

Rule Change 2004(6)

**The Colorado Rules of Criminal Procedure
Chapter 29. Colorado Rules of Criminal Procedure
For All Courts of Record In Colorado**

The following rules are amended as of July 1, 2004:

RULE 32.1. DEATH PENALTY SENTENCING HEARING

RULE 32.2. DEATH PENALTY POST-TRIAL PROCEDURES

**Amended and Adopted by the Court, En Banc, March 11, 2004,
effective July 1, 2004.**

BY THE COURT:

**Alex J. Martinez
Justice, Colorado Supreme Court**

RULE 32.1. DEATH PENALTY SENTENCING HEARING

(a) Purpose and Scope. The purpose of this rule is to establish a uniform, expeditious procedure for conducting death penalty sentencing hearings in accordance with section ~~16-11-103, 8A~~18-1.3-1201, 6 C.R.S.

(b) Statement of Intention to Seek Death Penalty. In any class 1 felony case in which the prosecution intends to seek the death penalty, the prosecuting attorney shall file a written statement of that intention with the trial court no later than 60 days after arraignment and shall serve a copy of the statement on the defendant's attorney of record or the defendant if appearing pro se.

~~**(c) Notification to Chief Justice and Appointment of Three Judge Panel.** Immediately upon receipt of the statement of intention to seek the death penalty, the trial judge shall direct the clerk of the trial court to transmit a copy of that statement to the Chief Justice of the Colorado Supreme Court. Upon designation of the sentencing panel judges pursuant to section 16-11-103(1)(a.5)(I), 8A C.R.S., the Chief Justice shall notify the trial judge in writing of the members of the panel. As soon as practicable, the trial judge shall give written notice of the designated panel to the prosecuting attorney and to the defendant's attorney of record or the defendant if appearing pro se.~~

~~**(d) Date of Sentencing Hearing.** Within five days a~~After a verdict of guilt to a class 1 felony, the trial judge shall set a date for the sentencing hearing. ~~The sentencing hearing shall be held as soon as practicable following the trial, but not later than 60 days after the trial verdict is returned, unless good cause is shown.~~

~~**(e) Trial Transcripts.** The presiding judge shall assure that certified trial transcripts are provided to each of the designated panel members at least 30 days in advance of the scheduled commencement date of the sentencing hearing.~~

~~**(f)**~~**(d) Discovery Procedures for Sentencing Hearing.** The following discovery provisions shall apply to the death penalty sentencing hearing:

(1) **Aggravating Factors.** Not later than 20 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall ~~make available~~provide to the defendant, ~~and file with the court~~ a list of the aggravating factors enumerated at ~~§ 16-~~

~~11-103(5), C.R.S. section 18-1.3-1201(5), 6 C.R.S., that are then known to the prosecuting attorney and that the prosecuting attorney intends to prove at the hearing. and shall promptly furnish the defendant written notification of any additional aggravating factors as they become known. Not later than 5 days after the guilty verdict, the prosecuting attorney shall have furnished the defendant written notification of all aggravating factors that the prosecuting attorney may prove at the sentencing hearing.~~

(2) **Prosecution Witnesses.** Not later than 20 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall ~~make available~~provide to the defendant a list of the witnesses whom the prosecuting attorney ~~intends to~~may call at the sentencing hearing and shall promptly furnish the defendant with written notification of any such witnesses who subsequently become known or the materiality of whose testimony subsequently becomes known. ~~Not later than 5 days after the guilty verdict, the prosecuting attorney shall have furnished the defendant with written notification of all witnesses whom the prosecuting attorney may call at the sentencing hearing, except the names of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.~~ Along with the name of the witness, the prosecuting attorney shall furnish the witness' address and date of birth, the subject matter of the witness' testimony, and any written or recorded statement of that witness, including notes.

(3) **Prosecution Books, Papers, Documents.** Not later than 20 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall ~~make available~~provide to the defendant a list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the prosecuting attorney ~~has within the prosecuting attorney's possession or control and intends to~~may introduce at the sentencing hearing and shall promptly furnish the defendant written notification of additional such items as they become known. ~~Not later than 5 days after the guilty verdict, the prosecuting attorney shall have furnished the defendant written notification of all such materials that the prosecuting attorney may introduce at the sentencing hearing.~~

(4) **Prosecution Experts.** As soon as practicable but not later than ~~30~~60 days before trial, the prosecuting attorney shall ~~make available~~provide to the defendant any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any experts whom the prosecuting attorney intends to call as a witness at the sentencing hearing and shall promptly furnish the defendant additional such items as they become available. ~~Not later than 5 days after the guilty verdict, the prosecuting attorney shall have furnished the defendant all reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any experts whom the prosecuting attorney may call as a witness at the sentencing hearing.~~

(5) **Material Favorable to the Accused.** Not later than 20 days after the filing of the written statement of intention required in subsection (b) of this rule, the prosecuting attorney shall make available to the defendant any material or information within the prosecuting attorney's possession or control that would tend to ~~reduce the punishment of the accused, mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing,~~ and the prosecuting attorney shall promptly make available to the defendant any such material or information that subsequently comes into the prosecuting attorney's possession or control.

