

Synopsis of SFC Amendment

The Senate Finance Committee amendment removes most of the Senate Judiciary Committee amendment's addition (the portion of the bill which would have changed the way in which justices, judges, and magistrates are compensated). It does not reinstate the previous Section 4, which had dealt with post-traumatic stress disorder. As it remains, the twice-amended committee substitute consists of the original first three sections:

- Section 1, expanding permissible payouts from the law enforcement protection fund;
- Section 2, increasing the penalty for any felon in possession of a firearm from a fourth degree felony to a third degree felony; and
- Section 3, increasing from one year to three years the current basic sentence enhancement for a first noncapital felony in which a firearm was brandished; and
- Section 4, establishing July 1, 2020 as the effective date of the bill.

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to the House Judiciary Committee Substitute for House Bills 6, 35, and 113:

- removes the bill's provisions dealing with post-traumatic stress disorder in first responders (law enforcement officers and emergency medical service workers);
- amends Section 34-1-9 NMSA 1978, which defines salaries for justices, judges and magistrates, by deleting language establishing presiding magistrates' salaries as a percentage of the chief judge of a metropolitan court and magistrate salaries as percentages of the salaries of metropolitan judge salaries, and replacing it with language stating that magistrate salaries will be determined by the legislature; and
- changes the bill's sentence enhancement provisions by removing an ambiguous phrase regarding sentence duration.

Synopsis of Original Bill

The House Judiciary Committee substitute for House Bills 6, 35 and 113 amends statutory provisions pertaining to the law enforcement protection fund and felony offenses involving firearms, and adds a section to the New Mexico Occupational Disease Disablement Law establishing a presumption that posttraumatic stress disorder is (with certain exceptions) proximately caused by employment as a law enforcement officer or emergency medical services first responder.

Section 1 expands permissible payouts from the law enforcement protection fund by amending Section 29-13-7 NMSA 1978 by removing the contingency for use of the fund

- 1) To provide retention amounts up to \$7500 [and eliminating the end date of June 30, 2021.
- 2) To recruit and to provide bonuses for and training law enforcement officers engaged in community-oriented policing.

Section 2 amends Section 30-7-16 NMSA 1978 by increasing the penalty for any felon in possession of a firearm from a fourth degree felony to a third degree felony. The current penalty for a third degree felony is three years in prison and a \$5,000.00 fine.

Section 3 amends Section 31-18-16 NMSA 1978 to increase from one year to three years the current basic sentence enhancement for a first noncapital felony in which a firearm was brandished; increases from three years to five years the current basic sentence enhancement for a second or subsequent noncapital felony with a firearm; removes the prohibition against suspending or deferring sentences for first and subsequent noncapital felonies in which a firearm was brandished; and defines the term “brandished”.

Section 4 follows on Laws 2019, Chapter revision of Section 34-1-9 NMSA 1978 118 (HB324), extending the presumption of PTSD being related to employment, from firefighters to emergency medical service workers (EMTs) and law enforcement officers. This bill indicates that conditions involving employment in those at-times stressful occupations would be presumed to be related to a new diagnosis of post-traumatic stress disorder (PTSD) if symptoms of that condition had not been found on a pre-employment physical. Courts could rebut the presumption that PTSD was caused by employment if the EMT or law enforcement officer could be shown to have been engaged in other activities, outside his/her employment, that would be likely causes of PTSD, but the person in question could still then attempt to make the case that her/his employment as an EMT or law enforcement officer had caused the PTSD.

Once diagnosed as having PTSD presumed to have been due to employment-related stress, the employer would be required to provide medical treatment for that disorder. If the presumption were successfully contested, the employer’s workers’ compensation insurance provider would be reimbursed by the employee’s other health insurance for those costs incurred.

The act would have an effective date of July 1, 2020.

