

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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 1/18/2024

Bill No: HB 77-280

Sponsor: Rep. John Block & Rep. Harlan
Vincent

**Agency Name
and Code** 280-LOPD
Number: _____

**Short
Title:** Reinstate Death Penalty

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
\$0	\$1,565,000	Nonrecurring	NMCD (\$1,065,000) & AOC (\$500,000)

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 77 would reinstate the death penalty for capital crimes. It would undo the effect of HB 285 from the 2009 legislative session, which repealed the statutory authorization for the death penalty. Since 2009, “capital” felonies have been punishable either with an ordinary life sentence (in which the prisoner becomes eligible for parole after 30 years in prison) or life without the possibility of parole (LWOP).

In general, the bill would allow the State of New Mexico to kill people by lethal injection if they are convicted of first-degree murder and a jury (or, in some situations, a judge) finds that certain aggravating circumstances exist and decides to impose the death penalty. The bill would require a bifurcated procedure of a guilt phase followed by a penalty phase. It would require automatic review of death sentences and associated convictions by the New Mexico Supreme Court, and it would specify considerations for the Court to assess during that review. It would also prohibit execution of juveniles, people who are “insane,” and people with intellectual disabilities.

HB 77 contains 26 separate sections. A brief summary of the effect of each section follows.

Section 1 would amend Section 31-18-14, the capital sentencing authority, to allow sentences of life imprisonment, LWOP, or death. It provides for a separate sentencing hearing after a trial or guilty plea. It prohibits imposition of the death penalty for minors. Finally, it provides that if any death sentence is invalidated by a court, it should be replaced by a penalty of LWOP.

Section 2 amends Section 31-18-23, the “three strikes” law, to clarify that it would not apply if the defendant received a death sentence. It expands the three strikes law’s application to kidnappings that result in physical injury or a sex offense (currently, the law applies only if the kidnapping resulting in great bodily harm). It also removes a definition of great bodily harm, for unclear reasons.

Section 3 would amend Section 31-20A-2, which currently says that if a jury finds aggravating circumstances beyond a reasonable doubt, the defendant shall be sentenced to LWOP. HB 77 instead separates aggravating circumstances into two categories. If the jury finds an aggravating circumstance from Subsection A (*see* Section 4 below), the defendant will receive LWOP. If the jury finds an aggravating circumstance from Subsection B, the jury will decide whether to impose a sentence of death or LWOP. Section 3 also specifies that if the defendant was younger than 18 at the time of the offense, if the jury finds an

aggravating circumstance, it can decide whether to impose a sentence of life or LWOP.

Section 4 would amend the list of aggravating circumstances. Subsection A lists the circumstances that would result in a sentence of LWOP (none of which are new additions):

- Intentional killing during kidnapping or some sex crimes,
- Intentional killing during escape from prison,
- Intentional killing by a prisoner of another prisoner or other person “lawfully on the premises of a penal institution (not including a prison employee),
- Murder for hire, and
- Murder of a witness.

Subsection B lists the circumstances that would authorize imposition of a sentence of either LWOP or death:

- Killing of a peace officer (currently LWOP-eligible),
- Killing of a child (not currently an aggravating circumstance),
- Intentional killing by a prisoner of a prison employee (currently LWOP-eligible), and
- Killing in the course of attempting to harm or kill a peace officer (not currently an aggravating circumstance).

Section 5 would create a new statutory section laying out the procedure for death sentences in jury trials, bench trials, and guilty pleas. It provides for bifurcated proceedings in all cases.

Section 6 specifies that after conviction of a capital felony, at the beginning of the sentencing phase, the judge should explain to the jury that a “sentence of life imprisonment” means the defendant will serve 30 years before he is eligible for parole.

Section 7 says that if a jury unanimously finds a death-eligible aggravating circumstance and unanimously chooses a death sentence, “the court shall sentence the defendant to death.” If the jury does not “make the required finding or is unable to reach a unanimous verdict,” the court should sentence the defendant to LWOP. This is confusing (see “significant issues” below), but it seems to mean that if the jury does not unanimously find a death-eligible aggravating circumstance and unanimously choose the death penalty, but *does* find an LWOP-eligible aggravating circumstance, the court should sentence the defendant to LWOP. The section does not say what should happen if the jury does not unanimously find any aggravating circumstance beyond a reasonable doubt—presumably, the court imposes an ordinary life sentence.

