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

**Filing Date: November 5, 2020**

**NO. S-1-SC-36394**

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

v.

**DAVID GUTIERREZ II,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**  
**Drew Douglas Tatum, District Judge**

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for Appellant

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for Appellee

## ORDER ON REHEARING

### **VIGIL, Chief Justice.**

{109} This Court filed the original opinion in this case on August 30, 2019. That opinion affirmed Defendant’s conviction for willful, deliberate, and premeditated first-degree murder and also abolished the spousal communications privilege contained in Rule 11-505 NMRA. *See* paragraphs 39, 82, *supra*. Defendant thereupon filed a motion for rehearing pursuant to Rule 12-404 NMRA, which was supported by briefs of amici curiae. We granted the motion on the singular basis that “[t]he Court should hear the opinions [of] civil litigants and other jurists before the wholesale abolition of an established privilege,” and we withdrew the order dated December 31, 2018, designating retired Justices Petra Jimenez Maes and Gary L. Clingman to participate in this case. (It was unnecessary to withdraw the designation of retired Justice Charles W. Daniels who had passed away in the meantime.) Justice Nakamura, then Chief Justice, dissented. We further ordered that the State was granted leave to file a brief to address the issue on rehearing, including a response to the amicus briefs, and that upon the filing of the State’s brief, “this matter shall be submitted by the Clerk to the sitting Justices of this Court for final resolution.”

{110} With this order we hereby retract the ruling in the original majority opinion that abolished the spousal communications privilege contained in Rule 11-505. *See* paragraphs 9-39, 82, *supra*. The spousal communications privilege contained in Rule

11-505 is hereby reinstated for all cases pending or filed as of the date of our order granting rehearing in this case, June 26, 2020. The remaining portions of the original majority opinion, applying Rule 11-505 to Defendant's case and affirming Defendant's conviction of first-degree murder, paragraphs 40-81, *supra*, shall stand.

{111} We determine that whether the spousal communications privilege contained in Rule 11-505 should be modified or abolished in New Mexico should be the subject of comprehensive study and robust public discussion. Accordingly, we refer to the Rules of Evidence Committee the matter of whether Rule 11-505 should be amended or abolished or should remain unchanged, and we ask the committee to submit its recommendation to this Court pursuant to Rules 23-106 and -106.1 NMRA. *See* paragraph 103, *supra* (Vigil, J., concurring in part, dissenting in part). In conducting the review of this matter, we further instruct the Rules of Evidence Committee to consider the views and reasoning expressed by the Justices in the original majority opinion, paragraphs 1-81, *supra*, as well as the partial concurring and dissenting opinions, paragraphs 84-108, *supra*.

{112} In addition, we write today to clarify our interpretation and application of the rule governing motions for rehearing in this Court, Rule 12-404(B)(1) NMRA. That rule provides,

Rehearing in the Supreme Court may be granted on the request of any three justices. Any justice or acting justice may participate in a rehearing or consideration of a motion for rehearing irrespective of whether the justice participated in the decision or was a member of the court at the time the decision was filed.

By its plain language, Rule 12-404(B)(1) permits any sitting Justice of the Court to vote on a motion for rehearing, regardless of whether the sitting Justice was a member of the panel at the time the opinion was filed. When the motion for rehearing was filed in this case on September 15, 2019, the five sitting Justices were all qualified under the New Mexico Constitution and the Rules of Appellate Procedure to rule on Defendant's motion for rehearing. As a result, the Court withdrew the designation order in this case.

{113} Upon review following our grant of Defendant's motion for rehearing, we hereby retract the ruling in the original majority opinion abolishing the spousal communications privilege. We reinstate Rule 11-505 in our Rules of Evidence and direct the Rules of Evidence Committee to evaluate the spousal communications privilege and submit to this Court the committee's recommendation on the future of the spousal communications privilege in this state's judicial system.

{114} **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Chief Justice**

**WE CONCUR:**

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**BARBARA J. VIGIL, Justice**

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**C. SHANNON BACON, Justice**

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**DAVID K. THOMSON, Justice**

**NAKAMURA, Justice, dissenting.**

{115} I am saddened by the Court's reinstatement of the spousal privilege, an evidentiary rule whose legacy is the silencing of women and the hindrance of truth seeking. *See* paragraphs 10-12, 29-32, *supra*.

{116} I also disagree with the Court's grant of rehearing on a prudential issue. Rule 12-404(A) provides for rehearing where the movant alleges that the Court has misapprehended an issue of law or fact or has relied upon an argument not briefed by the parties. Here, the Court takes up rehearing in order to refer the spousal privilege, Rule 11-505, to the Rules of Evidence Committee for recommendations as to its retention. A majority of Justices previously considered and rejected this course for good reason. This Court has ultimate rulemaking authority regarding rules of evidence and procedure in New Mexico courts. *See* paragraph 9, *supra*; Rule 11-501 NMRA. Rules Committees are creatures of this Court; they serve in the Court's discretion. Rule 23-106 NMRA. Thus, when a majority of this Court holds an existing court-created rule to be unsound or unjust, it does not preserve the rule and wait for a committee of the Court's own creation to supply recommendations. *See, e.g., State v. Pieri*, 2009-NMSC-019, ¶ 33, 146 N.M. 155, 207 P.3d 1132 (overruling *Eller v. State*, 1978-NMSC-064, 94 N.M. 52, 582 P.2d 824, and amending Rule 5-304(D) NMRA to state a new rule regarding the sentencing information given to criminal defendants). Here, the Court has a duty to abolish an evidentiary rule that

undermines the pursuit of truth and has outlived any persuasive justifications for its retention. *See* paragraph 38, *supra*.

{117} Furthermore, while I agree that Section 12-404(B)(1) permits a Justice who did not participate in a prior decision to participate in rehearing, I disagree with the Rule’s use here. Three Justices who did not participate in rendering the original opinion relied on Rule 12-404(B)(1) to participate in rehearing, and—together with one of the original dissenting Justices—withdrawed the order appointing those who participated and concurred in the Court’s original opinion. I fear that granting rehearing through this process incentivizes litigants to seek rehearing whenever the Court’s decision is split and a change in the members of the Court is imminent. *See Flaska v. State*, 1946-NMSC-035, ¶ 73, 51 N.M. 13, 177 P.2d 174 (“It would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases.”) (quoting the Supreme Court of Michigan) (internal quotation marks and citation omitted). This in turn generates mistrust and a lamentable uncertainty and unpredictability in our law. *See Romero v. Byers*, 1994-NMSC-031, ¶ 12, 117 N.M. 422, 872 P.2d 840 (recognizing “the values of uniformity, predictability, and stability in the law”).

{118} For the foregoing reasons, I respectfully dissent.

