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FISCAL IMPACT REPORT

SPONSOR Hickey **ORIGINAL DATE** 1/28/22 **LAST UPDATED** 2/9/22 **HB** _____
SHORT TITLE Enhancing the Sentences for Brandishing a Firearm **SB** 120
ANALYST Tolman

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY28	FY29	FY30	FY31	4 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$2,730.6	\$4,397.9	\$4,434.8	\$4,451.6	\$16,015.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Public Defender Department (PDD)
 Attorney General's Office (NMAG)
 Sentencing Commission (NMSC)
 Children, Youth and Families (CYFD)
 New Mexico Corrections Department (NMCD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

Senate Bill 120 amends Section 31-18-16 NMSA 198 (the Criminal Sentencing Act) and would increase the enhanced penalty for crimes in which a firearm is brandished from three years to five years for a first offense, from five years to seven years for a second offense, and from five years to nine years for a third or subsequent offense. The enhancement for a third or subsequent offense for a youthful offender is increased from three years to five years.

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

Incarceration drives costs in the criminal justice system, so the primary fiscal implications examined in this analysis relate to changes in the length of time served in prison that might result

from this bill. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. The Corrections Department reports the average cost to incarcerate a single inmate in FY21 was \$49.6 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$23.4 thousand per inmate per year across all facilities. This bill will likely increase the time individuals spend incarcerated.

Overall, this analysis estimates SB120 will result in additional incarceration costs of \$4.5 million per year. These additional costs will begin to be realized in FY28, increasing over the following three years (as more individuals serve longer sentences as a result of these increased enhancements) and leveling out at \$4.5 million in FY31 (as offenders begin to be released from prison) and future fiscal years.

Additional system costs beyond incarceration, such as additional costs to the judicial branch for increased trials that might result due to the higher penalties provided by SB120 are not included in this analysis, but could be significant. The Administrative Office of the Courts (AOC) and the Public Defender's Department (PDD) both note that as penalties become more severe, defendants may 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. PDD also notes that as the penalties for second and third or subsequent occurrences increase, defendants could be more likely to accept a plea deal just to mitigate risk.

This analysis does not include potential benefits of crime deterrence due to increased punishment, as research shows sentence length has little to no deterrent effect. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the severity of punishment if convicted.

Additional detail on the calculations and assumptions underlying estimated incarceration costs are outlined below.

Increased Time Served and Costs Under SB120. Currently, the firearm enhancement applies a three-year enhancement to all noncapital felonies in which a firearm is brandished (although this analysis assumes the enhancement can also be applied to cases in which a firearm is discharged) and a five-year enhancement for a second, third, or subsequent offense. The proposed change in SB120 would increase the enhancement from three years to five years for a first offense and from five years to seven years for a second offense. For a third or subsequent offense, currently carrying a five-year enhancement, SB120 increases the enhancement to nine years.

According to a 2019 report from the U.S. Department of Justice's Bureau of Justice Statistics,¹ 20.9 percent of state prisoners possessed or used a firearm during the offense for which they were incarcerated. Of those who possessed a firearm during their offense, 32 percent did not use their firearm (possession only), 21.5 percent used but did not discharge their firearm (brandishing), and 46.5 percent discharged their firearm.

¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (January 2019). Source and use of firearms involved in crimes: Survey of prison inmates, 2016. Report #NCJ 251776. Available: <https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf>.

Applying these rates to estimated FY21 prison admissions for noncapital offenses (1,160), this analysis estimates the changes proposed by SB120 will impact approximately 165 individuals annually, and assumes 163 of these individuals are subject to the penalty for a first offense, one is subject to the penalty for a second offense, and one is subject to the penalty for a third or subsequent offense. Based on estimates of actual time served for enhancements at different levels provided by the Sentencing Commission, 164 individuals (those subject to the penalty for a first or second offense) will spend an additional 417 days in prison each due to the increased enhancement, a cost of \$26.8 thousand per offender and \$4.4 million overall. The individual subject to the penalty for a third or subsequent offense would cost \$53.7 thousand. Overall, this results in a total additional cost of \$4.5 million.

