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**Criminal Law - Whether the Elements of Deliberation and  
Premeditation Adequately Distinguish First Degree Murder from  
Second Degree Murder: State v. Garcia**

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# CRIMINAL LAW—Whether the Elements of Deliberation and Premeditation Adequately Distinguish First Degree Murder from Second Degree Murder: *State v. Garcia*

## I. INTRODUCTION

New Mexico, like many other jurisdictions, uses the elements of deliberation and premeditation to distinguish first degree murder from second degree murder; however, for both practical and theoretical reasons, both of these elements serve as inadequate distinctions.<sup>1</sup> In *State v. Garcia*,<sup>2</sup> the New Mexico Supreme Court tried to clarify this “deliberate and premeditated” distinction. This Note provides an overview of the deliberation and premeditation elements of first degree murder, discusses the rationale of the *Garcia* decision, analyzes the facts of *Garcia* under state laws from other jurisdictions, and evaluates whether *Garcia* provides adequate standards to help determine what evidence will help prove the deliberate intent to kill.

## II. STATEMENT OF THE CASE

David Garcia was convicted of first degree murder for the stabbing death of Ray Gutierrez.<sup>3</sup> The stabbing occurred at a house party that both Garcia and Gutierrez attended on April 27, 1990. Clara Pelland, Gutierrez’s girlfriend, witnessed the stabbing and testified at Garcia’s trial.

Pelland testified that Garcia and Gutierrez argued throughout the party. At one point she heard Garcia say, “Remove Ray [Gutierrez] away from me or you’re not going to be seeing him for the rest of the day.” Pelland stated that when she later looked for Garcia and Gutierrez in the back yard of the house, she was told that they had gone to the front yard. When Pelland found them there she saw Garcia stab Gutierrez in the chest. Pelland then grabbed Gutierrez and shouted at Garcia, “Look what you did to my boyfriend.” Garcia replied, “I’m going to mess you up like I messed up your boyfriend. I’ll be seeing you soon.”

After the stabbing, Garcia fled and the police searched the area for him. Garcia eventually turned himself in and told the police, “I did it. I did it. I’m not ashamed to admit it. I told my brother I did him and I’d do him again.”

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1. Leo M. Romero, *A Critique of the Willful, Deliberate, and Premeditated Formula for Distinguishing Between First and Second Degree Murder in New Mexico*, 18 N.M. L. REV. 73, 83 (1988).

2. 114 N.M. 269, 837 P.2d 862 (1992).

3. Refer to *Garcia*, 114 N.M. at 269-71, 837 P.2d at 862-64, for a complete statement of the facts of the case.

At trial, Garcia moved for a directed verdict arguing that the State failed to prove beyond a reasonable doubt that he had the specific intent required to commit first degree murder. The trial court denied his motion, and Garcia was convicted of first degree murder.

On appeal, the New Mexico Supreme Court reviewed whether the trial court erred when it denied Garcia's motion for a directed verdict. In its analysis, the court acknowledged that the standard of review of a trial court's ruling on a defendant's motion for a directed verdict was not clear in New Mexico.<sup>4</sup> Consequently, the supreme court explained the standard as requiring an appellate court to first "view the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of a verdict of conviction."<sup>5</sup> Secondly, an appellate court must then evaluate the evidence to determine whether a jury could rationally reach its verdict beyond a reasonable doubt.<sup>6</sup>

In *Garcia*, the supreme court applied the requisite standard of review and reversed Garcia's conviction for first degree murder. It then remanded the case for a new trial on the offenses of second degree murder and voluntary manslaughter.<sup>7</sup> In its analysis, the court stated that because the State failed to show that Garcia weighed the considerations for and against killing Gutierrez, it had failed to establish that Garcia formed the requisite deliberate intent for first degree murder.<sup>8</sup>

### III. HISTORICAL AND CONTEXTUAL BACKGROUND

Most jurisdictions classify murder into two separate degrees.<sup>9</sup> This concept of separate classification originated from the Pennsylvania Reform Act of 1794 (the Act), which was designed to primarily confine the most severe punishments, such as the death penalty, to first degree murder.<sup>10</sup> Consequently, the Act classified murders involving a deliberate and pre-meditated intent to kill as first degree murder and classified all other murders as second degree murder.<sup>11</sup>

#### *A. Analysis of the Deliberation and Premeditation Elements Contained under the New Mexico Murder Statute*

The substantial difference in penalties for first and second degree murder in New Mexico highlights the need for careful distinction of each classification's elements. The New Mexico homicide statute, like those in many other jurisdictions, defines first degree murder in part as any kind

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4. *Garcia*, 114 N.M. at 273-74, 837 P.2d at 866-67.

