

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date Jan. 24, 2024

Bill No: HB 198-280

Sponsor: Dayan Hochman-Vigil **Agency Name and Code** LOPD-280
Short Title: Felon in Possession of a Firearm Penalty **Number:** _____
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates:

Conflicts with: HB 46

Companion to:

Relates to: HB 168, HB 78, HB 47, HB 183, SB 5

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB 198 would increase the penalty for a felon possessing a firearm in NMSA 1978, Section 30-7-16.

Under current law, a non-violent felon possessing a firearm is guilty of a third degree felony (3 years) and a violent felon possessing a firearm is guilty of a special third degree felony (6 years). HB 198 would **triple** the non-violent felon penalty to a second-degree felony (9 years) while making the nine-year sentence *mandatory*; and would **double** the violent felon penalty to a special second-degree felony (12 years).

A new Subsection E would also add a provision to preclude “earned meritorious deductions” (commonly known as “good time”) toward the prison sentence imposed for any offense under Section 30-7-16, functionally doubling the amount of incarceration actually served in most cases.

FISCAL IMPLICATIONS

Higher-penalties cases are somewhat more likely to go to trial. These felonies would be handled by, at a minimum, mid-level felony capable attorneys (Associate Trial Attorneys), but more likely higher-level attorneys (Trial Attorneys). A mid-level felony capable Associate Trial Attorney’s mid-point salary *including benefits* is \$136, 321.97 in Albuquerque/Santa Fe and \$144, 811.26 in the outlying areas. A senior-level Trial attorney’s mid-point salary *including benefits* is \$149, 063.13 in Albuquerque/Santa Fe and \$157, 552.44 in the outlying areas. Recurring statewide operational costs per attorney would be \$12, 780.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$126, 722.33.

Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation of the proposed higher-penalty scheme.

Any increase in trials would also increase litigation costs for the courts and District

Attorneys' offices. Moreover, precluding earned meritorious deductions is certain to impact the housing budget for the Department of Corrections.

SIGNIFICANT ISSUES

Notably, the Legislature has consistently increased penalties for this crime three times in as many years. In 2020, the penalty for this crime was increased from a fourth degree felony to a third degree felony only for SVO felons, leaving the fourth-degree felony for non SVO felons. The next year, the Legislature removed the distinction, increasing the penalty for *all* felons to the third-degree felony carrying three years. In 2022, HB 68 increased the basic sentence for SVO felons to *six* years, leaving the non-SVO felon penalty at three years. HB 198 would thus constitute a *fourth* penalty increase to this crime in the span of as many years. Reviewer is unaware of any evidence showing that these previous penalty increases have had any deterrent effect or resulted in any reduction in gun crime. Reviewer is not aware of any research finding that increased criminal penalties have an increased deterrent effect on the commission of the crimes. The bill would, at most, lead to an increase in incarceration.

In addition, it is important to note that, unlike sentencing enhancements for using a firearm during the commission of another [violent] crime, Section 30-7-16 punishes a felon for simply possessing a gun or destructive device, even if they never *use* it. The statute represents a policy determination that felons should never possess a firearm. However, doing so hardly presents the same level of risk or danger associated with violent felonies, like armed robbery or aggravated burglary. Felon in possession is a crime of *mere possession*. It includes storing a gun in one's closet and does not require having it on their person or using it in any way, nor the commission of any contemporaneous crime. It is at its foundation, a *regulatory* offense, and the current penalty, which reflects three increases in the last three years, is sufficient.

Analyst notes that the increased penalty provision in Subsection B not only increases the non-violent felons' penalty for possession from a third to a second-degree felony, but also mandates that a person "shall be sentenced to a **minimum term** of nine years imprisonment." The basic sentence for a second-degree felony *is* nine years, so this additional language makes that nine-year sentence completely mandatory, taking away any judicial discretion to suspend or defer some or all of that nine-year term in favor of probation. No other second-degree felony sentence is mandatory in New Mexico law.