High levels of recidivism in New Mexico suggest a larger share of individuals will likely be eligible for the penalty for the third or subsequent offense than is assumed in the analysis above, so this is likely an underestimate of the total cost.

Because SB120 increases an existing sentencing enhancement, the fiscal impacts of this change are not anticipated to be realized until the first group of offenders admitted with the increased enhancement have served the term they would have served under the original sentence and enhancement. As a result, offenders admitted to prison in FY24 under the provisions of SB120 would begin to impact costs in FY28. As more people are admitted to prison, costs increase. Costs continue to rise for each year through FY31, when offenders admitted in the first year the change takes effect begin to leave prison after the change in time served resulting from SB120.

SIGNIFICANT ISSUES

Detering and Preventing Violent Crime. The Administrative Office of the District Attorneys and New Mexico Corrections Department (NMCD) claim that increased penalties for these types of crimes will have an increased deterrent effect and the longer sentences will keep the serious offenders out of the communities. However, research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and although laws and policies designed to deter crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

AOC points to the National Institute of Justice's article entitled, "Five Things About Deterrence," from June 5, 2016, which states that increasing the severity of punishment does little to deter crime.² The article goes on to say that although laws and policies designed to defer crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. AOC also notes that social science is still divided specifically on whether gun enhancements actually deter or prevent violence.³

² See <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> (retrieved January 21, 2022).

³ See <https://www.themarshallproject.org/2015/10/14/politicians-still-say-longer-prison-sentences-prevent-gun-violence-but-do-they> (retrieved January 21, 2022)

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful. In New Mexico, however, punishment has grown less certain as crime has increased, with fewer violent crimes solved and more violent felony cases dismissed. LFC's evaluation team has found in the 2nd Judicial District (Bernalillo County) specifically, neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and in 2020, when felonies began to rise, accountability for those crimes fell. Improving policing and increasing cooperation and coordination among criminal justice partners could help increase the certainty of punishment for the most violent offenses and provide a stronger deterrent to serious crime than heightened penalties.

Time Served in Prison. AOC notes that in 2020, Section 31-18-16 NMSA 1978 increased the basic sentence enhancement from one year to three years for a first noncapital felony in which a firearm was used and from three years to five years for a second or subsequent noncapital felony. Overall in just a two-year period, the sentence enhancements for brandishing a firearm in a noncapital felony in Section 31-18-16 NMSA 1978 would increase from one year to five years for a first conviction, from three years to seven years for a second, and from three years to nine years for a subsequent noncapital felony.

PDD argues that there is simply no additional need to increase the enhancements in these cases as the penalties are already significant. These enhancements are being added to the basic sentence for an underlying felony crime, which most commonly are aggravated assault and aggravated battery with a deadly weapon, where that weapon was a firearm. Furthermore, for offenders being sentenced for a second or third firearm felony, by definition, they will also be charged with the separate third-degree felony of "felon in possession" and their sentence will be simultaneously enhanced under the Habitual Offender Act (one year for one prior, four years for two priors, or eight years for three or more priors, added to each count). Therefore:

- A first time firearm offender currently charged with a third-degree felony firearm offense and no prior felonies would be facing a total of six years. Under SB120 this increases to 8 years.
- A first time third-degree firearm offender with a prior felony of any kind would currently be facing a total of 11 years. Under SB120 this increases to 13 years.
- A second-time firearm offender with no other prior felonies charged with a third-degree felony firearm offense could currently be facing a total sentence of 13 years. Under SB120 this total increases to 15 years.
- A third-time firearm offender with no other prior firearm felonies charged with a third-degree felony firearm offense could currently be facing a total sentence of 19 years. Under SB120, this total increases to 23 years.
- A third-time firearm offender charged with a third-degree felony firearm who had any other prior felonies, would currently be facing a total of 27 years under current law. Under SB120, this total increases to 31 years.