5. *Id.* at 274, 837 P.2d at 866 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979) and *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314 (1988)).

6. *Garcia*, 114 N.M. at 274, 837 P.2d at 867 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979) and *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314 (1988)).

7. *Id.* at 276, 837 P.2d at 869.

8. *Id.* at 275, 837 P.2d at 868.

9. WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *CRIMINAL LAW* § 7.7 (2d ed. 1986).

10. MODEL PENAL CODE § 210.2 commentary at 16 (1980).

11. *Id.*

of willful, deliberate and premeditated killing.<sup>12</sup> The statute defines second degree murder as a homicide in which the killer knows his or her acts will create a strong probability of death or great bodily harm.<sup>13</sup> Persons convicted of first degree murder are sentenced to death or to life imprisonment<sup>14</sup> and must serve a minimum of thirty years before becoming eligible for parole.<sup>15</sup> However, persons convicted of second degree murder are sentenced to a maximum of nine years imprisonment.<sup>16</sup> Because of this significant disparity between the penalties imposed for each separate classification of murder, it is very important to clearly distinguish the required elements for first degree murder from those of second degree murder.

The present New Mexico homicide statute does not contain any provisions outlining what evidence will support either a first or second degree murder conviction.<sup>17</sup> In fact, none of the terms contained within the first and second degree murder sections are specifically defined under any section of the New Mexico homicide statute. Consequently, the general definitions of these terms provide the only comprehensive guidance.

*Wharton's Criminal Law* defines the first degree murder term "willful" to mean the intent to kill,<sup>18</sup> the term "premeditation" to mean the process of thinking about killing before engaging in homicidal conduct,<sup>19</sup> and the term "deliberation" to mean the process of carefully weighing the alternatives of killing or not killing.<sup>20</sup> The second degree murder term "knows" generally means that the person is aware that his or her conduct will cause a certain result.<sup>21</sup>

Although the first and second degree murder sections have different requirements for mental culpability, the two statutes have been construed to have some of the same mens rea elements. For instance, the New Mexico Court of Appeals in *State v. Johnson*<sup>22</sup> interpreted the second degree murder statute to include intentional killings.<sup>23</sup> From this interpretation in *Johnson*, it follows that premeditation must also be an element of second degree murder because a killer would first have to think about the act of killing before forming the actual intent to kill.<sup>24</sup> Therefore, the element of premeditation is required for both first and

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12. N.M. STAT. ANN. § 30-2-1(A)(1) (Repl. Pamph. 1984).

13. *Id.* § 30-2-1(B).

14. *Id.* § 31-21-10(a).

15. *Id.* § 31-18-14.

16. *Id.* § 31-18-15(A)(2).

17. *See id.* § 30-2-1 (Repl. Pamph. 1984).

18. 2 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 139 (14th ed. 1979).

19. TORCIA, *supra* note 18, § 140.

20. *Id.*

21. LAFAYE & SCOTT, *supra* note 9, § 3.5 n.11 (citing MODEL PENAL CODE § 2.02(2)(b)(ii) (Official Draft 1962)).

22. 103 N.M. 364, 707 P.2d 1174 (Ct. App.), *cert. quashed*, 103 N.M. 344, 707 P.2d 552 (1985).

23. *Id.* at 370, 707 P.2d at 1180.

24. Dean Romero stated in his article that the term "willful" presumably means intentional and the term "premeditation" suggests that either the intent to kill preceded the act of killing or that the actor thought about killing before forming the intent to kill. Romero, *supra* note 1, at 83.

second degree murder, and the only actual distinction between the two classifications of murder is the element of deliberation.

### B. *Analysis of the Uniform Jury Instruction Defining Deliberation*

Although no statutory provision defines deliberation, the New Mexico Uniform Jury Instructions do:

The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.<sup>25</sup>

In sum, the jury instruction provides that a person must weigh and consider the act of killing before commencing this act.<sup>26</sup> Moreover, this instruction stipulates that the person's thought process may occur within a short period of time; however, a person who has acted upon a rash impulse has not formed a deliberate intent to kill.<sup>27</sup>

Although jury instruction 14-201 defines deliberation, it does not outline the evidence required to show a deliberate intent to kill.<sup>28</sup> For instance, the instruction states that a deliberate intent can be formed in a short period of time, but the instruction does not state how much time is sufficient. Also, the instruction provides that the slayer must weigh and consider the question of killing and his or her reasons for and against such a choice, but the instruction does not provide any guidelines as to what the jury should consider when determining whether the slayer actually went through this process.

