

<b>LFC Requester:</b>	<b>Austin Davidson</b>
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**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

**AgencyAnalysis.nmlegis.gov**

*{Analysis must be uploaded as a PDF}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** 1/17/24  
**Bill No:** HB 77

**Sponsor:** Rep. John Block  
**Short**        Reinstate Death Penalty  
**Title:**        \_\_\_\_\_

**Agency Name and Code**        AOC  
**Number:**                        218  
**Person Writing**                Kathleen Sabo  
**Phone:** 505-470-3214 **Email** aoccaj@nmcourts.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
None	\$1,565.00	Nonrec.	General

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: HB 77 amends and enacts statutory sections within Chapter 31 NMSA 1978, governing criminal procedure, to reinstate the death penalty for those convicted of the following capital felonies:

- (1) When the victim was a peace officer who was acting in the lawful discharge of an official duty when the peace officer was murdered;
- (2) When the victim was a child under the age of 18;
- (3) When, while incarcerated in a penal institution in NM, the defendant, with the intent to kill, murdered an employee or a contractor of the penal institution; and
- (4) When the defendant attempted to harm or kill a peace officer who was acting in the lawful discharge of an official duty.

**Section 1:** Amends Section 31-18-14 NMSA 1978 to include death as a punishment when a defendant has been convicted of a capital felony, in addition to life imprisonment or life imprisonment without the possibility of release or parole. HB 77 requires the punishment to be imposed after a separate sentencing hearing. HB 77 excludes death as a punishment when a defendant has not turned 18 at the time of the commission of the capital felony for which the defendant was convicted. The HB 77 amendment provides that in the event that the sentence of death in a capital felony case is held to be unconstitutional or otherwise invalidated by the NM or U.S. Supreme Court, the person previously sentenced to death shall be sentenced to life imprisonment without the possibility of release or parole.

**Section 2:** HB 77 amends Section 31-18-23(A) NMSA 1978, governing mandatory life imprisonment for three violent felony convictions, to limit application of the statute when the sentence imposed for the third violent felony conviction does not result in death. HB 77 also amends Section 31-18-23(E)(2)(c) NMSA 1978 to define “violent felony” to mean kidnapping resulting in physical injury or a sexual offense inflicted upon the victim by the victim’s captor, as provided in Section 30-4-1(B) NMSA 1978, and Subsection (E)(2)(e), to remove the reference to the definition of “great bodily harm” as provided in Section 30-1-12(A) NMSA 1978 from the definition of “violent felony”.

**Section 3:** HB 77 amends Section 31-20A-2 NMSA 1978, governing the determination of sentence for a capital felony, to limit the consideration of aggravating circumstance to the Section 31-20A-5(A) NMSA 1978 aggravating circumstances listed, and requiring the defendant to be sentenced to life imprisonment without possibility of release or parole. HB

77 also provides that if the jury does not find a Subsection A aggravating circumstance, the defendant shall be sentenced to life imprisonment. HB 77 enacts a new Subsection B, providing that if the jury finds, beyond a reasonable doubt, that one or more of the aggravating circumstances enumerated in Section 31-20A-5(B) NMSA 1978 exist, the jury is required to determine whether the defendant shall be sentenced to death or life imprisonment without the possibility of parole, and provides considerations in making that determination, for guidance. HB 77 also enacts a new Subsection C to provide that in the event a defendant was younger than 18 at the time of commission of the capital felony for which the defendant was convicted, if a jury finds that an aggravating circumstance as enumerated in Section 31-20A-5(A) or (B) NMSA 1978 exists, the sentencing court or jury is required to consider the defendant's age at the time of commission of the capital felony as a mitigating factor and shall determine whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of release or parole.

**Section 4:** HB 77 amends Section 31-20A-5 NMSA 1978, governing aggravating circumstances, to limit the aggravating circumstances to be considered by the sentencing court or jury pursuant to Section 31-20A-2(B) NMSA 1978, to the following:

- (5) the victim was a peace officer who was acting in the lawful discharge of an official duty when the peace officer was murdered;
- (6) the victim was a child under the age of 18;
- (7) while incarcerated in a penal institution in NM, the defendant, with the intent to kill, murdered an employee or a contractor of the penal institution; and
- (8) the defendant attempted to harm or kill a peace officer who was acting in the lawful discharge of an official duty.

