

LFC Requester: \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

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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 109-280

**Sponsor:** Reps. Stefani Lord, Harlan  
Vincent, & John Block  
**Short Title:** Crimes Punishable by Death

**Agency Name and Code Number:** 280-LOPD  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(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)**

	<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>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB 77 (Reinstate Death Penalty), SB 73 (Death Penalty for Murdering Police)

Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: HB 109 would set the penalty as “death” for almost any criminal sexual penetration of a child or sex trafficking of a child. The death penalty does not currently exist for *any crime* in New Mexico; as it was repealed by HB 285 in 2009. This bill appears to operate in conjunction with HB 77, which would reinstate the death penalty for certain first-degree murders, by adding to the list of crimes punishable by death.

**Section 1** would amend Section 30-9-11, the criminal sexual penetration (CSP) statute. From a drafting perspective, this is a complicated statute already. Under current law, there are four provisions that address CSP of a minor:

- 30-9-11(C) defines “aggravated criminal sexual penetration,” which is CSP of a child under 13 “with an intent to kill or with a depraved mind regardless of human life.”
- 30-9-11(D)(1) defines first-degree CSP to include any CSP of a child under 13.
- 30-9-11(E)(1) defines second-degree CSP to include any CSP “committed by the use of force or coercion” on a child at least 13 but younger than 18.
- 30-9-11(G) defines fourth-degree CSP to include:
  - CSP of a child who is at least 13 but younger than 16—but *only* if the defendant is at least 18, at least 4 years older than the child, and not married to the child, and
  - CSP of a child at least 13 but younger than 18, if the defendant is a school employee (and is at least 18, at least 4 years older than the child, and not married to the child).

Section 1 of HB 109 would eliminate all of these provisions except for aggravated CSP in Section 30-9-11(C). It would replace them with a new crime of “criminal sexual penetration of a child in the first degree,” which would include *all* CSP of a child under 18.

The bill would retain the fourth-degree CSP of a child 13 to 16 years of age where the defendant is at least 18, at least 4 years older than the child, and not the spouse of the child.

**Section 2** would amend Section 30-52-1, the human trafficking statute, to provide that “if the conduct is commercial sexual activity” and the victim is under 18, the crime is “a first degree felony for human sexual trafficking against a victim under the age of eighteen.” Currently, if the victim is 16-17, human trafficking a third-degree felony; it is a second- or first-degree

felony for younger children.

**Section 3** would amend Section 31-18-15, the statute defining noncapital felonies. It would impose a sentence of death for 1) aggravated CSP, 2) the newly defined crime of CSP of a child, and 3) the newly defined crime of human sexual trafficking of a victim under the age of 18.

It would also increase the monetary fines for aggravated CSP and the new “first degree felony for CSP of a child” to \$100,000.

## 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](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://lailluminator.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**

HB 109 would raise serious constitutional and logistical concerns in several ways. If it were enacted, defendants would immediately challenge its constitutionality.

- 1) New Mexico does not currently have a legal or practical structure in place for imposing the death penalty. To comply with the federal constitution, death penalty regimes must follow specific procedures, including bifurcated proceedings (separate phases for determining guilt and penalty) and automatic appeal with specific guidance for the appellate courts. *See Gregg v. Georgia*, 428 U.S. 153, 190-92, 198-99 (1976) (plurality opinion); *Fry v. Lopez*, 2019-NMSC-013, ¶¶ 15-17. This bill would impose the death penalty without creating any statutory framework to go with it, virtually guaranteeing both constitutional violations and practical problems.
- 2) HB 109 appears to impose a mandatory death penalty, without any provision for the jury to find aggravating factors, considering mitigating factors, or show mercy to a defendant. Imposing a mandatory death penalty for a broad range of crimes is unconstitutional. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding unconstitutional a mandatory death penalty statute); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same); *State*

*v. Rondeau*, 1976-NMSC-044, 89 N.M. 408 (holding New Mexico’s mandatory death penalty unconstitutional in light of *Woodson* and *Roberts*).

- 3) HB 109 imposes the death penalty for crimes that do not result in death. This is unconstitutional under *Kennedy v. Louisiana*, 554 U.S. 407 (2008), which specifically held that the death penalty for rape of a child violated the Eighth Amendment’s prohibition on cruel and unusual punishment. “As it relates to crimes against individuals . . . the death penalty should not be expanded to instances where the victim’s life was not taken.” *Id.* at 437.
- 4) Even if there were some way around these other constitutional problems, *any* death penalty regime might well violate 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). It is very possible that *no* death penalty system would pass constitutional muster in New Mexico.

- 5) The bill makes no provision for any potential lesser penalties for the crimes it creates. If HB 109 were passed and the State were *not* permitted to apply the death penalty—for example, because a court determined it was unconstitutional on its face, or as applied to particular defendants—it is not clear what penalty courts could impose.
- 6) The proposed amendments to Section 30-9-11 (the CSP statute) would have extreme consequences, some of which are likely unintentional.
  - It would take crimes that are currently punished by a range of penalties—from 1.5 years in prison for fourth-degree CSP to life in prison for aggravated CSP—and impose the death penalty for all of them, flattening distinctions between less-serious and more-serious conduct.
  - The bill would do the same for the human trafficking statute, imposing the death penalty for conduct that is currently punishable as a third-, second-, or first-degree felony depending on the age of the child.
  - Instead of criminalizing specific CSP of children, the bill defines *all* sexual penetration of a child as a death-eligible offense and then creates a carve-out for statutory rape, currently defined as fourth-degree CSP. But it does not exempt sex that is currently *lawful*. Under HB 109, consensual sexual activity between an adult and a 16- or 17-year-old, which is not currently a crime, would become “criminal sexual penetration of a child in the first degree,” punishable by death.

The same would be true for consensual sex between two teenagers under the age of 18, or teenagers less than four years apart in age, or a teenager and his spouse.

## **PERFORMANCE IMPLICATIONS**

## **ADMINISTRATIVE IMPLICATIONS**

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

Two other bills introduced so far this session would also create a death penalty in New Mexico: HB 77, which would implement a comprehensive death penalty scheme, and SB 73, which would impose the death penalty for the murder of police officers. Both bills raise their own constitutional problems. Neither directly conflicts with this bill.

## **TECHNICAL 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.

## **OTHER SUBSTANTIVE ISSUES**

It is unclear why HB 109 attempts to impose the death penalty by amending Section 31-18-15, which specifically governs sentencing for non-capital felonies. New Mexico also has *capital* felonies (currently punishable only by life imprisonment or life without the possibility of parole), and that sentencing authority is contained in Section 31-18-14. Any change to capital punishment in New Mexico should amend the capital sentencing statute, not the non-capital sentencing statute.

## **ALTERNATIVES**

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

Status quo.

## **AMENDMENTS**