Consequently, the jurors will probably apply their own conceptions of what deliberation means and implement their own standards to decide what evidence will satisfy the deliberate intent to kill.<sup>29</sup> To avoid this problem, the jury instruction should at least provide some guidelines as to what evidence will help prove a deliberate intent to kill.

### C. *Alternatives to the Deliberation Distinction*

One way to clearly distinguish first degree murder from second degree murder is to eliminate the deliberation element altogether from the New

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25. N.M. UNIF. JURY INSTRUCTION CRIM. 14-201.

26. *Id.*

27. *Id.*

28. In *State v. Ortega*, 112 N.M. 554, 567 n.13, 817 P.2d 1196, 1209 n.13 (1991), the New Mexico Supreme Court expressed reservations about the elaborations contained within Uniform Jury Instruction 14-201 such as: "'careful thought,' 'consideration for and against,' and 'weigh[ing] and consider[ing] the question of killing and the reasons for and against the choice.'"

29. Without standards for the kind of evidence that is sufficient to sustain a finding of a willful, deliberate and premeditated killing, the application of the deliberation formula requires no more than an intent to take away the life of another and makes meaningless the legislative classification of intentional murder into two degrees. Romero, *supra* note 1, at 91-92.

Mexico murder statute.<sup>30</sup> The drafters of the Model Penal Code as well as other jurisdictions have recognized the confusion that often results when trying to construe the deliberation term; therefore, they chose not to define murder with this term.

### 1. Model Penal Code

The drafters of the Model Penal Code (MPC) did not separately classify murder into first and second degree murder.<sup>31</sup> Instead, they outlined the culpability requirements for murder under one section. The MPC defines murder under section 210.2(1) as the act of killing committed either purposely, knowingly, or recklessly.<sup>32</sup> A person acts purposefully when she has the objective to consciously engage in certain conduct and is aware or believes or hopes that certain attendant circumstances exist.<sup>33</sup> A person acts knowingly when she is aware of her conduct, that certain circumstances exist, and that her conduct will cause a certain result.<sup>34</sup> Finally, a person acts recklessly when she acts in conscious disregard of a substantial and unjustifiable risk.<sup>35</sup>

By defining each element of mental culpability, the drafters of the MPC have outlined the specific circumstances necessary to prove the mens rea elements under section 210.2 of the MPC murder provision. Thus, the MPC provides adequate guidance as to what will prove the required elements of murder.

In addition, without classifying murder into two separate categories, the MPC drafters managed to include a provision to punish those murders which warrant the death penalty.<sup>36</sup> Therefore, without eliminating capital punishment, the drafters have effectively eliminated the problems that the courts and juries often experience when interpreting the deliberation term.

### 2. Other Jurisdictions

Some jurisdictions, such as Delaware, Illinois, and Connecticut, also do not use the deliberation element to distinguish first degree murder from second degree murder. For instance, Delaware classifies murder into two categories, but uses the elements of "intent" and "recklessness" to

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30. Dean Romero suggested in his article that the legislature altogether eliminate the deliberation element for distinguishing between first and second degree murder. Instead, he recommended that the legislature follow the Model Penal Code as well as other jurisdictions and specifically list the circumstances that warrant a first degree murder conviction. Romero, *supra* note 1, at 93.

31. The drafters of the Model Penal Code (MPC) believed that the classification of murder into two separate categories was fundamentally unsound. "Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis." MODEL PENAL CODE § 210.6 commentary at 127 (1980).

32. *Id.* § 210.2(1).

33. *Id.* § 2.02(2)(a).

34. *Id.* § 2.02(2)(b).

35. *Id.* § 2.02(c).

