

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

Section 1 is new material to be added to Chapter 31, Article 20A NMSA 1978 to be entitled “Death Penalty in Certain Circumstances”

Subsection A provides that a person convicted of intentionally causing the death of a child pursuant to Section 30-6-1 [“Abandonment or abuse of a child”] shall be sentenced to death.

Subsection B provides a person convicted of causing the death of a child while committing a felony pursuant to the Controlled Substances Act shall be sentenced to death.

Subsection C provides that a person convicted of causing the death of a law enforcement officer while committing a felony shall be sentenced to death and “a person convicted for any related acts that led to the death of the law enforcement officer shall be sentenced to death.”

Subsection D provides that the court may impose a lesser sentence, if mitigating circumstances exist, but no less than life imprisonment without the possibility of parole.

Subsection E provides the aggravating factors warranting the death penalty: (1) prior convictions for child abuse or neglect; (2) prior CYFD intervention or plans or commitments the defendant failed to follow; (3) degree of suffering inflicted upon the child; (4) the age of the child; (5) any premeditation or planning; (6) prior criminal history of a serious violent offense; (7) killing multiple victims; (8) endangering the lives of other in the community; (9) membership in a gang or cartel.

Subsection F provides that a person charged under this section shall be afforded full due process rights, including the right to legal representation and a fair trial.

Subsection G provides that a separate hearing shall be held to determine if the death penalty is justified and the jury must be unanimous in a death sentence.

Subsection H provides that a defendant is required to establish mitigating circumstances by a preponderance of the evidence.

Subsection I provides that convictions resulting in the death penalty shall be automatically appealed to the supreme court “to ensure a thorough review of the case.”

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

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

Death penalty litigation will require significant additional resources and expertise from both the Law Office of the Public Defender, the district attorneys’ offices, the corrections department, and the district and appellate courts.

SIGNIFICANT ISSUES

Redundancy Issues

Subsections F and I appear to be unnecessary. The federal and state constitutions already guarantee due process, right to counsel, and a fair trial to all criminal defendants and those guarantees do not need to be explicitly repeated in a criminal statute. As to jurisdiction of the New Mexico Supreme Court, that is also already guaranteed by the state constitution. *See* N.M. Const. art. VI, § 2 (“Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court.”).

Causation Issues

Subsections B and C raise potential causation concerns as it is not clear what actions could be considered to “cause” the death of a child while committing a felony under the Controlled Substances Act or committing a felony or “any related acts” that lead to the death of a law enforcement officer. The concern would be that an unrelated, tangential, or non-dangerous felony could subject a person to the death penalty without a clear causal connection to the resulting death.

In the realm of felony murder, the New Mexico Supreme Court has consistently narrowed the type of felony that can support a first degree murder conviction for felony murder. “The collateral-felony doctrine derived from our concern that the prosecution may be able to elevate improperly the vast majority of second-degree murders to first-degree murders by charging the underlying assaultive act as a predicate felony for felony murder.” *Campos v. Bravo*, 2007-NMSC-021, ¶ 10. Thus, “the purpose of the collateral-felony limitation to the felony-murder doctrine is to further the legislative intent of holding certain second-degree murders to be more culpable when effected during the commission of a felony—thereby elevating them to first-degree murders—while maintaining the important distinction between the classes of second- and first-degree murders.” *State v. Campos*, 1996-NMSC-043, ¶ 22.

Similar concerns would likely be raised in elevating child abuse and other crimes to death penalty status. *See also State v. Stevens*, 2014-NMSC-011, ¶ 39, 323 P.3d 901 (“We therefore hold that when a CSP II charge is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent”).

Death Penalty Issues

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 Court discussed the landmark United States Supreme Court decisions that address the imposition of the death penalty and when and how it can be constitutionally applied by states.

See Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding capital sentencing schemes unconstitutional as applied due to lack of procedures guarding against the arbitrary imposition of the death penalty); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding a revised capital punishment scheme because it contained procedures to guard against the arbitrary and capricious imposition of the death penalty, including comparative proportionality review). *Fry*, ¶ 13. The Court noted that while the United States Supreme Court clarified in *Pulley v. Harris* that comparative proportionality review is not constitutionally required (465 U.S. 37, 45 (1984)) it did not “undermine the importance of comparative proportionality review for those states that chose to incorporate comparative proportionality review as a mandatory component of the capital sentencing scheme.” *Fry*, ¶ 20.

The New Mexico Capital Felony Sentencing Act was adopted in 1979 and remained largely unchanged until its repeal in 2009. *Fry*, ¶¶ 18-19. *See e.g.* 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.

PERFORMANCE IMPLICATIONS

None noted.

ADMINISTRATIVE IMPLICATIONS

None noted.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIPS

SB 187 – Death Penalty for Murder of a Peace Officer

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

n/a

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

n/a