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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/02/2018

SPONSOR Youngblood/Nibert LAST UPDATED \_\_\_\_\_ HB 155

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

ANALYST Torres/Edwards/Daly

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Up to \$134.4	Up to \$1,090.4	Up to \$1,805.8	Up to \$3,271.2	Recurring	General Fund
<b>Total</b>	Up to \$162.3	Up to \$1,316.4	Up to \$2,632.8	Up to \$3,949.2	Nonrecurring	General Fund
<b>Grand Total</b>	Up to \$296.7	Up to \$2,406.8	Up to \$4,438.6	Up to \$7,220.3	Both	General Fund

\*This table depicts a “worst case scenario” by multiplying the estimated costs per case by the average number (14) of potential death penalty-eligible defendants (defendants convicted of first degree murder) over the last eleven years. This does not mean every eligible case will be prosecuted as a death penalty case. A breakdown of these costs is included in the fiscal implications section.

\*Between 1979 and 2007 when the death penalty was an option to prosecutors, there were 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)  
 New Mexico Attorney General (NMAG)  
 Law Offices of the Public Defender (LOPD)  
 New Mexico Corrections Department (NMCD)  
 New Mexico Sentencing Commission (NMSC)

#### Synopsis of Bill

House Bill 155 reinstates the death penalty in New Mexico for those convicted of three capital felonies:

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

The facts necessary to support a conviction of and sentencing for one of these capital crimes are referred to in this analysis as Subsection B aggravating circumstances.

The bill allows for (but does not require) a new jury to be impaneled for the sentencing proceeding after a guilty verdict by a jury or a judge, or upon a guilty plea. After considering mitigating circumstances and upon a finding beyond a reasonable doubt of a Subsection B aggravating circumstance and a jury's unanimous verdict of death (or similar findings and determination by the judge in a nonjury sentencing), a sentence of death shall be imposed. A review by the New Mexico Supreme Court is automatically required. If the defendant is not sentenced to death after a finding beyond a reasonable doubt of a Subsection B aggravating circumstance, the sentence will be life imprisonment without the possibility of release or parole.

The means of execution is by intravenous injection of a lethal substance, and persons conducting the execution remain anonymous. The governor may suspend an execution.

HB 155 contains an exception to the imposition of the death penalty when the defendant is less than 18 years of age at the time of commission. Upon a finding beyond a reasonable doubt of a Subsection A or Subsection B aggravating circumstance, that defendant may be sentenced by the sentencing court or jury to life imprisonment or life imprisonment without the possibility of release or parole after considering the defendant's age at commission as a mitigating circumstance. It also excepts a defendant who has an intellectual disability as determined by a court upon a preponderance of the evidence, who shall be sentenced to life imprisonment without the possibility of release or parole. Additionally, further proceedings are required upon belief that a death row inmate has become insane or is pregnant.

In addition, this bill continues to require (currently in existing law) the imposition of a sentence of life imprisonment without the possibility of release or parole upon a specific jury finding beyond a reasonable doubt of one or more of these aggravating circumstances (referred to as a Subsection A aggravating circumstance) for all other capital felony cases heard by a jury:

- 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.

This bill also amends Section 32-18-23 NMSA 1978 (the "three strikes law") to provide its provisions do not apply when the punishment imposed for the third felony is death.

Absent a specified effective date in the bill, it becomes effective May 16, 2018, and applies only to capital felonies committed on or after that date.

## **FISCAL IMPLICATIONS**

The costs estimated in the Estimated 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 (based on admissions to NMCD for first degree murder from 2005-2017, see table at end of Attachment 1) whose perpetrators 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 155 is likely smaller. NMCD does not have access to victim information and is unable to establish the number of cases involving the death of a law enforcement officer, a prison employee, or a child. AODA, however, reported during the 2016 Special Session that four of the first degree felons admitted to correctional facilities in calendar year 2016 would have been eligible for the death penalty under provisions like those contained in HB 155.

The known costs of the death penalty include both recurring and nonrecurring costs which escalate in future years as more case come forward. Recurring costs, including the costs of LOPD attorneys and the incarceration of inmates on death row, total up to \$1,090.4 thousand in FY18. Nonrecurring costs, including trial costs, post conviction attorney fees, experts, and other costs could cost up to \$1,316.4 thousand in FY18. Overall, the death penalty could cost up to \$2,406.8 thousand in FY19.

More detailed descriptions of the costs to the judicial system, NMCD and for lethal injection are provided in Attachment 1. NMCD did not provide estimated death row incarceration costs for 2017; this analysis uses 2016 data to derive costs.