(6) **Prosecution's Rebuttal Witnesses.** Upon receipt of the information required by subsection (7), the prosecuting attorney shall notify the defendant as soon as practicable but not later than 15 days before trial of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

~~(6) (7)~~ **Defendant's Disclosure.**

(a) Subject to constitutional limitations, the defendant shall provide the prosecuting attorney with the following information and materials not later than ~~20 days after the guilty verdict~~30 days before trial: ~~Upon receipt of the information required by this subsection (6), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the~~

~~defendant's disclosures.~~

(I) A list of witnesses whom the defendant may call at the sentencing hearing. Along with the name of the witness, the defendant shall furnish the witness's address and date of birth, the subject matter of the witness's testimony, and any written or recorded statement of that witness, including notes, that comprise substantial recitations of witness statements and relate to the subject matter of the testimony;

(II) A list of the books, papers, documents, photographs, or tangible objects, and access thereto, that the defendant may introduce at the sentencing hearing;

(III) Any reports, recorded statements, and notes of any expert whom the defendant may call as a witness during the sentencing hearing, including results of physical or mental examinations and scientific tests, experiments, or comparisons.

(b) Any material subject to this subsection (7) that the defendant believes contains self-incriminating information that is privileged from disclosure to the prosecution prior to the sentencing hearing shall be submitted by the defendant to the trial judge under seal no later than forty-five days before trial. The trial judge shall review any material submitted under seal pursuant to this paragraph (c) to determine whether it is in fact privileged.

- (i) Any material submitted under seal pursuant to this paragraph (c) that the judge finds to be privileged from disclosure to the prosecution prior to the sentencing hearing shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.
- (ii) If the trial judge finds any of the material submitted under seal pursuant to this paragraph (c) to be not privileged from disclosure to the prosecution prior to the sentencing hearing, the trial judge shall notify the defense of its findings and allow the defense seven days after such notification in which to seek a

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modification, review or stay of the court's order requiring disclosure.

- (iii) The trial judge may excise information it finds privileged from information it finds not privileged in order to disclose as provided in (ii) above.

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~~(7)(8)~~ **Regulation of Discovery and Sanctions.** No party shall be permitted to rely at the sentencing hearing upon any witness, material, or information that is subject to disclosure pursuant to this rule until it has been disclosed to the opposing party. The trial court, upon a showing of ~~extraordinary circumstances that could not have been foreseen and prevented,~~ good cause, may grant an extension of time to comply with the requirements of this rule. If it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may enter an order against such party that the court deems just under the circumstances, and which is consistent with constitutional limitations, including but not limited to an order to permit the discovery or inspection of materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing ~~in evidence~~ the ~~information and materials, not timely disclosed,~~ or impose sanctions against the offending party. enter such other order as it deems just under the circumstances and which is consistent with constitutional limitations.

~~(g) Sentencing Hearing.~~ The trial judge shall be the presiding judge for the sentencing hearing. The trial judge shall rule on all motions relating to the sentencing hearing, shall conduct the sentencing hearing and shall rule on all evidentiary issues. If the Chief Justice designates a replacement for the trial judge pursuant to section 16-11-103(1)(a.5), 8A C.R.S., the three appointed judges shall choose a presiding judge from among themselves. The elected presiding judge shall assume the duties of the trial judge as they relate to the sentencing hearing.

~~(h) Decision of Panel.~~ No later than 10 days following the conclusion of the presentation of evidence and argument at the sentencing hearing, the judges shall present their written decision as required by sections 16-11-103(2)(c) and (d), 8A C.R.S., in open court with the defendant present.

RULE 32.2. DEATH PENALTY POST-TRIAL PROCEDURES

(a) Purpose and Scope. The purpose of this rule is to establish a fair, just and expeditious procedure for conducting trial court review of any post-trial motions and of any post-conviction motions, and for conducting appellate review of direct appeal and post-conviction review appeal in class one felony cases in which a sentence of death is imposed, as directed by section 16-12-201, 8A C.R.S. (1997), et seq.

(b) Trial Court Procedure.

(1) **Stay of Execution.** The ~~three-judge panel~~trial judge, upon the imposition of a death sentence, shall set the time of execution pursuant to section ~~16-11-403~~18-1.3-1205 and enter an order staying execution of the judgment and sentence until receipt of an order from the supreme court. The trial court shall immediately mail to the supreme court a copy of the judgment, sentence, and mittimus.