FISCAL IMPLICATIONS

In their analyses of HB 35:

- AOC stated that firearm enhancement cases take up a considerable amount of judicial time because the district courts have to conduct not only a trial, but a sentencing phase as well. There may be an increase in the amount of work that needs to be done by the courts, thus requiring additional resources needed to handle the increase. AOC also noted that increasing the mandatory enhancement by several years is so severe that many accused persons will invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability, and jury fees. According to AOC, these additional costs are not capable of quantification.

- LOPD stated that while it would be able to absorb some increase in cases under the proposed law, cases with higher penalties tend to go to trial more often. Any increase in LOPD expenditures brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

- NMCD noted the fiscal impact of the bill is difficult to estimate. The bill’s increases in sentencing for first and subsequent uses of firearms in noncapital felony cases could result in longer sentences for repeat offenders as well as first time offenders. A moderate increase in population could be anticipated based on the increase in imprisonment sentences for individuals convicted of use of a firearm in noncapital felony cases. According to NMCD, the average annual cost to incarcerate a single inmate in state and private institutions is \$40,419. This includes all classification of inmates. Classification is determined by inmate’s custody levels,

and costs vary based on custody levels and particular facilities. The cost per client in Probation and Parole averages out to \$3,566 annually, including Community Corrections programs, standard supervision, and intensive supervision programs.

In their analyses of HB113:

- LOPD referred to the higher penalty for a felon found in possession of a firearm and noted that higher-penalty cases are somewhat more likely to go to trial. If the bill is enacted and results in more trials, LOPD may need to hire more trial attorneys with greater experience. These felonies would be handled by mid-level felony capable attorneys (associate trial attorneys). Depending on the volume of cases in a particular location, there may be a significant recurring increase in needed FTEs for LOPD and contract counsel compensation.

- AOC stated that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judicial branch 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. Like LOPD, AOC noted that an increase in the number of jury trials and appeals is possible, given the increase in the penalty. In general, prosecutions brought pursuant to laws with increased penalties can take up a considerable amount of judicial time and resources.

- NMCD noted that the fiscal implications of the bill are difficult to estimate, as incarceration and supervision costs are dependent on convictions. Increasing the penalty for being a felon in possession of a firearm from a fourth to third degree felony could result in a moderate increase in population as heavier penalties for third degree felonies include longer sentences, thus increasing population.

SIGNIFICANT ISSUES

The SJC amendment amends Section 34-1-19 NMSA 1978, which establishes salaries for state judges, by striking language that ties magistrate judge salary to salaries of all other state judges, and inserts language stating the legislature will establish magistrate salaries. Currently, magistrate court judges earn an annual salary of \$95.3 thousand, or seventy-five percent of what a metropolitan court judge earns. Magistrate judges need only a high school education or equivalent to serve (Section 35.2.1 NMSA 1978). The Committee Substitute for House Bills 2 and 3 the General Appropriation Act of 2020 includes a 3 percent salary increase for district and magistrate court judges, increasing magistrate court salary to approximately \$97.5 thousand annually.

With the SJC amendment, the bill may be vulnerable to a legal challenge under Article IV, Section 16 of the state constitution because it “embraces more than one subject.” Specifically, the bill relates to enhanced criminal penalties for certain felonies and to magistrate salaries, which are two different and unrelated issues. The purpose of Article IV, Section 16’s “one subject” limitation is to prevent the practice of “logrolling” where a bill includes two unrelated measures so that the passage of one measure is “piggyback[ed] ... on the popularity of the other.” *State ex rel. Clark v. State Canvassing Bd.*, 1995-NMSC-001, ¶ 26 (applying the similar limitation in N.M. Const. Art. XIX, § 1, which requires that two or more amendments to the constitution be submitted “so as to enable the electors to vote on each of them separately”). A bill violates the one subject limitation if it includes “discordant provisions having no rational or logical relation to each other.” *State v. Roybal*, 1960-NMSC-012, ¶ 9.