It is also worth noting that, because people charged with this crime must have a prior felony conviction, the vast majority will also already be subject to Habitual Offender Enhancements to the existing basic sentence, which involve a one, four, or eight-year enhancement depending on the number of prior felony cases. Thus, for the most egregious repeat offenders, the *existing* basic sentence could easily become either 11 years (for non-violent felons) or 14 years (for violent felons) even if this bill were not enacted.

With respect to the newly added Subsection (E), precluding earned meritorious deductions for this particular crime is inconsistent with the existing statutory scheme. Under the Earned Meritorious Deductions Act (EMDA), NMSA 1978, Section 33-2-34, all "nonviolent offenses" are eligible for earning "good time," and possession crimes are necessarily "nonviolent." The only crimes ineligible for earning "good time" under the EMDA are first degree murder and "serious violent offenses," which include crimes resulting in death, great bodily harm, or *at least* a victim targeted by violent *conduct*. See § 33-2-34(L)(4). The prohibition for earning good time contained in HB 198 is completely inconsistent with the

policies underlying the EMDA.

Specifically, the ability for inmates to earn good time is a prison management tool designed to encourage not only “good behavior” in terms of not *mis*behaving, but also to encourage rehabilitative efforts, such as programming, education, treatment, and working jobs within the prison. Removing good time eligibility for this whole swath of inmates actually disincentivizes compliance with rules and orders from corrections officers, but also disincentivizes what little rehabilitative opportunities currently exist.

PERFORMANCE IMPLICATIONS

In addition to an increased desire to defend against higher penalty charges at a jury trial, the need to heavily litigate pretrial motions and to prepare a defense presentation at sentencing is also more pressing. Furthermore, if charged alongside other charges, felon-in-possession charges are almost always “severed” from the other counts to avoid having to unnecessarily inform the jury of a defendant’s “felon” status in considering the other allegations. Thus, cases including this charge among others tend to require *two trials* and not just one. With the increased penalties and good time ineligibility, the need for more experienced attorneys and reliance on peripheral LOPD services such as investigators and social workers would make defending these charges more resource-intensive than they are currently.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

Precluding good time by cross-referencing the EMDA without also amending the EMDA itself would create a confusing conflict between the two statutes.

Similarly, creating a “special” penalty of 12 years for the second-degree felony for violent felons without also amending NMSA 1978, Section 31-18-15 creates a conflict in the law that could be read as creating an unenforceable sentence. Since before the 1994 amendments, Section 31-18-15(A) had begun, “If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows,” and then listed the categories of offenses. *See* 2019 N.M. Laws, ch. 211, § 7; *see also* 1993 N.M. Laws, ch. 182, § 1 (same). But in 2022, the legislature changed the introductory language to say: “As used in a statute that establishes a noncapital felony, the following defined felony classifications and associated basic sentences of imprisonment are as follows.” 2022 N.M. Laws, ch. 56, § 29 (emphasis added). This amendment ensures that basic sentences like the 15-year “second-degree felony resulting in the death of a human being,” is a “defined felony classification” that must be “used in a statute that establishes a noncapital felony” in order for that “associated basic sentence” to attach.

This bill would create a unique 12-year basic sentence within the Chapter 30 statute establishing the crime, without including that basic sentence in the *exhaustive* list of basic sentences provided in Section 31-18-15(A). If that statute is read strictly as the sole source of a court’s sentencing authority – which it should be in light of the unambiguous 2022 amendment – then it would seem that a court is *without* authority to impose a disparate basic sentence assigned

only within the “statute that establishes a noncapital felony.”

OTHER SUBSTANTIVE ISSUES

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, and while it appears a bill increasing criminal penalties for felon in possession offenses has received a message, analyst is unaware if this bill has been drawn pursuant to a special message of the Governor.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo: felon in possession would be punished as a third degree felony carrying three years in prison for most felons, and carrying six years in prison for those whose “felon” status is premised on a SVO. Furthermore, *in addition to* the possession crime, *use* of a firearm to commit a new crime is punishable by whatever penalty attaches to that offense, plus, for most crimes, a firearm enhancement. Furthermore, that penalty for using a firearm can already be increased based on the person’s felon status under the Habitual Offender Act.

AMENDMENTS