36. *Id.* § 210.6(3).

distinguish first degree murder from second degree murder.<sup>37</sup> Under the Delaware statute, first degree murder consists of intentionally causing the death of another person while second degree murder occurs when a person recklessly causes the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life.<sup>38</sup>

Similarly, Illinois provides that a crime constitutes first degree murder when (1) a person intends to kill or do great bodily harm to an individual or knows that his or her acts will cause death to that individual, or (2) the person knows that his or her acts create a strong probability of death or great bodily harm.<sup>39</sup> The Illinois second degree murder statute provides that if certain mitigating factors are present which contribute to provoke or justify a killing described under the first degree murder provision, then a person will be guilty of second degree murder.<sup>40</sup>

Connecticut uses a different approach. It does not separate murder into first and second degree, but rather sets out only one statutory section for murder.<sup>41</sup> The commentaries under Connecticut's murder section provide insight as to why the Connecticut legislature eliminated the premeditation and deliberation elements from its statute:

Under this inevitable formulation—inevitable because of the impossibility of a definition based upon length of time—the determination of premeditation frequently amounts to an exercise in semantics, and the jury's decision of a matter of life and death turns upon an issue which is, at best, vague and confusing and which has troubled judges and attorneys throughout legal history.<sup>42</sup>

These commentaries reveal that Connecticut, like Delaware and Illinois, has chosen to simplify the process of construing the required elements necessary to prove murder by specifically excluding the deliberation element from its statute.

#### IV. RATIONALE OF THE *GARCIA* DECISION

The supreme court acknowledged in *Garcia* the lack of a clear distinction between first and second degree murder in New Mexico.<sup>43</sup> Consequently, the court tried to articulate an intelligible difference between the two classifications of murder. The court explained that the New Mexico homicide statute consists of two separate categories of intentional killings.<sup>44</sup>

37. DEL. CODE ANN. tit. 11, §§ 635-36 (Repl. Vol. 1987).

38. *Id.*

39. ILL. ANN. STAT. ch. 720, para. 5/9-1(a)(2) (Smith-Hurd 1993).

40. *Id.* para. 5/9-2(a). The mitigating factors are: (1) whether the killer was acting under sudden and intense passion and (2) whether the killer reasonably believed that certain circumstances existed that justified the killing. *Id.*

41. CONN. GEN. STAT. ANN. § 53a-54a(a) (West 1985) provides that "[a] person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception."

42. CONN. GEN. STAT. ANN. § 53a-54 comm'n cmt. (West 1985).

43. *Garcia*, 114 N.M. at 272, 837 P.2d at 865.

44. *Id.* at 273, 837 P.2d at 866.

Specifically, the court stated that the first degree murder category consists of willful, premeditated, and deliberate killings and the second degree murder category consists of killings without premeditation and deliberation, but with the knowledge that the killer's acts create a strong probability of death or great bodily harm.<sup>45</sup> The court explained that the second degree murder category includes rash and impulsive killings but does not include deliberate killings.<sup>46</sup> Thus, the supreme court's decision in *Garcia* depended upon whether the evidence showed that Garcia deliberated or acted upon a rash impulse when he killed Gutierrez.

In *Garcia*, the supreme court applied the requisite standard of review, as discussed earlier in this Note, for a denial of a defendant's motion for a directed verdict, and held that there was insufficient evidence to show that Garcia had deliberated before he killed Gutierrez.<sup>47</sup> Specifically, the court stated that "[t]here was *no* evidence to support the jury's conclusion that . . . Garcia decided to stab Gutierrez as a result of careful thought; that he weighed the considerations for and against his proposed course of action; and that he weighed and considered the question of killing and his reasons for and against this choice."<sup>48</sup> The court reached its conclusion by reasoning that all of the evidence presented tended to support a rash and impulsive killing rather than a deliberate killing.<sup>49</sup>

In its analysis, the court viewed the fist fight between Garcia and Gutierrez as the State's only evidence of Garcia's state of mind just before the stabbing.<sup>50</sup> However, the court stated that this evidence supported a rash and impulsive killing rather than a deliberate killing.<sup>51</sup> Furthermore, the court was not persuaded by the State's argument that Garcia had formed a deliberate intent to kill Gutierrez when he and Gutierrez walked from the back yard to the front yard of the house.<sup>52</sup> Although the court did concede that Garcia had time to deliberate during this walk, it ultimately concluded that there was no evidence to enable the jury to infer beyond a reasonable doubt that Garcia actually formed a deliberate intent to kill while he walked from the back yard to the front yard.<sup>53</sup>

Also, the court viewed Garcia's statement before the stabbing, "[r]emove Ray away from me or you're not going to be seeing him for the rest of the day," as evidence of Garcia's intent to fight Gutierrez, but not as evidence of his intent to kill Gutierrez.<sup>54</sup> The only direct evidence which influenced the court that Garcia had the intent to kill Gutierrez

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45. *Id.*

46. *Id.*

47. *Id.* at 274, 837 P.2d at 867.

48. *Id.*

49. *Id.* at 274-75, 837 P.2d at 867-68.

50. *Id.*

51. *Id.* at 275, 837 P.2d at 868.