HB 77 provides that, for the purposes of this section, "penal institution" includes facilities under the jurisdiction of the Corrections Department and county and municipal jails.

**Section 5:** HB 77 enacts a new section within Chapter 31 NMSA 1978, governing sentencing procedure for a capital felony, and providing for a separate sentencing proceeding to be conducted by the court to determine a defendant's sentence, upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony. HB 77 requires that the sentencing proceeding be conducted:

- In a jury trial, as soon as practical by the original trial judge before either the original trial jury or a jury impaneled for the purpose of sentencing.
- In a nonjury trial, as soon as practical by the original trial judge or jury.
- If a plea of guilty to a capital felony is entered, as soon as practical by the original trial judge or by a jury upon demand of a party.

HB 77 provides that all evidence admitted at the trial shall be considered at the sentencing hearing and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Section 31-20A-5 NMSA 1978 and HB 77, Section 8. HB 77 further requires a judge, in a jury sentencing proceeding, to give appropriate instructions and allow arguments, and requires the jury to retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge is required to allow argument and determine the punishment to be imposed.

**Section 6:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 requiring the court to explain to the jury, at the beginning of a sentencing hearing for a capital felony case, subsequent to a verdict by the jury that the defendant is guilty of a capital felony, that a

sentence of life imprisonment means that the defendant shall serve 30 years of the sentence before the defendant becomes eligible for a parole hearing, as provided in Section 31-21-10 NMSA 1978.

**Section 7:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing court sentencing, requiring the court to take the following actions:

- **Sentencing proceeding where jury unanimously finds beyond a reasonable doubt and specifies at least one of the Section 31-20A-5(B) NMSA 1978 aggravating circumstances and unanimously specifies a death sentence pursuant to Section 31-20A-2(B) NMSA 1978:** the court is required to sentence the defendant to death.
- **Where sentence of death is not unanimously specified or the jury does not make the required finding or is unable to reach a unanimous verdict:** the court is required to sentence the defendant to life imprisonment without the possibility of release or parole in accordance with Section 31-20A-2 NMSA 1978.
- **In nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded:** the judge shall determine and impose the sentence, provided that the judge shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one Section 31-20A-5(B) NMSA 1978 aggravating circumstance.

**Section 8:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing mitigating circumstances to list the mitigating circumstances to be considered by the sentencing court or the jury pursuant to Section 31-20A-2(B) NMSA 1978. HB 77 specifies that the list is not inclusive.

**Section 9:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing review of judgment and sentence, to require a conviction and sentence of death be automatically reviewed by the NM Supreme Court, which is required to rule on the validity of the sentence of death. HB 77 specifies the circumstances under which a sentence of death shall not be imposed. HB 77 prohibits an error in the sentencing proceeding from resulting in the reversal of the conviction for a capital felony, and provides that if the trial court is reversed on appeal because of an error only in the sentencing proceeding, the supreme court is required to remand solely for a new sentencing proceeding, applying only to the issue of punishment. HB 77 also provides that in cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding requires the following: (1) a new jury to be impaneled for the new sentencing proceeding if the sentencing proceeding was before a jury; (2) the original trial judge to conduct the new sentencing proceeding if the sentencing proceeding was before a judge; or (3) the designation of another judge to conduct the new sentencing proceeding if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, and providing that the parties are entitled to disqualify the new judge on Section 38-3-9 NMSA 1978 grounds before the newly designated judge exercises any discretion.

**Section 10:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing the prohibition against capital punishment of persons with an intellectual disability, and requiring the court, upon a motion of the defense requesting a ruling that a sentence of death by precluded pursuant to this section, to hold a hearing, prior to conducting the sentencing proceeding pursuant to HB 77, Section 7. HB 77 requires the court, upon a finding by a

preponderance of the evidence that the defendant has an intellectual disability, to sentence the defendant to life imprisonment without the possibility of release or parole. HB 77 provides that a ruling by the court that evidence of diminished intelligence does not preclude a sentence of death pursuant to this section shall not restrict the defendant's opportunity to introduce the evidence at the sentencing proceeding or to argue that the evidence should be given mitigating significance. HB 77 further provides that if the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion pursuant to this section.

