

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2017 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)

*and*

[DFA@STATE.NM.US](mailto:DFA@STATE.NM.US)

*{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:*

<b>Original</b>	<input checked="" type="checkbox"/>	<b>Amendment</b>	<input type="checkbox"/>		<b>Date</b>	
<b>Correction</b>	<input type="checkbox"/>	<b>Substitute</b>	<input type="checkbox"/>		<b>Bill No:</b>	HB72
<b>Sponsor:</b>	Monica Youngblood			<b>Agency Code:</b>	264	
<b>Short</b>	Reinstate Death Penalty			<b>Person Writing</b>	Gail MacQuesten	
<b>Title:</b>				<b>Phone:</b>	310 1723	
				<b>Email</b>	gailmacquesten@gmail.com	

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		
0	0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Unknown	Unknown	Unknown	Unknown	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB54  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

The bill reinstates the death penalty for capital felonies with specific aggravating circumstances, sets out a sentencing procedure for capital felony cases, provides a procedure for review of such sentences, and sets out a procedure for carrying out the death penalty. In addition, the bill addresses a number of special circumstances.

Offenses and defendants eligible for the death penalty.

HB72 provides that the death penalty may be imposed in a capital felony case only when the jury or sentencing court finds beyond a reasonable doubt that one or more of the following aggravated circumstances exists:

1. The victim was a peace officer who was acting in the lawful discharge of an official duty when the peace officer was murdered;
2. The victim was a child under the age of eighteen; and
3. While incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee or a contractor of the penal institution.

For the purposes of this section, “penal institution” includes facilities under the jurisdiction of the corrections department and county and municipal jails. (See Section 3, paragraph B.)

The bill prohibits imposing the death penalty on juveniles. If the defendant had not reached the age of eighteen at the time of the commission of the capital felony, he or she may be sentenced to life imprisonment or life imprisonment without the possibility of release or parole. (See Section 1, 13-18-14(A).)

The bill prohibits imposing the death penalty on a defendant with an “intellectual disability.” “Intellectual disability” means significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior. An IQ of 70 or below on a reliably administered IQ test is presumptive evidence of mental retardation. The defense may request a ruling on the issue prior to the sentencing proceeding. If the court finds, by a preponderance of the evidence, that the defendant has an intellectual disability, it shall sentence the defendant to life imprisonment without the possibility of release or parole. If the motion is denied, the jury shall not be informed of the ruling.

Procedures in capital felony cases.

In all capital felony cases, guilt and punishment are determined in separate proceedings.

The jury (or the court, in non-jury cases) first determines guilt, without any consideration of punishment. If the jury or judge determines that the defendant is guilty of a capital felony, or if the defendant pleads guilty to a capital felony, the court conducts a separate sentencing proceeding to determine if the defendant should be sentenced to life imprisonment, life imprisonment without the possibility of release or parole, or death.

The sentencing proceeding should be conducted as soon as practicable by the original trial judge before the original trial jury (or by the original judge, if the original trial was a bench trial). If guilt was determined by a plea, the defendant may demand a jury for the sentencing proceeding. All evidence considered at the trial shall be considered, and additional evidence may be presented as to aggravating or mitigating circumstances. The court shall explain to the jury that a sentence of life imprisonment means that the defendant shall serve thirty years of the sentence before the defendant becomes eligible for a parole hearing.

The jury (or judge, in cases without a jury) must determine if aggravating circumstances exist.

If the judge or jury finds beyond a reasonable doubt one or more aggravating circumstances listed in Subsection A of Section 31-20A-5 NMSA 1978, the defendant shall be sentenced to life without the possibility of release or parole. Section A sets out the following aggravated circumstances:

1. The murder was committed with intent to kill in the commission of or attempt to commit kidnapping, criminal sexual contact of a minor or criminal sexual penetration
2. The murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution in New Mexico
3. While incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico;
4. The capital felony was committed for hire; and
5. The capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding or for retaliation for the victim having testified in any criminal proceeding.

If the judge or jury finds beyond a reasonable doubt one or more aggravating circumstances set out in Section B that make the case eligible for the death penalty, the judge or jury shall determine whether the defendant shall be sentenced to death or life imprisonment without the possibility of release or parole. (Those aggravating circumstances are described above- murder of an officer, in the lawful discharge of an official duty, a child victim under eighteen, or intentional killing of an employee or a contractor of the penal institution by an incarcerated inmate.) To determine whether to impose the death sentence or life without the possibility of release or parole, the sentencing authority should consider whether mitigating circumstances exist, as set out in the act, and “whether other mitigating circumstances exist.” The mitigating circumstances set out in the act are:

1. the defendant has no significant history of prior criminal activity;
2. the defendant acted under duress or under the domination of another person;
3. the defendant’ capacity to appreciate the criminality of his or her conduct, or to conform that conduct to the requirements of the law was impaired;
4. the defendant was under the influence of mental or emotional distress;

5. the victim was a willing participant in the defendant's conduct;
6. the defendant acted under circumstances that tended to justify, excuse or reduce the crime;
7. the defendant is likely to be rehabilitated;
8. the defendant cooperated with authorities; and
9. the defendant's age.

