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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/02/11

SPONSOR     Kintigh     LAST UPDATED \_\_\_\_\_ HB     371    

SHORT TITLE     Reinstating the Death Penalty     SB \_\_\_\_\_

ANALYST     Sanchez, C.    

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	\$0.0	\$50.0+	\$50.0+	\$100.0+	Nonrecurring	Jury/Witness, and General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 533

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
 Public Defender Department (PDD)  
 New Mexico Corrections Department (NMCD)  
 Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

This bill would reinstate the death penalty. For capital felonies (first degree murder), the punishment for a convicted offender would be life imprisonment or death. Life imprisonment is defined as a thirty year sentence (no reductions for "good time") before becoming eligible for (but not guaranteed) parole. Convicted offenders under the age of 18 (at the time of the commission of the crime) could only receive a life sentence. Capital sentencing deliberations

would focus on statutorily defined aggravating circumstances, statutorily defined mitigating circumstances, and any other mitigating circumstances. The trial process is bifurcated, with the punishment phase being held separately by the judge or jury only if the defendant is first found guilty of a capital felony by the same judge or jury. If a defendant pleads guilty to a capital felony, the judge will conduct the penalty phase hearing unless the defendant requests a jury. Juries hearing the penalty phases must be instructed by the judge that life imprisonment means a full 30 year sentence before parole eligibility. In order to impose death, a jury must unanimously find beyond reasonable doubt, must specify at least one of the delineated aggravating circumstances, and must unanimously specify death. In order to impose the death penalty, a judge must unanimously find beyond reasonable doubt and must specify at least one of the delineated aggravating circumstances. Otherwise, only a life sentence can be imposed by the relevant judge or jury.

The bill would also add an aggravating circumstance (to the current list of aggravating circumstances) of the victim being under 18 year of age. The bill would add a designated list of mitigating circumstances, such as no significant prior criminal history, the defendant was under duress, etc. The bill also provides for an automatic review by the New Mexico Supreme Court of the conviction and death sentence. A reversal of the sentencing proceeding does not invalidate the underlying conviction. Mentally retarded individuals are specifically excluded from the death penalty.

If the defendant is sentenced to death, and the warden of the penitentiary has good reason to believe that the defendant is insane, the warden must notify the relevant district attorney for further action (to file a petition, after which a hearing is held). If after hearing the defendant is found sane, the warden must proceed to execute the death sentence judgment as specified in the warrant. If the defendant is found insane, the defendant is to be taken to the New Mexico Behavioral Health Institute in Las Vegas for safe confinement until defendant's sanity or reason is restored. If reason is restored, the warden must then execute the defendant pursuant to the Governor's issued warrant. A similar suspension of execution of the warrant occurs if it is determined that a female defendant sentenced to death is pregnant, allowing the pregnant Defendant to give birth before being executed.

Death is to be effectuated by lethal injection. Finally, the bill delineates who may attend or witness the execution of the relevant Defendant.

HB 371 would apply to crimes committed on or after July 1, 2011.

## **FISCAL IMPLICATIONS**

According to the Public Defender Department, reinstating the death penalty would cost New Mexico millions of dollars. The State Bar Task Force on the Administration of the Death Penalty in New Mexico Final Report, completed in 2004, outlines exactly why death penalty cases are so costly: These cases require heightened standards for defense counsel and at least two highly qualified defense attorneys at each stage of proceedings. They require extensive trial level litigation as well as constitutionally and statutorily mandated appeal. Unlike any other criminal trial, these cases demand that a certified court reporter transcribe all proceedings. The survivors of the victim should be accorded particular respect. Jury selection is a long, arduous process that potentially touches on the constitutional and religious rights of New Mexicans, and costs at least four times as much as a non-death first-degree murder case. Due to changes in federal habeas

corpus law, these cases must be long and thoroughly litigated in state court habeas proceedings as well. The Task Force ultimately recognized and recommended substantial changes to the way death penalty cases are prosecuted and defended in New Mexico, which may further increase costs.

Although a study has ever been done in New Mexico on the total costs of a death penalty case to the state (including the prosecution, the public defender, and the extensive drain on court resources.), a recent Duke University study done on North Carolina's costs found that the death penalty costs North Carolina \$2.16 million dollars per execution over a system that imposes life imprisonment.

