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## FISCAL IMPACT REPORT

SPONSOR: Swisstack DATE TYPED: 01/28/03 HB 117  
 SHORT TITLE: DWI Penalties for Certain Offenders SB \_\_\_\_\_  
 ANALYST: Fox-Young

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
	\$2,500.0		Significant	Recurring	General Fund
			\$500.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	FY04			
	Minimal	Minimal*	Recurring	Intensive Supervision Fund

\*CD reports that there will be a minimal increase in revenue to the intensive supervision fund due to extended periods of probation and parole as well as possible supervision of misdemeanor offenders.

Relates to HB 40, HB 139, HB 189, SB 16, SB 93, SB 99

### SOURCES OF INFORMATION

#### Responses Received From

Corrections Department (CD)  
 Administrative Office of the Courts (AOC)  
 State Highway and Transportation Department (SHTD)  
 Public Defender Department (PDD)  
 Attorney General (AG)

#### No Response

Administrative Office of the District Attorneys (AODA)

## SUMMARY

### Synopsis of Bill

House Bill 117 amends sections of the Habitual Offenders Act relating to the sentencing of persons convicted of drug and alcohol driving offenses. It increases penalties for certain felony DWI offenders, mandates treatment for repeat DWI offenders and requires that the Corrections Department (CD) provide substance abuse counseling and treatment to felony DWI offenders.

The bill exempts offenders convicted of aggravated driving while under the influence of intoxicating liquor or drugs. (Section 66-8-102 NMSA)

The bill removes the impact of completion of DWI screening programs on sentencing and **increases penalties for fourth and subsequent DWI offenses**. The bill mandates incarceration for fourth and subsequent offenses; fifth and sixth time offenses remain fourth degree felonies; and seventh and subsequent offenses are increased to third degree felonies.

- Fourth time offenders shall be sentenced to a term of imprisonment extending for a minimum of six and a maximum of eighteen months.
- Fifth time offenders shall be sentenced to a term of imprisonment extending for a minimum of twelve and a maximum of twenty-four months.
- Sixth time offenders will be sentenced to a term of imprisonment extending for a minimum of eighteen and a maximum of thirty months.
- Seventh time and subsequent offenders will be sentenced to a term of imprisonment extending for a minimum of twenty-four months and a maximum of thirty-six months.

Mandatory court-approved treatment programs—thirty-day inpatient or ninety-day outpatient—are imposed for second and third misdemeanor offenses.

House Bill 117 appropriates \$2,500,000 from the General Fund to the Corrections Department (CD) for the provision of substance abuse counseling and treatment for felony DWI offenders. CD shall provide substance abuse counseling and treatment to any person who has been convicted of a DWI felony.

### Significant Issues

The Attorney General (AG) reports that HB 117 adopts the Supreme Court's reasoning in State v. Anaya, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223, that held that a DWI fourth degree felony was different from other fourth degree felonies and should not be included in the Habitual Offender Act. When the DWI Reform Act was passed in 1992, the Legislature created a fourth-degree felony penalty for a fourth or subsequent conviction of DWI. The Anaya case dealt with whether the Legislature intended to create a special kind of fourth-degree felony or a "regular" fourth-degree felony that would be subject to habitual offender enhancement. The Supreme Court initially decided the Legislature intended felony DWI to be treated like all other felony crimes. After Justice Frost was replaced on the court, the opinion was withdrawn and a new opinion was substituted. This second opinion held the legislative intent was not clear and there-

fore a special kind of felony had been created. AG reports that the passage of HB 117 would clarify the Legislature's intent to treat felony DWI's separately from other felonies.

### **FISCAL IMPLICATIONS**

The appropriation of \$2,500.0 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2004 shall revert to the general fund.

CD reports that the most significant fiscal implications to the department will result from increases in the prison population, increased enrollment in treatment programs, and increases in probation and parole caseloads; however, the bill does not contain an appropriation to fund such increases. CD estimates cost increases will begin to surface about one year after the effective date, then leveling off in the next three years. CD estimates that HB 117 would result in an annual increase of approximately 30 to 40 longer prison sentences for fifth convictions and an annual increase of approximately 20 to 30 longer sentences for sixth, seventh and subsequent convictions.

