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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_

**SPONSOR** Duncan/Rehm/Matthews/Moya/Vincent      **ORIGINAL DATE** 2/23/2023

**BILL**

**SHORT TITLE** Crime of Organized Residential Threat      **NUMBER** House Bill 397

**ANALYST** Rabin

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

	FY25	FY27	FY29	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	At least \$79.8	At least \$183.8	At least \$209.8	At least \$827.0	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.  
\*Amounts reflect most recent analysis of this legislation.

Relates to House Bill 55

### 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)  
 Corrections Department (NMCD)  
 Department of Public Safety (DPS)

## SUMMARY

### Synopsis of House Bill 397

House Bill 397 creates the new crime of organized residential theft, which consists of a coordinated plan to deprive one or more recipients on two or more occasions or deprive multiple recipients located in the state of merchandise distributed by mail or other method of delivery over the span of one year. Organized residential crime has tiered penalties ranging from a petty misdemeanor to a second-degree felony, depending on the aggregated value of the merchandise taken from any recipient over the course of a year, as outlined below.

Aggregate Value of Merchandise	Penalty	Basic Sentence
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Aggregate Value of Merchandise	Penalty	Basic Sentence
Between \$500 and \$2,500	Fourth-degree felony	Up to 18 months in prison and a possible fine of up to \$5,000
Between \$2,500 and \$20,000	Third-degree felony	Up to three years in prison and a possible fine of up to \$5,000
More than \$20,000	Second-degree felony	Up to nine years in prison and a possible fine of up to \$10 thousand

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. 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. HB397 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

Without additional available data, the analysis estimates the creation of this new crime will result in at least one additional person being admitted to prison at each tier of the crime each year. Based on the actual length-of-stay for offenders released from prison in FY21 whose highest charge was for a fourth-, third-, and second-degree felony, this analysis estimates HB397 will result in increased annual incarceration costs of at least \$209.8 thousand to the state. Costs to the state are estimated to be at least \$79.8 thousand in FY25 and will rise over the next three years to reach \$209.8 thousand in FY28 and future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials (if more defendants invoke their right to a trial when facing more serious penalties), are not included in this analysis, but are also likely to be low. Indeed, the Administrative Office of the Courts (AOC) notes the bill could lead to cost-savings for prosecutors, defense attorneys, and courts by combining what would otherwise be multiple court cases over the course of several months into fewer cases, and more serious charges may result in more defendants being referred to treatment programs.

The provisions of this bill effectively increase sentences for some acts that are already criminalized. 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

**Public Safety Impacts.** Many provisions of HB397 deal with conduct that is already criminalized, effectively creating additional penalties for some instances of this conduct.

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.

**Other Concerns.** The Administrative Office of the District Attorneys (AODA) identifies some issues that substantially alter the impact of the bill, potentially contrary to the sponsors' intent:

If the words "span of one year" are for the purpose of aggregating the value of merchandise stolen and nothing more, then suggest removing it from the description of the crime on page 1, line 22. The definition of "aggregate value" is sufficient to allow aggregation of one year to determine the penalty. As the bill is written, the "span of one year" on page 1 becomes an element of the crime and would require the prosecution to prove that the coordinated plan was in place for an entire year. Also, as the bill is written, it is not clear whether the span of one year applies in all instances or only in the second instance relating to "multiple recipients".

It is worth noting that the following scenarios would not fall within this new statute:

- several thefts from multiple recipients in the state where a value of \$500 or less was taken from each recipient;
- a theft of merchandise valued at over \$500 but taken on only one occasion

The Public Defender Department (PDD) identifies numerous issues with unclear language in the bill (noted under Technical Issues, below), which the department writes could lead to vagueness challenges. PDD also notes the crimes contemplated in HB397 are already covered under existing larceny statutes and federal law, and recipients also have civil remedies available.

The office of the New Mexico Attorney General (NMAG) also notes:

Under subsection E, the crime of ORT is intended to be charged separately from its predicate acts (larceny). This language prevents charging an individual with both ORT and "a separate or additional offense arising out of the same transaction." This provision generates a practical charging concern. The plain language of this subsection would prevent charging both 'ORT' and 'Larceny,' or

‘ORT’ and ‘Conspiracy.’ While charging ‘ORT’ and ‘Larceny’ would likely merge for sentencing purposes under double jeopardy considerations anyway, it is common for theft/larceny charges to be pursued along with ‘Conspiracy’ when committed with two or more people. With this provision in HB 397, prosecutors would be faced with charging ‘ORT’ alone or ‘Larceny’ and ‘Conspiracy’ together. For a felony amount of merchandise for example (\$500-\$2,500), prosecutors would likely charge the latter two charges, amounting to two 4<sup>th</sup> degree felonies, as opposed to ‘ORT’ which is only a single 4<sup>th</sup> degree felony. Such a provision may limit the practical usefulness of the legislation. It appears that the purpose of subsection E is to clarify the unit of prosecution, that is, to prevent the charging of separate ORT counts for each parcel/item of merchandise. If this is the intent of the drafters, this could be clarified.

