

1           **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: February 22, 2018

4 **NO. S-1-SC-36127**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **SHANAH CHADWICK-MCNALLY,**

9           Defendant-Appellant.

10 **INTERLOCUTORY APPEAL FROM THE DISTRICT COURT OF**

11 **SAN JUAN COUNTY**

12 **John A. Dean, Jr., District Judge**

13 Bennett J. Baur, Chief Public Defender

14 Mary Barket, Assistant Appellate Defender

15 Santa Fe, NM

16 for Appellant

17 Hector H. Balderas, Attorney General

18 M. Victoria Wilson, Assistant Attorney General

19 Santa Fe, NM

20 for Appellee

1 **OPINION**

2 **NAKAMURA, Chief Justice**

3 {1} Defendant Shanah Chadwick-McNally is charged with an open count of  
4 first-degree murder and faces a potential sentence of life without the possibility of  
5 release or parole (LWOP). She argues in this interlocutory appeal that, due to her  
6 possible LWOP sentence, she must be afforded the heightened procedural protections  
7 that apply when the State seeks the death penalty. *See, e.g.*, Rule 5-704 NMRA  
8 (setting forth procedures that must be followed in death penalty cases).

9 {2} We hold that death penalty procedures do not apply in this case for the simple  
10 reason that “[t]he extraordinary penalty of death” is not implicated. *See, e.g., State*  
11 *v. Martinez*, 2002-NMSC-008, ¶ 8, 132 N.M. 32, 43 P.3d 1042 (“The extraordinary  
12 penalty of death demands heightened scrutiny of its imposition.”). Consequently, we  
13 agree with the district court that Rule 5-704 does not apply and that Defendant is not  
14 entitled to a hearing under *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d  
15 845, to test whether the alleged aggravating circumstances are supported by probable  
16 cause. We also agree that the Capital Felony Sentencing Act (the Act) as amended  
17 in 2009 neither requires nor prohibits bifurcated guilt and sentencing proceedings.  
18 NMSA 1978, §§ 31-20A-1 to -6 (1979, as amended through 2009). Lastly, we  
19 conclude that the Act precludes consideration of evidence of mitigating circumstances

1 for sentencing purposes. We affirm and remand for proceedings consistent with this  
2 opinion.

3 **I. BACKGROUND**

4 {3} The State charged Defendant with an open count of first-degree murder, a  
5 “capital felony,” *see* NMSA 1978, § 30-2-1(A) (1994), and with one count each of  
6 first-degree kidnapping, robbery, and conspiracy to commit robbery. The charging  
7 document specifically alleged two aggravating circumstances related to the  
8 first-degree murder charge: (1) Defendant committed the murder with the intent to  
9 kill in the commission of or attempt to commit kidnapping, and (2) Defendant  
10 committed the murder for the purpose of preventing the victim from testifying about  
11 the crime. *See* § 31-20A-5 (setting forth seven aggravating circumstances for which  
12 a defendant found guilty of a capital felony shall be sentenced to LWOP under  
13 Section 31-20A-2).

14 {4} The State later sought guidance about whether the procedures that apply in  
15 death penalty proceedings would be required in Defendant’s case, in which the State  
16 is seeking an LWOP sentence. The State argued that death penalty procedures are  
17 inapplicable because Rule 5-704 applies only to death penalty cases and because the  
18 2009 amendments to the Act repealed most of the procedural protections that had

1 applied when the death penalty was in force, including bifurcated guilt and sentencing  
2 proceedings and the consideration of mitigating circumstances. The State conceded,  
3 however, that “prosecutors in other New Mexico judicial districts . . . have apparently  
4 been utilizing death penalty procedures and Rule 5-704 in LWOP cases.”

5 {5} After the pretrial conference, the district court issued an order holding that  
6 death penalty procedures do not apply in Defendant’s case and that Defendant is  
7 precluded from presenting evidence of mitigating circumstances to the jury. The  
8 court also found that the order involved “a controlling question of law as to whether  
9 defendants in capital felony cases facing the possibility of life without parole should  
10 be afforded the procedural safeguards provided, under Rule 5-704 or other law, to  
11 defendants facing a possible death sentence.”