Additionally, CD reports that increasing the penalties from a fourth to third degree felony for seventh and subsequent offenses will result in an increase of one year in the period of probation and parole for offenders, yielding a corresponding increase in probation and parole costs. Mandating treatment for misdemeanor offenses will also serve to increase supervision by probation and parole.

CD estimates that the provisions of HB 117 will transfer some of the costs currently associated with housing fourth degree offenders in county jails to department prisons and probationary supervision.

Based upon Fiscal Year 02 actual expenditures, the annual contract/private prison cost of incarceration is \$23,552 for males, and the annual per client cost to house a female inmate at a privately operated facility is \$25,117. Because state-owned prisons are essentially at capacity, any net increase in inmate population will be housed at a contract/private facility. The annual per client cost for a standard supervision program in Probation and Parole is \$1,533, and the annual per client cost in Intensive Supervision programs is \$2,964. The annual per client cost in department-operated Community Corrections programs is \$5,618, and the annual per client cost in privately-operated Community Corrections programs is \$10,953.

CD reports that a \$2,500.0 appropriation may not cover substance abuse treatment for all DWI felony offenders. The bill mandates that CD provide substance abuse treatment to all felony DWI offenders, regardless of whether they are sentenced to prison or sentenced to probation. Currently, prison programs for substance abuse treatment exist as voluntary programs and making the programs mandatory will increase the present numbers of offenders attending such programs in prisons.

The statutory amendments proposed in this bill will yield a significant increase in the number of felony DWI convictions, therefore necessitating an increase in the number of felony prosecutors, defense attorneys and court staff. Cost increases will be further exacerbated because felony cases are inherently more expensive than misdemeanors. Public Defender Department (PDD) reports that clients facing harsher jail terms are less likely to plead at either the magistrate or district level.

PDD indicates that this bill will significantly increase the department's needs for in-house and contract counsel and that in-house felony counsel cost more than entry-level misdemeanor attorneys who staff the lower courts. The department estimates that this bill would increase the need for felony attorneys in each of the eight outlying districts, Albuquerque and in districts served by contract counsel. PDD estimates that overall departmental costs will increase by at least \$500.0 annually.

The State Highway and Transportation Department (SHTD) reports that the department's Federal Highway construction fund was sanctioned \$3,000.0 in FY00, \$3,000.0 in FY01, and \$6,000.0 million in FY02. SHTD reports that the fund will continue to be sanctioned \$6,000.0 annually in future fiscal years as long as the state does not meet the federal government's criteria. SHTD sets forth the necessary conditions and the state's level of compliance as follows:

- *A minimum one-year license revocation for all repeat DWI offenders.* SHTD reports that the state **does not meet** this condition.
- *Impoundment or Immobilization of, or the Installation of an Ignition Interlock System, on motor vehicles.* SHTD reports that the state **does not meet** this condition.
- *An assessment of their degree of alcohol abuse, and treatment as appropriate.* SHTD reports that the state currently **does meet** this condition, but that HB 117, as written, would bring the state out of compliance. (SEE TECHNICAL ISSUES ALSO)
- *Certain mandatory minimum sentences.* The state **does not meet** this condition. (SEE TECHNICAL ISSUES ALSO)

### **CONFLICT, DUPLICATION, RELATIONSHIP**

Relates to HB 40: amends same section of law, has conflicting jail times; relates to HB 139-amending same section of law, no conflicts; relates to HB 189-amends same section of law, has conflicting language; relates to SB 16-amends same section of law, has conflicting language; relates to SB 93-amends same section of law, has conflicting language; and SB 99-amends same section of law, no conflicting language.

### **TECHNICAL ISSUES**

SHTD reports that HB 117, as written, brings the state out of compliance with the federal government because it requires only first time DWI offenders undergo screening, as opposed to all offenders. SHTB recommends amending section 66-8-102 to retain mandatory screening and mandatory treatment for all offenders, basing treatment on individuals' screening results.

Additionally, HB 117 does not satisfy the federal government's requirements for mandatory minimum sentencing of repeat offenders. The guidelines laid out in HB 117 mandate a minimum sentence of no fewer than 72 hours in jail for a second conviction, but the federal government requires a sentence of no fewer than 120 hours for such convictions.