

LFC Requester:

**AGENCY BILL ANALYSIS
2025 REGULAR SESSION**

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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 January 31, 2025
Bill No: SB 187-280

Sponsor: Crystal Brantley
Short Title: DEATH PENALTY FOR
MURDER OF PEACE OFFICER

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

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB 187 would amend Section 31-20A-2 to add in that a person may be sentenced to death if the jury finds beyond a reasonable doubt that the aggravating circumstance was that the victim was a peace officer who was in lawful discharge of an official duty or who was targeted because of the victim’s status as a peace officer.

SB 187 would also amend Section 31-20A-2 to add as an aggravating circumstance that the victim was targeted because of their status as a peace officer.

This bill would undo the effect of HB 285 from the 2009 legislative session, which repealed the statutory authorization for the death penalty. Since 2009, “capital” felonies have been punishable either with an ordinary life sentence (in which the prisoner becomes eligible for parole after 30 years in prison) or life without the possibility of parole (LWOP). This bill would allow the death penalty when a peace officer is killed while in the lawful discharge of an official duty or who was targeted because the person is a peace officer.

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. 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

There is a strong possibility that the death penalty scheme in SB 187 is unconstitutional. If it were enacted, it is likely that defendants would quickly challenge it under 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 appears SB 187 would reinstate the same death penalty regime that raised these constitutional concerns in *Fry*.

The bill does not make clear that the jury must find not only the requisite aggravating circumstance, but also must unanimously find that the death penalty should be imposed. *See Apprendi v. New Jersey*, 530 U.S. 466, 470 (2000). It does not make clear what sentencing procedure should be used, whether there should be a bifurcated hearing, and whether there should be an automatic appeal. Nor does the bill specify the manner in which the death penalty would be imposed.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

New Mexico previously used lethal injection to carry out the death penalty. Not only have lethal injection protocols been challenged as cruel and unusual punishment, but there is now a shortage of execution drugs in the United States. *See Anna Meisel & Melanie Stewart-Smith, Death Row: The Secret Hunt for Lethal Drugs Used in US Executions*, BBC News (Oct. 21, 2023), <https://www.bbc.com/news/world-us-canada-67150566>.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. LWOP will be available as a penalty for capital crimes with aggravating circumstances.

AMENDMENTS