12 {6} Defendant filed an application for interlocutory appeal under Rule 12-203(A)  
13 NMRA, which we granted. We have jurisdiction under Article VI, Section 2 of the  
14 New Mexico constitution and NMSA 1978, Section 39-3-3(A)(3) (1972). *See State*  
15 *v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that this  
16 Court has “jurisdiction over interlocutory appeals in situations where a defendant may  
17 possibly be sentenced to life imprisonment or death”).

1 **II. DISCUSSION**

2 {7} Our analysis proceeds in two parts. We first briefly review the 2009  
3 amendments to the Act and Rule 5-704. We then address Defendant’s arguments  
4 about the procedures that must be followed when the State seeks an LWOP sentence.

5 **A. The 2009 Amendments to the Act and Rule 5-704**

6 {8} New Mexico abolished the death penalty in 2009 for crimes committed on or  
7 after July 1, 2009. *See* 2009 N.M. Laws, ch. 11, §§ 5-7. In place of the death penalty,  
8 the 2009 law established a new maximum sentence for defendants convicted of a  
9 capital felony: “life imprisonment without possibility of release or parole[,]”  
10 abbreviated in this opinion as LWOP. Section 31-20A-2; *see also* NMSA 1978,  
11 § 31-21-10(C) (2009) (“An inmate of an institution who was sentenced to life  
12 imprisonment without possibility of release or parole is not eligible for parole and  
13 shall remain incarcerated for the entirety of the inmate’s natural life.”).

14 {9} The 2009 legislation also repealed much of the Act as it had existed when the  
15 death penalty was in force. *See* 2009 N.M. Laws, ch. 11, § 5 (repealing Sections  
16 31-20A-1, -2.1 through -4, and -6). The repealed provisions guaranteed certain  
17 procedural safeguards for defendants who faced a possible death sentence, including  
18 separate, bifurcated guilt and sentencing proceedings; the weighing of aggravating

1 and mitigating circumstances to determine whether the defendant should be sentenced  
2 to death or life imprisonment; and automatic appellate review of any case in which  
3 the defendant was sentenced to death. *See generally* §§ 31-20A-1 to -6 (1979, as  
4 amended through 1991). New Mexico originally adopted these safeguards after the  
5 United States Supreme Court held that statutes with similar protections “withstood  
6 constitutional scrutiny” in death penalty proceedings. *See State v. Garcia*, 1983-  
7 NMSC-008, ¶ 25, 99 N.M. 771, 664 P.2d 969 (noting that Sections 31-20A-1 to -6  
8 “were modeled after similar statutes . . . [that] have withstood constitutional scrutiny  
9 by the United States Supreme Court”).

10 {10} As a result of the 2009 law, the Act now consists of just two provisions.  
11 Section 31-20A-5 sets forth the aggravating circumstances that must be proven, in  
12 addition to the defendant’s guilt of the underlying capital felony, if the State chooses  
13 to seek an LWOP sentence. And Section 31-20A-2 prescribes how a defendant  
14 convicted of a capital felony shall be sentenced—whether to life imprisonment or  
15 LWOP—based on a finding of at least one aggravating circumstance.

16 {11} Death penalty proceedings are also subject to Rule 5-704. The rule  
17 incorporates the procedures formerly required under the Act when the death penalty  
18 was in effect, *see, e.g.*, Rule 5-704(D)(1) (providing that the procedures set forth in

1 Section 31-20A-1 shall be followed unless the defendant requests separate juries for  
2 trial and sentencing purposes), and imposes additional procedures that must be  
3 followed when the state seeks the death penalty. *E.g.*, Rule 5-704(C) (“The defendant  
4 in a death penalty case must be represented by at least two (2) attorneys . . .”).

5 {12} This Court amended Rule 5-704 shortly after the death penalty was abolished.  
6 *In re Death Penalty Sentencing Jury Rules*, 2009-NMSC-052, 147 N.M. 302, 222  
7 P.3d 674. In our order approving the amendments, we acknowledged that the death  
8 penalty had been abolished, but we also noted that “the death penalty remains a  
9 sentencing option for a limited number of cases alleging crimes committed before  
10 July 1, 2009.” *Id.* So, in response to “concerns expressed by the Governor, the  
11 Legislature, and others regarding the death penalty system in New Mexico,” we  
12 approved amendments to Rule 5-704 that established additional procedures that apply  
13 in death penalty proceedings. *Id.*; *e.g.*, Rule 5-704(D) (setting forth procedures for  
14 “separate trial and sentencing juries” upon notice from a defendant who “may be  
15 punished upon conviction by the penalty of death”). Notably, the amended rule  
16 makes no reference to an LWOP sentence.