In its analysis of HB35, AOC noted that the imposition of longer, enhanced sentences may spur more defendants to retain attorneys and demand jury trials. Indigent defendants are entitled to public defender services.

In its analysis of HB35, LOPD noted that the bill may permit sentence enhancements multiple times in a single case. For example, a drunken person might brandish a gun at five people standing together. Under current New Mexico case law, this might result in five convictions for aggravated assault, each of which can be separately enhanced under Section 31-18-16. Assuming five convictions, the person's sentence would be enhanced by three years per count (if it were a first offense) for a total enhancement of 15 years, or a total of 25 years if it were a second firearm offense. LOPD explained that people are frequently convicted of multiple felonies for single acts in this manner due to the proliferation of criminal statutes. The New Mexico Supreme Court has declared that multiple enhancement in a single case (which may comprise of more than one felony) is the intent of the legislature. *State v. Boraz*, 2017-NMSC-030, ¶ 27. Consequently, according to LOPD, if the Legislature intends the enhancement in Section 31-18-16 to be used only once per case (even though multiple felony counts are charged) then it should clarify that intent.

In its analysis of HB113, LOPD noted that applying the higher third degree penalty to *all* felons who possess a firearm does not narrowly address public safety concerns. Because there are many non-violent felonies, this bill would treat violent felons in possession of a firearm the same as an embezzler or simple drug possessor whose gun possession does not carry the same public safety concern.

According to NMSC's analysis of HB113, as of June 30, 2019, there were 76 offenders committed to the custody of the New Mexico Corrections Department who had a conviction for a felon receiving, transporting, or possessing a firearm or destructive device as their highest charge.

NMAG focuses the bill's amendment to Section 31-18-16 NMSA 1978, which currently applies the firearm penalty enhancement when a firearm is "used" in the commission of a felony. The bill amends the provision to make the penalty enhancement applicable when a firearm is "brandished" in the commission of a felony and to add a definition of "brandished," which requires the display of a firearm "with deliberate intent to intimidate a person."

NMAG contends that the bill's definition of "brandished" would seriously limit a prosecutor's ability to add firearm enhancements to serious crimes involving firearms. For example, the definition would foreclose penalty enhancements where a firearm was discharged if the intent was not to intimidate, but was to injure or retaliate. Additionally, NMAG states that the change from "use" to "brandish" would require a prosecutor to prove a defendant's "deliberate intent" to have a penalty enhancement apply. Because the bill requires specific intent, NMAG states that a defendant might be able to use voluntary intoxication or mental illness as a defense to the enhancement. NMAG notes that federal law, like New Mexico's current law, applies penalty enhancements to any "use" of a firearm.

Regarding post-traumatic stress disorder and Section 4 of the current bill, the Center for Disease Control's National Institute on Occupational Safety and Health states that emergency workers are frequently subject to stress; some deal with the stress immediately and others have a longer-term reaction to the stress. From CDC's National Institute on Occupational Safety and Health's website on this issue,

<https://www.cdc.gov/niosh/topics/traumaticincident/default.html>:

Emergency workers must respond quickly to natural disasters, such as earthquakes or hurricanes, and to manmade disasters, such as technological failures or terrorist attacks. These workers are at risk of experiencing stress from what psychologists refer to as a *traumatic incident*. A traumatic incident is one that may involve exposure to catastrophic events, severely injured children or adults, dead bodies or body parts, or a loss of colleagues. NIOSH recommends that all workers involved in response activities help themselves and their coworkers and reduce the risk of experiencing stress associated with a traumatic incident by utilizing simple methods to recognize, monitor, and maintain health on-site and following such experiences.

Symptoms of Stress

Workers may experience physical, cognitive, emotional, or behavioral symptoms of stress. Some people experience these reactions immediately at the scene, while for others symptoms may occur weeks or months later.