If the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances set out in Subsection B and unanimously specifies the sentence of death, the court shall sentence the defendant to death. If the jury does not make the required finding, the sentence of death is not unanimously specified, or the jury is unable to reach a unanimous verdict, the sentence is life imprisonment without the possibility of release or parole. If a judge hears the sentencing proceeding without a jury, the judge may impose the death sentence only upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances listed in Subsection B.

If the jury or sentencing judge does not find beyond a reasonable doubt aggravating factors as set out in Sections A or B, the defendant shall be sentenced to life.

#### Review of death penalty cases.

A judgment of conviction and sentence of death is subject to automatic review by the supreme court. The supreme court shall not uphold a sentence of death if:

1. The evidence does not support the finding of a statutory aggravating circumstance;
2. The evidence support a finding that the mitigating circumstances outweigh the aggravating circumstances;
3. The sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or
4. The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

If a sentence of death is held to be unconstitutional or otherwise invalidated by the state supreme court or the United States supreme court, the defendant shall be sentenced to life imprisonment without possibility of release or parole.

If error occurs in the sentencing proceeding, the supreme court shall remand solely for a new sentencing proceeding. If the original sentencing proceeding was before a jury, a new jury shall be impaneled. All exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding.

#### Procedures for carrying out the death penalty.

The bill sets out the procedures for issuing a warrant of execution and transmitting a statement of conviction to the governor, the process for suspending execution, and the process for ordering execution of a judgment that remains in force but has not been executed.

The bill specifies that the death penalty shall be by administration of a continuous, intravenous injection of a lethal substance. The bill sets out requirements for the place of execution, who may be present at the execution, and a process for returning the death warrant to the court.

#### Special circumstances.

If a defendant becomes insane after delivery to the warden for execution, the warden is to notify the district attorney in the district in which the state penitentiary is located. The district attorney is to file a petition in the district court seeking an inquiry into the defendant's sanity. If the court finds the defendant insane, the defendant is to be confined in the New Mexico behavioral health institute at Las Vegas. When the superintendent of the institute certifies that the defendant's sanity is restored, the governor shall issue a warrant to the warden appointing a day for execution.

If there is good reason to believe a female defendant sentenced to death is pregnant, the bill provides a similar process for notifying the district attorney in the county in which the state penitentiary is located and seeking an inquiry from the court. If the defendant is pregnant, the execution is suspended until the governor receives from the warden a certificate that the female defendant is no longer pregnant. The governor shall then issue a warrant to the warden appointing a day for execution.

#### Additional changes.

The bill amends NMSA 1978, Section 31-18-23, the "three strikes" law, to provide that its provisions do not apply when the punishment for the third felony is death.

### **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

The bill will have significant fiscal implications throughout the criminal justice system. Death penalty cases are more complex than non-death penalty cases, and are typically subject to close and repeated review. Police departments and crime labs may face additional costs in investigating such cases. The prosecutor will face additional costs in investigating the case, preparing for trial, and preparing for sentencing. Typically, extensive expert testimony will be necessary, both at the guilt phase and at the sentencing phase. Significant time and effort will be spent in researching and presenting evidence and testimony on mitigating circumstances. The state supreme court will spend additional time in conducting the review required by the bill, which goes beyond the normal appellate review process, and may require additional fact findings. The case will likely be subject to further review, including possible review by the United States supreme court on a petition for certiorari, state habeas corpus (which may include additional factual presentations beyond the presentations at trial, such as evidence on ineffective assistance of counsel), federal habeas corpus challenging the constitutionality of the conviction and sentencing, and federal Section 1983 actions, addressing possible civil rights infractions. During this lengthy process, the defendant will likely be held in a special, secure "death row," requiring additional costs to the corrections department.

### **SIGNIFICANT ISSUES**

The death penalty is an issue that has received, and continues to receive, significant attention from legislatures and the courts. The law on the subject continues to evolve.