1 **B. Whether Death Penalty Procedures Apply in This Case**

2 {13} With this context in hand, we turn to the four issues presented. First, whether  
3 Rule 5-704 applies in this case. Second, if Rule 5-704 does not apply, whether  
4 Defendant is entitled to “comparable procedures,” including a hearing to determine  
5 whether the State’s alleged aggravating circumstances are supported by probable  
6 cause. Third, whether the Act expressly prohibits bifurcated proceedings and whether  
7 Defendant should be permitted to “reserve consideration” of the aggravating  
8 circumstances until after the jury has considered her guilt or innocence. And finally,  
9 whether the sentencing scheme under the Act precludes the presentation of evidence  
10 of mitigating circumstances in this case and whether such an interpretation would  
11 violate the federal or state constitutions. These are questions of law, and our review  
12 is de novo. *AFSCME Council 18 v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674.

13 **1. Rule 5-704 Applicability**

14 {14} Whether Rule 5-704 applies in this case is not a difficult question. The rule’s  
15 language—and indeed its very title, “Death penalty; sentencing,”—establishes its  
16 singular application to death penalty cases. *See generally* Rule 5-704 (using the  
17 words “death penalty” twenty times throughout the rule without reference to an  
18 LWOP sentence and repeatedly referring to the sentence of death). More

1 substantively, the rule’s numerous procedural requirements reflect the constitutional  
2 principle that death penalty cases are different. *Martinez*, 2002-NMSC-008, ¶ 8  
3 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)  
4 (“Death, in its finality, differs more from life imprisonment than a 100-year prison  
5 term differs from one of only a year or two.”))

6 {15} Defendant has not cited, nor are we aware of, any authority that would require  
7 applying Rule 5-704 to this case, in which the State is seeking an LWOP sentence and  
8 not the death penalty. Absent a constitutional or legislative directive, we will not  
9 impose the rule’s considerable demands more broadly than they were intended. We  
10 decline to extend the application of Rule 5-704 to this case.

## 11 **2. Comparable Procedures**

12 {16} Next, Defendant argues that if Rule 5-704 does not apply in this case, the  
13 district court “at a minimum” must hold a hearing under *Ogden* to determine whether  
14 the alleged aggravating circumstances are “inapplicable or insufficiently supported.”  
15 We disagree.

16 {17} We held in *Ogden* that “[a] defendant who has been notified that the State will  
17 seek the death penalty may move to dismiss an aggravating circumstance before  
18 trial.” 1994-NMSC-029, ¶ 15. To effectuate that right, we authorized district courts

1 to “conduct a limited evidentiary hearing” to determine whether “there is probable  
2 cause to believe an aggravating circumstance is present.” *Id.* ¶ 17-18. We later  
3 amended Rule 5-704 to make the procedure mandatory in death penalty cases. *See*  
4 Rule 5-704(B) NMRA (2004) (“No later than ninety (90) days prior to trial, the court  
5 shall hold a hearing to determine whether or not there is probable cause to believe  
6 that one or more aggravating circumstances exist.”).

7 {18} *Ogden* was premised on “[o]ur view that it is important to curtail unwarranted  
8 death-penalty prosecutions . . . [because] they are qualitatively and quantitatively  
9 distinct from other criminal proceedings.” 1994-NMSC-029, ¶ 10. We noted that  
10 death penalty prosecutions and sentencing command extra judicial resources; are  
11 uniquely complex and demanding; require bifurcated proceedings, a death-qualified  
12 jury, more skilled and experienced prosecutors and defenders, and extensive  
13 investigation into the defendant’s background for proof of mitigating circumstances;  
14 and entail significant pretrial motions, applications, and hearings. *Id.* ¶¶ 11-12.

15 {19} The considerations that we credited in *Ogden* do not carry the same force when,  
16 as in this case, the heightened procedural requirements and complexities of a death  
17 penalty proceeding are not present. Put simply, the State’s decision to seek an LWOP  
18 sentence does not invoke the unique complexities and demands of a death penalty

1 case. The district court therefore correctly determined in Defendant’s case that a  
2 hearing is not warranted under *Ogden* as the State is not seeking the death penalty.