## **SIGNIFICANT ISSUES**

NMCD summarizes one point of view in favor of imposition of a death penalty:

This legislation would result in a specific deterrent for specific violent crimes. The general public would no longer be at risk for violence from the particular offender convicted and sentenced under this statute, should the bill become law.

On the other hand, LOPD believes that life without parole (LWOP) sufficiently protects the community from the same category of criminals that would be subject to the death penalty. It notes that no one has ever escaped from New Mexico's supermax level six incarceration. LOPD also warns that the state should anticipate challenges by defense counsel on every aspect of HB 155 if it is enacted. It goes on to provide this background:

Since 1962, only one death sentence in New Mexico has actually been carried out: an inmate who dismissed his attorneys and voluntarily went to his death. Every other death sentence from 1962 to this day failed to weather the full rigor of direct appeal and other post-conviction challenges. The economics of the death penalty, though impossible to predict exactly, are very clear and very expensive. In New Mexico, in particular, what can be foreseen is an infinitesimal return on a monumental investment – especially given the extraordinarily scarce resources currently at the disposal of our poor state. The proposed legislation would charge an enormous additional annual expense to the taxpayers of this already cash-strapped state. If the legislation is enacted, the Legislature should anticipate supplemental budget requests from the DAs, NMAG, courts and LOPD every time such a sentence is sought.

Responding agencies raise issues as to particular provisions in the bill:

Sentencing procedure.

NMAG first points out that in Section 3, Section 31-20A-2 is amended to create three subsections: Subsection A provides for a mandatory LWOP upon a finding of one or more aggravating circumstance listed in Subsection A of § 31-20A-5; Subsection B provides for either a death sentence or LWOP upon a finding of one or more aggravating circumstance listed in Subsection B of § 31-20A-5; Subsection C provides either a sentence of LWOP or life upon a finding of any aggravating circumstance committed during a first degree murder by a child under age 18. NMAG advises that, in listing the factors to be considered in determining whether to impose a death sentence, Subsection B fails to require the sentencer to weigh the mitigating circumstances against the aggravating circumstances. That requirement is mandated under United States Supreme Court precedent interpreting the Eighth Amendment (and was included in repealed Section 31-20A-2(B)).

Further, NMAG asserts that 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 bill requires the court 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 Subsection B aggravating circumstance, or is not unanimous in that finding, NMAG advises it would be unconstitutional to sentence the defendant to life imprisonment without the possibility of release or parole (unless the jury finds a Subsection 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 Subsection B aggravating circumstance), a death sentence cannot be imposed. But HB155 as drafted would automatically impose a sentence of life without the possibility of release or parole (without any finding of a Subsection A aggravating circumstance).

NMAG suggests that, to achieve the apparent goal of making LWOP the default sentence when the death penalty is not imposed, the language “or the jury does not make the required finding” should be removed. This would result in LWOP being the mandatory sentence when the jury, having found at least one Subsection B aggravating circumstance, nevertheless does not choose to impose the death penalty. That approach, however, would provide no direction as to the situation in which the jury does not make the required finding.

Additionally, Section 5(B) authorizes the use of a second jury for purposes of sentencing after a verdict that the defendant is guilty of a capital felony, but does not specify who may request a new jury: the defendant? The prosecutor? Can a court make its own independent determination to impanel a new jury?

Explanation of Sentence.

NMAG next advises that the requirement in Section 6 that the judge instruct the jury in the penalty phase of a death penalty trial that a life sentence means the defendant must serve thirty years before becoming eligible for parole: this instruction is required by the decision in Clark v. Tansy, 1994-NMSC-098, 118 N.M. 486. It points out that Section 6 does not require the judge to instruct the jury as to the meaning of life without possibility of release or parole, and advises that it is likely that Clark v. Tansy would be interpreted to require such instruction.

Automatic New Mexico Supreme Court Review.

AOC advises that Article 2, Section 2 of the Constitution of New Mexico provides that appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. Appellate review normally consists of reviewing the record for error. HB 155 requires the Supreme Court make a determination on the validity of the death sentence, based on: whether the evidence supports the fining of a statutory aggravating circumstance; whether the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances; whether the sentence of death 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. HB 155 does not specify the standard the court is to apply in making these determinations. Additionally, there is no provision for the taking of evidence in making these determinations, nor is there a provision authorizing hearings for the purpose of taking evidence on these issues at either the Supreme Court or district court level prior to the Supreme Court's automatic review. (For additional discussion on this issue and the proportionality review requirement, see the FIR on the substantially identical HB 72, introduced in 2017, @ <https://www.nmlegis.gov/Sessions/17%20Regular/firs/HB0072.PDF>)

