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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/12

SPONSOR Kintigh LAST UPDATED _____ HJR 6

SHORT TITLE Death Penalty for Certain Crimes SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	Substantial*	Substantial*	Substantial*	Recurring	General Fund; Jury and Witness Fee Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

Conflicts with HB 237 and SB 59

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorney (AODA)
 Attorney General's Office (AGO)
 Public Defender Department (PDD)
 Parole Board (PB)
 New Mexico Corrections Department (NMCD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Joint Resolution 6, if approved by the voters, would re-impose the death penalty. It would amend Article XX of the New Mexico Constitution to make the imposition of the death penalty for murder in the first degree mandatory when a jury finds, beyond a reasonable doubt that:

- (1) the victim was a peace officer who was acting in the lawful discharge of an official duty when murdered;
- (2) the victim was a person under 18 years of age;

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- (3) the murder was committed with intent to kill in the commission of or attempt to commit kidnapping or criminal sexual penetration;
- (4) the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;
- (5) while incarcerated in a prison or jail in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in, employed by or lawfully on the premises of the prison or jail;
- (6) the capital felony was committed for hire; or
- (7) the capital felony was murder of a witness to a crime or a person likely to be a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding or in retaliation for the victim having testified in any criminal proceeding.

Additionally, HJR 6 would authorize the legislature to impose the death penalty for other crimes in future legislation, and would require federal procedural laws, rules and jury instructions for federal capital offense cases be applied in all cases in which the death penalty may be imposed.

FISCAL IMPLICATIONS

The SOS reports that in accordance with Section 1-16-4 NMSA 1978, upon receipt of the certified proposed constitutional amendment or other question from the Secretary of State, the county clerk shall include it in the proclamation to be issued and shall publish the full text of each proposed Constitutional amendment or other question in accordance with the constitution of New Mexico.

Although the county clerk includes the proposed amendments in the clerk's proclamation, it is the responsibility of the State to pay for the costs associated with the publication per Section 1-16-13 NMSA 1978, including printing samples of the text of each constitutional amendment in both Spanish and English in an amount equal to ten percent of the registered voters of the state. There are currently 1.7 million registered voters in the state. Voters whose election mail is returned as undeliverable will be sent the proper notice under federal law in 2012, and if they do not vote in the next two federal elections, may be purged in 2015. Under these timelines, the voter roll is expected to increase until the purge in 2015.

The SOS reports that in 2010, the publication cost was \$520,000 for 5 constitutional amendments, or approximately \$104,000 per amendment. Although the SOS is continually seeking ways to reduce publication costs, it believes the 2010 figure is a reasonable projection for 2012 costs, given the increasing number of voter registrations.

In addition, a number of agencies report substantial additional costs in the event the voters approve the re-imposition of the death penalty. Of note, the PDD first advises that mandatory death penalty schemes are unconstitutional. See Significant Issues, below. The PDD suggests that the fiscal impact of HJR 6 as drafted would be determined by how quickly the amendment and any enabling laws were struck down, which would include the costs incurred for any of these costly prosecutions brought before such a ruling as well as costs incurred by the state in any litigation brought challenging this amendment.

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As to costs that could be anticipated in the event a constitutionally valid death penalty was restored, the PDD reports:

The fiscal implications of a constitutionally-valid restoration of the death penalty would, on the other hand, be large. The death penalty was repealed just three years ago in significant degree because of the great expense involved in pursuing death penalty prosecutions. 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 to move immediately to fill glaring vacancies in the Capital Crimes Unit 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.

Similarly, the AOC reports:

Passage of this resolution, if it were to be adopted by the voters, would mean that jury trials on death penalty cases would begin anew. Death penalty cases take up a considerable amount of judicial time because the district courts have to conduct not only a trial but a sentencing phase as well. As the stakes cannot be any higher, these can be some of the most complex and time-consuming cases on a court’s docket.