Section 8 would create a non-exhaustive list of mitigating circumstances that the sentencing jury (or judge) could consider in deciding not to impose the death penalty.

Section 9 provides that any “judgment of conviction and sentence of death shall be automatically reviewed” by the New Mexico Supreme Court. It specifies circumstances in which the death penalty should not be imposed:

- If the evidence does not support the aggravating circumstance,
- If the evidence supports a finding that mitigating circumstances outweigh aggravating circumstances,
- If the death sentence “was imposed under the influence of passion, prejudice or any other arbitrary factor,” or
- The death sentence is “excessive or disproportionate to the penalty imposed in similar

cases, considering both the crime and the defendant.”

These are the same review criteria established in New Mexico law before repeal. *See Fry v. Lopez*, 2019-NMSC-013, ¶ 18 (plurality opinion).

Section 10 prohibits executing a person with an intellectual disability and defines a procedure for determining whether the defendant has an intellectual disability.

Section 11 specifies the procedure for issuing a warrant of execution.

Section 12 requires the sentencing judge to send the conviction and judgment to the governor.

Section 13 says that only the governor may suspend the execution, but allows the warden of the penitentiary where the defendant is to be executed to suspend the execution if the defendant is insane or pregnant.

Section 14 describes a procedure for the warden and district attorney to trigger an inquiry into the defendant’s sanity.

Section 15 gives the district attorney a role in determining the sanity or pregnancy of the defendant.

Section 16 says that if the defendant is insane, he should be taken for treatment to the New Mexico Behavioral Health Institute in Las Vegas.

Section 17 instructs the warden to proceed with the execution once the defendant is found to be sane or is treated to sanity.

Section 18 sets out a procedure for determining whether a defendant is pregnant and delaying the execution if she is. (The section refers only to “a female defendant” and does not address pregnancies of a transgender or non-binary prisoner.)

Section 19 says that if a death sentence is in place but has not been executed, the district attorney in the county of conviction may ask the court of conviction to bring in the defendant. The court “shall inquire into the facts and, if no legal reason exists against the execution,” shall order the warden to execute the defendant. The section specifies that this order is not appealable.

Section 20 specifies that the defendant should be killed by “intravenous injection of a lethal substance.”

Section 21 gives specifications for the room where the person will be executed.

Section 22 describes the people who may be present at the execution. It includes:

- The warden,
- A doctor,
- The attorney general,
- “reputable citizens to be selected by the warden” (it specifies at least 12 should be

- invited),
- Up to two religious leaders or teachers chosen by the defendant,
 - Up to five other people chosen by the defendant, and
 - Such peace officers as the warden may think expedient.

No other witnesses are permitted, and no witnesses under the age of 18. The list of spectators does not appear to contemplate that any defense attorneys, journalists, or elected officials will be present.

Section 23 requires the warden to return the death warrant to the court after execution.

Section 24 appropriates \$1,065,000 to the corrections department for FY 2025.

Section 25 appropriates \$500,000 to the administrative office of the courts for FY 2025.

Section 26 says that the act applies only to capital felonies committed on or after the effective date of the act.

FISCAL IMPLICATIONS

The creation of a death penalty in New Mexico would require significant expenses for the Law Offices of the Public Defender. Death penalty litigation is expensive and time-consuming, and it requires experienced defense attorneys, as well as mitigation specialists and expert witnesses.

Capital defense is extraordinarily expensive. A capital defense team should have at least two capable attorneys with specialized training, one investigator, a mitigation specialist, and someone who can screen for mental and psychological issues. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 4.1(A). Additionally, defending death penalty cases is often impossible without experts, such as “pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators,” and particularly neurological and psychiatric experts and testing. *Id. in* 31 Hofstra L. Rev. 913, 955-56 (2004).