Section 9 raises additional issues. NMAG comments that this provision replaces the provisions of repealed NMSA 1978 § 31-20A-4 providing for automatic appeal of the judgment of conviction and sentence of death. Subsection C lists the bases for reversing a death sentence, including when “the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” This type of proportionality review - comparing one case to another case to determine that the sentences are proportionate to each other given the facts of the crime and the character of the defendant - is not constitutionally required. However, NMAG notes that the New Mexico Supreme Court is currently set to review the manner in which it reviews claims that a sentence is disproportionate. NMAG warns that it is possible, if not highly likely, that the Supreme Court will either (1) conclude that the 2009 repeal renders all existing and any future death sentences disproportionate, or (2) broaden the universe of cases which it considers in judging the proportionality of any given death sentence in such a way that, as a practical matter, because New Mexico prosecutors seldom seek the death penalty, no future death sentence will survive proportionality review under this Section.

Other Issues

NMAG also notes that Section 13 includes the provisions currently in NMSA 1978 § 31-14-3 providing that the warden of the penitentiary of New Mexico may suspend the execution of a death sentence when there is reason to believe the defendant has become insane so that a hearing on the matter may be held. Section 13 of this bill, however, omits the language that allows for suspension of the judgment of death when an appeal is taken.

**TECHNICAL ISSUES**

The second sentence in Section 1(A) declares a defendant who is not 18 at the time of the commission of a capital felony shall not be sentenced to death but may be sentenced to life imprisonment or life imprisonment without the possibility of release or parole. Section 3(C) describes in more detail the process by which the sentence to be imposed is determined. Reference to Section 3(C) in Section 1(A) may avoid later confusion concerning this process,

including consideration of aggravating and mitigating circumstances and issues relating to mandatory life without possibility of parole for juvenile offenders.

## **OTHER SUBSTANTIVE ISSUES**

According to the National Conference of State Legislatures (NSCL), in 2017, Alabama, Florida, Georgia, and Mississippi enacted measures relating to the death penalty. Alabama removed references to advisory jury verdicts and now prohibits a court from overriding a jury verdict in capital cases and also provides that post-conviction death penalty remedies take place concurrent to any direct appeal. Florida now requires jury unanimity in death penalty sentencing procedures to bring procedures into conformity with the constitutional requirements. Georgia now encourages district attorneys to seek the death penalty against defendants accused of the offense of murder against a law enforcement officer. Mississippi amended the methods by which execution via lethal drugs are to be performed.

### *National Fiscal Impact*

LOPD notes that studies from other states and the federal system continue without exception to show the enormous expense occasioned by death penalty cases. Recent studies in three states demonstrate the unmistakable pattern. A Nebraska study showed the average per-case cost of a death penalty prosecution to have been \$1.5 million dollars more expensive than a prosecution with a maximum punishment of life without the possibility of parole (LWOP). For this reason, mainly, Nebraska followed New Mexico's lead and repealed its death penalty. A study in Washington, a state currently in the process of considering repeal, yielded similar data. A death penalty prosecution in Washington costs on average a million dollars more than a life imprisonment without possibility of release or parole. A recent Colorado study shows an LWOP prosecution takes on average 24.5 days in court, as compared to a remarkable 147.6 days in court on average for a death penalty prosecution – six times as long. See this and other data and information on the website of Death Penalty Information Center – [www.deathpenaltyinfo.org/costs-death-penalty#financialfacts](http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts)

The NCSL provided this information 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

Detailed discussion of these states’ costs are on Attachment 2.

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.

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.”

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*Costs to the New Mexico Judicial System*

To impose the death penalty under this bill, two jury proceedings are typically required: one to determine guilt and one to determine the sentence to be imposed. In its analysis of HB 115 the Administrative Office of the Courts (AOC) confirms its estimate that a death penalty jury trial will cost \$12 thousand 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 if there are two separate proceedings, more costs will be incurred.

AOC also cites the New Mexico Supreme Court's finding in State v. Young (2007) which arose out of the Santa Rosa prison riot cases: "it is indisputable that the prosecution and defense of capital murder cases are substantially more expensive than in non-capital cases." In that case, 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 (these figures are 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 concludes 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 proceed due to lack of funding and inherent unconstitutionality.

In previous analyses of similar bills in past sessions, according to the LOPD, the costs for the two current death penalty cases that remain in the system (the numbers of which are used in the fiscal analysis for this bill) were: for the first case, trial costs of \$145 thousand, post-conviction attorney fees of \$250.4 thousand, and additional expenses, including experts, of \$211.5 thousand for a total cost to date of \$607.4 thousand; for the second case, trial fees of roughly \$150 thousand, post-conviction attorney fees of \$325.1 thousand, and other expenses including experts of \$392.8 thousand, for a total cost of \$1.3 million.

