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FISCAL IMPACT REPORT

SPONSOR <u>Woods/Diamond</u>	LAST UPDATED <u>2/26/2023</u>
	ORIGINAL DATE <u>1/26/2023</u>
SHORT TITLE <u>Livestock Larceny Separate Offenses</u>	BILL NUMBER <u>Senate Bill 199</u>
	ANALYST <u>Rabin</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*¹ (dollars in thousands)

	FY27	FY34	FY41	15 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	\$11.8	\$117.2	\$117.2	\$1,464.9	Recurring	General Fund

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

Conflicts with House Bill 153

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)
- Livestock Board (NMLB)
- Sentencing Commission (NMSC)
- Corrections Department (NMCD)
- Department of Public Safety (DPS)

SUMMARY

Synopsis of Senate Bill 199

Senate Bill 199 amends the crime of larceny to change the unit of prosecution for livestock theft (a third-degree felony, punishable by up to three years in prison), making every stolen animal a separate larceny offense. Currently, a single “episode of theft” constitutes one crime, even if multiple animals are stolen.

¹ Because this bill would effectively increase the sentence for an existing crime, many of the fiscal impacts will not be felt for several years, and the full fiscal impact will not be felt until FY32. This table provides an estimated impact over 15 years to more effectively convey the actual costs of the proposal.

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 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. SB199 would cumulatively increase the penalty for the existing crime of livestock theft when more than one livestock animal is stolen, effectively increasing the sentence in any case involving more than one animal. Longer sentences could result in fewer releases relative to admissions, driving up overall populations. SB199 could increase the number of incarcerated individuals and increase the time they spend incarcerated.

The changes proposed by SB199 would allow individuals who can currently only be charged with one third-degree felony, which carries a three-year prison sentence, to instead be charged with multiple third-degree felonies. NMSC estimates the average length of time served by offenders released from prison in FY21 whose highest charge was for a third-degree felony was 912 days, about 2.5 years. Based on the marginal cost of each additional inmate in New Mexico's prison system, each offender sentenced to serve additional prison time for each additional third-degree felony under this proposed bill could result in estimated increased costs of \$58.6 thousand to NMCD.

However, the existing crime of larceny of livestock has resulted in very few prison admissions over the past two decades. The Sentencing Commission reports that between 2004 and 2013, three individuals were admitted to prison with this being their most serious charge, and none have been admitted since 2013. Indeed, fewer than 20 counts of this crime have been disposed in the last five years, and most have been dismissed. Given how rarely individuals are sent to prison for the existing crime, this analysis assumes only one person will be admitted to prison each year for one additional third-degree felony term each year, but notes this is likely an overestimate.

Because SB199 effectively enhances the sentence for an existing crime, the fiscal impacts of this change are not anticipated to be realized until the first group of offenders admitted under the enhanced sentence have served the term they would have served under current law. Under current law, offenders serve an average of 912 days, but for each additional third-degree felony they are convicted of under this proposal, they are anticipated to serve an additional 912 days in prison. As a result, offenders admitted to prison in FY24 under SB199 would begin to impact costs in FY27. As more people are admitted to prison, costs increase. These additional costs will begin to be realized in FY27, increasing over the following four years (as more individuals are convicted of multiple felonies) and leveling out at \$117.2 thousand per year in FY32 (as offenders begin to be released from prison) 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 could be moderate.

SIGNIFICANT ISSUES

Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment. As a result, 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. Given how rarely individuals have been convicted or sent to prison for the existing crime, more effective enforcement and prosecution of the existing offense would likely have a substantially greater deterrent effect than allowing the crime to be charged multiple times for the same incident.

In its analysis of duplicate bill House Bill 153, the Administrative Office of the Courts provides background on the issue addressed by this bill:

In early October of 2022, the New Mexico Supreme Court ruled in *State v. Torres*, No. S-1-SC-38484 (<https://caselaw.findlaw.com/nm-supreme-court/1920870.html>), that under the state law prohibiting livestock larceny, Section 30-16-1(G) NMSA 1978, livestock theft is to be prosecuted for each occurrence of theft rather than a separate charge for each animal allegedly stolen.

According to an October 3rd 2022 news release from the Administrative Office of the Courts,

To reach its decision, the Court analyzed the wording of the statute, the legislative purpose of the law, the severity and length of punishments provided for under the current statute, and reviewed the legislative history of laws against livestock theft since New Mexico’s territorial days.

The justices rejected arguments by the state that defendants should face one charge for each head of livestock stolen. The law “contemplates prosecution for the theft of anywhere from a single animal to an entire herd,” the Court reasoned.

“Specifically, the word livestock, which is neither singular nor plural, suggests that the Legislature did not contemplate a unit of prosecution based on the count or number of animals stolen in a single episode of theft,” the Court wrote. “The language of the livestock larceny statute supports this reading. The statute punishes the larceny of livestock as ‘a third degree felony regardless of its value.’ Section 30-16-1(G) (emphasis added). This contrasts with the portion of the larceny statute addressing the theft of generic property, which provides for ‘gradations of punishment based on the monetary value of the property.’”

