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## FISCAL IMPACT REPORT

**SPONSOR** Youngblood/Nuñez      **ORIGINAL DATE** 09/30/16  
**LAST UPDATED** 10/5/16      **HB** 7/aHAFC

**SHORT TITLE** Reinstate Death Penalty      **SB** \_\_\_\_\_

**ANALYST** Daly/Downs/Rogers

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

	<b>FY17</b>	<b>FY18</b>	<b>FY19</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Up to \$545.2	Up to \$1090.4	Up to \$1,805.8	Up to \$3,271.2	Recurring	General Fund
<b>Total</b>	Up to \$658.2	Up to \$1,316.4	Up to \$2,632.8	Up to \$3,949.2	Nonrecurring	General Fund
<b>Grand Total</b>	Up to \$1,203.4	Up to \$2,406.8	Up to \$4,438.6	Up to \$7,220.3	Both	General Fund

\*Fiscal impact table depicts a “worst case scenario” if the cost per case was multiplied by the average number of potential death penalty-eligible defendants over the last eleven years. This does not mean every eligible case will be prosecuted as a death penalty case. Detailed costs on the two death penalty cases remaining in the system, as well as jury costs, correctional costs, and pharmaceutical costs, are included in the fiscal implications section.

\*Between 1979 and 2007 when the death penalty was an option to prosecutors, there have been over 200 death penalty cases filed, but only 15 men sentenced to death and only one execution (Marcia J. Wilson, New Mexico Law Review Spring 2008, Vol. 38, No. 2).

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Public Defender Department (PDD)

New Mexico Corrections Department (NMCD)

New Mexico Sentencing Commission (NMSC)

Administrative Office of the District Attorneys (AODA)

This analysis uses information received from the agencies listed above who responded to bills seeking to reinstate the death penalty in prior years, except as noted where updated information has been received.

#### Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment adds language to allow for a new jury to be impaneled for the sentencing proceedings upon a guilty verdict by a jury or a judge, or upon a guilty plea. The amendment replaces the term “mentally retarded” with “intellectual disability” in all instances it appears. The amendment also strikes the clause requiring a medical

examination in the presence of the court for a defendant who is suspected to be pregnant, leaving the examination to be done in private, and strikes the specific type of lethal drug in exchange for the phrase, “substance into the convicted person in a quantity sufficient to cause death.” Finally, the HAFC amendment adds language to ensure the individuals who conduct the execution remain anonymous.

The amendment does not clarify when a new jury is to be impaneled, either by the request of the defendant or prosecutor.

### Synopsis of Original Bill

House Bill 7 reinstates the death penalty in New Mexico for those convicted of three capital felonies:

- the murder of a peace officer;
- the victimization of a child under the age of eighteen; and
- murder with the intent to kill of an employee or contractor while the defendant is incarcerated in a penal institution of New Mexico, including those under the jurisdiction of the corrections department and county and municipal jails.

The bill also provides for automatic review of a judgment and sentence of death by the supreme court of New Mexico. It contains exceptions to the imposition of the death penalty when the defendant is under 18 at the time of commission and when the defendant has a mental disability. It also requires further proceedings upon belief that a death row inmate has become insane or is pregnant.

In addition, this bill authorizes the imposition of a sentence of life imprisonment without the possibility of release or parole upon a specific jury finding of one or more aggravating circumstances for these capital felonies:

- 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;
- the murder was committed with intent to kill by the defendant while attempting to escape from a New Mexico penal institution;
- a defendant, while incarcerated in a New Mexico penal institution, murdered with intent to kill a person incarcerated in or lawfully on that institution’s premises;
- the capital felony was committed for hire; and
- murder of a witness, or a person likely to become a witness, to a crime to prevent report of the crime or testimony in a criminal proceeding, or for retaliation for the victim’s testimony in any criminal proceeding.

The bill becomes effective 90 days after being signed into law. The provisions of this bill are not retroactive.

### **FISCAL IMPLICATIONS**

In the years since analysis was last performed on capital punishment bills, agencies and other organizations have generated and identified significant new data on the fiscal and social impact of the death penalty that are incorporated in this analysis.

