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FISCAL IMPACT REPORT

ORIGINAL DATE 1/24/18

SPONSOR Rehm LAST UPDATED _____ HB 28

SHORT TITLE Violent Felonies for Sentencing SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate Increase see Fiscal Implications	Indeterminate Increase see Fiscal Implications	Indeterminate Increase see Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 18

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Defender Department (PDD)
 New Mexico Attorney General's Office (NMAG)
 New Mexico Sentencing Commission (NMSC)
 Administrative Office of the Courts (AOC)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 28 (HB28) proposes to amend Section 31-18-23 NMSA 1978 to include counting a violent felony committed by a person less than 18 years of age as a violent felony if the person was sentenced as an adult or if the (young) person was convicted as an adult in another state.

The bill adds the following to the list of violent felonies:

- voluntary manslaughter,
- involuntary manslaughter,
- aggravated battery,
- shooting at a dwelling or occupied building resulting in great bodily harm,

- aggravated battery against a household member,
- abuse of a child that results in great bodily harm to the child,
- negligent abuse of a child that results in the death of the child,
- intentional abuse of a child that results in the death of the child,
- aggravated arson,
- aggravated battery upon a peace officer,
- homicide by vehicle or great bodily harm by vehicle,
- injury to a pregnant woman by vehicle.

Additionally, the bill also proposes to change the time an inmate sentenced to life in prison is eligible for a parole hearing to one that has served 10 or more years of the imposed sentence and is 60 years of age or older. If the inmate is granted parole, the inmate will be under the supervision of the parole board for the remainder of his or her natural life.

The effective date of the provisions in this bill should it become law is July 1, 2018.

FISCAL IMPLICATIONS

Enhanced sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. According to the New Mexico Corrections Department (NMCD), the cost per day to house an inmate in state prison (public and private combined) in FY17 was an average of \$123 per day, or about \$44,779 per year. Increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements can contribute to overall population growth as longer sentence decrease releases relative to the rate of admissions pushing the overall prison population higher. The LFC reported in its FY19 budget recommendations that NMCD ended FY17 with a \$1 million budget surplus. NMCD's general fund budget, not including supplemental appropriations, has grown by an average of two percent, and is 11 percent higher than FY14, closely mirroring the inmate population growth of 10 percent.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage and losses in future earnings and intangible victim costs such as jury awards for pain, suffering and lost quality of life.

The Public Defender Department (PDD) does not provide cost of attorneys with the skills to deal with more complex cases; however in its response to another bill it does provide the cost of a mid-level attorney. The cost of a mid-level trial attorney is between \$92.5 thousand and \$99.7 thousand depending on the area of the state where additional attorneys would be needed. The cost outside of Santa Fe and Albuquerque are at the higher level because it has to provide a salary differential to maintain qualified employees. In addition to the mid-level attorney, PDD would also need to hire support staff, a secretary, investigator and social worker, which would cost on average \$77.1 thousand per attorney. Other annual operating costs per attorney are estimated at \$2.3 thousand. Nonrecurring costs to add a new attorney and support staff is estimated at \$3.1 thousand. The average impact to the general fund operating budget to add one attorney is \$175.1 per year.

The Administrative Office of the Courts (AOC) anticipates minimal impact should this bill become law, although increased caseloads do have the potential to increase caseloads.

In late 2015, the New Mexico Sentencing Commission (NMSC) ran a simulation using court data for disposed cases from 2000 – 2014 that had the charges included in HB28. During that 15-year period, 386 individuals were convicted twice and 27 were convicted three or more times on charges included in this bill.

Using release data from the New Mexico Corrections Department, NMSC found that the average time spent in prison varied based on the charge but was between two years and 19.5 years, excluding any pre-trial credit. Based on their analysis the average sentence increase on a 30-year sentence is 20.4 years. The FY17 annual cost to incarcerate an inmate is \$44.8 thousand; therefore, the cost to incarcerate one inmate for the additional 20.4 years is \$913.4 thousand. If the 27 inmates with three or more conviction were to serve a 30-year sentence, the future cost to the state would be \$24.7 million.

It must be noted that although New Mexico has had a three strikes law since 1994, NMSC was unable to find a single instance in which a person received a three strikes sentence enhancement.

SIGNIFICANT ISSUES

PDD in its analysis states that HB28 makes an effort to maintain the physical harm component in the definition of “violent felonies.” According to PDD, the bill includes additional offenses whose inclusion reaches beyond the type of offense this enhancement is designed to address, and which do not fit within the existing statutory structure. Moreover, PDD provides the following:

Voluntary manslaughter involves intentional conduct, it is defined by the existence of “provocation,” which is what makes it different from “murder.” In other words, it is commonly understood that a person who is not necessarily or otherwise inclined to violence, acted violently a person’s “proclivity for violence.”