Additionally, as the AOC reports generally, the fiscal impact on the courts would be proportional to the enforcement of this law and commenced prosecutions. 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. Although these costs cannot be quantified at this time, the AOC points to one cost in particular:

To assemble a jury for a death case, the district court will summon as many 1,000 people, virtually all of whom are entitled to jury pay. It is estimated that the 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 costs approximately \$7,000-\$8,000. This money comes out of the Jury and Witness Fund, a special fund administered by this agency. In the past several years this agency has had to request loans from the State Board of Finance to pay for jury and witness costs in the late months of each fiscal year. If death penalty cases are being prosecuted around the state, the expectation will be that the Fund will be even less sufficient to meet the needs of the rest of the state in a given year.

In the same vein, the AODA comments that death penalty cases have proven to be very expensive and time-consuming because of several factors including: (1) the very nature of the penalty sought, (2) the procedural and legal requirements imposed in an attempt to minimize the chance of error; and (3) the fact that almost all such cases require the appointment of a public defender or public defenders or contract attorneys all paid for by the State, and who are uniformly committed to providing the most zealous advocacy possible in their client's defense. Consequently, the AODA observes, death penalty cases consume an inordinate amount of resources of both time and money of the District Attorney's Offices, the Attorney General's Office, the Public Defender's office and the courts.

In contrast, the DPS suggests there may be positive implications for it and the state as a whole if the reinstatement of the death penalty provides a deterrent effect and reduces the number of individuals murdered, including peace officers and correctional employees killed in the line of duty. Finally, the NMCD and PB anticipate no fiscal impact during the three year period covered by the table above.

In light of all of these analyses, while the overall cost to the state cannot be quantified, it appears it could be substantial.

SIGNIFICANT ISSUES

The PDD advises that HJR 6:

proposes the submission of a constitutional amendment requiring, in defiance of the United States Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and its progeny, the death penalty as a mandatory sentence for certain first degree murders. In *Woodson*, the United States Supreme Court held that mandatory death-penalty schemes violate the constitution of the United States of America. There is no question that the proposed amendment would be struck down by the federal courts, and any death sentences handed down in New Mexico would be reversed.

More generally, the NMCD suggests that imposing the death penalty on prisoners who murder prison staff would likely deter such crimes and enhance the safety and security of prison staff. The PB echoes that position, commenting that a potential death penalty may also enhance parole board safety.

PERFORMANCE IMPLICATIONS

The AGO may be involved in any proceedings challenging the constitutionality of the proposed mandatory imposition of the death penalty. Additionally, the requirement that federal procedural laws, rules and jury instructions be applied in any death penalty cases would also impact performance by the courts, the AODA, the PDD and the AGO, estimated by the PDD to be extensive.

CONFLICT

HJR 6 conflicts with SB 237, which provides for imposition of the death penalty under a different scheme. HJR 6 also conflicts with SB 59 to the extent SB 59 would impose a life sentence upon conviction of murder of a child under 13 under certain circumstances.

OTHER SUBSTANTIVE ISSUES

As to the provision requiring application of federal criminal procedural laws, rules and jury instructions for federal capital offense cases, both the AOC and AODA note that mandate contradicts constitutional provisions governing the conduct of court proceedings. The AODA points to Article VI, sections 1 and 3 of the New Mexico Constitution, which grant the Supreme Court the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. As the AOC explains:

The resolution would require state district courts to apply federal procedure and jury instructions to death penalty cases. Ordinarily, procedures and jury instructions are the sole and non-delegable prerogative of the New Mexico Supreme Court. The basis for this prerogative is, however, the New Mexico Constitution's division of duties among the three independent branches of government. If the Constitution is amended, then presumably this prerogative can be limited to the extent that the amendment specifically requires the courts to conduct death penalty cases in a particular way.

In addition, the AGO returns to the fiscal impact of death penalty cases, advising that the economics of death penalty litigation have developed into constitutional issues. In State v. Young, 143 N.M. 1, 2007 NMSC 58, 172 P.3d 138 (2007), the New Mexico Supreme Court temporarily stayed the death penalty prosecution of defendants charged with first degree murder, finding that inadequate state funding of their defense would lead to violation of their Sixth Amendment right to effective assistance of counsel. (Ultimately, the AGO notes, financial issues were resolved and prosecution by the AGO resulted in convictions of first degree felony murder and seven other felonies.)

The DPS notes that a constitutional amendment re-imposing the death penalty would allow voters to determine whether the death penalty should be imposed in New Mexico.

MD/svb