Known Costs of the Death Penalty (in thousands)					
Cost Factor	Total Known Costs Over Last 11 Years	Average Cost per Year	Potential Cost for up to 14 Eligible Individuals Per Year	Potential Cost for up to 14 Eligible Individuals for 3 Years	Recurring or Nonrecurring
Trial costs:	\$ 830.1	\$ 25.2	\$ 352.2	\$ 1,056.5	Nonrecurring
Post conviction attorney fees:	\$ 575.5	\$ 17.4	\$ 244.2	\$ 732.5	Nonrecurring
Experts and other associated costs:	\$ 1,697.3	\$ 51.4	\$ 720.1	\$ 2,160.2	Nonrecurring
PDD attorneys:	N/A	\$ 375.0	\$ 375.0	\$ 1,125.0	Recurring
Incarceration on Death Row:	\$ 1,124.2	\$ 51.1	\$ 715.4	\$ 2,146.2	Recurring
<b>Total costs:</b>	<b>\$ 4,227.1</b>	<b>\$ 520.1</b>	<b>\$ 2,406.8</b>	<b>\$ 7,220.3</b>	<b>Over 3 Years, \$3,949.1 thousand nonrecurring, \$3,271.2 thousand recurring</b>

The costs estimated in the operating budget impact table on page one reflect the total costs of death penalty proceedings for an average of 14 first degree murders per year that could potentially be eligible for the death penalty; however, the universe of cases that would ultimately be subject to the death penalty under House Bill 7 is likely smaller because the number of cases involving the death of a law enforcement officer, a prison employee, or a child is unknown as NMSC does not have access to victim information. Recurring costs are only the costs of incarcerating individuals and the cost for PDD to staff its Capital Crimes Unit. Nonrecurring costs are associated with legal proceedings. Total yearly costs could be much lower if the death penalty is not pursued for every eligible case. The cost to the judicial system to process one individual through the death penalty process, which historically has taken an average of 11 years, is about \$105 thousand per year. The cost to incarcerate one individual on death row is \$51.1 thousand per year.

*Costs to the New Mexico Judicial System*

To impose the death penalty under this bill, two jury proceedings are required: one to determine guilt and one to determine the sentence to be imposed. The Administrative Office of the Courts (AOC) has confirmed its estimate that a death penalty jury trial will cost \$12 to \$17 thousand more than a non-death penalty case. A higher number of jurors will need to be called for the selection process, and the two separate proceedings will cause more costs to be incurred.

In a previous analysis of a capital punishment bill, the Public Defender Department (PDD) reported the death penalty was repealed in 2009 because of the great expense involved in pursuing these prosecutions despite the death penalty being imposed only once in the law’s 31 year history. In the 2007 Santa Rosa Prison Riot cases, the department spent \$474.6 thousand on contracts, \$1 million on expert witnesses, and \$76.8 thousand on other costs associated with the trial for a total expense to the department of \$1.6 million for just one case seeking the death penalty.

In AOC’s analysis of previous capital punishment bills, it cited the New Mexico Supreme Court’s finding in *State v. Young* (2007) which arose out of the Santa Rosa prison riot cases. The court found “it is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases.” The Supreme Court held that, unless the legislature appropriated funds in addition to the \$870 thousand appropriated for expert witnesses

and \$300 thousand for defense (figures not included in fiscal impact table), the death penalty could not be imposed. The Legislature did not appropriate the funds and, when the case returned to district court, the death penalty was abandoned. AOC concluded that in a period of budget constraints, especially in the courts, justice, and safety agencies, it can be expected that more death penalty cases will not be able to proceed due to lack of funding and inherent unconstitutionality.

PDD has provided updated cost information on the two current death penalty cases that remain in the system. The following figures were used in fiscal analysis. For one case, trial costs were \$145 thousand, post conviction attorneys fees were \$250.4 thousand, and additional expenses, including experts, were \$211.5 thousand for a total cost to date of \$607.4 thousand. For another case, trial fees were roughly \$150 thousand, post conviction attorneys fees were \$325.1 thousand, and other expenses including experts were \$392.8 thousand, for a total cost of \$1.3 million.