Before repeal of the death penalty, the New Mexico Supreme Court held that if attorneys in death penalty cases are inadequately compensated, their clients are deprived of their constitutional right to counsel, and the state *may not* seek the death penalty until the defense is adequately funded. *See State v. Young*, 2007-NMSC-058, ¶ 1, 143 N.M. 1. “Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.” ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 9.1(B)(1).

In one high-profile death penalty case, attorneys testified in 1999 that the trial defense would require at least \$1 million per defendant. *See Young*, 2007-NMSC-058, ¶ 11. That was 25 years ago; \$1 million in 1999 is roughly \$1.9 million today. *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. One federal report found that the median cost of defending a death penalty case was *eight times* the cost of defending a death-eligible case in which prosecutors did not seek the death penalty. *See* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services: Judicial Conference of*

the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases at x (2010), available at <https://www.uscourts.gov/services-forms/defender-services/publications/update-cost-and-quality-defense-representation-federal>. In 2022, the Louisiana Public Defender's Office spent \$7.7 million on death penalty defense alone. Julie O'Donoghue, *Louisiana spent \$7.7 million on death penalty defense. It hasn't executed anyone in 13 years*, La. Illuminator (Mar. 21, 2023), <https://lailuminator.com/2023/03/21/louisiana-spent-7-7-million-on-death-penalty-defense-it-hasnt-executed-anyone-in-13-years/>.

Capital defense requires defense resources not only for trial, but also, if the defendant is convicted, for the sentencing phase (which can be the equivalent in time and resources of a second trial), direct appeal to the New Mexico Supreme Court, certiorari review to the United States Supreme Court, habeas corpus proceedings in the district court (sometimes more than once), and appellate review of those habeas proceedings. If the conviction is overturned on direct appeal or habeas review, the process starts over again. Each step of a capital case would require extraordinary time commitments from LOPD's most experienced attorneys and contractors.

It is impossible to anticipate how many death penalty cases prosecutors would bring if this bill were enacted, so we cannot estimate exactly how much additional funding LOPD would require. However, any increase in LOPD expenditures would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates. The midpoint of an upper-level (Public Defender 4), non-supervising public defender salary including benefits is \$149,063.16 in Albuquerque/Santa Fe and \$157,552.44 in other parts of the state (due to necessary salary differential to maintain qualified employees). Support staff for attorneys costs \$126,722.33, on average. Additionally, investigators are crucial to death penalty defense; salary and benefits for an investigator averages \$95,718.51 annually. Because capital cases require highly experienced attorneys and would likely involve supervising attorneys, these salaries understate the cost of salaries for capital defense.

In addition to more attorney FTE, significant additional resources would be required to ensure adequate training and supports were established and maintained for counsel, investigators, mitigations specialist and others defending death penalty cases. As discussed above, zealous representation of those facing the death penalty requires dramatically more and different resources, time, and skills than any other type of case. LOPD currently does not have a structure in place for capital defense.

It is also critical to remember that the public defense costs are only one small part of the total state expenditures that would be required, as the courts, DAs, law enforcement, laboratory analysts, and importantly corrections budgets are all certain to be significantly impacted as well.

SIGNIFICANT ISSUES

- 1) There is a strong possibility that the death penalty scheme in HB 77 is unconstitutional. If it were enacted, it is likely that defendants would quickly challenge it under the New Mexico Constitution. In *Fry*, after the 2009 repeal of the death penalty, two defendants remaining on death row challenged their sentences on a variety of constitutional grounds, including cruel and unusual punishment and equal protection. *Fry*, 2019-NMSC-013, ¶ 8 (plurality opinion). The New Mexico Supreme Court avoided the question of the death penalty's constitutionality, but suggested that the Court harbored significant doubts about whether any death penalty scheme was constitutionally workable.

The *Fry* plurality opinion wrote that the 2009 repeal of the death penalty “represents a profound change in the legislative attitude toward the death penalty and a shift in the standards of decency” and quoted a case that held “that capital punishment no longer comports with contemporary standards of decency.” *Id.* ¶ 27. Another justice, writing separately, would have found the whole scheme unconstitutional: “It is difficult to imagine a justification that would find constitutional the disproportional manner in which New Mexico has administered the death penalty under the 1979 Act.” *Id.* ¶ 137 (Daniels, J., concurring in the judgment). HB 77 would reinstate the same death penalty regime that raised these constitutional concerns in *Fry*.