Even more troubling, *involuntary* manslaughter essentially constitutes death resulting from criminal negligence. Negligent behavior – while it can be dangerous and may warrant criminal punishment – does not carry with it the level of culpability associated with heedlessly violent behavior, nor does it evidence a person’s “violent nature.”

This rationale similarly applies to negligent child abuse, which HB28 proposes to include as a “violent felony.” As relates to “violent” crimes triggering a life sentence, only intentional child abuse concerns the type of violent behavior the Legislative sentencing structure historically has attempted to address by this three-strikes statute.

Similarly, injuries from car crashes are not intentional acts falling within the scope of “violent” behavior targeted by this Legislature’s historic purpose for this statute. These crimes fall under the scope of criminal negligence crimes. Without minimizing their inherent seriousness and noting that they are subject to their own enhancements when committed under the influence (often resulting in very lengthy

sentences), these offenses do not result from a violent nature or proclivity for violence.

Finally, third-degree aggravated battery does not inherently require injury at all, as the deadly weapon alternative carries no such requirement. This proposed inclusion would be another departure from the Legislature’s previous sentencing rationale for the three-strikes law.

The AOC believes that HB28 will dramatically increase the number of violent felonies that can lead to the imposition of a life sentence under Section 31-18-23 NMSA 1978, including within the list offenses that do not require that someone be killed or seriously injured (e.g. Section 30-22-25(C) NMSA 1978, aggravated battery upon a peace officer with a deadly weapon or in any manner whereby great bodily harm or death *can* be inflicted; and including misdemeanor resisting, evading or obstructing an officer, Section 30-22-1 NMSA 1978, as a circumstance under which Section 66-8-101.1 third degree injury to a pregnant woman by vehicle may occur). It can be anticipated that the HB 28 amendments will be challenged as constitutional violations of the prohibition against cruel and unusual punishment (U.S. Constitution, Amendment VIII, and N.M. Constitution, Article II, Section 13) and the right to equal protection (U.S. Constitution, Amendment XIV, and N.M. Constitution, Article II, Section 18).

The New Mexico Attorney General’s Office (NMAG) provides that legal commentators have expressed reservations over the use of convictions incurred when a criminal was a juvenile to later incarcerate that criminal as an adult for significant periods of time. See, e.g., Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes As Cruel and Unusual Punishment*, 46 U.S.F.L. Rev. 581 (2012) (discussing Eighth Amendment concerns in this context).

Additional common considerations often brought up when legislative bodies across the United State consider expanding a given state’s “three strikes” laws are things like concerns over whether a given sentence implicates the Eight Amendment prohibition against cruel and unusual punishment, concerns over the removal of judicial discretion, and concerns that repeat offenders facing life imprisonment will contribute to judicial backlog.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the following performance measures:

- NMCD:
 - Percent of prisoners reincarcerated back into the corrections department within thirty-six months due to technical parole violations;
 - Percent of prisoners reincarcerated back into the corrections department system within thirty-six months due to new charges or pending charges;
 - Percent of inmates testing positive for drug use or refusing to be tested in a random monthly drug test;
 - Percent of sex offenders reincarcerated back into the corrections department within thirty-six months; and
- District Courts:
 - Cases disposed of as a percent of cases filed;

- Percent change in case filings by case type;
- District Attorneys:
 - Average caseload per attorney;
 - Number of cases prosecuted;
 - Number of cases prosecuted per attorney;
- Public Defenders:
 - Percent of cases taken by contract attorneys;
 - Percent of cases that go to trial with clients defended by contract attorneys.

ADMINISTRATIVE IMPLICATIONS

AOC reports that life imprisonment cases take up a considerable amount of judicial time. The proposed legislation may increase the work that needs to be done by the courts and require additional resources to handle the increased workload.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB18 Three Strikes Enhancement,

OTHER SUBSTANTIVE ISSUES

According to NMSC, roughly half of the states have enacted some form of three strikes statutes, with most enacting theirs around the time New Mexico did in 1994. The most recent was Massachusetts in 2012. Notably, that same year California voters passed Proposition 36, which provides that a three strikes life sentence can only be imposed if the third felony is serious or violent; this was significant as the California three strikes law was in many ways the model for the national discourse on these laws. Most states have modified, sometimes extensively, their three strikes laws since they were initially adopted.

NMCD points out that it is not clear if the offender has to serve an actual ten year period or if “good time” earned by the offender can be counted as part of the ten year threshold.

ALTERNATIVES

PDD suggests reviewing the basic habitual offender statute instead of addressing the issue of inherent proclivity for violence individually.

ABS/sb