According to the PDD, for three defendants in the Santa Rosa death-eligible prison killing, over a nine-year period, this department spent almost 1 million dollars on expert costs alone. At the height of the billing requirements, a single death eligible case can cost the Public Defender Department 1% of its budget. No other kind of criminal case comes remotely close to this cost per case, or per defendant. Therefore, HB 371 would have a disproportionate impact on the PDD's budget, as well as that of whatever prosecuting agency was affected (AG or individual District Attorney's office).

The PDD believes New Mexico does not receive much return on its death penalty investment. Fewer than half of the cases in which the prosecutor seeks the death penalty end in a death sentence. And, according to the National Bureau of Justice Statistics, 68% of all these convictions are overturned on appeal—the highest overturn rate in the United States. Therefore, less than one-fourth of all death penalty prosecutions ultimately result in a defendant going to death row in New Mexico. Finally, New Mexico's actual execution rate is even lower than the 12% of all convicted and sentenced murderers ultimately executed, nationally. Taking this data to its logical conclusion, there is only a 4.5% chance that any multi-million dollar death penalty prosecution will ever end in an execution in New Mexico.

According to the Administrative Office of the Courts, Moreover, to assemble a jury for a death penalty case, the district court will summon as many as one thousand (1,000) people. An estimate of what a death penalty case cost for the jury and witness fee fund is approximately \$20,000-\$25,000. In contrast, a non-death penalty murder case cost approximately \$7,000-\$8,000.

New Mexico has first-hand experience with the costs of death penalty litigation. In State v. Young, 143 N.M. 1, 4-5, 172 P.3d 138 (2007), the New Mexico Supreme Court found “it is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases.” The Supreme Court discusses why such cases cost significantly more than any other type of criminal case. In Young, the Legislature had appropriated \$870,000 for defense expert witnesses, as well as more than \$300,000 for defense attorneys, who contended that at least \$200,000 per defense team was needed to provide constitutionally adequate representation. The case does not detail the prosecution costs. The Supreme Court held that, unless additional funds were appropriated for the defense teams, the death penalty could not be imposed. The Legislature did not appropriate the funds and, when the case returned to district court, the death penalty was abandoned.

It is difficult to calculate what additional resources would go to death penalty cases, in part because it is impossible to know how many cases would be brought. A 2009 report from the Death Penalty Information Center analyzes, in light of “reconsidering the death penalty in a time of economic crisis” the costs of death penalty litigation, their causes, and whether costs could be reduced. The report is at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>

The bill could be very costly for the Corrections Department (NMCD) if the department is forced to transport defendants found insane to the New Mexico Behavioral Institute as required by this bill. NMCD has the duty to supervise its own prisoners, including any Defendant sentenced to death. While the New Mexico Behavioral Institute in Las Vegas (Institute) does have a security fence, it is not a prison. The Institute has no statutory authority to operate as a jail or prison. It has little or no training or experience in housing or supervising prisoners, much less maximum custody or dangerous prisoners, and its security level is far below what is available in NMCD prison facilities. Therefore, if the insane Defendant had to be transported to the Institute, NMCD would be required for safety and security reasons to have six NMCD correctional officers (two officers per shift) supervise that Defendant or prisoner on a 24 hours per day, 7 days per week basis. NMCD, not the Institute, would be liable if this Defendant escaped or injured a staff member or another resident while residing in the Institute.

It would be very expensive for NMCD to have to constantly monitor or supervise such a Defendant while he or she resided in the Institute. There could also be considerable overtime expenses incurred because NMCD has no prison facilities located in Las Vegas. Further, NMCD currently has almost a 19% staff vacancy rate for correctional officers. Having six full time officers (two officers on each of three shifts) supervise only one inmate would only exacerbate the staffing shortage. Also, this would obviously be an extremely inefficient use of NMCD’s existing resources and of taxpayer monies. While it would be very inefficient to utilize six officers to supervise only one inmate, it would be essential in order to ensure the safety and security of the staff and other residents at the Institute.

