

Opinion No. 55-6239

July 27, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable James M. Scarborough, District Judge, Div. II, First Judicial District, Santa Fe, New Mexico

You have asked the opinion of this office regarding the proper sentence to be imposed in cases of conviction of murder in the second degree.

Section 40-24-10, N.M.S.A., 1953, provides:

"Penalties for murder and manslaughter. -- Every person convicted of murder in the first degree shall suffer death unless the jury trying said cause shall specify life imprisonment in the penitentiary in lieu of death; and in case the jury trying the cause shall specify life imprisonment, the judge shall sentence the person convicted to life imprisonment. **Every person convicted of murder in the second degree shall be punished by imprisonment in the state penitentiary for any period of time not less than three (3) years;** every person convicted of manslaughter shall be punished by imprisonment in the state penitentiary for a period of time not less than one (1) year nor more than ten (10) years." (Underscoring mine.)

Your question: What is the maximum sentence called for by Section 40-24-10 for the crime in question?

It is noticed that this section does not, in terms, specify what the maximum shall be. It does, however, contemplate that the maximum term shall not be less than three years.

Also it is contemplated that it may be more than three years. What then is the outer limit? It certainly cannot be stated that the maximum is a definite term of years whether that be thirty, seventy-five, or ninety-nine years. To so hold would be to arbitrarily set a maximum not called for by the statute. This is lent weight by the fact that in the same statute the maximum sentence for manslaughter is set at a definite number of years.

The only possible conclusion is that, implicitly, the maximum sentence provided is life imprisonment. See **People vs. Gonzales**, 173 P. 407; **People vs. Rossi**, 37 Cal. App. 778, 174 P. 916. It is our opinion, therefore, that the sentence for conviction of murder in the second degree is from three years to life imprisonment.

I trust this answers your inquiry satisfactorily.

By: Santiago E. Campos

Assistant Attorney General