Whether or not stress symptoms have been alleviated shortly after the traumatic events to which these first responders have been exposed, later symptoms may develop, and the individual may be diagnosed as having PTSD. Current American Psychiatric Association Diagnostic and Statistical Manual-5th Edition (APA DSM) criteria for the diagnosis of PTSD are given in the box below:

- A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:
 1. Directly experiencing the traumatic event(s).
 2. Witnessing, in person, the event(s) as it occurred to others.
 3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.
 4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse). **Note:** Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.
- B. Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:
 1. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s). **Note:** In children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed.
 2. Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s). **Note:** In children, there may be frightening dreams without recognizable content.
 3. Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring. (Such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings.) **Note:** In children, trauma-specific reenactment may occur in play.
 4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

5. Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
- C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following:
 1. Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
 2. Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
- D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
 1. Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia, and not to other factors such as head injury, alcohol, or drugs).
 2. Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g., “I am bad,” “No one can be trusted,” “The world is completely dangerous,” “My whole nervous system is permanently ruined”).
 3. Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.
 4. Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).
 5. Markedly diminished interest or participation in significant activities.
 6. Feelings of detachment or estrangement from others.
 7. Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).
- E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
 1. Irritable behavior and angry outbursts (with little or no provocation), typically expressed as verbal or physical aggression toward people or objects.
 2. Reckless or self-destructive behavior.
 3. Hypervigilance.
 4. Exaggerated startle response.
 5. Problems with concentration.
 6. Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).
- F. Duration of the disturbance (Criteria B, C, D and E) is more than 1 month.
- G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.
- H. The disturbance is not attributable to the physiological effects of a substance (e.g., medication, alcohol) or another medical condition.

There is also stigma about behavioral health conditions which often prevents people from seeking help (American Addiction Centers, *The Treatment Needs of Our Firefighters & First Responders*, 2015). The unfortunate reality of a delayed reaction to stress has been reported in data on suicides. According to the *Morbidity and Mortality Weekly Report* (MMWR July 1, 2016: 641–645), females working in protective service occupations had the highest rate of suicide compared to all other occupations. “term “post-traumatic stress disorder” has been used since the 1970s and has been part of APA’s DSM since the 1980s. The severity of the disorder is highly variable; more severe cases can be quite disabling. Recommended therapies for the

disorder have evolved since that time and are moderately effective in most cases. They include cognitive-behavioral therapy, group interpersonal therapy, and various medications including antidepressants and benzodiazepines.

HSD notes the three-way connection among first responder employment, PTSD, and suicide.

PERFORMANCE IMPLICATIONS

In its analysis of HB35, AOC stated that the bill may impact the courts' performance-based budgeting measures, which may result in a need for additional resources. For example, the district court's performance measure clearance rates may be impacted if increased penalties lead to an increased demand for jury trials and fewer plea bargains, thereby increasing the amount of judge and clerk time needed to dispose of cases.

In its analysis of HB113, AOC noted the bill may have an impact on the performance measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

TECHNICAL ISSUES

With removal of the original committee substitute's section 4 dealing with post-traumatic stress disorder in first responders, the short title of the bill is no longer accurate.

OTHER SUBSTANTIVE ISSUES

In its analysis of HB35, LOPD stated that there is no research finding that increasing penalties has a deterrent effect on the commission of crimes. This suggests that the sentence enhancements proposed by the bill would simply lead to more people being incarcerated and longer prison terms, which would increase costs and population in state correctional facilities.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The law enforcement protection fund would be limited more severely in the amounts that could be disbursed for recruitment and retention of law enforcement officers. Penalties for use of a firearm during commission of a crime would not be increased and for felons found to be in possession of a firearm would not be increased. Whether the bill as twice amended is passed and signed or not, discrepancy regarding PTSD would continue to exist: Firefighters would continue to have the presumption that their employment had caused their diagnosed PTSD, while emergency medical personnel and law enforcement officers would not. Arguably, this would not be defensible, since all three occupations are inherently stressful.