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## Closing the N.M. Death Penalty Door

By Leslie Linthicum | Journal Staff Writer

If I'm going to start a diet on Monday morning, you can be sure to find me face-first in the ice cream container on Sunday night. It is the yo-yo dieter's logic that it's a good idea to get all the fattening stuff out of the house - yes, by eating it - before the calorie restriction begins.

The state of New Mexico launched a diet Wednesday, cutting out death sentences for murders from our moral menu. But it's possible we'll sneak in one more binge.

It's one of those situations that make perfect sense and no sense. Let's see how we got here.

Earlier this year, the New Mexico House and then the Senate decided it was time for New Mexico to stop killing people for killing people. The governor mulled it over and ultimately signed the bill that wipes away the death penalty and replaces it with a prison sentence that lasts until the prisoner dies.

Here's where the problem lies. Two murder defendants in New Mexico currently face the death penalty in cases that began before the Legislature acted to repeal the law. Michael Astorga is accused of fatally shooting a Bernalillo County sheriff's deputy during a traffic stop, and William Watson is accused of hiring someone else to kill a Roosevelt County rancher.

The New Mexico Constitution bars state lawmakers from passing laws that are retroactive, so Astorga and Watson can be subject to the death penalty. The Salvadoran gangsters who are accused of shooting up a Denny's in Albuquerque and killing a cook a week before the capital punishment expiration date could also be tried and sentenced under the old law.

Then there are the two men currently on death row in New Mexico who also still face execution. Although Gov. Bill Richardson, who signed the death penalty repeal, says he wouldn't consider commuting their sentences, a future governor could.

One, two, three, four or more executions? That's an awful lot of capital punishment for a state that's sworn off it.

Bernalillo County District Attorney Kari Brandenburg tells me prosecutors really have no choice. Only now that the death penalty has expired, is it replaced with a true life-in-prison sentence? If she or any other prosecutor were to drop the death penalty option for those older cases, the harshest

sentence a jury could hand down for a murder would be 30 years in prison, and she doesn't want that to happen.

If a true life-in-prison sentence were available now, Brandenburg says, it might very well change how she thinks about prosecuting Astorga. She says she's never been much of a fan of the death penalty because it doesn't work well as a deterrent to criminals. (Only 7 percent of the time it's charged do juries actually hand it down. And most of those sentences are overturned on appeal).

Brandenburg says that when she convenes a meeting of her deputies to decide whether to seek the death penalty on a case, "I want them all to feel sick to their stomachs when we make that decision. We don't take it lightly."

But Brandenburg is left with Astorga, who has become the poster boy for the pro-death penalty argument, although he is only accused of the crime - not yet tried for it or found guilty.

"We're not making an example of him," Brandenburg says. But nonetheless, he is a political hot potato.

In an article in the New Mexico Law Review last year, death penalty researcher Marcia Wilson found that the average sentence for murderers not sentenced to death was 65 years when all of the other crimes (the robbery, conspiracy, kidnapping) that were part of the murder were factored in. Many were even longer, in the 100-year range.

But Astorga is charged with only first-degree murder, tampering with evidence and being a felon in possession of a firearm. And he's only 33 years old.

If he is convicted of all those charges, his sentence would be, at most, about 34 years. (We'll leave his second murder indictment for a separate crime out of the mix, although he could face another chunk of time for that.)

If Astorga did what he's accused of, the state could be party to allowing a bona fide badass who killed a cop walk the streets when he's in his mid-60s.

That scares Brandenburg, who thinks an ex-con in his 60s still has some living left to do.

It doesn't scare state Rep. Gail Chasey, the Albuquerque Democrat who has been pushing for the repeal for years. She thinks it's safe to say Astorga would never make parole. And research on life expectancy of prison inmates, which is not surprisingly less than people on the outside, helps make her case.

She says the solution to these in-between cases can be taken care of by judges and juries without getting in one more whack in the lethal injection room.

"With these stacked sentences, effectively it's life without parole," Chasey says. "They'll never get out. It's death in prison."

How do we go forward? If Brandenburg and other prosecutors want to sleep well at night, they can go ahead with their death penalty prosecutions, secure in knowing they've done their duty.

And we can go ahead and trust that the will of the people - that we're done killing to punish killers - will be heeded. Maybe now that we've decided to ban the death penalty, juries will be unwilling to hand it down. Maybe the state Supreme Court will rule out the death penalty for Astorga and Watson. Maybe a new governor down the road will commute these remaining death sentences to life in prison.

Since we agreed we would clean out the snack drawer and fill it with nutritious food, any of those solutions that avoid more killing seems reasonable.

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