

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

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: SB 73-280

Sponsor: Sen. Craig Brandt
Short Title: Death Penalty for Murdering Police

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)

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

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB 77 (Reinstate Death Penalty); HB 109 (Crimes Punishable by Death)

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 73 would impose the death penalty, which has not existed since the passage of HB 285 in 2009, for the murder of police officers. It would make two substantive changes to the law.

Section 1 of the bill 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 life without the possibility of parole (LWOP). SB 73 would mandate that the defendant instead be sentenced to death if the jury finds either of two aggravating circumstances:

- The victim was a peace officer acting in the lawful discharge of his duty (which is currently an aggravating circumstance eligible for LWOP), or
- The victim was a peace officer who was *not* acting in the lawful discharge of official duty, but was targeted because of his status as a peace officer (which is not currently an aggravating circumstance eligible for LWOP).

Section 2 would add this second category to the list of aggravating circumstances in Section 31-20A-5.

FISCAL IMPLICATIONS

The creation of a death penalty fifteen (15) years after its repeal in New Mexico would have significant fiscal implications 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 relevant to defenses at the guilt phase and sentencing phase. *See* 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) 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) SB 73 would make the death penalty mandatory if a jury found aggravated circumstances. The bill contains no system for the jury to consider mitigating circumstances or to show mercy to a defendant, nor would it ever allow for the imposition of LWOP as a lesser penalty for murder of a police officer. A mandatory death penalty would raise serious concerns under both the state and federal constitutions, and if this bill were enacted and used, defendants would immediately challenge its constitutionality. *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) Even if SB 73 were amended to include the type of death penalty regime used in other states, commonly used death penalty systems 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. Defendants would quickly challenge SB 73 on these grounds as well.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 73 conflicts with HB 77, which would implement a comprehensive death penalty scheme similar to the one repealed in 2009 (and would raise its own constitutional concerns). Both bills would amend Section 31-20A-2, the capital sentencing authority, and Section 31-20A-5, the list of aggravating circumstances, but they would do so differently. It is not clear how SB 73's mandatory death penalty could be reconciled with the scheme in HB 77.

HB 109 also would create a death penalty in New Mexico. It does not appear to directly conflict with SB 73.

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

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS