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FISCAL IMPACT REPORT

SPONSOR Rehm/Pettigrew/Lord LAST UPDATED _____
ORIGINAL DATE 1/31/2023
BILL _____
SHORT TITLE Enhanced Sentencing for Fentanyl NUMBER House Bill 60
ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY26	FY28	FY30	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$753.1 to \$1,506.3	\$2,731.4 to \$5,462.8	\$3,348.2 to \$6,696.5	\$11,962.2 to \$23,924.3	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

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)
New Mexico Attorney General (NMAG)
Sentencing Commission (NMSC)
Department of Health (DOH)
Corrections Department (NMCD)
Department of Public Safety (DPS)

SUMMARY

Synopsis of House Bill 60

House Bill 60 imposes a sentencing enhancement to the basic sentence for drug possession if an individual possessed fentanyl. The bill provides a three-year enhancement for 25 to 49 pills or 50 to 90 milligrams of fentanyl, a five-year enhancement for 50 to 74 pills or 100 to 149 milligrams, and a seven-year enhancement for more than 75 pills or more than 150 milligrams.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of

individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have significant fiscal impacts. 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 jails, consequently increasing long-term costs to state and county general funds. In addition to the potential for new crimes to send more individuals to prison and jail, longer sentences could result in fewer releases relative to admissions, driving up overall populations. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 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 \$26.6 thousand per year across all facilities. HB60 is anticipated to increase the time individuals spend incarcerated.

It is not clear how many individuals would be impacted by the provisions of this bill, but given the prevalence of fentanyl in New Mexico and data on causes of overdose deaths, this analysis estimates between 20 and 40 percent of admissions to prison for drug possession may be impacted, a total of 44 to 88 individuals annually. Based on estimates of actual time served for sentencing enhancements provided by the Sentencing Commission, this analysis estimates the bill would result in average increased costs of \$3.3 million to \$6.7 million. These additional costs will begin to be realized in FY26, increasing over the following four years (as more individuals serve longer sentences) and leveling out in FY30 (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 or increased costs to law enforcement to investigate and arrest individuals for the new and expanded crimes under HB68 are not included in this analysis, but could be significant.

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.

SIGNIFICANT ISSUES

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.

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful than increasing penalties. 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.

According to the Department of Health

Nationally overdose mortality related to fentanyl increased from 57,834 persons to 71,238 from 2020 to 2021. In New Mexico, there was an 84 percent increase in just one year from December 2020 to December 2021, with a peak rate in March 2022. The apparent decline since last spring may be due in part to the beginning of public health interventions specifically focused on fentanyl, including legalization and distribution of fentanyl test strips, enhanced overdose prevention education, and naloxone distribution to those most at risk for fentanyl overdose.

While increased penalties for substance use related crimes have widely been used at both federal and state levels, there is no evidence that increased sentencing will decrease rates of substance use, fentanyl related overdose mortality, or drug related criminal activity. According to a report by Pew Charitable Trust, there is no correlation between increased imprisonment for drug related crimes and substance use rates (<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>).

Increased sentencing and incarceration have also been shown to have a substantial negative impact on health and social disparities, including obtaining employment, education and other services (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9302017/>). There has also been little evidence of decreases in use, prevalence, or frequency of use according to a 2001 report from the National Research Council. Additionally, incarceration of drug sellers/dealers does not decrease supply given the relative ease of replacing street level dealers (<https://nap.nationalacademies.org/read/18613/chapter/7#144>). It is likely the impact of increased mandatory sentencing for drug distribution related crimes has little impact on supply as it primarily incarcerates persons at the lowest levels of drug syndicates. This legislation may be challenging to enforce as many pills that are sold as fentanyl do not actually contain fentanyl. In most cases, pills contain a variety of substances, not all of which are controlled.

The Public Defender Department provides the following analysis:

As explained by the CDC, fentanyl is often possessed unknowingly because it is routinely added to other drugs and made to look like other drugs. In particular, the CDC cautions that fentanyl “is available on the drug market in different forms, including liquid and powder. Powdered fentanyl looks just like many other drugs. It is commonly mixed with drugs like heroin, cocaine, and methamphetamine and made into pills that are made to resemble other prescription opioids. Fentanyl-laced drugs are extremely dangerous, and many people may be unaware that their drugs are laced with fentanyl.” See The Facts About Fentanyl, Center for Disease Control Online, available at <https://www.cdc.gov/stopoverdose/fentanyl/index.html>.

Currently, the crime of drug possession does not require knowledge of *what* drug

is possessed. *See* UJI 14-3130 NMRA (for conviction, requiring a person knew it was the drug possessed, **or** believed it to be that drug, **or** believed it to be some “other substance the possession of which is regulated or prohibited by law”). Because fentanyl is often possessed unknowingly and the bill punishes the possession of fentanyl based on the amount involved without requiring particular knowledge that the substance is or contains fentanyl, it would certainly be used to punish persons who unknowingly possess fentanyl.

Likewise, as is well-established, increasing punishment for drug use and possession is an ineffective means of reducing drug-related problems. *See* More Imprisonment Does Not Reduce State Drug Problems, Issue Brief, PEW Charitable Trusts, March 8, 2018, available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems> (finding, consistent with “a large body of prior research,” that stiffer prison terms do not deter drug misuse, distribution, and other drug-law violations).

Indeed, specialists recognize that punishing possession and use, as opposed to treating addiction as a public health crisis, tends to stigmatize drug use and thereby prevents people from seeking treatment for their addiction. *See* Dr. Nora Volkow, Director of the National Institute on Drug Abuse, Punishing Drug Use Heightens the Stigma of Addiction, NIDA Online, available at <https://nida.nih.gov/about-nida/noras-blog/2021/08/punishing-drug-use-heightens-stigma-addiction> (“Punitive policies around drugs mark people who use them as criminals, and so contribute to the overwhelming stigma against people contending with an often-debilitating and sometimes fatal disorder — and even against the medical treatments that can effectively address it.”)

Increasing penalties has little deterrent effect, and that is particularly true for a crime driven by addiction. In furtherance of the presumed goal of reducing the prevalence of fentanyl in the unregulated market, targeting individual users who have no control over the contents of contaminated drugs, and who are driven to the market by their substance use disorder would seem of limited effectiveness. While increasing penalties for drug traffickers is also likely to have only limited deterrent value, it would seem to be more directly targeting the market itself, rather than the end user.

Per the NM Sentencing Commission, drug offenses account for 12 percent of new admissions for male inmates to the Department of Corrections and 32 percent for females. *See* N.M. Sentencing commission, *Profile of NM Prison Population* (Dec. 2022), available at <https://nmsc.unm.edu/reports/2022/confined-report-2022.pdf>. Where the NMCD has limited treatment programming, increasing incarceration rates for individuals in need of treatment seems not only ineffective, but also counterproductive.

For these reasons, it is unclear that the proposed significant increases in punishment will be effective for their intended purpose.

TECHNICAL ISSUES

The Administrative Office of the Courts notes the following technical issues:

There appears to be a discrepancy between subsections A and B of section 1 of the bill. Subsection A addresses fentanyl possession equaling 50 to 90 milligrams; Subsection B addresses fentanyl possession equaling 100 to 149 milligrams. As currently written, the sentencing enhancement imposed by HB60 would not apply to fentanyl possession equaling 91 milligrams to 99 milligrams.

As currently drafted, the sentencing enhancements imposed by HB60 would not apply to defendants convicted of trafficking a controlled substance (Section 30-31-20 NMSA 1971) or distribution of a controlled substance to a minor (Section 30-31-21 NMSA 1971).

The office of the New Mexico Attorney General adds:

Between subsection B and C of HB60, “and” is used as the conjunction, this implies that all subsections are required. The appropriate conjunction between these subsections would be “or” because only one subsection would apply per offender or case.

It is also possible that Subsections A, B, and C could be in conflict with one another because the number count of pills differs from the noted milligram quantity. There is no guidance in the bill if this were to happen in a case. Similarly, subsection A indicates a range of “fifty to ninety milligrams” and subsection B indicates a range of “one hundred to one hundred forty-nine milligrams.” As a result, the amount of ninety-one to ninety-nine milligrams are unaccounted for.

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