- 2) One sentence in Section 7 of the bill is confusing enough that it would be likely to give rise to litigation. “Where a 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 shall sentence the defendant to [LWOP].” This suggests that without a unanimous jury finding in the sentencing phase, the court defaults to a sentence of LWOP. This is inconsistent with the rest of the bill. In Section 3(A), in order to impose LWOP, the bill requires the jury to find an aggravating circumstance beyond a reasonable doubt. The default sentence is ordinary life imprisonment with the possibility of parole after 30 years; both death and LWOP are supposed to require additional, unanimous jury findings beyond a reasonable doubt. (This is the case under current law—the default sentence is ordinary life imprisonment, with the possibility of parole after 30 years, *unless* the jury finds an aggravating circumstance.)
- 3) Section 9 of the bill provides for automatic Supreme Court review of cases with death sentences, and Section 9(C) specifies circumstances in which the Court should not allow imposition of a death sentence. These circumstances are extremely fact-specific, some limited to the facts of the case (“the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor”) and some requiring consideration of other cases as well (“the sentence of death is excessive or disproportionate to the penalty imposed in similar cases”). There is no provision in HB 77 for raising these concerns in the district court or for creating a factual record for the Supreme Court to review. Instead, it appears that the Supreme Court is supposed to engage in factfinding—again, it is unclear how. In *Fry*, the Supreme Court expressed concern that there was “no central repository of information regarding death penalty cases” and no mechanism for collecting case records to assess proportionality. *See Fry*, 2019-NMSC-013, ¶ 39 (plurality opinion).
- 4) Section 11 of the bill specifies that the date of execution should be set 60-90 days from the date of judgment. The section says nothing about staying the judgment for appeal or for post-conviction habeas litigation. It is not unusual for the post-trial proceedings in capital cases to take many years. (For example, the petitioner in *Fry* lost his direct appeal in 2005, and the petitioner in the companion case lost his direct appeal in 1999, before both won habeas relief in the Supreme Court in 2019.) Allowing time for habeas proceedings is particularly vital, because habeas proceedings—unlike direct appeals—provide an opportunity for additional investigation and presentation of newly discovered evidence. As written, the bill does not provide for stays or tell the district court or the department of corrections how to account for post-trial litigation.
- 5) Sections 14 through 18 discuss stays of execution when a defendant is insane or pregnant. The bill does not define “insane.” Moreover, although it allows the warden to trigger an inquiry into insanity or pregnancy, it provides no mechanism for the defendant or her lawyer

to raise these issues.

- 6) Section 19 addresses a situation in which a death sentence is in place but has not been carried out. In this situation, the district attorney may petition the district court where the defendant was convicted. The district court *must* bring in the defendant “and, if no legal reason exists against the execution of the judgment,” the district court *must* order the execution “at a specified time.” The bill says that there *is no appeal available* from this order.

This section raises constitutional concerns. By eliminating any discretion from the district court and then eliminating any right of appeal, this section undermines the defendant’s right to due process of law. If the district court makes an error—for example, ignoring that there is a pending petition for habeas corpus—this provision means that the defendant cannot appeal the order to correct the error. It is a recipe for premature and wrongful executions.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, analyst is unaware if it has been drawn pursuant to a special message of the Governor, and it was not vetoed following the previous regular session.

HB 77 specifies that executions are to be carried out by lethal injection. Not only have lethal injection protocols been challenged as cruel and unusual punishment, but there is now a shortage of execution drugs in the United States. *See* Anna Meisel & Melanie Stewart-Smith, *Death Row: The Secret Hunt for Lethal Drugs Used in US Executions*, BBC News (Oct. 21, 2023), <https://www.bbc.com/news/world-us-canada-67150566>.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. LWOP will be available as a penalty for capital crimes with aggravating circumstances.

AMENDMENTS