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FISCAL IMPACT REPORT

SPONSOR Saavedra DATE TYPED 2/16/04 HB 518

SHORT TITLE Consecutive Sentences for Certain Felonies SB _____

ANALYST Koplik

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
			See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts
 Attorney General's Office
 Public Defender Department
 Corrections Department

SUMMARY

Synopsis of Bill

House Bill 518 adds a section to §31-18-14 NMSA 1978, related to sentencing options on felony murder cases. When a person commits first degree murder while in the commission of any felony or while attempting to commit a felony, the person may be charged and convicted of both murder and the underlying felony. This bill allows the court to sentence these two offenses to be served consecutively. The proposed legislation does not require consecutive sentences; that is left to the discretion of the sentencing judge.

Significant Issues

The **Attorney General's Office** states that this bill would clarify the legislative intent that a conviction and sentence may be entered by a trial court for the commission of the predicate felony when a person is convicted of first-degree murder under the felony-murder doctrine.

The bill addresses a problem raised by the 1995 Supreme Court decision in *State v. Contreras*, 120 N.M. 486 (1995). In 1995, the New Mexico Supreme Court ruled that a person convicted of first-degree murder under what is known as the "felony-murder doctrine" may be sentenced for the murder, but not for the underlying or predicate felony committed at the same time. *State v. Contreras*, 120 N.M. 486 (1995). *This decision turned solely on legislative intent.* Justice Ransom's opinion stated that allowing both convictions and sentences to stand would "...be to 'prescribe greater punishment than the legislature intended,'" *id.* at 490-1, citing to *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). The opinion clearly indicates that the legislature may correct this situation by statute. This bill, as drafted, achieves that purpose.

Mr. Contreras was found guilty by of committing an armed robbery and killing the robbery victim. This crime is deemed to be felony murder under our statutes. NMSA 1978, § 30-2-1 (A) (2). Because the state had to prove the armed robbery to also prove the murder, the Supreme Court found the conduct to be unitary. The court determined that the elements of robbery were subsumed in the homicide. Absent legislative intent to the contrary, the court held the trial court could not sentence Contreras for the armed robbery. This case provides a good example of a situation where someone commits a murder and receives no additional imprisonment for an underlying crime like armed robbery, kidnapping or rape.

There is *no constitutional impediment* to the entry of a conviction and sentence for unitary conduct. Once again, the issue turns solely on legislative intent. *Blockberger v. United States*, 284 U.S. 299, 304 (1932). It should also be noted that often the prosecution charges murder in alternative counts. If the jury finds the accused guilty of willful and deliberate murder and does not rely on an underlying, predicate felony for a felony-murder conviction, the defendant can be sentenced for ancillary crimes. This creates the seemingly unintended circumstance of creating two criminal escapades in different ways.

The following analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. It should be noted that pursuant to a recent Court of Appeals decision, if any statutory sections amended by this bill are also amended by another bill or bills, the bill last signed by the Governor may be the only one that will be considered a valid law. *See State v. Smith*, Ct.App. No.s 24,253, 24,254 and 24,258 (filed 1/12/04), *pet. for cert. pending*.

The **Public Defender Department** states that in New Mexico, the crime of felony-murder is a first-degree crime. Felony-murder is defined as a second-degree murder committed during the commission of a felony. It is impossible to commit felony-murder without committing a felony. The fact that the murder occurred during another crime "enhances" the crime from second degree-murder to first-degree murder. Felony-murder carries a life sentence without the ability to earn goodtime credit. Imposition of a sentence for the underlying felony would have almost no effect because the defendant would already be serving a life sentence.

The Double Jeopardy clause of the state and federal constitutions prevent the state from punishing someone twice for the same crime. That does not mean that the state cannot punish someone for different crimes that are committed at the same time. Many criminal acts violate more than one statute and those multiple punishments do not violate double jeopardy. However, when there is no way to commit one crime without committing the other, then punishing the person twice does violate the constitution. Imposing a sentence for first-degree felony murder and the underlying felony is clearly unconstitutional in New Mexico even if it is approved by the legislature.

In most other states, felony-murder is a second-degree murder, not a first degree-murder. In those states, the court can impose separate penalties for both crimes. Similarly, in New Mexico, if the defendant is convicted of a second-degree murder and a separate felony he can be punished for both. For example, the defendant could receive the 15-year sentence for the second-degree murder and fifteen years for the commission of a felony resulting in death, which the judge could impose consecutively for 30 years.

The **Corrections Department** states that since the life sentence in New Mexico means serving a 30 year prison sentence before being eligible for parole; this bill in effect allows for 30 years plus usually 3 years to 9 years for the underlying felony. First, this bill is aimed at deterring people from committing dangerous felonies; and then punishing and incapacitating those offenders who kill in the course of committing dangerous felonies. Second, it is possible the bill could result in longer prison terms for some offenders convicted of murder. However, the impact to the Corrections Department will, as a practical matter, be delayed for 30 years.

FISCAL IMPLICATIONS

The Corrections Department faces the most apparent fiscal impact from this proposed legislation. However, this impact would be felt only after 2034, because the offender would have already served a life sentence. At this date, it is possible that some offenders would serve longer sentences. On the other hand, the proposed legislation could deter dangerous felony conduct, resulting in fewer life sentences and slightly reducing costs.

The contract/private prison annual costs of incarcerating an inmate based upon FY 2003 actual expenditures is \$20.7 thousand per year for males. The cost per client to house a female inmate at a privately operated facility is \$26.3 thousand per year. Because state owned prisons are essentially at capacity, any net increase in inmate population will be housed at a contract/private facility.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The Attorney General's Office states that current law will remain unchanged. When the prosecution relies on a predicate felony to prove a charge of felony murder, the offender can only be sentenced for the murder and may not be sentenced for an accompanying robbery, rape, kidnapping or other serious felony offense committed at the same time.

SK/dm