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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Muñoz **ORIGINAL DATE** 1/31/2025

BILL

SHORT TITLE Felony for Certain Thefts **NUMBER** Senate Bill 228

ANALYST Valdez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

Agency/Program	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
LOPD	No fiscal impact	\$14.6	\$14.6	\$29.2	Recurring	General Fund
NMCD	No fiscal impact	\$28.2	\$39.8	\$68	Recurring	General Fund
Total	No fiscal impact	\$42.8	\$54.4	\$97.2	Recurring	General Fund

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

Relates to Senate Bill 153

Sources of Information

LFC Files

Agency Analysis Received From

Administrative Office of the District Attorneys (AODA)
Law Office of the Public Defender (LOPD)
New Mexico Corrections Department (NMCD)
Department of Public Safety (DPS)

Agency Analysis was Solicited but Not Received From

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Senate Bill 228

Senate Bill 228 (SB228) amends Section 30-16-3 NMSA 1978 to make it a fourth-degree felony for a person to enter a retail establishment with the intent to commit a felony or theft after that person received notice they were not authorized to enter that retail establishment.

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns if enacted, or June 20, 2025.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so the primary fiscal implications

examined in this analysis relate to changes in the number of individuals in prison and the length of time served in prison that might result from this. 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 long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. The Corrections Department reports the average cost to incarcerate a single inmate in FY24 was \$56.7 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 \$28.2 thousand per inmate per year across all facilities. This bill will likely increase the number of individuals incarcerated.

SB228 makes it a fourth-degree felony to enter a retail establishment, after having been banned, with the intent to commit a felony or theft. Without any evidence of how many have been guilty of this crime in the past, this analysis assumes one person per year will be subject to this penalty, leading that person to be imprisoned for a fourth-degree felony. Currently, those committing this crime would be guilty of a misdemeanor property crime. Per the New Mexico Sentencing Committee, misdemeanor property crimes carry an average sentence of 0.77 years. On average, those guilty of a fourth-degree felony serve 1.41 years in a New Mexico correctional facility. The cost of the difference of 0.64 years per offender constitutes the marginal cost of incarceration imposed by SB228. Given the marginal costs of each offender, this analysis would expect costs to the Corrections Department (NMCD) of \$6,500 in FY26 and for those costs to plateau at \$18.1 thousand in FY27 and into the future.

The Law Offices of the Public Defender point out that increasing penalties make it more likely that defendants will invoke their right to a trial, potentially requiring LOPD to hire more trial attorneys to provide constitutionally required counsel. They also point out that, as a felony crime, representation would be needed in district court as opposed to magistrate courts or Metropolitan Court. District court representation requires attorneys with greater experience. LOPD notes the potential difference in attorney salary costs that they would experience:

Compared to an entry-level assistant trial attorney's mid-point salary including benefits (\$121,723.30 in Albuquerque/Santa Fe and \$130,212.59 in the outlying areas), 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.

This analysis assumes LOPD will need to replace one entry-level assistant trial attorney with one felony-capable associate attorney. The difference in attorneys required would amount to \$14.6 thousand per year.

SIGNIFICANT ISSUES

The Administrative Office of the District Attorneys points out the bill codifies existing case law in New Mexico:

In *State v. Archuleta*, 2015-NMCA-037, the Court of Appeals held that these actions—entering a place of business after being notified that a person could no longer shop there with intent to commit a theft or felony therein—did not satisfy the elements of burglary. The defendant in Archuleta entered a Walgreens, knowing that his permission to do so had been revoked by the store, and entered with the intent to steal a bottle of rum (which he did, in fact, steal).

The state charged him with burglary, arguing that the elements of burglary had been met,

i.e. (1) unauthorized entry and (2) with intent to commit a theft or felony therein. The Court of Appeals held this was too expansive a view of the burglary statute, and this type of entry was not the type of “harmful” entry that the statute contemplates. The Court of Appeals relied on the then-recent case of *State v. Office of the Public Defender ex rel. Muqddin*, 2012-NMSC-029, 285 P.3d 622, in which the Supreme Court conducted a comprehensive review of the burglary statute in the context of two burglary prosecutions for “entry” into a motor vehicle; the siphoning of gas and the removal of wheel wells. The court concluded that these prosecutions expanded the term “entry” too far and that the term is reversed for actual intrusions into a protected personal space and/or an actual enclosure. ¶¶ 41-45. The Court of Appeals applied this holding to the facts of *Archuleta* to conclude that the burglary statute did not encompass such an entry into a public place.

In *Archuleta*, the Court of Appeals explicitly overruled its precedent of *State v. Tower*, 2002-NMCA-109. *Archuleta*, 2015-NMCA-037, ¶¶ 15-16. In *Tower*, the defendant had been given a no-trespass order from Foley’s department store for previous acts of shoplifting. Sometime later, he entered the store again and stole merchandise. The Court of Appeals upheld his burglary conviction.

This bill would make it explicit that these actions can constitute the felony of burglary.

LOPD echoes the legal analysis above and considers the interest addressed by SB228:

Burglary security interests are those that have to do with feeling safe in a private space and ensuring that—when you leave your secure space—no one will come inside while you are gone. Retail stores undoubtedly have such interests: Private “employees only” areas of the store are protected, and when the manager closes and locks the store for the night, she has an interest in returning the next day to open the store and find that no one came inside in the meantime. The security interest for a store that is addressed by SB228 is neither of these. An open store is not a “private” space. Shoppers—members of the public—are invited inside. Thus, the security interest at issue in this case not an interest in excluding shoplifters from entering the store; it is preventing them from exiting the store without paying for the goods being sold. The entry itself is not the store’s true concern and it should not be punished as a felony.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill relates to Senate Bill 153, which amends the aggravated burglary statute—Section 30-16-4—to delete “dwelling” from the structures listed and to add a new crime of “home invasion” instead.

TECHNICAL ISSUES

LOPD highlights a potential issue with the title of SB228:

The short title for an identical bill in 2024 read “Felony Entering Retail Establishments,” which accurately describes the proposal. However, this bill’s short title reads “Felony for Certain Thefts,” which is a misleading title, since the crime it creates does not involve any resulting theft at all; it punishes only entering the store; no theft is required.