**Section 11:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, requiring a warrant signed by the judge and attested by the court clerk under seal of the court be drawn and delivered to the sheriff, when a judgment of death is rendered by any court of competent jurisdiction. HB 77 requires the warrant to state the conviction and judgment and appoint a day on which the judgment is to be executed, which shall not be less than 60 nor more than 90 days from the date of judgment, and shall direct the sheriff to deliver the defendant, at a time specified in the warrant but not more than 10 days from the date of judgment, to the warden of the penitentiary of NM for execution.

**Section 12:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to require the judge of a court in which a defendant was convicted and sentenced to death to, immediately after the conviction, transmit to the governor a statement of conviction and judgment.

**Section 13:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to permit only the governor to suspend the execution of a judgment of death, except the warden of the penitentiary of NM to whom a death in accordance with the provisions of HB 77, Sections 14-18.

**Section 14:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 requiring a district attorney who has received notice from the warden that the defendant, under judgment of death, has become insane, to immediately file a petition in district court, asking the court inquire into the question of the defendant's sanity. HB 77 provides that it is the duty of the district court to inquire into the question and render a judgment.

**Section 15:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to require the district attorney to attend a hearing provided for in HB 77, Sections 14 and 18, and permits the district attorney to produce witnesses before the court and to issue process in the same manner as process is issued for witnesses to testify before the grand jury, which failure to comply with issued process may be punished in a like manner as failure to comply with process issued by the court.

**Section 16:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to require the court to make and cause to be entered an order reciting the fact of the inquiry made pursuant to HB 77, Section 14, and its result. HB 77 provides that if it is found that the defendant is insane, the order is required to direct that the defendant be taken to the NM Behavioral Health Institute at Las Vegas and kept there in safe confinement until the defendant's sanity is restored.

**Section 17:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to govern the duties of the warden with regard to procedure when sanity is restored.

**Section 18:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 to require the warden to notify the district attorney of the county in which the state penitentiary is situated if there is good reason to believe that a female defendant who was sentenced to death is pregnant, and to require the district attorney to immediately file in the district court a petition requesting the court inquire into the question of the defendant's pregnancy. HB 77 provides that it is the duty of the district court to inquire into the question and render a judgment. HB 77 permits the court to summon 3 disinterested physicians of good standing to inquire into the alleged pregnancy, who shall examine the defendant, hear any evidence produced and make a written finding and certificate of their conclusion, to be approved by the court. HB 77, Section 15 provisions are to apply to the proceedings. Subsection B provides for the requirements placed upon the warden.

**Section 19:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing the circumstance where a judgment of death remains in force but is not executed, and providing for a defendant to be brought before the court in which the conviction is had, and for the court to inquire into the facts and, if no legal reason exists against the execution of the judgment, requiring the court to issue an order that the warden execute the judgment at a specified time. HB 77 prohibits an appeal from the order directing and fixing the time for the execution of a judgment.

**Section 20:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978 directing that death shall be by lethal injection.

**Section 21:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing place of execution.

**Section 22:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, governing where judgement is executed and who may be present.

**Section 23:** HB 77 enacts a new statutory section within Chapter 31 NMSA 1978, requiring the warden, after the execution, to return the death warrant to the court that rendered the judgment.

**Section 24:** HB 77 appropriates \$1,065,000 from the general fund to the Corrections Department for expenditure in FY 25 to cover the costs associated with this Act. Any unexpended or unencumbered balance remaining at the end of FY 25 shall revert to the general fund.

**Section 25:** HB 77 appropriates \$500,000 from the general fund to the Administrative Office of the Courts (AOC) for expenditure in FY 25 to cover the costs associated with this Act. Any unexpended or unencumbered balance remaining at the end of FY 25 shall revert to the general fund.

**Section 26:** HB 77 provides that the provisions of this Act apply only to capital felonies committed on or after the effective date of this Act. Nothing contained in the provisions of the Act are to be construed to alter in any way the execution of a sentence of death imposed for a crime committed before the effective date of the Act.

## **FISCAL IMPLICATIONS**

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and resultant required court proceedings, including hearings, sentencing proceedings, inquiries and transmissions by the court, and appeals from orders and judgments. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

Increased penalties are likely to result in increased costs related to additional judge time, courtroom staff time, courtroom availability and jury fees. Indigent offenders are entitled to public defender services.

To impose the death penalty under HB 77 two jury proceedings are typically required: one to determine guilt and one to determine the sentence to be imposed, resulting in increased jury costs as a higher number of jurors will need to be called for the selection process, and if there are two separate proceedings, more costs will be incurred.