In an earlier analysis, PDD reported the enhanced requirements of the Supreme Court of the United States, the guidelines of the American Bar Association, and the standards and requirements of New Mexico statutes and rules all show PDD would have to ensure adequate services to the accused in death penalty cases, including filling all vacancies within the Capital Crimes Unit, and plan for substantially greater costs per annum for essential ancillary services, such as forensic scientists (DNA experts, forensic pathologists), psychologists, mitigation experts, crime scene reconstruction experts, jury consultants and the like, as well as greatly enhanced costs for specialized attorney training.

PDD confirmed its estimate that it would cost \$375 thousand to restructure the Capital Crimes Unit as a death-penalty defense unit. Additionally, it has always been necessary due to conflicts of interest to contract about half the death penalty defense work to private attorneys. A roughly equivalent diversion of PDD's resources would be necessary to bring the performance of the contract death-penalty defense attorneys in line with the aforementioned minimal national standards. PDD estimates a total annual budgetary impact of \$750 thousand for both staff and contract attorneys. For the purpose of analysis, the fiscal impact table includes a recurring \$375 thousand for the Capital Crimes Unit staff attorney salaries.

The District Attorneys report no additional impact to operating budgets will result from passing the death penalty.

*Costs to the New Mexico Corrections Department (NMCD)*

If New Mexico incarcerated an individual on death row awaiting execution for the national average of 11 years, total incarceration costs would be more than \$562 thousand, using per diem costs provided by NMCD.

The New Mexico Sentencing Commission (NMSC) provided the number of offenders committed to NMCD for first degree murder since 2005. Under the provisions of House Bill 7, many of these offenders could be subject to the death penalty. If the 15 inmates committed in FY16 were all sentenced to death and were housed on death row for the average 11 year delay in execution, it could cost New Mexico more than \$8 million. The table below indicates that an average 14 death penalty sentences could be imposed per year. Overall, 164 people over the last 12 years could have received death penalty sentences.

<b>Number of Admissions to NMCD for First Degree Murder by Fiscal Year</b>	
2005	19
2006	6
2007	16
2008	16
2009	13
2010	13
2011	7
2012	13
2013	16
2014	18
2015	12
2016	15
<b>Average</b>	<b>14</b>

Source: NMSC

According to the District Attorneys, four of the first degree felons admitted to corrections facilities in calendar year 2016 would have qualified for the death penalty under House Bill 7 (three victims were children and one victim was a police officer).

NMCD has advised in its previous analyses that provisions such as those in Section 14 of the bill could be very costly for the New Mexico Corrections Department (NMCD) if the department is forced to transport defendants found insane to the New Mexico Behavioral Institute as required by the bill. NMCD is responsible for supervising its own prisoners, including any defendant sentenced to death. While the New Mexico Behavioral Institute in Las Vegas (Institute) does have a security fence, it is not a prison. The Institute has no statutory authority to operate as a jail or prison, has little to no training or experience in housing or supervising prisoners, much less maximum custody or dangerous prisoners, and its security level is far below what is available in NMCD prison facilities. If the insane defendant had to be transported to the Institute, NMCD would be required for safety and security reasons to have six NMCD correctional officers (two officers per shift) supervise that defendant or prisoner on a 24 hour per day, seven days per week basis. NMCD, not the Institute, would be liable if this defendant escaped or injured a staff member or another resident while residing in the Institute.

There could also be considerable overtime expenses incurred because NMCD has no prison facilities located in Las Vegas. Further, NMCD currently has a very high vacancy rate for correctional officers. Having six full time officers supervise only one inmate would exacerbate the staffing shortage. While it would be very inefficient to use six officers to supervise only one inmate, it would be essential in order to ensure the safety and security of the staff and other residents at the Institute.

*Drug Costs*

In the past, New Mexico has used the three drug method with sodium thiopental, a combination the DPIC states would most likely not be used in future executions.

The costs of lethal injection drugs are hard to determine. According to the Texas Department of Criminal Justice, the cost for the drugs used was \$86. However, news reports state the drugs now cost \$1.3 thousand for a more powerful sedative drug.

