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FISCAL IMPACT REPORT

SPONSOR	<u>Chasey</u>	ORIGINAL DATE	1/28/09		208/aHJC/aSPAC
		LAST UPDATED	4/06/09	HB	<u>/aSFL</u>
SHORT TITLE	<u>Proof of Aggravating Circumstance Standards</u>			SB	
		ANALYST	<u>C. Sanchez</u>		

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Public Defender (PD)

New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of SFL Amendment

The Senate Floor amendment makes a technical change.

Synopsis of SPAC Amendment

The Senate Public Affairs Amendments to HB 208 strikes the House Judiciary Committee amendments 1 and 3. The SPAC amendment inserts the following new subsection:

- B. When the determination of guilt or innocence for the underlying offense is made by a jury, the original trial jury shall determine whether aggravating circumstances exist. If the offender waives a jury trial for the underlying offense, the offender retains the right to a jury determination of aggravating circumstances. If the offender waives a jury determination of aggravating circumstances, the basic sentence may be altered upon a finding by the judge beyond a reasonable doubt of any aggravating circumstances surrounding the offense or concerning the offender.

Synopsis of HJC Amendment

The House Judiciary Committee amendment to HB 208 essentially does three things:

- inserts language to allow a determination of aggravating circumstances by the “original trier of fact or jury”;
- makes it clear that presentation of evidence or statements regarding aggravating circumstances be made to the “original trier of fact or jury as soon as practicable” following the determination of guilt or innocence;
- strikes the word “aggravated” and replaces it with “aggravating”

Synopsis of Original Bill

In State v. Frawley, 2007 NMSC-057, 143 N.M. 7, 172 P.3d 144 (2007), the New Mexico Supreme Court found NMSA 1978 Section 31-18-15.1(A) (1993) facially unconstitutional and stated that the Legislature must fix the constitutional problem. HB 208, a Courts, Corrections and Criminal Justice bill, is that fix which creates a separate procedure whereby a jury must make a finding beyond a reasonable doubt of any aggravating circumstances surrounding the offense or the offender. If this finding is made by the jury, a judge may aggravate the defendant’s sentence by one-third. A separate presentation of evidence or statements regarding an alleged aggravating circumstance shall be made to the jury following the determination of guilt or innocence. A judge may lower a sentence by a third if he finds any mitigating circumstances surrounding the offender or the offense.

FISCAL IMPLICATIONS

It is difficult to assess the financial impact of this bill. It could increase or reduce enhanced sentences, or because of the variability of juries throughout the state, no ultimate change could occur. Obviously, longer sentences tend to increase the NMCD prison population.

According to the AOC, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. There are issues that will be litigated that will result in increased costs to the courts. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. See also “significant issues”, below.

SIGNIFICANT ISSUES

In Blakely v. Washington 124 S.Ct. 2531 (2004), the United States Supreme Court called into question the authority of a judge to provide for an upward departure from a basic or presumptive sentence. Subsequent to the Blakely decision, there were conflicting federal and New Mexico court decisions regarding whether a judge could impose an upward departure from a basic sentence of imprisonment. A partial list of relevant cases includes Cunningham v. California (U.S. Supreme Court), State v. King (NM Court of Appeals), State v. Lopez (NM Supreme Court) and State v. Frawley (NM Supreme Court).

Following the New Mexico Supreme Court’s decision in *State v. Frawley*, (filed October 25, 2007) (NM Supreme Court) (p. 18), it now seems settled that Section 31-18-15.1 NMSA 1978, which authorizes a judge to provide for an upward departure from a basic sentence, is facially unconstitutional.

The bill essentially succeeds in bringing the sentencing scheme into compliance with the constitutional mandate articulated in Frawley.

The New Mexico Sentencing Commission researched and discussed this matter thoroughly and ultimately endorsed an amendment to Section 31-18-15.1 NMSA 1978 that would require a jury finding beyond a reasonable doubt of any aggravating circumstances surrounding the offense or concerning the offender. The approach endorsed by the New Mexico Sentencing Commission has already been enacted in the following states: Kansas, Arizona, Minnesota, North Carolina, Oregon, and Washington.

According to the New Mexico Sentencing Commission, states which have adopted this approach are intent on preserving their systems of presumptive sentencing and “likely have some confidence in the ability of (this approach) to achieve particular sentencing goals, such as reducing unwarranted sentencing disparities, enhancing the predictability of correctional resource needs, and establishing balance and proportionality among sentences.”

TECHNICAL ISSUES

On page 2, line 25, strike “aggravated” and insert in lieu thereof “aggravating”.

OTHER SUBSTANTIVE ISSUES

According to the AOC, though HB 208 is a constitutional solution to the issues addressed in Frawley, there still needs to be additional guidance in the legislation to the Courts on the following issues which would lessen the amount of future litigation:

1. HB 208 requires a jury finding without designating whether or not it is the trial jury or a newly impaneled and chosen jury who makes this finding. If it is a new jury, there will be additional costs to the courts.

Would this hearing begin immediately after the verdict is rendered or at a later date?

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There will be no constitutional statutory means of altering a sentence in aggravating or mitigating circumstances.

CS/svb:mt