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FISCAL IMPACT REPORT

SPONSOR Ely/Matthews/
Hochman-Vigil ORIGINAL DATE 2/01/2020 LAST UPDATED _____ HB 267

SHORT TITLE Continuing Drug Enterprise Act SB _____

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$305.5	\$305.5	\$611.0	Recurring	General Fund
		Indeterminate- See Fiscal Implications	Indeterminate- See Fiscal Implications	Indeterminate- See Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Offices of the Public Defender (LOPD)
Office of the Attorney General (NMAG)
Corrections Department (NMCD)
Department of Public Safety (DPS)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)

No Response Received

Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

House Bill 267 adds the “Continuing Drug Enterprise Act” to Criminal Code. The Continuing Drug Enterprise Act:

- makes it a first degree felony for a person to commit a serious felony drug offense that is part of a continuing drug enterprise while that person is an organizer of the enterprise. An “organizer” is defined as a person who organizes, supervises or manages a continuing drug enterprise and obtains “substantial income or resources” from that role;

- provides that the remedies provided in the Continuing Drug Enterprise Act do not preclude and are in addition to civil or criminal remedies provided by the Racketeering Act, the Controlled Substances Act or any other NM law; and
- gives the Attorney General and district attorneys authority to enforce the Continuing Drug Enterprise Act.

In addition to enacting the Continuing Drug Enterprise Act, the bill amends existing sections of the Criminal Code to make it a first degree felony if unlawful racketeering activity includes an act chargeable or indictable as:

- Trafficking in controlled substances, except marijuana
- Distribution of controlled substances or controlled substance analogs, except marijuana
- Distribution of controlled substances or controlled substance analogs to a person under the age of eighteen

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

NMCD states that the fiscal impact of the bill is difficult to estimate. The first degree felony crime created under the Continuing Drug Enterprise Act and change in penalty to first degree felony for certain racketeering activities might result in longer sentences. Depending on convictions, longer sentences may correlate with an increase in population in the state's corrections facilities. NMCD states that a moderate increase in population would result in additional costs, based on the average annual costs for incarceration and supervision. NMCD states that the average annual cost to incarcerate a single inmate is \$40,419. This includes state and private institutions and all classification of inmates. Classification is determined by inmate 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.

LOPD states that if HB267 is enacted and more higher-penalty trials result, LOPD may need to hire more trial attorneys with greater experience to ensure compliance with constitutional mandates of effective assistance of counsel. Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. The approximate cost to the LOPD to hire an experienced attorney FTE is \$216 thousand to \$223 thousand depending on geographic placement. The cost of hiring a senior investigator FTE is approximately \$82.5 thousand. Assessment the bill's impact on the LOPD and the need for additional FTE would be necessary if and when the proposed higher-penalty scheme were implemented.

NMAG notes that HB267 provides the Attorney General with enforcement authority, including initiating investigations, assisting grand juries, obtaining indictments, filing information and complaints, and prosecuting cases. Because it expands the scope of criminal violations over which the Attorney General has prosecutorial jurisdiction, the bill, if enacted, would require additional financial and personnel resources.

AOC notes that as penalties become more severe, defendants may more often 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. These additional costs cannot be quantified at this time.

AOC also states that 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 an increase in commenced prosecutions than would be pursued under current general assault and battery law, as well as 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.

SIGNIFICANT ISSUES

LOPD notes that violations of the crime created under HB267 are punishable as a first-degree felony. First degree felonies carry a mandatory 18-year sentence, and a court does not have the discretion to suspend any of the sentence. As a result, defendants charged with first-degree felonies have no incentive to plead guilty and seek the leniency of the court at sentencing. This means that people charged with first-degree felonies are much more likely to take their case to trial.

LOPD also explains that racketeering law separately permits a defendant to be punished for racketeering as well as for the underlying pattern of crimes that give rise to racketeering. HB267, in addition to creating a new first-degree felony crime, essentially transforms existing drug-racketeering crimes underlying the new crime into first-degree felonies with corresponding longer, mandatory sentences. This extreme sentencing increase is certain to result in more trials and the costs of incarceration may skyrocket.

LOPD notes that there is a plethora of evidence that increased penalties do nothing to actually deter criminal activity. The basic penalties available under current law for racketeering activities already carry the potential for two second-degree felonies and at least one first-degree felony (a total of 18 mandatory plus 18 discretionary years in prison). Additionally, those convictions are subject to habitual offender enhancements of up to eight years per count depending on a person's felony history and to aggravation by up to one-third of the basic sentence, depending on a person's role in the enterprise and surrounding conduct. The current statutory scheme already allows prosecutors and judges significant avenues for prosecuting drug kingpins for not just their individual actions, but the criminal activities carried out by their criminal organization. Likewise, the current scheme provides a number of avenues for harsh sentencing against drug kingpins. According to LOPD, HB267 would exponentially increase the *basic* sentence with extreme *mandatory* sentences for what is at its core a non-violent offense.

LOPD states that the bill may raise constitutional double jeopardy issues. LOPD explains that although double jeopardy analysis is typically treated as a matter of legislative intent, even an unambiguous statement of intent to allow multiple punishments would have constitutional double jeopardy implications if it is overtly punishing the same conduct more than once. The crux of a legislative intent analysis is whether each punishment is addressing a different social evil, even if the social evils are similar. This bill appears to be creating a specialty form of racketeering and punishing it in addition to racketeering; both target the same social evil of

organized drug crimes. Consequently, according to LOPD, double jeopardy challenges are all but assured.

According to AOC, the “Continuing Drug Enterprise Act” proposed in HB267 is similar to the Continuing Criminal Enterprise Statute (also called the CCE Statute or The Kingpin Statute) under U.S. federal law (United States Code, 21 U.S.C. § 848). The federal statute makes it a crime for a person to commit or conspire to commit a continuing series of felony violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970 when such acts are taken in concert with five or more other persons. The person must have been “principal administrator, organizer, or leader of the enterprise” and have “obtained substantial income or resources” from the “continuing series of violations.”

PERFORMANCE IMPLICATIONS

AOC states that HB267 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

OTHER SUBSTANTIVE ISSUES

AODA believes the joint authority given to AODA and NMAG to enforce the Continuing Drug enterprise Act is unnecessary. According to AODA, the present system in which district attorneys have primary prosecution authority, pursuant to the New Mexico Constitution, works well. Additionally, NMAG presently assists district attorneys with prosecutions upon request and may prosecute a case upon referral by a district attorney or when a district attorney declines to prosecute or fails to prosecute.

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