## SIGNIFICANT ISSUES

According to the National Conference of State Legislatures (NCSL), no state has enacted a law to reinstate capital punishment after a legislative repeal since at least 1976, when the United States Supreme Court decided Gregg v. Georgia, ending the de facto moratorium on capital punishment in the U.S. There are some examples of voter initiatives reinstating capital punishment after repeal or a law being struck down through litigation, such as Oregon in 1978 and 1984. States have also reformed or reenacted a relevant law after it has been struck down in the courts. Most bills that are introduced to reinstate capital punishment are fairly narrow.

In its previous analyses, the Attorney General's Office (AGO) reported that renewing the death penalty would likely result in an increase in costs throughout the system. Securing capital-eligible trial counsel requires significantly more funding and training. Securing death penalty-eligible jurors takes significantly more time and effort. Sentencing experts who can educate a jury or judge about aggravation and mitigation issues costs money; however, costs could be contained as a similar process currently exists for the imposition of life sentences. Housing of prisoners on death row typically requires significantly enhanced security measures. Post-conviction appellate and habeas corpus wrangling in the death penalty context is generally much more substantial. However, it is possible that the renewal of capital punishment in New Mexico could result in fewer trials as the issue of the death penalty would become another item to be dealt with in plea negotiations.

AGO analysis on this bill states the following:

Section 7 provides that “[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, the court shall sentence the defendant to life imprisonment without the possibility of parole in accordance with Section 31-20A-2.” However, life without parole itself requires the finding of specific aggravating circumstances. In the prior version of this statute, Section 31-20A-3 (repealed in 2009), the default sentence was life imprisonment. Making the default sentence life without parole if the sentence of death is not imposed is contrary to the life without parole statutory scheme. If a death aggravating circumstance is not found beyond a reasonable doubt that does not mean that a life without parole aggravating circumstance has been found. The new statutory scheme specifically delineates one set of aggravating circumstances for a death sentence and one set for life without parole. A defendant cannot be sentenced to life without parole without a finding of a particular aggravating circumstance beyond a reasonable doubt.

Section 10(C) provides that if the defendant is found by the court to be mentally retarded, and therefore cannot be subject to the death penalty, the court shall sentence the defendant to life without parole. Again, the life without parole sentence requires the finding of an aggravating circumstance beyond a reasonable doubt. Such a finding cannot be presumed.

In its analysis of a 2012 bill that sought to reinstate the death penalty (HB 237), AGO provided these observations that appear to apply to this bill as currently drafted:

The availability of the death penalty often heightens the stakes when parties argue over traditional constitutional issues, especially the right to counsel.

This bill clearly bars the application of the death penalty from mentally-retarded, juvenile and pregnant defendants. This will foreclose a common mode of attack against the constitutionality of the death penalty on Eighth Amendment (cruel and unusual punishment) grounds (See Sections 10, 1A and 18).

This bill contains “failsafe” language which would require the imposition of a life sentence should the re-enacted death penalty later be ruled unconstitutional or otherwise invalid by the New Mexico or United States Supreme Courts (Section 1B).

The language stating that “capital sentencing deliberations shall be guided by” specific, enumerated considerations, seems vague. The bill might better withstand scrutiny if it read “controlled by” instead of “guided by” (Section 3B).

Language permitting the consideration of “other mitigating circumstances” (beyond what is already enumerated) will likely strengthen the bill as it appears to afford a defendant with a heightened due process in the sentencing hearing (Section 3B(3)).

Language requiring a jury be instructed on the actual, real world meaning of the phrase “life sentence” could cause a challenge as jurors are typically not permitted to delve into the consequence of their verdict. It could be argued that a jury contemplating a death sentence would reach a verdict requiring death when it might otherwise have imposed a life sentence, owing to concerns that a defendant could “out-live” his life sentence and be released (Section 6).

The provision dealing with insanity of a defendant awaiting imposition of a death sentence places a burden on the prosecution to bring the issue to the court’s attention. There is no apparent reason why the prison authorities could not be required to notify counsel for both parties and the trial court (Section 14).

The section that addressed a court’s order concerning a defendant’s insanity does not indicate a standard of proof that a court must employ when determining this issue (Section 16).