52. *Id.*

53. *Id.*

54. *Id.*

was his confession, "I told my brother I did him and I'd do him again."<sup>55</sup> The court noted, however, that Garcia's confession did not show that he formed a deliberate intent to kill Gutierrez before the stabbing because he confessed after the stabbing had occurred.<sup>56</sup> After reviewing all of the evidence presented by the State, the court held that there was insufficient evidence to establish that Garcia formed the requisite deliberate intent to commit first degree murder.<sup>57</sup>

## V. ANALYSIS AND IMPLICATIONS OF THE *GARCIA* DECISION

### A. *Comparison of Deliberate Killings with Rash and Impulsive Killings*

In *Garcia*, the court did not struggle with whether Garcia deliberated; instead it had difficulty with construing the term "deliberation" itself as a distinction between first degree and second degree murder. For example, the court did not clearly specify what type of evidence supported a deliberate intent element required for first degree murder. Instead, it only stated that "rash and impulsive killings" fall within the category of second degree murder.<sup>58</sup> However, this "rash and impulsive" classification, like the "deliberation" element, does not clearly distinguish second degree murder from first degree murder.

For example, the supreme court has previously held in *State v. Lucero*<sup>59</sup> and *State v. Blea*<sup>60</sup> that no time is too short to deliberate. Moreover, the Uniform Jury Instruction defining "deliberation" also states that a deliberate intent can be formed within a short period of time.<sup>61</sup> This implies that a killer could conceivably form a deliberate intent within a matter of seconds. Therefore, it follows that a murder in which the killer deliberated for just a few seconds is not clearly distinguishable from a murder in which the killer has acted upon a rash impulse.

The court recognized this flawed reasoning in *Garcia* and commented, "[b]ut what is a 'short period of time'? A second or two? If so, then it is hard to see any principled distinction between an impulsive killing and one that is deliberate and premeditated."<sup>62</sup> The court seems to imply here that a deliberate killing requires more time than a rash and impulsive killing, but the court does not specify how much time is required. Furthermore, it does not indicate what evidence tends to show that a killer acted upon a rash impulse. Consequently, the same confusion results when the court uses the "rash and impulsive" classification to distinguish

55. *Id.*

56. *Id.*

57. *Id.* at 274, 837 P.2d at 867.

58. *Id.* at 273, 837 P.2d 866.

59. 88 N.M. 441, 541 P.2d 430 (1975).

60. 101 N.M. 323, 681 P.2d 1100 (1984).

61. N.M. UNIF. JURY INSTRUCTION CRIM. 14-201.

62. *Garcia*, 114 N.M. at 275, 837 P.2d at 868.

second degree murder from first degree murder as when it uses the element of "deliberation" to distinguish between the two categories of murder.

*B. Need for Clear Guidelines to Help Establish What Evidence Will Prove the Requisite Deliberate Intent to Kill for First Degree Murder*

As stated earlier, there is a great disparity between the penalties imposed for each classification of murder.<sup>63</sup> Because of this disparity, first degree murder should be clearly distinguishable from second degree murder. Although the supreme court recognized in *Garcia* the need for a clearer distinction between the two classifications of murder, it did not specify what evidence will support a deliberate intent to kill. The court did not indicate what amount of time is sufficient to form a deliberate intent to kill nor did it state what evidence will show that a killer has weighed and considered the act of killing before carrying out this act.

The supreme court only indicated what evidence will not support the deliberate intent to kill. The court's holding in *Garcia* suggests that evidence of a fight in which the killer threatened the victim will be insufficient although the killer had time to form the required deliberate intent to kill. This holding provides inadequate guidance because evidence of deliberation is still not clearly defined. In a practical sense, the *Garcia* decision does not help prosecutors, defense counsel, or other courts with the next murder case because uncertainty still exists as to what evidence will help prove the deliberate intent to kill.

*C. Analysis of Garcia Under Murder Statutes Contained in Other Jurisdictions*

The inevitable problem of construing the element of deliberation could be eliminated altogether if the New Mexico murder statute did not contain the deliberation element within its definition of first degree murder. Instead, New Mexico should adopt a statutory scheme similar to those enacted by Connecticut, Delaware, Illinois, and the Model Penal Code, which do not use the deliberation element to define murder.<sup>64</sup>

Neither Connecticut nor the Model Penal Code classifies murder into two separate categories.<sup>65</sup> For example, the Connecticut statute provides that a person will be guilty of murder if he or she intended to cause the death of another person.<sup>66</sup>

In *Garcia*, the supreme court found that Garcia stabbed Gutierrez with the intent to kill him.<sup>67</sup> Accordingly, Garcia's intent to kill Gutierrez

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63. See N.M. STAT. ANN. §§ 31-18-14, 31-18-15(A)(2) (Repl. Pamp. 1990).