3 **3. Bifurcated Proceedings**

4 {20} Defendant argues that the sentencing scheme under the Act does not expressly  
5 prohibit bifurcation. Defendant also argues, as a matter of public policy, that parties  
6 should be permitted “to reserve consideration of aggravating factors for a subsequent  
7 hearing following the guilt-innocence phase” in LWOP cases.

8 {21} Unlike when the death penalty was in force, the Act is now otherwise silent  
9 about the procedures that must be followed in a case like Defendant’s, including  
10 whether bifurcated guilt and sentencing proceedings are permitted or required. *See*  
11 §§ 31-20A-2, -5. “We do not read language into the Act that is not there.” *State v.*  
12 *Wyrostek*, 1994-NMSC-042, ¶ 17, 117 N.M. 514, 873 P.2d 260. We follow our  
13 previous holdings on this question and decline to require or permit bifurcated  
14 proceedings *as a matter of course* “absent a clear directive from the Constitution.”  
15 *State v. Rudy B.*, 2010-NMSC-045, ¶ 58, 149 N.M. 22, 243 P.3d 726 (concluding that  
16 due process does not require bifurcation of guilt and insanity proceedings), *abrogated*  
17 *on other grounds by Horton v. California*, 496 U.S. 128, 130, app. A (1990).

1 {22} Whether bifurcated proceedings are appropriate must be determined on a case-  
2 by-case basis, after the issue has been properly raised and argued under the Rules of  
3 Criminal Procedure for the District Courts. See Rule 5-601(B) NMRA (“Any  
4 defense, objection or request which is capable of determination without a trial on the  
5 merits may be raised before trial by motion.”); cf. Rule 5-203(C) NMRA (providing  
6 that a district court “may order separate trials of offenses . . . or provide whatever  
7 other relief justice requires” when it “appears that a defendant or the state is  
8 prejudiced by a joinder of offenses or of defendants”).

#### 9 **4. Evidence of Mitigating Circumstances**

10 {23} Defendant argues that the sentencing scheme under the Act does not prohibit  
11 the presentation of mitigating evidence. Defendant also argues that the district  
12 court’s conclusion that the Act does not permit evidence of mitigating circumstances  
13 violates the United States and New Mexico Constitutions. We disagree with both  
14 arguments.

15 {24} “A trial court’s power to sentence is derived exclusively from statute.” *State*  
16 *v. Chavarria*, 2009-NMSC-020, ¶ 12, 146 N.M. 251, 208 P.3d 896 (quoting *State v.*  
17 *Martinez*, 1998-NMSC-023, ¶ 12, 126 N.M. 39, 966 P.2d 747). “This limitation on  
18 judicial authority reflects the separation of powers notion that ‘it is solely within the

1 province of the Legislature to establish penalties for criminal behavior.” *Martinez*,  
2 1998-NMSC-023, ¶ 12 (quoting *State v. Mabry*, 1981-NMSC-067, ¶ 18, 96 N.M. 317,  
3 630 P.2d 269). “This Court must construe statutes, if possible, to give effect to their  
4 objective and purpose and to avoid absurd results.” *State v. Begay*, 2017-NMSC-009,  
5 ¶ 9, 390 P.3d 168. “The primary indicator of legislative intent is the plain language  
6 of the statute.” *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d  
7 863.

8 {25} The plain language of Section 31-20A-2, as amended in 2009, is unequivocal  
9 with respect to sentencing:

10           If a jury finds, beyond a reasonable doubt, that one or more  
11           aggravating circumstances exist, . . . the defendant *shall* be sentenced to  
12           life imprisonment without possibility of release or parole. If the jury  
13           does not make the finding that one or more aggravating circumstances  
14           exist, the defendant *shall* be sentenced to life imprisonment.

