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FISCAL IMPACT REPORT

LAST UPDATED _____
ORIGINAL DATE 2/6/2025

SPONSOR Brantley

BILL

SHORT TITLE Death Penalty for Murder of Peace Officer **NUMBER** Senate Bill 187

ANALYST Valdez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

Agency/Program	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
LOPD	Indeterminate but minimal	At least \$1,900.0	At least \$1,900.0	At least \$3,800.0	Recurring	General Fund
AODA	Indeterminate but minimal	At least \$1,900.0	At least \$1,900.0	At least \$3,800	Recurring	General Fund
NMCD	Indeterminate but minimal	At least \$22.5	At least \$45.0	At least \$67.5	Recurring	General Fund
Total	Indeterminate but minimal	At least \$3,800	At least \$3,800	At least \$7,600	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Agency Analysis Received From

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Law Office of the Public Defender (LOPD)
- New Mexico Attorney General (NMAG)
- New Mexico Corrections Department (NMCD)
- Department of Public Safety (DPS)

SUMMARY

Synopsis of Senate Bill 187

Senate Bill 187 (SB187) amends Section 31-20A-2 NMSA 1978 to allow courts to impose the death penalty on defendants found guilty of murdering a peace officer. Under the current law, defendants found guilty of murdering a peace officer who was either acting in their official capacity or not acting in their official capacity, but targeted because of their status as a peace officer, are subject to life imprisonment without the possibility of release or parole. The bill also adjusts the enumerated list of aggravating circumstances that would lead to life imprisonment under current law to include murdering a peace officer in Section 31-20A-5.

The rest of the bill revises the text of the law to accommodate the new clauses and update some language. The numbering scheme is adjusted to include the sections added by SB187. In Section

2, the spelling of the word “kidnapping” is corrected. Also, the “corrections and criminal rehabilitation department” is amended to appropriately read “corrections department.”

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns if enacted, or June 20, 2025.

FISCAL IMPLICATIONS

SB187 will increase costs to prosecuting district attorneys’ offices, the Law Office of the Public Defender (LOPD), the Corrections Department (NMCD), and district and appellate courts. The Administrative Office of the Courts (AOC) notes that increases in penalties increase costs of judges, courtroom staff, courtroom availability, jury fees, and public defender services. Further, imposition of the death penalty requires two jury proceedings: one to determine guilt and another to render a sentence. AOC points out that the New Mexico Supreme Court argued in *State v. Young*, 2007-NMSC-058, 143 N.M. 1, 172 P.3d 138. that “it is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases.”

The additional costs added by SB187 will be particularly burdensome for LOPD. The department asserts that providing capital defense requires a team with at least two attorneys with specialized training, one investigator, and someone trained in screening for mental and psychological issues. In addition, LOPD points out that in *State v. Young*, referenced above, the New Mexico Supreme Court held that defense attorneys must be adequately compensated otherwise their clients will be deprived of their right to counsel. In that same case, attorneys testified that death penalty trial defense would cost \$1 million in 1999—the equivalent of about \$1.9 million today. This analysis assumes the district attorney would face costs of approximately \$1.9 million for each case prosecuted.

In addition to those direct costs, including more attorney FTE, the cost of training both attorneys and non-attorneys to effectively manage a death penalty case would increase. More funding would likely be needed to support courts and judges who would have to spend substantial time on the death penalty in addition to current duties. NMCD also notes that the law would require additional staff, training, legal expenses, and the long-term management of death row inmates. While incarceration costs vary widely across states and time, studies on the issue agree that incarceration of death row inmates is more expensive. Research from 2021 shows that the average federal prisoner costs \$37.5 thousand per year, while the average federal death row prisoner costs \$60 thousand to \$70 thousand. That means the marginal cost of a death row prisoner is \$22.5 thousand to \$32.5 thousand more than other incarcerated individuals. The estimated cost to NMCD in this analysis is based on this marginal cost above what a non-death row prisoner would cost.

It is unclear how many offenders would be subject to SB187 in a particular year. However, the costs to the prosecution, defense, courts, jails, and prisons would be substantial even for a single case. This analysis assumes one case per year and utilizes the analysis from *State v. Young* as provided by LOPD to reach the estimates above.

SIGNIFICANT ISSUES

Reinstating the death penalty raises many important issues that would need to be addressed if the

bill were to be implemented. The Administrative Office of District Attorneys (AODA) provides a relevant recent history of death penalty litigation:

The death penalty was repealed in New Mexico in 2009. In *Fry v. Lopez* and *Allen v. McMaster*, 2019-NMSC-013, 447 P.3d 1086, the New Mexico Supreme Court vacated the death sentences—imposed before the 2009 repeal—of the two petitioners who were the last prisoners on death row in New Mexico. The Court concluded that the death sentences were disproportionate when compared with similar cases in which the death sentence was not imposed. Since 1979, the New Mexico Legislature has directed the Supreme Court to ensure that “the death penalty shall not be imposed if . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.” NMSA 1978, § 31-20A-4(C)(4) (1979, repealed 2009). The Court modified its approach to comparative proportionality review, expanding the pool of comparison cases to include factually similar crimes where the jury considered the death penalty, even if different aggravating circumstances were present. The decision was influenced by the legislative intent to reserve the death penalty for the most heinous crimes and the recognition that the death penalty had been infrequently imposed in New Mexico.