## **SIGNIFICANT ISSUES**

According to the AOC, HB 371 appears to adapt the proposed return of capital sentencing to current capital litigation case law, such as for suspending execution for the mentally ill and pregnant women. There are provisions that bar a “court or officer” other than the governor from suspending the execution of the death sentence (Section 12) and providing that there is no appeal from an order fixing the time for execution of the death sentence (Section 18). In addition to the usual array of complex appellate and habeas corpus litigation issues that are endemic to death penalty cases, the enactment of a new statute is certain to invite many challenges to provisions in the new statute that vary from provisions that had been litigated under the statute that was in place prior to July 1, 2009. It is not possible to accurately estimate the number and cost of these statutory challenges, or the additional resources they would require of the courts.

According to the Administrative of District Attorneys, death penalty cases are typically in the judicial system for years and, consequently, they use resources of publicly funded agencies like the courts, the Public Defender’s Office, the District Attorney’s Offices, and the Attorney General’s Office. In addition, those sentenced to death are incarcerated for years, although arguably less than those sentenced to life without parole.

According to the Correction Department (NMCD), HB 371 could deter current NMCD inmates from killing NMCD staff and inmates in the future in order to avoid the death penalty. Murdering prison staff and inmates are designated aggravating circumstance in the bill.

As of April 1, 2008, the Death Penalty was authorized by 37 states, the Federal Government, and the U.S. Military. Those jurisdictions without the Death Penalty include 13 states and the District of Columbia. (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin).

Capital punishment was suspended in the United States from 1972 through 1976 primarily as a result of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). In this case, the court found the imposition of the death penalty in a consolidated group of cases to be unconstitutional, on the grounds of cruel and unusual punishment in violation of the eighth amendment to the United States Constitution.

Capital punishment is often the subject of controversy. Opponents of the death penalty argue that it has led to the execution of innocent people, that life imprisonment is an effective and less expensive substitute, that it discriminates against minorities and the poor, and that it violates the criminal's right to life. Supporters believe that the penalty is justified for murderers by the principle of retribution, that life imprisonment is not an equally effective deterrent, and that the death penalty affirms the right to life by punishing those who violate it in the strictest form.

## **PERFORMANCE IMPLICATIONS**

According to the Public Defender, there is currently only one unit of the Public Defender Department that operates statewide and is still called the “Capital Crimes Unit”. Pulling that unit off of its current workload (first degree murders statewide, as well as “shaken baby” and other ‘medical’ cases requiring extensive pre-trial motions and what would be considered by most criminal defense attorneys as “civil” discovery practice) would then put all of these other serious cases back onto the various districts and/or expensed to contracts, neither of which units can handle any increase in serious cases. In one office, for example, the District Defender was in trial for approximately six weeks continuously last summer on serious cases. According to the PDD, there simply is no stretch left in the Department to handle an increase, especially in serious felony cases. We have also left a number of highly paid attorney positions vacant, and the department anticipates no monies to refill those positions until general fund revenues recover.

## **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. Under the prior law, death penalty cases always drained resources normally directed to the core functions of the agencies. And in the thirty years under the old law, all this commitment of time and resources resulted in exactly one execution.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Duplicates SB 533

**OTHER SUBSTANTIVE ISSUES**

According to the PDD, given the severe budget crisis currently facing the state, it would be unfair to the taxpayers to restore a rarely-imposed penalty which would require the commitment of millions of tax dollars in the coming years. Enhanced requirements of the Supreme Court of the United States, authoritative guidelines of the American Bar Association, and standards and requirements of New Mexico statutes and rules all mean that in order to ensure adequate services to the accused in death penalty cases, the Department would have move immediately to fill glaring vacancies in the Capital Crimes Unit (2 of 6 attorneys, 1 of 1 in-house investigator) and plan for substantially greater costs per annum in the funding essential ancillary services, as for forensic scientists (DNA experts, forensic pathologists), psychologists, mitigation experts, crime scene reconstructionists, 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 “farm out” about half the death penalty defense work to private contract 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 restoration of the death penalty in the range of \$750,000, or three quarters of a million dollars. Again, this commitment must be seen in the context of the fact that from 1978 to 2009 – the duration of the “modern” New Mexico death penalty statute – exactly one man was actually executed.

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

The death penalty will not be reinstated in New Mexico.

CS/svb