15 (Emphasis added.) Under the statute’s plain language, the determinative factors are  
16 the jury’s findings of guilt and of one or more aggravating circumstances. When both  
17 findings are present, an LWOP sentence is mandatory and cannot be mitigated. *See*  
18 *State v. Cabezuela*, 2015-NMSC-016, ¶ 11, 350 P.3d 1145 (“Mandatory life  
19 sentences, with or without the possibility of parole after thirty years, are for capital  
20 felonies and are not subject to mitigation.” (citing *State v. Juan*, 2010-NMSC-041,

1 ¶ 42, 148 N.M. 747, 242 P.3d 314)). Neither the district court nor the jury has  
2 discretion to deviate from the statute’s command. *See* NMSA 1978, § 12-2A-4(A)  
3 (1997) (“‘Shall’ . . . express[es] a duty, obligation, requirement or condition  
4 precedent.”). The inability to exercise any sentencing discretion precludes the  
5 admission of mitigating evidence for sentencing purposes. The district court correctly  
6 concluded that Defendant is precluded under the Act from presenting evidence of  
7 mitigating circumstances for sentencing purposes. Defendant’s constitutional  
8 arguments do not cause us to doubt this conclusion.

9 {26} Defendant argues that interpreting the Act to preclude the introduction of  
10 mitigating evidence would be contrary to an “emerging Eighth and Fourteenth  
11 Amendment categorical approach” holding mandatory LWOP sentences to be  
12 unconstitutional for juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 465  
13 (2012) (“[M]andatory life without parole for those under the age of 18 at the time of  
14 their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual  
15 punishments.’”). Defendant’s reliance on federal authorities that apply to juvenile  
16 offenders is misplaced.

17 {27} The United States Supreme Court in *Harmelin v. Michigan* considered whether  
18 the imposition of a mandatory LWOP sentence without consideration of “so-called

1 mitigating factors,” was cruel and unusual punishment under the Eighth Amendment.  
2 501 U.S. 957, 994 (1991). The Court determined that imposition of the mandatory  
3 LWOP sentence was not cruel and unusual punishment as the individualized  
4 sentencing requirements imposed in death penalty proceedings do not extend to non-  
5 death penalty proceedings. *Id.* at 995-96. Applied to this case, *Harmelin* establishes  
6 that the Act does not violate the Eighth Amendment by imposing a mandatory LWOP  
7 sentence without consideration of an adult defendant’s “individualized” or mitigating  
8 circumstances.

9 {28} Defendant argues that *Harmelin*’s continued validity is in doubt because of  
10 more recent cases addressing the constitutionality of mandatory LWOP sentences for  
11 juveniles. *E.g.*, *Miller*, 567 U.S. at 465 (holding that a mandatory LWOP sentence  
12 for a juvenile violates the Eighth Amendment). These cases are readily  
13 distinguishable. They result from the Court’s determination that “children are  
14 constitutionally different from adults for purposes of sentencing.” *Miller*, 567 U.S.  
15 at 471; *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the death  
16 penalty for juvenile offenders violates the Eighth Amendment). Nothing in these  
17 cases undermines *Harmelin*’s holding with regard to LWOP sentences for adults. *See*  
18 Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78

1 Mo. L. Rev. 1087, 1088 (2013) (concluding that *Graham* and *Miller* “do not provide  
2 much basis for sweeping reversals of adult LWOP sentences”). Defendant’s federal  
3 constitutional rights were not violated by the district court’s decision to preclude her  
4 from presenting evidence of mitigating circumstances.

5 {29} Defendant argues in the alternative that she is entitled to greater protections  
6 under the New Mexico Constitution. We do not reach this issue because Defendant  
7 did not cite any authority in the district court to support her general assertion that she  
8 is entitled to greater protections under the state constitution. *See State v. Leyva*,  
9 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861 (reviewing requirements for  
10 preserving a state constitutional claim for appellate review).

### 11 **III. CONCLUSION**

12 {30} We affirm that neither Rule 5-704 nor *Ogden* apply in this case. We further  
13 affirm that Defendant may not introduce evidence of mitigating circumstances for  
14 sentencing purposes. We remand for further proceedings consistent with this opinion.  
15 On remand, Defendant may pursue bifurcation under the rules of criminal procedure  
16 if she wishes to do so. This opinion has no bearing on her entitlement to bifurcation.

1 {31} **IT IS SO ORDERED.**

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**JUDITH K. NAKAMURA, Chief Justice**

4 **WE CONCUR:**

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6 **PETRA JIMENEZ MAES, Justice**

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8 **EDWARD L. CHÁVEZ, Justice**

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10 **CHARLES W. DANIELS, Justice**

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12 **BARBARA J. VIGIL, Justice**