Past studies have indicated a significant cost differential for court services between non-capital and capital cases, and there is every reason to believe that the costs have increased markedly and that the differential has widened. In *State v. Young*, 2007-NMSC-058, 143 N.M. 1, 172 P.3d 138, arising out of the Santa Rosa prison riot cases, the NM Supreme Court found that “it is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases.”

## **SIGNIFICANT ISSUES**

- 1) The death penalty was abolished in New Mexico in 2009, when NM became the 15<sup>th</sup> state to abandon capital punishment. As of 2023, 23 states and the District of Columbia had abolished the death penalty. (See the Death Penalty Information Center’s state by state guide to the death penalty at <https://deathpenaltyinfo.org/states-landing> .) The repeal in NM, however, was not retroactive, leaving two people on death row in NM. In June of 2019, the NM Supreme Court vacated those sentences and ordered the two prisoners be resentenced to life in prison.
- 2) In the FIR for 2017’s HB 72, a substantially similar bill, the following issues are raised, among others:
  - Arguments in favor of imposition of the death penalty as the general public would no longer be at risk for violence from the particular offender convicted and sentenced under the Act.
  - The belief that life without parole sufficiently protects the community from the same category of criminals that would be subject to the death penalty.
  - The failure of Section 31-20A-2(B) NMSA 1978 (HB 77, Section 3) to require the sentencer to weigh the mitigating circumstances against the aggravating circumstances, as mandated under the U.S. Supreme Court precedent interpreting the Eighth Amendment.
  - That studies from other state and the federal system continue, without exception, to show the enormous expense occasioned by death penalty cases.
  - The difficulty, at that time, of states being able to purchase lethal injection drugs, due to stopped production and manufacturer refusal to sell to states for the purpose of execution. (It is noted that some states recently passed laws allowing for alternative execution methods is lethal injection drugs are unavailable.

The FIR contains two attachments related to costs to the NM judicial system and the NM

Corrections Department, and details of other states' death penalty costs. (See the HB 72 FIR at <https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF> .)

See also 2018's HB 155 and the resulting FIR at <https://www.nmlegis.gov/Sessions/18%20Regular/firs/HB0155.PDF> .

3) In the FIR for 2018's HB 155, it was noted that

AOC advises that Article 2, Section 2 of the Constitution of New Mexico provides that appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. Appellate review normally consists of reviewing the record for error. HB 155 requires the Supreme Court make a determination on the validity of the death sentence, based on: whether the evidence supports the finding of a statutory aggravating circumstance; whether the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances; whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. HB 155 does not specify the standard the court is to apply in making these determinations. Additionally, there is no provision for the taking of evidence in making these determinations, nor is there a provision authorizing hearings for the purpose of taking evidence on these issues at either the Supreme Court or district court level prior to the Supreme Court's automatic review. (For additional discussion on this issue and the proportionality review requirement, see the FIR on the substantially identical HB 72, introduced in 2017, @ <https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF>)

4) HB 77 differs from 2017's HB 72 in the following ways:

- Section 2(E)(2)(c) in HB 77 amends the definition of "violent felony" to mean kidnapping resulting in physical injury or a sexual offense inflicted upon the victor by the victim's captor, as provided in Section 30-4-1(B) NMSA 1978, rather than "kidnapping resulting in great bodily harm".
- Section 4 adds as an aggravating circumstance, "the defendant attempted to harm or kill a peace officer who was acting in the lawful discharge of an official duty."
- HB 77 appropriates funds to both the Corrections Department and the Administrative Office of the Courts to cover the costs associated with the Act.

### **PERFORMANCE IMPLICATIONS**

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

### **ADMINISTRATIVE IMPLICATIONS**

See "Fiscal Implications," above.

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

None.



## **TECHNICAL ISSUES**

- 1) HB 77, Section 5(B) requires that a separate sentencing proceeding be conducted for a capital felony, “[i]n a nonjury trial,...as soon as practicable by the original trial judge or jury.” It appears, however, that in a nonjury trial there would be no original jury. If the statute is meant to permit a jury impaneled for the purpose of sentencing to conduct the sentencing proceeding, then the provision needs to be amended to clarify that meaning.

## **OTHER SUBSTANTIVE ISSUES**

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

## **AMENDMENTS**