jurors do not waiver from these decisions which were made prior to the start of the sentencing phase.
- b. 60% of jurors with a pro death penalty position did not change their premature death penalty position and 97% of all pro death penalty jurors felt strongly about their pro-death penalty position during the evidentiary phase of trial.
- c. 30% of jurors fail to understand the instruction that aggravation must be proven by a standard of beyond a reasonable doubt.
- d. 30 - 44% of jurors fail to understand the instruction, legal standard and legal considerations regarding mitigating evidence.
- e. 24 - 71% of jurors believed that the death penalty was the **only** acceptable punishment for six specific types of murder.
- f. 37 - 44% of jurors understood that the death penalty would be required if the defendant would be dangerous in the future or the defendant's conduct is heinous, vile or depraved.
- g. Only 15% of jurors believe that individual jurors or the jury as a whole is/are responsible for the defendant's punishment (imposition of the death penalty).
- h. Jurors in all 14 states underestimated (by statistical median averaging) the sentence which the defendant would receive if the death penalty was not imposed.
- i. At sentencing, jurors who estimated the non-death penalty sentence to be 20 years or longer are 11.8% less likely to impose the death penalty over jurors who estimated the non-death penalty sentence to be from 0 to 9 years.

12. The opinions and results reflected in the Capital Jury Project are considered to be consistent with previous research and studies conducted prior to the start of the Capital Jury Project, including various mock jury studies.

13. The Capital Jury Project also analyzed the black/white racial aspects of the decision making process in death penalty cases. The project identified racially significant problems which continue to exist in the application of the death penalty where black/white racial dynamics occur within the jury or where the accused is a black defendant. Due to the ethnically diverse population (a significant percentage being Hispanic and Native American) and the unique historic background of the State of New Mexico, the Court does not find the black/white racial problems identified by the Capital Jury Project appropriate for consideration at this time. In

addition, both Defendants identified in this case are asserted to be Hispanic and Anglo/Hispanic in origin. The Capital Jury Project did not study any ethnic issues regarding Hispanic jurors or racially unique problems regarding accused individuals of Hispanic origin.

IT IS THEREFORE ORDERED AND DECREED that the Defendants' Motion to Dismiss the Death Penalty is hereby granted in part and denied in part as follows:

A. The premature determination of the death penalty during the evidentiary (guilt) phase of trial is contrary to the clear and objective standards established by the New Mexico Capital Felony Sentencing Act and constitutes an arbitrary and capricious violation of the United States Constitution and the New Mexico Constitution. The Capital Jury Project has scientifically determined that nearly one-half of the 1,200 actual death penalty jurors participating in the survey indicated that they made a premature determination regarding the death penalty during the evidentiary (guilt) phase of trial. This percentage is so significant that this Court must take steps to protect the Defendants' right to a fair trial without a premature determination of the death penalty during the evidentiary phase of trial rather than during the sentencing phase of trial. It now appears impossible to eliminate this improper and wholly discretionary misapplication of the law by the evidentiary phase jury when the same jury is impaneled to decide the capital sentencing punishment phase immediately thereafter. The only way to properly and adequately protect the sentencing phase from being tainted by a premature jury determination during the evidentiary phase of trial is to impanel a separate jury for the sentencing phase of trial. Such a requirement is contrary to the statutory scheme established by the New Mexico Capital Felony Sentencing Act and the understanding mandated by *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny. The Capital Jury Project, however, has now scientifically

established that without formal separation of the juries assigned to the evidentiary and sentencing phases of death penalty cases, the Constitutional principals mandated by *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny cannot be met. When death penalty juries consistently fail to adhere to the standards and essential requirements of law as set forth in the detailed instructions from the Court, and a rational review of this premature decision making mistake cannot be made by the Court, then the principals required under *Furman* and its progeny are violated. Science has now proven that despite the United States Supreme Court's desire to allow the States to establish standards to guide juries through the evidentiary and sentencing phases of death penalty cases, premature decision making has not been eliminated and continues to be done by nearly half of all death penalty jurors. Without separate juries during the evidentiary and sentencing phases of trial, Defendants rights under United States and New Mexico Constitutions are being violated. Separate juries will be required for the evidentiary and sentencing phases of this trial. All portions of the New Mexico Capital Felony Sentencing Act inconsistent with the impanelment of a separate jury for the death penalty sentencing phase of this trial are determined to violate the United States Constitution and the New Mexico Constitution. On this point, the Defendant's motion is partially granted to require a separate jury during the death penalty phase of trial, if in fact a death penalty jury becomes necessary at that time.

B. Despite potentially ineligible jurors being identified as having sat on death penalty cases reviewed by the Capital Jury Project, this issue can and should be addressed by careful questioning of the panel by the parties and the Court. The Court's strict adherence to the eligibility requirements during the jury selection process can eliminate ineligible jurors from inclusion within the sentencing jury. It is the Court's responsibility to insure that ineligible

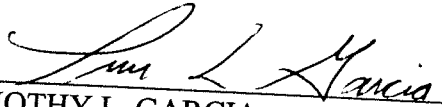
jurors are stricken from the sentencing jury in a death penalty case. With the capital sentencing jury being separately selected from the jury determining guilt during the evidentiary phase of these trials, close scrutiny will be made by the Court to insure that ineligible jurors are removed from any sentencing jury selected. The Capital Jury Project did not establish that a proper jury cannot be selected in all death penalty cases, it only established that some ineligible jurors may have gotten through the jury selection process. Defendant's motion is denied regarding Constitutional challenges based upon ineligible jurors having been identified as serving on prior death penalty cases studied under the Capital Jury Project.

C. Despite jurors having stated a misunderstanding of the aggravation and mitigation instructions of the Court as reflected by the Capital Jury Project, the Court and parties can take appropriate steps during the separate sentencing phase of trial to carefully explain the instructions and avoid further significant errors of this nature. Defendant's motion is denied regarding Constitutional challenges based upon jurors having misunderstandings of the aggravation and mitigation instructions of the Court which were reflected by the Capital Jury Project.

D. Despite jurors having stated a misunderstanding of the sentencing alternatives if the death penalty is not imposed as reflected by the Capital Jury Project, the Court and parties can take appropriate steps during the separate sentencing phase of trial to carefully explain the non-death penalty sentence so as to eliminate this misunderstanding. Defendant's motion is denied regarding Constitutional challenges based upon jurors having misunderstandings of the non-death penalty sentence which would be imposed as the alternative to the death penalty which were reflected by the Capital Jury Project.

E. Despite some jurors having stated a misunderstanding of the jury's responsibility for the imposition of the death penalty as reflected by the Capital Jury Project, the Court and parties can take appropriate steps during the separate sentencing phase of trial to carefully explain the jury's responsibility for the imposition of the death penalty so as to eliminate this misunderstanding. Defendant's motion is denied regarding Constitutional challenges based upon some jurors having misunderstandings of the responsibility for imposing the death penalty as reflected in the Capital Jury Project.

F. The Court does not identify any racial bias issues as reflected in the Capital Jury Project that would apply in this case. Defendant's motion is denied regarding Constitutional challenges based upon assertions of racial bias having an effect of the death penalty determination in New Mexico and specifically in this case.


TIMOTHY L. GARCIA
District Judge

copies to:

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