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FISCAL IMPACT REPORT

SPONSOR <u>Jaramillo/Cadena</u>	LAST UPDATED _____
SHORT TITLE <u>Certain Drug Possession & Habitual Offender</u>	ORIGINAL DATE <u>2/7/23</u>
	BILL NUMBER <u>Senate Bill 187</u>
	ANALYST <u>Daly</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	(Indeterminate but substantial)	(Indeterminate but substantial)	(Indeterminate but substantial)	(Indeterminate but substantial)	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Department of Health (DOH)
 Department of Public Safety (DPS)
 Law Offices of the Public Defender (LOPD)
 New Mexico Attorney General (NMAG)
 New Mexico Corrections Department (NMCD)
 New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Senate Bill 187

Under Senate Bill 187, felony convictions for non-distribution possession of drugs contrary to the Controlled Substances Act and for driving under the influence of drugs or alcohol rendered in another jurisdiction are not prior felonies for the purpose of enhancing criminal sentences as a habitual offender.

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

NMCD comments that the fiscal impact of SB187 is difficult to estimate, as it would require conviction speculation, but costs would almost certainly be reduced to some degree, as fewer felony convictions would be eligible to lengthen sentences. LFC estimates a marginal cost (the cost per additional inmate) of \$26.6 thousand per inmate per year across all facilities. Further, in FY22, 48 women and 171 men were admitted with drug possession as the highest degree of conviction. The average length of incarceration in FY21 for this offense was 1.36 years (495 days). The number of these inmates who may re-offend in the future but whose sentences would not be enhanced by this prior conviction is unknown. As a result, LFC staff estimates the fiscal impact of this bill to be, in terms of cost savings, indeterminate but may be substantial.

SIGNIFICANT ISSUES

Currently, a prior felony conviction for non-distribution possession of drugs results in an enhanced sentence as a habitual offender. The increase in the offender's basic sentence can range from one to eight years, depending on the number of prior felony convictions. SB187 excludes this type of conviction from the enhancement provisions of the habitual offender statute.

Research shows incarceration is not an effective solution to substance abuse. As DOH comments, [2017 report from the Pew Charitable Trusts](#) examining all 50 states found no statistically significant relationship between state drug offender imprisonment rates and rates of illicit drug use, drug overdose deaths, and drug arrests.

According to data from the [National Survey on Drug Use and Health](#), in 2018, 14.1 percent of New Mexicans over the age of 12 reported using illicit drugs in the past month, compared with 11.4 percent nationally. Rates of illicit drug use in New Mexico exceeded the national rate every year between 2010 and 2018, but between 2016 and 2018, the rate of New Mexicans reporting illicit drug use increased at almost twice the rate of the national increase. Insufficient treatment resources make addressing this issue difficult. A [2020 Department of Health gap analysis of substance use disorder treatment](#) estimated only 34.3 percent of the estimated 204.7 thousand New Mexicans needing substance use disorder (SUD) treatment in 2018 received it.

Offenders sentenced for drug possession offenses comprise a growing share of prison admissions, posing significant social and financial costs to the state. While the state's average prison population has declined 7.6 percent since FY16, the share of admissions made up of offenders whose highest charge was drug possession grew from 8 percent to 11.6 percent over the same period. According to the [Sentencing Commission's July 2020 prison population forecast](#), New Mexico incarcerates people for drug crimes at a higher rate than the national average. New Mexico's high rates of substance use disorders and increasing illicit drug use suggest these trends will continue absent legislative intervention.

NMSC comments:

Advocates against the use of habitual offender laws for drug possession offenses argue that the application of habitual offender laws to those offenders does not make sense: "In the context of drug possession, the effect of habitual offender laws is to punish habitual

drug use. Although any criminal sanction for drug use is inappropriate, habitual offender sentencing delivers especially disproportionate punishment. If a person is facing a subsequent conviction for drug possession, it is simply an indication that the criminal justice system has failed to stop drug use, not that the person deserves a longer sentence. Moreover, it risks punishing some people for ‘recidivism’ who may in fact be drug dependent, a health rather than a criminal justice issue.” (See “Why Habitual Offender Laws Do Not Make Sense for Drug Possession” on page 102 of “Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States” published by the ACLU, available here:

https://www.aclu.org/sites/default/files/field_document/usdrug1016_web.pdf.)

AOC reports that eliminating enhanced sentences, or criminal penalties in general, for offenses such as non-distribution drug possession is becoming more common as states seek to provide stabilization and recovery-oriented services in lieu of overt punishment. It notes:

Limiting jail exposure for some justice-involved individuals has also been shown to have benefits, especially in the context of receiving quality ancillary services. Such benefits are typically related to what is often lost by a return to incarceration, such as continuity of community treatment services, prosocial networks or relationships, educational and/or employment commitments, medications and/or medical interventions, etc. Although some individuals must be incarcerated to maintain public safety, research on drug court participants has shown that jail can diminish success for those receiving quality rehabilitative services. The Adult Drug Court Best Practices, Volume I notes on page 32, “Research in Drug Courts indicates that jail sanctions produce diminishing returns after approximately three to five days (Carey et al., 2012; Hawken & Kleiman, 2009). A multisite study found that Drug Courts that had a policy of applying jail sanctions of longer than one week were associated with increased recidivism and negative cost-benefits (Carey et al., 2012). Drug Courts that relied on jail sanctions of longer than two weeks were two and a half times less effective at reducing crime and 45 percent less cost-effective than Drug Courts that tended to impose shorter jail sanctions.

Rather than enhancing basic sentences, AOC suggests an individual likely would be better served by a mandated referral for behavioral health or substance use disorder screening, assessment and services like those provided by treatment courts.

Additionally, under existing law, felony convictions for driving under the influence of drugs or alcohol are not a basis for enhancing a sentence as a habitual offender if the underlying offense occurred in New Mexico. If the conviction occurred in another state or jurisdiction, however, then it does enhance the sentence upon a later conviction. See Subsection (D) (1) and (2). SB187 removes this inconsistency by excluding a prior conviction for driving under the influence of drugs or alcohol rendered in another jurisdiction as a grounds to enhance a sentence.

OTHER SUBSTANTIVE ISSUES

LOPD notes the impact of this type of enhanced penalty throughout the course of a criminal case involving drug possession:

Even in cases that are resolved by plea, possession cases tend to be, and should be,

litigated heavily for search and seizure issues, with both prosecution and defense briefing issues and courts holding additional hearings. However, under current systems, defendants often accept plea agreements offering to withhold *the habitual enhancement*, foregoing that crucial constitutional litigation. Moreover, upon violation of probation, including for technical violations like drug use, the withheld enhancement time is often imposed, so this practice often entices defendants to enter plea agreements that do not end up avoiding mandatory incarceration time in the long run. Because probationers suffering from substance use disorder are highly likely to relapse and violate, removing that additional consequence would better enable reasonable plea negotiations and better focus on treatment, rather than incarceration.

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