## **TECHNICAL ISSUES**

It appears the requirement in Section 6 that the jury be instructed at the beginning of a sentencing hearing that a sentence of life imprisonment means a defendant shall serve 30 years before becoming eligible for parole is contrary to the sentence to be imposed for capital felonies under Section 3B if the jury finds one or more aggravating circumstances, since the sentence to be imposed (if not death) is life without the possibility of release or parole.

**OTHER SUBSTANTIVE ISSUES**

*National Fiscal Impact*

The National Conference of State Legislatures provided the information below on the death penalty in other states:

States around the nation face high costs and long sentencing periods due to capital punishment. In Tennessee and Maryland, the average length of time on death row before execution is more than 13 years. In New Jersey, the average length of time on death row before execution is over 30 years.

	Average length of time on death row before execution (years)	Estimated cost per capital case (thousands)
Arizona	15.1	\$ 163.4
California	17.2	\$ 500.0
Connecticut	17.2	\$ 500.0
Idaho	42.0	\$ 262.9
Maryland	13.5	\$ 1,700.0
Nevada	3.5	\$ 1,032.0
<b>Total Average:</b>	<b>18.1</b>	<b>\$ 967.1</b>

Source: National Conference of State Legislatures

In Arizona, the average length of time on death row before execution is 15 years and the estimated cost for a capital case is \$163.9 thousand. The estimated cost for a capital case resulting in a life sentence is \$128.5 thousand while noncapital cases resulting in life sentences cost about \$70.2 thousand. Arizona’s cost of incarceration from indictment to sentencing is \$27.1 thousand per year for capital inmates compared to \$16.9 thousand for noncapital inmates.

In California, the average length of time on death row before execution is 17 years between pronouncement of judgment and execution. The state’s estimated cost for a capital case is \$500 thousand more than a noncapital case. California estimates the cost for confinement on death row is \$90 thousand annually versus a noncapital cost of \$34.2 thousand annually.

The Los Angeles Times reported in 2011, California taxpayers paid “more than \$4 billion on capital punishment in California since it was reinstated in 1978, or about \$308 million for each of the 13 executions carried out since then, according to a comprehensive analysis of the death penalty's costs.” The U.S. 9th Circuit Judge Arthur L. Alarcon and Loyola Law School Professor Paula M. Mitchell forecasted the tab for maintaining the death penalty will climb to \$9 billion by 2030, when San Quentin's death row will have swollen to well over 1,000.

Connecticut calculated its average length of time on death row before execution to be 17 years and \$500 thousand for a capital case. The average cost for confinement on death row is \$46.9 thousand compared to \$29 thousand for noncapital cases.



The average length of time on death row before execution in Idaho is about 40 years, and the estimated cost for a capital case is \$262.9 thousand. Kansas estimates it costs \$49.4 thousand annually to incarcerate a death row inmate compared to \$24.7 thousand for an inmate in the general population.

Studies from Idaho, state that simply having death as a sentencing option costs money. An Idaho legislative report states that “because Idaho allows county prosecutors to seek death as a sentencing option when specific statutory aggravating circumstances are present in a first-degree murder case, the state incurs costs. At least some of the extra costs are reflected in statutory requirements that must be adhered to for capital cases. For example, not only are two attorneys required to represent the defendant, but the Idaho Supreme Court must also conduct a mandatory review of all death sentences. In addition, the Department of Corrections must maintain a certain level of readiness for executions.”

Idaho also created a Capital Crimes Defense Fund in 1998 to help counties pay for trial costs for death penalty cases. The fund includes contributions from participating counties and any other court fees or funds designated or appropriated by the Idaho Legislature. Participation in the fund is voluntary, and all but one county in the state participates. Counties must pay the first \$10 thousand in trial costs before submitting reimbursement claims to the fund, and they must pay the wages of the lead defense attorney.

Maryland, a state which has executed only five people from 1978 until the abolition of the death penalty in 2013, estimates the average length of time on death row before execution is 14 years, and the total cost for a capital case is \$3 million.

