Administrative Office of the Courts

FOR IMMEDIATE RELEASE

June 28, 2019

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New Mexico Supreme Court vacates death sentences of the last inmates on death row

SANTA FE – The state Supreme Court today set aside the death sentences of the only inmates awaiting execution in New Mexico, concluding that their sentences were unlawfully disproportionate in comparison to the penalties imposed in similar murder cases.

In a divided decision, three justices sent the cases of Timothy Allen and Robert Fry back to a district court in San Juan County to impose sentences of life imprisonment.

New Mexico repealed the death penalty a decade ago for murders committed after July 1, 2009. However, the death sentences of Allen and Fry remained in place because they were convicted and sentenced years before New Mexico abolished capital punishment.

The 1979 law under which Allen and Fry were sentenced requires the state's highest court to review capital punishment cases and prohibits a sentence of death when it is "excessive or disproportionate" to the penalties in similar cases. The requirement for a "comparative proportionality" review was adopted by the Legislature to protect against the death penalty being arbitrarily imposed in violation of constitutional protections against cruel and unusual punishment.

"In comparing Petitioner's cases to other equally horrendous cases in which defendants were not sentenced to death, we find no meaningful distinction which justifies imposing the death sentence upon Fry and Allen. The absence of such a distinction renders the ultimate penalty of death contrary to the people's mandate that the sentence be proportionate to the penalties imposed in similar cases," the Court said in a majority opinion written by Justice Barbara J. Vigil.

Retired Justices Edward L. Chávez and Charles W. Daniels joined in the majority decision and each wrote specially concurring opinions. Chief Justice Judith K. Nakamura dissented and Retired Justice Petra Jimenez Maes joined in the dissent.

"The Majority misstates the governing law and has done what our Legislature would not: repeal the death penalty in its entirety for all defendants in New Mexico," Chief Justice Nakamura wrote in the dissenting opinion.

Justices Chávez, Daniels and Maes remained assigned to the death penalty case after their retirement last year. The three justices were on the Court when Allen and Fry brought their legal challenge more than five years ago.

Until 2009, New Mexico allowed the death penalty only for first-degree murders with certain aggravating circumstances, including a killing during a kidnapping and the murder of a police officer. Allen was convicted of kidnapping, attempted rape and murdering 17-year-old Sandra Phillips in 1994. Fry was sentenced to death for fatally stabbing and bludgeoning Betty Lee, a mother of five, in 2000. He also was convicted of kidnapping, attempted rape and evidence tampering. In other cases, Fry was sentenced to life in prison for three murders in 1996 and 1998 in San Juan County.

The state's highest court had previously affirmed the convictions and death sentences of Allen and Fry. Each of the men had post-conviction legal challenges pending when the state repealed the death penalty. They appealed to the Supreme Court after a district court rejected arguments that their death sentences were unconstitutional because New Mexico had abolished capital punishment.

In today's decision, the Court did not address the issue of constitutional violations and instead concluded that the death sentences were invalid under statutory safeguards established by the Legislature for death penalty cases.

The Court initially heard arguments in the combined cases in 2014, and later asked attorneys for additional written briefing on whether to modify its approach for determining whether a death sentence is excessive or disproportionate to sentences in similar cases. The Court's majority expanded the cases reviewed for an assessment of the death sentences of Allen and Fry, and concluded that "a death sentence is disproportionate if juries do not generally impose a death sentence in similar cases and there is no real justification for the death sentence."

In more than half a century, the only person executed in New Mexico was Terry Clark. He was put to death by lethal injection in 2001 for the murder, kidnapping and rape of a nine-year-old girl. The execution occurred after Clark dropped all appeals of his death sentence.

From July 1979 through December 2007, juries imposed a death sentence in 15 cases and 12 of those were vacated — seven reversed on direct appeal or post-conviction proceedings and five were commuted in 1986 by then Gov. Toney Anaya. One inmate died in prison while awaiting execution. During that time, prosecutors sought the death penalty in 211 cases but only 52 cases advanced to a separate proceeding for jurors to decide on imposing a death sentence.

Allen and Fry will be eligible for parole after serving 30 years under a sentence of life imprisonment. But if paroled, they would immediately begin serving additional sentences for

their other convictions, Justice Chávez wrote in his concurring opinion. Allen, who soon turns 56, faces an additional 25 years after serving his murder sentence. Fry, 45, will never be eligible for release from prison, the Justice said, because he faces 120 years for the life sentences of his first-degree murder convictions.

Justice Daniels, in a concurring opinion, said "when the collective result of all the actions taken under authority of our state justice system is that one or even three cold-blooded murders out of hundreds are executed by the state while the equally culpable majority are spared, our state cannot honestly claim it has imposed the death penalty in a proportionate manner."

"A killer's crimes reflect who he is. What we do to the killer reflects who we are," wrote Justice Daniels. "Can we really look anyone in the eye and say that executing these two defendants would be proportionate when compared to non-deadly punishment our state has overwhelmingly meted out in virtually all equally serious first-degree murder cases, and specifically in similar cases, since enactment of the Capital Felony Sentencing Act in 1979? I, for one, cannot honestly do so."

In the dissenting opinion, Chief Justice Nakamura wrote: "The legislative command that this Court assure that Fry's and Allen's death sentences are not 'disproportionate to the penalty imposed in similar cases' should not be construed in the way embraced by the Majority. They perceive in the language authority to conclude that, because so few offenders in New Mexico have ever been sentenced to die, no offenders shall ever again be sentenced to die in New Mexico. I respectfully contend that the Majority's judgment is error."

Previous New Mexico Supreme Court decisions in death penalty cases correctly interpreted the law, the Chief Justice wrote, "to require us to do no more than evaluate whether there is some precedent for the death sentence and to assure ourselves that the sentence is not excessive in light of the nature of the crime. To do anything more than this intrudes upon the capital-sentencing jury's rightful, constitutional authority to extend mercy or impose death."

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To read the decision in consolidated opinion in *Fry v. Lopez*, No. S-1-SC-34372 and Allen v. LeMaster, No. S-1-SC-34386, please visit the New Mexico Compilation Commission's website using the following link:

https://nmonesource.com/nmos/nmsc/en/item/421112/index.do