PDD notes lack of clarity in the language regarding the prosecution’s ability to charge other crimes could lead to double jeopardy concerns or arguments based on the general/specific statute rule.

NMAG further writes:

The legislation contemplates criminalizing organized residential theft for acts committed throughout the state. Venue ordinarily exists in any county in which a material element of the crime was committed, which would allow any county in which an organized retail theft was committed to have proper venue. As it stands, the bill does not have an explicit venue provision.

## RELATIONSHIP

The Sentencing Commission (NMSC) explains:

This bill is similar to HB55, which addresses organized retail theft. Under certain circumstances, both bills may potentially criminalize the same transaction. HB397’s definition of “recipient” includes businesses that receive merchandise distributed by mail or another method of delivery, while HB55’s definition of “retailer” includes people and businesses that sell goods to the public. If a business intends to sell merchandise, but that merchandise is instead stolen upon delivery, either bill, if enacted, may apply to criminalize that theft if the other elements are met.

The penalties in both bills are the same, and both bills specify that an individual charged under that section may not be charged with an additional or separate offense arising from the same transaction.

## TECHNICAL ISSUES

HB397 does not define the term “merchandise,” a key concept of the bill. AOC explains “merchandise” is defined elsewhere in the Criminal Code as “chattels of any type or description regardless of the value offered for sale in or about a store,” but that definition is not applicable to HB397 and would not be easily borrowed for the purposes of HB397. AOC recommends

defining the term “merchandise” as used in this statute. PDD also expresses concerns with the lack of a definition of merchandise.

NMSC notes the definition of “recipient” “...includes businesses that receive merchandise distributed by mail or another method of delivery, and does not require that the delivery address be a residential address. This is incongruous with the title of the bill, and may cause confusion in implementation if the bill is enacted.” NMAG and PDD note similar concerns.

AODA notes the bill’s definition of “organized” simply repeats the crime, and suggests removing it.

NMAG notes:

Subsection A utilizes the language “over the span of one year” while subsection F(1) defines aggregate value and uses the phrase “over the span of one calendar year.” By stating *over the span of one calendar year*, it may be argued that only acts within a single calendar year (2022, 2023, etc) are sufficient for aggregation, whereas the intent of the drafter seems to be that all predicate acts within a continuous 365-day period be sufficient for aggregation. This language could be clarified. At a minimum, amending the language to be consistent throughout may prevent confusion.

NMAG further writes:

Subsection F(2) defines “coordinated” as “knowingly combining with another for the purpose of committing theft.” This language is nearly identical to NMSA 1978, Section 30-28-2 which defines conspiracy as “knowingly combining with another for the purpose of committing a felony.” Because all of the theft offenses listed in HB397 are felonies, in practicality, coordinated as defined by HB397 carries the same meaning as conspiracy defined in Section 30-28-2. Using the same definition for two different words within the criminal code could create confusion.

PDD adds:

Subsection A defines “Organized residential theft” as a “coordinated plan to deprive one or more recipients of merchandise on two or more occasions or deprive multiple recipients located in the state of merchandise distributed by mail or other method of delivery over the span of one year.” Although “coordinated” is defined in paragraph (2) of Subsection F, it is unclear how that definition is helpful. The bill defines coordinated to mean, “knowingly combining with another for the purpose of committing theft.” This is circular. Under this bill, someone commits theft by knowingly combining with another to commit theft as part of a plan to deprive another of merchandise.

Even with a definition of “coordinated,” the scope of “a coordinated plan” remains unclear. The crime of conspiracy requires only “agreement,” not a plan. How detailed must a plan be to trigger charges under HB 397’s proposed language? It also appears that even a coordinated plan would not trigger liability if it does not occur on multiple occasions or deprive multiple recipients.

PDD further writes:

...the language “or deprive multiple recipients *located in the state of merchandise* distributed by mail or other method of delivery” is particularly confusing. At first reading, it appears this language is saying that multiple recipients located in the state of merchandise, which could not be true as there is no such thing as a “state of merchandise.” Rather, it appears what was intended was something like: “or deprive multiple recipients, located in the state, of merchandise.” Our Legislature has no authority over conduct outside of this state, so to specify that the recipient is located in New Mexico is unnecessary as there could be no other recipient that this bill would apply to.

In addition, this bill includes substantive law in its definitions. *See* Legislative Drafting Manual 53 (Sept. 22, 2015) (“**Do not put substantive law in a definition section.**”). The definition of “coordinated” specifically includes a *mens rea* (knowingly) and the definition of “organized” seems to regurgitate the definition of organized residential theft. Moreover, there appears no need to define “organized” as that word only appears in the title of the crime and is not used in the definition of the crime or penalties.

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