



experts, jury consultants and the like, as well as greatly enhanced costs for specialized attorney training. The Department estimates a budget of \$375,000 to fund this re-tooling of the Capital Crimes Unit as a death-penalty defense unit. Because it is always necessary due to conflicts of interest to contract about half the death penalty defense work to private attorneys, a roughly equivalent diversion of Department resources would be necessary to bring the performance of the contract death-penalty defense attorneys in line with the aforementioned minimal national standards. Thus, the Department estimates an annual budgetary impact of \$750,000.

The Attorney General's Office (AGO) reports that renewing the death penalty would likely result in an increase in costs throughout the system. Securing capital-eligible trial counsel requires significantly more funding and training. Securing death penalty-eligible jurors takes significantly more time and effort. Sentencing experts who can educate a jury or judge about aggravation and/or mitigation issues also cost money, but this may not increase as much as a similar process presently exists for the imposition of life sentences. Housing of prisoners on "death row" typically requires significantly enhanced security measures. Post-conviction appellate and *habeas corpus* wrangling in the death penalty context is generally much more substantial. However, it is possible that the renewal of capital punishment in New Mexico could result in fewer trials as the issue of the death penalty would become another item to be dealt with in plea negotiations.

## **SIGNIFICANT ISSUES**

The AGO reports:

The availability of the death penalty often heightens the stakes when parties argue over traditional constitutional issues, especially the right to counsel.

This bill clearly bars the application of the death penalty from mentally-retarded, juvenile and pregnant defendants. This will foreclose a common mode of attack against the constitutionality of the death penalty on 8<sup>th</sup> Amendment (cruel and unusual punishment) grounds.

This bill contains "failsafe" language which would require the imposition of a life sentence should the re-enacted death penalty later be ruled unconstitutional or otherwise invalid by the New Mexico or United States Supreme Courts.

The language in Section 2A of the bill, which states that "capital sentencing deliberations shall be guided by" specific, enumerated considerations, seems vague. The bill might better withstand scrutiny if it is made to read "controlled by" instead of "guided by".

The language in Section 2A(3) permitting the consideration of "other mitigating circumstances" (beyond what is already enumerated) will likely strengthen the bill as it appears to afford a defendant with a heightened due process in the sentencing hearing.

Section 4, which requires that a jury be instructed on the actual, real world meaning of the phrase "life sentence", could cause a challenge as jurors are typically not permitted to delve into the consequence of their verdict. It could be argued that a jury contemplating a death sentence would reach a verdict requiring death when it might otherwise have imposed a life sentence, owing to concerns that a defendant could "out-live" his life sentence and be released.

Section 13, which deals with insanity of a defendant awaiting imposition of a death sentence, places a burden on the prosecution to bring the issue to the court's attention. There is no apparent reason why the prison authorities could not be required to notify counsel for both parties and the trial court.

Section 15, which deals with the court's order on a defendant's insanity, does not indicate a standard of proof that a court must employ when determining this issue.

### **ADMINISTRATIVE IMPLICATIONS**

The administrative and performance implications for the courts, the Public Defender Department, the several offices of the district attorney and the police agencies would be extensive. Because of greatly enhanced standards of performance imposed by the state and federal constitutions and by the New Mexico Statutes and Rules of Criminal Procedure, when the state endeavors to take the life of a human being, all agencies involved are obliged to commit tremendous human and administrative resources, and tremendous time, to the process.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill covers the same territory as HJR6 ("Death Penalty for Certain Crimes, CA" – Dennis J. Kintigh), which would put the matter of a constitutional amendment imposing the death penalty under certain circumstances to a popular vote but does not conflict with same.

This bill could be interpreted to be in conflict with SB59 ("Child Murder as Aggravating Circumstance" – Mary Jane M. Garcia), which would amend §31-20A-2 NMSA, to create an aggravating circumstance for murder of a child under 13 years of age, which would impose a life sentence. The present bill includes an aggravating circumstance for murder of a child under 18 years of age, for the application of the death penalty.

### **ALTERNATIVES**

The AGO suggests including language requiring a jury finding for purposes of sentencing, regardless of whether the underlying case was tried to a jury or the bench. The waiver of a jury finding for sentencing can be allowed. In other words, a defendant could have the "guilt phase" determined by a judge or jury, and could also have the "punishment" phase determined by a judge or jury, independent of each other, with the exception that a party cannot disqualify a judge who heard the guilt phase from hearing the punishment phase, regardless of whether that judge acted as finder of law, fact, or both.

ABS/lj