Juvenile offenders. The bill provides that a juvenile who commits a capital felony will not be

subject to the death penalty, but may be subject to a sentence of life or life without the possibility of release or parole. As written, it appears that a juvenile would still go through the capital sentencing process. If the jury found one of the aggravating circumstances in Section A or Section B, the juvenile would be sentenced to life without the possibility of release or parole. (Review of mitigating factors would not change that outcome – mitigation can only reduce a sentence of death to a sentence of life without the possibility of release or parole.) If no aggravating circumstances were found, the juvenile would be sentenced to life. It appears, therefore, that New Mexico has established a system that imposes a mandatory sentence of life without the possibility of release or parole automatically on some crimes with certain aggravating factors when they are committed by a juvenile. In *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455 (2012) the Supreme Court held that “[a statutory] scheme that mandates life in prison without possibility of parole for juvenile offenders” violates the Eighth Amendment’s prohibition against cruel and unusual punishment, and that sentences must take into account the unique circumstances of the juvenile offender and mitigating circumstances.

Sentencing procedure. Section 7 is unclear on what happens if the jury comes back with an ambiguous sentence: “[w]here a sentence of death is not unanimously specified or the jury does not make the required finding or is unable to reach a unanimous verdict.” In that circumstance, the court is required to sentence the defendant to life without the possibility of release or parole. But if the jury does not make the required finding of a Section B aggravated circumstance, or is not unanimous in that finding, the defendant should not be subject to life without the possibility of release or parole, unless the jury finds a Section A aggravating circumstance. For example, if the jury disagrees on whether the victim, a peace officer, was acting in the lawful discharge of his duty, a death sentence cannot be imposed. But HB72 would automatically impose a sentence of life without the possibility of release or parole. Under the statutory scheme, however, that sentence should not be imposed unless the jury finds one of the aggravating circumstances listed in Section A.

Jury instruction. Section 6 requires the judge to explain that a sentence of life means that the defendant shall serve thirty years before becoming eligible for parole. Normally, the jury is not instructed on the consequences of their verdict, so whether this instruction is proper may be litigated. The argument would be that instructing the jury that “life” means serving at least 30 years would encourage the jury to return a sentence of death, because of concerns that the defendant could outlive a “life” sentence. The instruction is given in the sentencing phase, however, where the jury is explicitly given the task of determining consequences, and it may be argued that explaining what is meant by a “life” sentence is necessary. However, the statute is structured in such a way that the jury does not need to know what a “life” sentence is. If they find an aggravated circumstance under Section A, the sentence is automatically life without the possibility of release or parole. If they find an aggravated circumstance under Section B, they must decide between death and life without the possibility of release or parole. In neither situation is a “life” sentence an option. A “life” sentence is only an option if no aggravating circumstances are found.

Automatic New Mexico Supreme Court Review. The automatic review procedure set out in the bill goes significantly beyond the normal appellate review, which reviews the record for error. The bill requires the New Mexico Supreme Court to make its own determination on the validity of the death sentence, considering if the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the

crime and the defendant. The bill is not clear on what standard the court should apply in weighing evidence of aggravation and mitigation (and only tells the jury to “consider” and be “guided” in its sentencing determination by a consideration of whether mitigating circumstances exist. (The jury is not specifically instructed to determine if mitigation outweighs aggravation.) See Section 3, paragraph B and Section 8. It is unclear whether the Supreme Court is allowed to do its own balance of the factors. It is also unclear how the Supreme Court is to consider the influence of passion and prejudice, or whether the sentence is excessive or disproportionate, without taking additional evidence on those issues. Typically, the Supreme Court does not hold evidentiary hearings, and it is unclear whether the bill contemplates hearings by the Supreme Court, or separate hearings at the district court level prior to the Supreme Court’s automatic review.

## **PERFORMANCE IMPLICATIONS**

As discussed above, death penalty cases are more complex and are more closely reviewed than non-death penalty cases. They will require additional time and expense to prosecute and defend, and to take through the review process. Jury qualification is more difficult, because the jury must be “death qualified.” The elaborate sentencing proceeding is, in effect, a second trial, on issues of aggravation and mitigation. The automatic review at the New Mexico Supreme Court may be the equivalent of a third trial, on issues of whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

## **ADMINISTRATIVE IMPLICATIONS**

As discussed above, the bill leaves unanswered questions about the nature of the automatic Supreme Court review, how to handle juvenile offenders, and how to address ambiguous jury sentences.

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

HB54 also amends NMSA 1978, Section 31-18-23, the “three strikes” statute. HB54 makes significant changes to the statute, but does not amend paragraph A, the paragraph amended by HB72.

## **TECHNICAL ISSUES**

HB72 provides that if the warden has good reason to believe that the defendant has become insane, or that the defendant is pregnant, the warden is to notify the district attorney in the county in which the state penitentiary is situated. The district attorney is to file a petition with the court. See Sections 14 and 18. It is unclear why the warden cannot notify the court directly, or notify the attorneys who represented the state and the defense in the sentencing proceeding.

## **OTHER SUBSTANTIVE ISSUES**

None noted.

## **ALTERNATIVES**

None noted.

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

The death penalty will not be available in New Mexico.

**AMENDMENTS**

None proposed.