Children, Youth and Families Department (CYFD) notes that for FY21, the average age of an adjudicated client committed to a secure CYFD facility is 16 years, 9 months, and the number of youthful offenders with a one- or two-year commitment is three. This bill can be expected to add up to three years to the dispositional sentence of such youth.

PERFORMANCE IMPLICATIONS

AOC notes that this bill may impact measures of district court performance, such as cases disposed of as a percent of cases filed and percent change in case filings by case type.

CYFD notes that performance measures concerning the reintegration of clients into the community may be affected by this bill.

ADMINISTRATIVE IMPLICATIONS

AOC notes that this has the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

CONFLICT, RELATIONSHIP

Conflicts with House Bill 68, which implements differing changes to the sentencing enhancement for brandishing a firearm, and creates additional sentencing enhancements for possessing or discharging a firearm.

Relates to House Bill 64, which requires that when an individual brandishes a firearm in the commission of a noncapital felony, a guilty plea to that offense must include a guilty plea to a violation of the firearm enhancement statute.

Relates to House Bill 28, which increases the sentence for felon in possession of a firearm (a third degree felony), currently carrying a sentence of three years, to five years.

OTHER SUBSTANTIVE ISSUES

The Attorney General's Office notes the following:

There is no requirement to “charge” the brandishment of a firearm at either grand jury or preliminary stage. The brandishment enhancement, under Section 31-18-16, is a “separate finding of fact by the court or jury show[ing] that a firearm was brandished in the commission of a noncapital felony[.]” A sentencing enhancement is not a separate charge which is pleaded separately.

Other programs may also be more effective at preventing violence than increased penalties and incarceration. Community-based programs and focused policing interventions have been found to be effective in reducing violence in some settings (e.g., high-risk physical locations) and, according to the Department of Health (DOH), these programs appear to be more effective than prosecutorial policies like mandatory sentencing.⁴ Other proposed legislation support these solutions. House Bill 96 creates the Violence Intervention Program Act and appropriates \$10 million from the general fund to the violence intervention program fund for use by the Department of Health (DOH) to administer the act and to award violence intervention program grants to eligible state agencies, counties, municipalities, or tribal governments. The House Appropriations and Finance Committee substitute for House Bill 2 appropriates \$1.7 million in

⁴ Institute of Medicine (2013). Priorities for Research to Reduce the Threat of Firearm-Related Violence. Washington, DC: The National Academies Press. Available: <https://doi.org/10.17226/18319>.

recurring revenue and \$9 million in nonrecurring revenue from the general fund to DOH to establish a statewide grant program for violence intervention programs. It also appropriates \$300 thousand in recurring money from the general fund to DOH for an Office of Gun Violence Prevention.

ALTERNATIVES

The PDD suggests since there is no evidence to show that increased penalties deter criminal behavior that alternative actions could be sought. For instance, the New Mexico Sentencing Commission (NMSC) recently published a report that includes many evidence-based recommendations for reducing gun violence in New Mexico.⁵ Some of the alternative options outlined in the report include:

- Law enforcement agencies may focus either on areas with high crime or particular offenders.
- Departments of Health might take the lead either through a public health approach or by offering therapy to offenders.
- Municipalities might choose to design outdoor environments in ways that discourage crime or they might pass laws restricting possession of firearms.
- Alternatively, communities might combine one or more of the approaches simultaneously, as Albuquerque has done.

RTT/al/acv/al

⁵ Cairo, G., Chin, D., Gurule, A., & Shane, N. (January, 2022). Policy brief: Evidence-based initiatives to reduce street violence: A review of promising approaches. New Mexico Sentencing Commission. Available: <https://nmsc.unm.edu/reports/2022/policy-brief-evidence-based-initiatives-to-reduce-street-violence-a-review-of-promising-approaches.pdf>.