Theft of property over \$20,000 is punished as a second-degree felony, the Court noted, while theft of property valued at \$250 or less is a petty misdemeanor.

In its analysis of duplicate bill HB153, the Administrative Office of the District Attorneys notes the implications for the *Torres* ruling, saying “The amendment contained in this bill will address

the language in the *Torres* case by making it legislatively clear that a person can be prosecuted and convicted for multiple offenses based on the number of livestock stolen.”

In its analysis of duplicate bill HB153, the office of the New Mexico Attorney General notes the provisions of this bill could result in potential violations of the Eight Amendment, saying:

In extreme cases, where an offender steals a large number of animals in one episode of theft, a consecutive sentence under this bill could create an arguable issue of cruel and unusual punishment under the Eighth Amendment. In *Torres*, the New Mexico Supreme Court noted that the defendants faced exposure of 54 years and 75 years for a single episode of theft when charged per animal. 2022-NMSC-024, ¶ 44. The State affirmatively argued in *Torres* that the Eighth Amendment “will limit the potential cruelty” of the most severe sentences when an offender is charged per animal. *Id.* ¶ 47. The Court did not definitively address whether such sentences would constitute cruel and unusual punishment based on the canon of constitutional avoidance and its disposition that the State as limited to one count per episode of theft. *Id.* ¶ 46. But it determined that the “disparity” between the sentence applicable to the highest degree of non-livestock-based larceny where the penalty is premised on value, nine years, and the potential 54 and 75 year sentences in that case if charged per animal “is telling and further confirms that the Legislature did not intend Defendants to receive multiple punishments for the theft of multiple head of cattle in a single episode.” *Id.* ¶ 47. Because the Eight Amendment forbids sentences that are grossly disproportionate to the crime, *see Solem v. Helm*, 463 U.S. 277 (1983), and because the New Mexico Supreme Court has recognized a “disparity” between the potential sentence in a case charging large numbers of livestock larceny counts from a single episode of theft when charged per animal and the otherwise most severe form of larceny, potential sentences in extreme cases could lead to colorable Eight Amendment issues.

In its analysis of duplicate bill HB153, the Public Defender Department raises the following issues:

HB153 would make livestock theft subject to *far* more serious penalties than other types of theft. Theft of any livestock is already punished more seriously than most other theft: livestock theft is a third-degree felony, carrying a sentence of three years in prison, regardless of the value of the stolen animal or animals. Sections 30-16-1(G), 31-18-15(A). Theft of money or other non-livestock property is punished according to the value of the stolen property, and it ranges from a petty misdemeanor to a second-degree felony. *See* § 30-16-1(B)-(F). For theft of non-livestock property to be a third-degree felony, the stolen property would have to be worth over \$2,500. *See* § 30-16-1(E).

The rule that people are punished for each “episode of theft,” rather than separately for each stolen item, is true for every part of the larceny statute. *See State v. Brown*, 1992-NMCA-028, ¶¶ 1, 12-13, 113 N.M. 631 (discussing generic larceny); *State v. Boeglin*, 1977-NMCA-004, ¶¶ 1, 19, 90 N.M. 93 (discussing larceny of firearms). The courts have said that “a theft of one thousand dollars is one theft and not a thousand thefts.” *Boeglin*, 1977-NMCA-004, ¶ 9.

If every stolen animal constituted a separate offense of livestock theft, the penalties for larceny of livestock would vastly exceed the punishment for even the most serious non-livestock thefts. A person who stole \$10 million would be guilty of a second-degree felony punishable by nine years in prison. *See* 31-16-1(F). But a person who stole 25 head of cattle would be guilty of 25 third-degree felonies, which would carry a total sentence of *seventy-five years* in prison. (This was the charge for two of the defendants in the *Torres* case.) Nothing in HB 153 limits the meaning of “livestock” to large or valuable animals, so a person would also face a seventy-five-year sentence for stealing a box of 25 baby chicks.

In short, HB153 would impose wildly disproportionate penalties on livestock theft. Defendants in livestock theft cases could quickly end up with a *de facto* life sentence.

With the stacking of penalties by animal, the potential for extremely high penalties for a single *event* of theft would give prosecutors undue bargaining influence in plea negotiations because defendants who would otherwise be inclined to present defenses at trial would fear the risk of potentially *decades* in prison might feel compelled to accept a plea.

CONFLICT

SB199 conflicts with the House Judiciary Committee Substitute for House Bill 153, which amends the crime of larceny as it relates to livestock, providing graduated penalties based on the value of the livestock stolen, and allows livestock valued over \$20 thousand to be charged as separate offenses if multiple livestock are stolen, but may only be charged up to three times for each occurrence.

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