LOPD describes the fiscal impact involved in rebuilding its office to provide death penalty defense:

The final nature of the penalty envisioned requires an urgency of the defense at every step at which LOPD would represent death-eligible defendants - pre-trial, trial, appeal and habeas. Overall, a death penalty trial case requires at least five times the attorney-hours of an ordinary first degree murder case; this remains true on the appellate and habeas levels.

Presently, the entire statewide organization of the LOPD has only a single attorney who has ever tried a death penalty case (two are required) and she was not lead counsel and is presently a manager; only two LOPD lawyers have ever handled death appeals (one of whom is presently eligible for retirement and the other will retire in FY19). Enactment of the proposed legislation would require LOPD to recruit/re-implement a team of death-capable trial lawyers (two needed per defendant, so at least two teams of two advanced trial attorneys required), appellate lawyers (two per appeal, again advanced attorneys required) and habeas lawyers (same), as well as a dedicated investigator and paralegal. As there have been no new death cases in New Mexico since the repeal, no training has been presented here on this specialized area of the law. Each of the new team of attorneys would



have to be removed from their ordinary workload to attend out-of-state training. Further, every death case charged would require extraordinary resources for investigation and expert consultation.

Several New Mexico homicides each year would be death-eligible under the proposed law: if the bill were enacted, LOPD would have no choice but to work each of these as death penalty cases from the start. All hearings in such cases must be handled by senior-level felony Public Defender attorneys (Trial Attorneys). Depending on the volume of charges initiated by a given district attorney in a locale, there would be a recurring increase in needed LOPD FTEs for the office as well as a need for funds for contract counsel compensation for not-unusual conflict cases.

A senior level LOPD Trial Attorney's mid-point salary including benefits is \$102.2 thousand in Albuquerque/Santa Fe and \$109.4 thousand in the outlying areas (due to salary differential required to maintain qualified employees). Recurring statewide operational costs per attorney would be \$2,300 with start-up costs of \$3,128; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$77.1 thousand. Specialized capital defense training costs necessary to achieve constitutionally requisite effective assistance of counsel would amount to approximately \$15 thousand per capital-defense-qualified attorney, per annum.

LOPD also estimates implementation of the proposed legislation would require a minimum of eight new advanced trial attorney FTE positions in the Albuquerque area as set forth supra, with staff and training cost increases upon enactment amounting to a start-up total to LOPD of \$1.6 million and recurring costs of \$1.6 million per year. Expert witness fees and transportation costs for the lengthier trials and hearings certainly also would require additional funds, but these costs would be dependent upon the individual cases charged.

LOPD reports 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, LOPD 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.

Additionally, in that earlier analysis, LOPD 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 require PDD 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.

Administrative Office of the District Attorneys (AODA) similarly reports increased costs for the prosecution team. It notes that 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. Similarly, AGO reports a fiscal impact to both its criminal appeals and prosecutions divisions from death penalty litigation. Because neither AODA nor AGO provide estimates, the impact of these increased costs is not reflected in the operating budget table above.

*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 during the 2016 special session. NMCD in its analysis of HB 115 comments that it is unknown at this point just how many death sentences may be imposed under this bill after a finding of at least one of the three specified aggravating circumstances. While the bill authorizes the imposition of the death penalty in these cases, NMCD asserts that it seems most likely (due to consideration of mitigating circumstances and the limited scope and small number of aggravating circumstances that one or more of which must be present before imposing the death penalty) that most defendants will instead be given a life sentence without the possibility of parole. NMCD also notes that because the sentence of life imprisonment without the possibility of parole only came into effect in New Mexico in 2009, there is no historical context for reasonably determining the likelihood of imposition of a death sentence or a sentence of life imprisonment without possibility of release or parole. As a result, NMCD estimates the increase in its operational costs as unknown, but possibly minimum to moderate. For purposes of consistency with data received from other agencies used to develop the fiscal analysis contained in this FIR, LFC staff used the 2016 data previously received from NMCD which stated an average cost of \$51.1 thousand per death row inmate per year.

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, some unknown number 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 nearly \$8 million. The table below suggests that potentially an average 14 death penalty sentences could be imposed per year. It is that number that was used in preparing the Estimated Operating Budget Table.

<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
2017	13
Average	14

NMCD advised LFC staff in October 2016 that provisions such as those in Section 14 of the bill could be very costly for NMCD if the department is forced to transport defendants found insane to the New Mexico Behavioral Institute as required by the bill. 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 24hour 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.

#### *Drug Costs*

In the past, New Mexico has used the three drug method with sodium thiopental, a combination the Death Penalty Information Center states would most likely not be used in future executions. The costs of lethal injection drugs are hard to determine and were not included in the fiscal analysis of this bill.

*Detail of Other States' Death Penalty Costs*

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 a defendant sentenced to life without the possibility of parole.