Nevada estimates a death penalty case costs \$532 thousand more than a typical murder case and estimates it costs \$157.3 thousand for an average stay of 3.5 years compared to an average of \$76.8 thousand for an average stay of 1.6 years. Nevada’s Legislature detailed the expenses below:

<b>Total Incarceration Costs</b>						<b>Exhibit 7</b>
<b>Sentence</b>	<b>Median Intake Age</b>	<b>Expected Years Incarcerated</b>	<b>Total Facility Cost</b>	<b>Total Medical Cost</b>	<b>Execution and/or Burial Cost</b>	<b>Totals</b>
Death Penalty-Natural Causes	30	25	\$521,164	\$ 75,390	\$ 2,446	\$599,000
Death Penalty-Execution	30	11	\$258,050	\$ 18,797	\$47,107	\$323,954
Life Without the Possibility of Parole	31	31	\$459,787	\$135,876	\$ 2,446	\$598,109
Life With the Possibility of Parole- After 1995	27	32	\$430,218	\$112,065	-	\$542,283
Life With the Possibility of Parole- Before 1995	27	14	\$218,474	\$ 21,905	-	\$240,379

Source: NDOC’s Nevada Offender Tracking Information System, Nevada Corrections Information System, and auditor calculations.  
 Note: The expected years incarcerated is the difference between the median intake age and the median age of natural death for the death penalty-natural causes and life without the possibility of parole subgroups. The median age of natural death is 55 and 62 respectively. The death penalty-execution subgroup is based on the one “involuntary” execution conducted in the State of Nevada since July 1, 1977.

Thirty to 40 years may pass in New Jersey before an inmate is executed with notably higher incarceration costs, while Tennessee states it costs \$491.2 thousand to incarcerate a death row inmate versus \$1.3 million to incarcerate an a defendant sentenced to life without the possibility of parole.

In addition, according to the Bureau of Justice Statistics in 2013, 98 percent of inmates on death row nationally were male and the remaining 2 percent were female. The majority of death row inmates were between 35 and 60 years old with an average age of 47. Over 90 percent of death row inmates had received a high school diploma or GED or less. Only 9.4 percent of inmates have any college experience. More than 67 percent had previous felony convictions on their records before being placed on death row although only 9 percent had previous homicide convictions.

A Gallup research poll published in October 2015 shows 61 percent of all U.S. adults favor the use of the death penalty for those convicted of murder. The public has favored the use of the death penalty for all but one of the 78 years that Gallup has conducted the poll. The poll also showed 40 percent of Americans believed the death penalty was not imposed enough.

According to the National Conference of State Legislatures, in the “2008 case, *Baze v. Rees*, the U.S. Supreme Court approved a three-drug combination of (1) sodium thiopental, a sedative that induces unconsciousness, (2) pancuronium bromide, a muscle relaxer that induces paralysis, stopping respiration, and (3) potassium chloride, which causes cardiac arrest. This was the same three-drug combination that was used in the first lethal injection execution, and at the time of the *Baze* opinion 30 states were using that exact mixture. The court’s opinion also made it apparent that ‘substantially similar’ drug combinations would be legally acceptable. Since the *Baze* opinion, lethal injection drugs have become increasingly difficult for states to purchase due to stopped production and manufacturer refusal to sell to states for the purpose of execution. States have used new drugs or turned to compounding pharmacies in order to carry out executions.”

According to the Death Penalty Information Center (DPIC), three states have recently passed laws allowing for alternative execution methods if lethal injection drugs are unavailable. Oklahoma's law, which becomes effective in November 2015, allows for the use of nitrogen gas asphyxiation. Tennessee allows for the use of the electric chair. Utah allows the firing squad to be used if the state cannot obtain lethal injection drugs 30 days before an execution.

## **ALTERNATIVES**

In its analysis of a previous bill to reinstate the death penalty, AGO suggested including language requiring a jury finding for purposes of sentencing, regardless of whether the underlying case was tried to a jury or the bench. The waiver of a jury finding for sentencing can be allowed. In other words, a defendant could have the “guilt phase” determined by a judge or jury, and could also have the “punishment” phase determined by a judge or jury, independent of each other, with the exception that a party cannot disqualify a judge who heard the guilt phase from hearing the punishment phase, regardless of whether that judge acted as finder of law, fact, or both.

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

The death penalty will not be reinstated.