The New Mexico Capital Felony Sentencing Act was adopted in 1979 and remained largely unchanged until its repeal in 2009. *Fry*, ¶ 18-19. Several of these provisions are not addressed in the bill and remained repealed: Section 31-20A-2.1 (prohibition against capital punishment for mentally disabled people); Section 31-20A-3 (court sentencing for death penalty); Section 31-20A-4 (providing mandatory appellate review of the New Mexico Supreme Court to include the proportionality review); and 31-20A-6 (mitigating circumstances). It is possible that some or all of these provisions will need to be revived and/or modified to ensure that any revived death penalty scheme in New Mexico is constitutional.”

LOPD raises the likely possibility that this change would be immediately challenged in court on constitutional grounds, and notes omissions from the bill which would leave several legal questions ambiguous:

There is a strong possibility that the death penalty scheme in SB187 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 SB187 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.

The Department of Public Safety (DPS) notes the danger and risks assumed by peace officers, and the potential deterrence offered by SB187:

SB187 emphasizes the protection of peace officers, acknowledging the inherent risks they face in performing their duties. By allowing for the death penalty for individuals who murder a peace officer, the bill would send a strong message that such acts are intolerable and will be met with the harshest possible penalties.

According to the FBI's Uniform Crime Reporting Program's "Officers Killed and Assaulted in the Line of Duty, 2023 Special Report" and data from the Law Enforcement Employee Counts on the FBI's Crime Data Explorer, from 2021 to 2023, more officers were feloniously killed (194) than in any other consecutive three-year period in the past 20 years (73 officers in 2021, 61 officers in 2022, and 60 officers in 2023).

As of April of 2024, New Mexico has lost 184 officers in the line of duty, including the following in recent years: Bernalillo County Deputy James McGrane Jr. (2006), Albuquerque Police Officer Daniel Webster (2015), Rio Rancho Police Officer Gregg Benner (2015); and New Mexico State Police Officer Darian Jarrott, Alamogordo Police Officer Anthony Ferguson, Las Cruces Police Officer Jonah Hernandez, and New Mexico State Police Officer Justin Hare in the last 5 years alone.

While DPS discusses the deterrent power of SB187, AOC submits evidence suggesting the death penalty is not effective in that capacity:

A Death Penalty Information Center analysis of U.S. murder data from 1987 through 2015 has found no evidence that the death penalty deters murder or protects police. Instead, the evidence shows that murder rates, including murders of police officers, are consistently higher in death-penalty states than in states that have abolished the death penalty. And far from experiencing increases in murder rates or open season on law enforcement, the data show that states that have abolished the death penalty since 2000 have the lowest rates of police officers murdered in the line of duty and that killings of police account for a much smaller percentage of murders in those states. See Capital Punishment and Police Safety at <https://deathpenaltyinfo.org/policy-issues/deterrence/capital-punishment-and-police-safety>.

In addition, DPS points out two previous efforts to reinstate the death penalty: House Bill 72 (2017) and House Bill 155 (2018). The analysis for the 2017 bill is available here: <https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF>; and the analysis for the 2018 bill is available here: <https://www.nmlegis.gov/Sessions/18%20Regular/firs/HB0155.PDF>.

The New Mexico Attorney General (NMAG) point out both ambiguity in the law, and a conflict

with existing law in their analysis:

SB187 would not require the sentencing jury to find that the defendant knew that the victim was a peace officer acting in the lawful discharge of his or her duties. This would likely lead New Mexico Courts to read in such a knowledge requirement. See *State v. Consaul*, 2014-NMSC-030, ¶ 40 (reading recklessness requirement into child abuse statute); *State v. Ortega*, 1991-NMSC-084, ¶ 23, 112 N.M. 554 (noting the “general presumption in our Anglo–American jurisprudence that . . . serious, non-regulatory crimes are generally attended by moral culpability arising from or manifested in a mental state generally characterized as “an evil mind”).

As written, SB187 would conflict with NMSA 1978, Section 31-18-14 (2009), which provides that, “[w]hen a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole.” When the Legislature abolished the death penalty, it also repealed the detailed procedural safeguards that accompanied it, found at NMSA 1978, Sections 31-20A-1, -2.1, -3, -4, and -6. Some of these protections reflected the requirements of constitutional law. For example, Section 31-20A-2.1 prohibited the execution of defendants with “mental retardation” (now called “intellectual disability”) and provided a mechanism to resolve such claims. It is unconstitutional to execute an individual with intellectual disability per *Atkins v. Virginia*, 536 U.S. 304 (2002). Similarly, Section 31-20A-1 provided for bifurcated sentencing in death penalty cases, which may be required under the Eighth Amendment. See *Roberts v. Louisiana*, 428 U.S. 325, 356 (1976) (“The plurality holds the Louisiana statute unconstitutional for want of a separate sentencing proceeding in which the sentencing authority may focus on the sentence and consider some or all of the aggravating and mitigating circumstances.”). Because SB187 would reinstate the death penalty without these procedural safeguards, it would likely face Eighth Amendment and due process challenges.

PERFORMANCE IMPLICATIONS

DPS points out that the courts participate in performance-based budgeting. This bill may affect district court measures of cases disposed as a percentage of cases filed, and the percent change in case filings by case types. DPS goes on to reiterate that this change could be a deterrent to those who might otherwise consider harming law enforcement.

OTHER SUBSTANTIVE ISSUES

LOPD makes an important note on methods of execution:

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>.