(2) ~~Post-trial Motions for New Trial.~~ The defendant may file any post-trial motions, pursuant to Crim. P. 33, ~~within 15 days after the verdict or finding of guilt no later than 15 days after the imposition of sentence. Hearings on post-trials motions, if necessary, shall be held within 20 days of the filing of the motions, and ruling by the trial court on such motions shall be completed before the sentencing hearing. The trial court, in its discretion, may rule on such motion before or after the sentencing hearing, but must rule no later than 90 days after the imposition of sentence.~~

(3) **Advisement and Order.** Within 5 days ~~of~~after the imposition of ~~the~~a sentence of death, the court shall hold a hearing (advisement date) and shall advise the defendant pursuant to sections 16-12-204 and 205. On the advisement date, the court shall:

(I) Appoint new counsel to represent the defendant concerning direct appeal and post-conviction review matters absent waiver by the defendant;

(II) Make specific findings as to whether any waiver by the defendant of the right to post-conviction review, direct appeal, or the appointment of new counsel is made knowingly, voluntarily and intelligently;

(III) Order the prosecuting attorney to deliver to counsel for the defendant within 5 days of the advisement date one copy of all material and information in the prosecuting attorney's possession or control that is discoverable under Crim. P. 16 or pertains to punishment, unless such material and information has been previously provided to that counsel. Costs of copying and delivery of such material and information shall be paid by the prosecuting attorney;

(IV) If new counsel is appointed for the defendant, order defendant's trial counsel, at his or her cost, to deliver a complete copy of trial counsel's file to new counsel within 5 days of the advisement date;

(V) Direct that any post-conviction review motions be filed within 150 days of the advisement date; and

(VI) Order the production of three copies of a certified transcript of all proceedings in the case: one for the supreme court, one for the prosecution and one for the defense. Transcripts that are completed by the advisement date will be immediately provided to the prosecution and to defense counsel to the extent that counsel does not already possess those transcripts. All other transcripts shall be completed and delivered within 21 days of the advisement date or within 21 days of any subsequent hearing.

(4) **Resolution of Post-conviction Motions.** The court, upon receipt of any motion raising post-conviction review issues, as described in section 16-12-206, shall promptly determine whether an evidentiary hearing is necessary, and if so, shall schedule the matter for hearing within 60 days of the filing of such motions and enter its order on all motions within 30 days of the hearing. If no evidentiary hearing is required, the trial court shall rule within 30 days of the last day for filing the motions.

(5) **Record on Appeal.** In an appeal under this rule, the trial court shall designate the entire trial court record as the record on appeal. Within 21 days of the filing of the unitary notice of appeal, the trial court shall deliver to the supreme court any portion of the record not previously delivered under subsection (~~Bb~~) (3) (VI) of this rule.

(6) **Extension of Time.** Upon a showing of extraordinary circumstances that could not have been foreseen and prevented, the court may grant an extension of time with regard to the time requirements of sections (Bb) (2), (3), (4) and (5) of this rule.

(c) Appellate Procedure.

(1) **Unitary Notice of Appeal.** The notice of appeal for the direct appeal and the notice of appeal for all post-conviction review shall be filed by unitary notice in the supreme court no later than 5 days after the trial court's order on post-conviction review motions. The unitary notice of appeal need conform only to the requirements of sections (1), (2), (6) and (8) of C.A.R. 3(g).

(2) **Briefs.** Counsel for defendant shall file an opening brief no later than 180 days after the filing of the notice of appeal. The prosecution shall file an answer brief no later than 120 days after filing of the opening brief. Counsel for defendant may file a reply brief no later than 60 days after filing of the answer brief. Extensions of time will not be granted except on a showing of extraordinary circumstances that could not have been foreseen and prevented. The opening brief may not exceed 250 pages; the answer brief may not exceed 250 pages; and the reply brief may not exceed 100 pages. Extensions not to exceed 75 pages for the opening and answer briefs, and 50 pages for the reply brief may be allowed upon a showing of compelling need.

(3) **Consolidation.** Any direct appeal, any appeal of post-conviction review proceedings, and the review required by section ~~16-11-103(6)(a)~~ 18-1.3-1201(6)(a), shall be consolidated and resolved in one proceeding before the supreme court.

(4) Further Proceedings.

(I) After the supreme court resolves the appeal, ineffective assistance of counsel on direct appeal may only be raised by a petition for rehearing filed in the supreme court, pursuant to section 16-12-204;

(II) Any notice of appeal concerning a trial court decision entered pursuant to section 16-12-209 or concerning any second or subsequent request for relief

filed by the defendant, shall be filed in the supreme court within 30 days of the entry of the trial court's order. Such appeal shall be governed by the Colorado appellate rules as may be modified by the supreme court in case-specific orders designed to expedite the proceedings.

(d) Sanctions. The trial court and the supreme court may impose sanctions on counsel for willful failure to comply with this rule. ~~including but not limited to contempt sanctions, removal from representation on the case or before the court, and referral for disciplinary action.~~

This rule shall apply to class one felony offenses committed on or after January 1, 1998 for which a sentence of death is imposed.