64. See *supra* notes 30-41 and accompanying text.

65. See CONN. GEN. STAT. ANN. § 53a-54a(a) (West 1985); MODEL PENAL CODE § 210.2 (Official Draft 1962).

66. CONN. GEN. STAT. ANN. § 53a-54a(a) (West 1985).

67. "[I]ndeed, we do not hesitate to say that the jury properly found, beyond a reasonable doubt, that Garcia stabbed Gutierrez intending to kill him, or at least with knowledge that his acts created a strong probability of death or great bodily harm." *Garcia*, 114 N.M. at 275, 837 P.2d at 868.

would have been enough to convict him of murder under both the Model Penal Code and the Connecticut murder statute without going into an elaborate analysis of determining whether Garcia deliberated before he killed Gutierrez. Under the Connecticut murder statute, Garcia would have been convicted of a Class A felony and sentenced to somewhere between twenty-five years to life imprisonment.<sup>68</sup> He then would not be eligible for parole until he served at least twenty-five years of this sentence.<sup>69</sup>

Garcia could also have been convicted under a statutory scheme which categorizes murder into two separate degrees. For instance, both Delaware and Illinois classify murder into first and second degree without distinguishing the two categories of murder using the deliberation element.<sup>70</sup> Delaware distinguishes first degree murder from second degree murder with the elements of intent and recklessness.<sup>71</sup> Because Garcia had the intent to kill Gutierrez, he would have met the culpability requirement for first degree murder under the Delaware statute, which imposes life imprisonment.<sup>72</sup>

Likewise, Garcia would probably have been convicted of first degree murder under the Illinois statute because he had the intent to kill Gutierrez. However, if Garcia could show that certain mitigating circumstances, defined under the second degree murder statute, provoked Garcia to kill Gutierrez, then Garcia would probably have been convicted of second degree murder. In Illinois, the sentence for first degree murder is between twenty and sixty years whereas the sentence for second degree murder is between four and fifteen years.<sup>73</sup> A person convicted of first degree murder is not eligible for parole until he or she serves at least twenty years, less time credit for good behavior.<sup>74</sup>

Although the penalties imposed with respect to each jurisdiction vary from twenty years to life imprisonment, the overall statutory analysis for determining whether a person is guilty of murder is much simpler. The wide variation in sentencing for each separate jurisdiction illustrates that a state legislature has the authority to impose a variety of punishments for murder. It can choose to reserve the harshest penalty for first degree murder, and more moderate punishment for murders in which mitigating circumstances exist, or it can leave the sentencing to the discretion of the courts. Thus, nothing is lost in terms of imposing punishment when the deliberation element is eliminated from a first degree murder statute. Therefore, the New Mexico Legislature may still punish someone using

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68. CONN. GEN. STAT. ANN. § 53a-35a(2) (West 1985).

69. *Id.* § 54-125.

70. See DEL. CODE ANN. tit. 11, § 636 (Repl. Vol. 1987); ILL. ANN. STAT. ch. 720, para. 5/9-1(a) (Smith-Hurd 1993).

71. DEL. CODE ANN. tit. 11, §§ 635 & 636.

72. *Id.* § 4209 (Repl. Vol. 1987). A person convicted of first degree murder must serve at least one-third of the life sentence before becoming eligible for parole. *Id.* § 4346.

73. ILL. ANN. STAT. ch. 730, para. 5/5-8-1 (Smith-Hurd 1993).

74. *Id.* para. 5/3-3-3.

capital punishment, life imprisonment, or a lesser sentence without having the courts or juries struggle with a "deliberation analysis."

## VI. CONCLUSION

The element of deliberation is a difficult term to construe. Although the supreme court tried to clarify this term, the ultimate responsibility to provide guidelines as to what evidence will show deliberation belongs to the legislature. To avoid problems construing the deliberation term, the New Mexico Legislature should eliminate the deliberation element from its homicide statute and construct a statute similar to those adopted in Connecticut, Delaware, and Illinois. If, however, the legislature elects to retain deliberation as an element of first degree murder to distinguish it from second degree murder, it should at least state what evidence will support a deliberate intent to kill or list the crimes which will be punished under each separate category of murder.

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