

LFC Requester:	Austin Davidson
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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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 1/19/24
Bill No: HB 109

Sponsor: Rep. Stefani Lord
Short Title: Crimes Punishable by Death

Agency Name and Code AOC
Number: 218
Person Writing Kathleen Sabo
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
None	None	Rec.	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)

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

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Relates to HB 77, reinstating the death penalty. Conflicts with HB 116, also amending Section 30-52-1 NMSA 1978, governing human trafficking. Conflicts with HB 46 and HB 110, also amending Section 31-19-15 NMSA 1978, governing sentencing authority.

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 109 amends statutory sections within the Criminal Code and Chapter 31 to provide death as a punishment for aggravated criminal sexual penetration, criminal sexual penetration of a child and human sexual trafficking against a victim under 18, as follows:

- Amends Section 30-9-11(D) NMSA 1978 to remove the requirement that criminal sexual penetration be perpetrated on a child under 13.
- Amends Section 30-9-11 NMSA 1978 to add Subsection E, providing that criminal sexual penetration of a child in the first degree consists of all criminal sexual penetration perpetrated on a child under 18 and provides a penalty of first-degree felony for criminal sexual penetration of a child. Provides the following exceptions:
 - Fourth degree felony when the child is 13 to 16 and the perpetrator is at least 18 years of age and is at least 4 years older than the child and not the spouse of that child.
 - First degree felony for criminal sexual penetration of a child when the perpetrator is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and is at least 18 and is at least 4 years older than the child and not the spouse of that child.
- Amends Section 30-9-11(F) NMSA 1978 to remove the option that criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated by the use of force or coercion on a child 13 to 18. Clarifies that whoever commits criminal sexual penetration in the second degree is guilty of a second-degree felony.
- Amends Section 30-9-11 NMSA 1978 to remove Subsection G, governing criminal sexual penetration in the fourth degree.
- Amends Section 30-52-1 NMSA 1978, governing human trafficking, to add Subsection D, providing that whoever commits human trafficking if the conduct is commercial sexual activity and the victim is under the age of 18 is guilty of a first-degree felony for human sexual trafficking against a victim under the age of 18.
- Amends Section 1-18-15 NMSA 1978 to
 - Increase the penalty for first degree felony for aggravated criminal sexual

- penetration from life imprisonment to death
 - Add a penalty of death for first degree felony for criminal sexual penetration of a child
 - Add a penalty of death for first degree felony for human sexual trafficking against a victim under 18
- Amends Section 1-18-15(E) NMSA 1978 to increase or add the following fines that a court may impose:
 - For a first-degree felony for aggravated criminal sexual penetration, increases the permitted fine from \$17,500 to \$100,000
 - For a first-degree felony for criminal sexual penetration of a child, permits a fine of \$100,000
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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 commenced prosecutions, and appeals from convictions, as well as challenges to the constitutionality of the law. 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 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 15th 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 to 2023’s HB 77, 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) It can be anticipated that a law providing for the death penalty will be challenged as cruel and unusual punishment and therefore unconstitutional under the 8th amendment of the U.S. Constitution.

In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), Justice Kennedy, writing for the majority, opined that, "As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken." Justice Kennedy further noted

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," *Coker*, 433 U. S., at 598 (plurality opinion), they cannot be compared to murder in their "severity and irrevocability." *Ibid*.

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. See Inter-University Consortium for Political and Social Research, National Incident-Based Reporting System, 2005, Study No. 4720, <http://www.icpsr.umich.edu> (as visited June 12, 2008, and available in Clerk of Court's case file). Although we have no reliable statistics on convictions for child rape, we can surmise that, each year, there are hundreds, or more, of these convictions just in jurisdictions that permit capital punishment. Cf. Brief for Louisiana Association of Criminal Defense Lawyers et al. as *Amici Curiae* 1–2, and n. 2 (noting that there are now

at least 70 capital rape indictments pending in Louisiana and estimating the actual number to be over 100). As a result of existing rules, see generally *Godfrey*, 446 U. S., at 428–433 (plurality opinion), only 2.2% of convicted first-degree murderers are sentenced to death, see Blume, Eisenberg, & Wells, Explaining Death Row’s Population and Racial Composition, 1 J. of Empirical Legal Studies 165, 171 (2004). But under respondent’s approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty.

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

Relates to HB 77, reinstating the death penalty. Conflicts with HB 116, also amending Section 30-52-1 NMSA 1978, governing human trafficking. Conflicts with HB 46 and HB 110, also amending Section 31-19-15 NMSA 1978, governing sentencing authority.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS