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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/18/2017

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 13

SHORT TITLE Three Strikes Law SB \_\_\_\_\_

ANALYST Rogers

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$2,014.5 - \$3,104.5	\$4,014.5 - \$5,014.5	\$6,029.0- \$8,029.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 54.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General’s Office (AGO)  
 New Mexico Sentencing Commission (NMSC)  
 Law Office of the Public Defender (LOPD)

#### Responses Not Received From

New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

The bill adds additional violent crimes to the five crimes covered in the current “three strikes” law. The bill increases the number and type of qualifying felonies under which a person being sentenced for a third conviction – for any combination of listed offenses – must be given a mandatory life sentence.

Currently Included	Additional Crimes
First and second degree murder	voluntary manslaughter
second degree shooting at or from a motor vehicle	involuntary manslaughter
kidnapping resulting in great bodily harm	aggravated battery with a deadly weapon
aggravated, first degree criminal sexual penetration	shooting at a dwelling or occupied building resulting in great bodily harm
armed robbery resulting in great bodily harm	aggravated battery against a household member
	abuse of a child resulting in great bodily harm
	negligent abuse of a child resulting in death
	intentional abuse of a child resulting in death
	aggravated arson
	aggravated battery upon a peace officer with a deadly weapon
	homicide by vehicle or great bodily harm by vehicle while driving under the influence of intoxicating liquor or drug or driving recklessly or resisting, evading or obstructing an officer
	injury to a pregnant woman vehicle while driving under the influence of intoxicating liquor or drug or driving recklessly or resisting, evading or obstructing an officer

The provisions of this act apply to persons who have been convicted on, before or after July 1, 2017 of one of the violent felonies described in Section 1 of this act for the purpose of determining sentencing enhancements pursuant to that section for subsequent violent felony convictions on or after July 1, 2017. This stipulation could create a wave of new individuals sentenced to prison without possibility of parole.

The Attorney General’s Office (AGO) explains the bill expands the Three Strikes Law by counting as a violent felony conviction any violent felony conviction incurred by a person who is under age eighteen at the time of the crime, but only if the defendant was sentenced as an adult under New Mexico law, or was sentenced as an adult under the law of the state in which the conviction occurred.

AGO also states House Bill 13 amends NMSA 1978 Section 31-21-10, which provides for parole for persons sentenced to life imprisonment and for persons sentenced for most first, second, third or fourth degree felonies. House Bill 13 eliminates the possibility of parole for persons sentenced to the mandatory life sentence under the Three Strikes Law, except for inmates who are sixty years old or older and have served at least ten years of their sentence. Such inmates, if granted parole, would be under the guidance and supervision of the parole board for the remainder of their lives.

**FISCAL IMPLICATIONS**

The fiscal impact of this bill will be large. NMSC projects (see attachment 1) incarceration costs alone over the next 15 years could cause a general fund impact of \$24.9 million. The courts state there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be

proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. 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 attachment 1.

## **SIGNIFICANT ISSUES**

The AGO suggests the bill provides “additional grounds for prosecutors to seek sentence enhancements for violent offenders. Other offenses that may fairly be considered “violent” which the drafters may want to consider adding to the definition of violent felony are (1) third degree robbery, § 30-16-2, (2) criminal sexual contact, § 30-9-12(A), and criminal sexual contact of a minor, § 30-9-13. In addition, the drafters may want to consider adding aggravated fleeing a law enforcement officer as an alternative in Subsections (E)(2)(p) and (q), as it is a more serious offense than evading, resisting or obstructing an officer, which is included in those subsections.”

The Administrative Office of the District Attorney (AODA) states the “additional crimes listed in HB 13 include several that do not involve intentional conduct: involuntary manslaughter, negligent abuse of a child, homicide by vehicle and injury to pregnant woman by vehicle. The current predicate felonies for the three strikes act all require intentional conduct by the offender. The current predicate felonies for the three strikes law are either capital, first-degree or second-degree felonies. A number of the additional crimes listed in HB 13 are third degree felonies: aggravated battery, aggravated battery against a household member, criminal sexual penetration by force or coercion not otherwise specified in the act, aggravated battery upon a peace officer, homicide by vehicle and injury to pregnant woman by vehicle. The existing three strikes law requires that all of the predicate felonies result in death or great bodily harm.”

NMSC explains New Mexico’s three strikes law (Sections 31-18-23 and 31-18-24 NMSA 1978) was enacted in 1994. Section 31-18-24 NMSA 1978 (not included in HB 13) sets forth sentencing procedures if a three strikes sentencing enhancement is pursued:

“31-18-24. Violent felony sentencing procedure.

- A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.
- B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.
- C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.”

NMSC staff reviewed available New Mexico criminal justice data and were unable to find an instance when an offender received a three strikes sentencing enhancement.

According to NMSC, 28 states, including New Mexico, have a form of three strikes laws. Other states include Texas, Utah, Arizona, Colorado, and Nevada.

LOPD, in response to previous three strikes bills, stated that the purpose of the three strikes law as it currently exists is to identify recidivist criminals who show a “violent nature,” or “proclivity for violence,” and impose a life sentence for the safety of the public. LOPD expressed concern that “New Mexico has many felonies that are broadly worded enough to include both violent and non-violent conduct; the bill does not make the distinction to target only people who commit crimes in a violent way, and thus evidence a recidivist tendency justifying life in prison in order to protect the community.” LOPD stated that the lack of definition may sentence criminals who are not violent and may not warrant a life sentence.

LOPD previously provided examples of the broad nature of the bill, including the following: “kidnapping can include holding someone by the arm to make them take money out of an ATM. The bill does not limit itself to first degree kidnapping, and second degree kidnapping is defined as simply restraint with a particular intent; no actual harm need be suffered. Furthermore, even first degree kidnapping involves only ‘injury,’ and not great bodily harm, so that a scratch or bruise would suffice to be considered ‘violent’ under this bill.” The LOPD is concerned that accruing offenses eligible under the broad categories of the bill could quickly and unnecessarily sentence someone to life in prison.

LOPD previously stated that “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally. Section 31-18-17 NMSA 1978 already provides for significant sentencing enhancements for repeat felons, without imposing a life sentence. The life sentence provision should be targeting people whose level of violence justifies an extreme sentence for the safety of the community, recognizing that it is significantly greater than the penalty for any of the individual crimes, particularly where Section 31-18-23 NMSA 1978 does not allow any judicial discretion to find that a particular defendant is not in fact violent or a danger to the community.”

Finally, LOPD previously asserted that “the proposed additional felonies, as a third felony offense, would still be subject to a four-year mandatory sentencing enhancement under Section 31-18-17, the habitual offender enhancement statute applicable to all non-capital felonies (a fourth or subsequent felony offense incurs a mandatory eight year enhancement). Because that enhancement term applies to each felony in a new proceeding, it is a practical reality that habitual offender enhancements in a single case often total 12 or 16 years.”

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, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.

## PERFORMANCE IMPLICATIONS

The AOC is participating in performance-based budgeting. The bill may have an impact on the measures of cases disposed of as a percent of cases filed and percent change in case filings by case type.

## ADMINISTRATIVE IMPLICATIONS

LOPD noted that the proposed legislation would “certainly affect LOPD attorneys’ representation in cases where a potential third violent felony is charged, increasing the number of these cases that go to trial.”

## ALTERNATIVES

LOPD previously stated “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally.” LOPD also stated that Section 31-18-17 NMSA 1978 provides for sentencing enhancements for repeat felons, without imposing a life sentence. The LOPD believes that a life sentence should be retained only for those individuals whose actions truly warrant the sentence. As an alternative, the Legislature could revisit the basic habitual offender statute.

## OTHER SUBSTANTIVE ISSUES

NMSC cautions care should be taken to ensure that the applicability section set forth in HB 13 does not violate the provisions of Article II, Section 19 of the New Mexico Constitution preventing retroactive laws, bills of attainder, and impairment of contracts: “no ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.”

NMSC explained that many states, including New Mexico, have adopted “truth in sentencing” laws. Such laws typically require “serious violent offenders” to serve not less than 85% of their sentence. The attached New Mexico Sentencing Commission reports include information on time served by serious violent offenders (males and females) in New Mexico:

The AODA states the current three strikes law includes first-degree murder, which is now punishable by life in prison without parole (see, Sec. 30-2-1(A) and Sec. 30-18-14, NMSA 1978) and first-degree aggravated CSP which is punishable now by life imprisonment (see, Sec. 30-9-11(C) and Sec. 31-18-15(A)(2), NMSA 1978). HB 37 would add intentional child abuse that results in the death of a child, which is a first degree felony punishable by life imprisonment, to the existing three strikes law (see, Sec. 30-6-1(H) and Sec. 30-18-15(A)(2), NMSA 1978). In other words, for several of the listed crimes the life sentence imposed by the three strikes law could be in addition to a life sentence imposed for the predicate felony. An additional sentencing hearing to implement an additional life sentence under the three strikes law could be unwarranted if financial and personnel resources are strained.

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NMSC provided an extensive cost simulation, provided below:

### Simulation of Number of Offenders 2000 – 2014

To determine the impact of expanding the list of qualifying offenses subject to mandatory life imprisonment for three violent felony convictions, NMSC used data provided by the courts to run a simulation. Table 1 contains the list of charges in the bill that were used in the analysis.

Table 1. Charges

First degree murder
Second degree murder
Manslaughter
Third degree aggravated battery
Second degree shooting at a dwelling or occupied building
Second degree shooting at or from a motor vehicle
Third degree aggravated battery on a household member
Kidnapping with great bodily harm
First degree intentional child abuse
First through third degree criminal sexual penetration
First or second degree robbery
Aggravated arson
Aggravated battery upon a peace officer
Homicide by vehicle or great bodily harm by vehicle
Injury to pregnant woman by vehicle

NMSC has data on court cases disposed from 2000 – 2014. For the simulation, NMSC tried to determine the effect if the law had been changed in 2000 to include the charges above. The commission selected all cases that had a conviction on any of the above charges from 2000 – 2014 and then counted the number of convictions by offender. Over the 15-year period, 8,977 individuals were convicted for one of the charges at least once. Table 2 contains the number of individuals that were convicted once, twice or three times or more over the 15 year time period. The percentage of offenders who had three or more convictions was 0.3%. This would yield an estimated additional 27 offenders in the New Mexico Corrections Department serving life sentences over the first 15 years of the statute implementation. There were 386 offenders who had two convictions during the time period on these charges (4.3%).

Table 2. Number of Offenders by Number of Convictions

Once	8,564	95.4%
Twice	386	4.3%
3 times or more	27	0.3%
<b>Total</b>	<b>8,977</b>	<b>100.0%</b>

## **Estimating Differences in Sentence Lengths**

To estimate the difference in sentence lengths, NMSC used New Mexico Corrections Department (NMCD) release data. NMSC looked at the average time from sentence date to release date for each of the charges. The commission found the averages varied widely by charge; ranging from 2-19.5 years. It is important to note that this average does not include any pre-sentence confinement credit so the actual amount of time served is probably higher.

NMSC then calculated the weighted average, which takes into account the number of offenders who served time for each charge relative to the total number. For example, 1st degree murder has the longest average; however, there are fewer offenders who serve time on that charge compared to a charge like 3rd degree aggravated battery which has a large number of offenders and a significantly shorter average sentence to release length. The weighted average from sentence date to release date across all these crimes was 5.1 years. If upon the third conviction for one of these crimes, the offender was subject to a 30-year sentence, NMSC estimates the average time from sentence to release would be 25.5 years, if an offender earned all available meritorious deduction. This would be an increase in sentence of 20.4 years.

## **Estimate Cost of Increased Sentence Length**

NMSC found that the weighted average from sentence date to release date across the crimes included in the bill was 5.1 years. If upon the third conviction for one of these crimes, the offender was subject to a 30-year sentence, the commission estimated the average time from sentence to release would be 25.5 years, if an offender earned all available meritorious deduction. This would be an increase in sentence of 20.4 years and could cost up to \$24.9 million in incarceration costs.

Using the department's FY15 average cost to incarcerate a male inmate of \$45,250 per year in a state-owned prison, LFC estimates project the individual impact per inmate would be \$1.2 million across a 30 year prison sentence. The cost would be up to \$34.6 million if all 27 offenders who had three or more convictions on these charges received a 30-year sentence. In addition, trial costs could be as much as \$480 thousand.

The Law Office of the Public Defender (LOPD) explained that when a life sentence is being considered, the defendant is more likely to retain a lawyer and go to trial with the goal of acquittal or lesser conviction instead of a life sentence. Both the Administrative Office of the Courts (AOC) and LOPD stated that the increase in the number of these complex cases will take more resources, leading to higher costs and could lead to a need for increased indigent defense funding to maintain constitutional compliance.

Enhanced sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. An increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. NMCD's general fund base budget has grown by an average \$9.5 million per year, or 3 percent, since FY14 as a result of growing prison population and inmate's needs.

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, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.

