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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12

SPONSOR Brown LAST UPDATED \_\_\_\_\_ HB 282

SHORT TITLE Certain Arsons as Felonies SB \_\_\_\_\_

ANALYST Sánchez

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

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$33.9*	\$33.9*	\$67.8*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

**\* Impact to the New Mexico Corrections Department is dependent on the number of individuals convicted of a fourth degree felony and sentenced to the required 18 months in prison. One individual costs the State of New Mexico an average of \$33.9 thousand per day to incarcerate in a state penal institution.**

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
 Public Regulation Commission (PRC)  
 Public Defender Department (PDD)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

House Bill 282 would amend Section 30-17-5 NMSA 1978, which deals with criminal offenses related to fire. The bill would specifically amend paragraphs B – D by adding “to property other than an occupied structure” to the paragraphs and clarifying that the arson does not have to result in damage for the offender to be guilty of a petty misdemeanor. The bill adds a new paragraph making arson to an occupied structure with no damage or damage up to \$2,500 a fourth degree felony. Additionally, the bill would amend Section 30-17-6 NMSA 1978 adding “aggravated arson causing bodily injury to another person guilty of a third degree felony, add “causing great bodily harm or death to another person” to a second degree felony and allows the prosecution to prosecute the crime under a different violation if it is covered in another statutory provision.

## FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) reports in its response that any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. With the increase in penalty for these specific crimes, it is possible that there will be an increase in caseloads which may require more jury trials. The cost is unknown at this time.

Note: major assumptions underlying fiscal impact should be documented.

## SIGNIFICANT ISSUES

The Public Defender Department's (PDD) response includes the following paragraphs that suggest that some of the sections of the bill may not withstand legal muster.

Section 2 of the bill, or NMSA 1978, Section 30-17-6, contains a problematic subsection, subsection D. The language of subsection D contained in these amendments appears to allow the State to avoid double jeopardy problems by stating in overbroad terms that “[p]rosecution pursuant to this section shall not prevent prosecution pursuant *to any other provision* of the law when the conduct also constitutes a violation of that provision.” (emphasis added)

Criminal defendants have federal and state constitutional rights that include the right to be free from double jeopardy (prosecutions for the same offense). U.S. CONST. amend. V, cl. 2, (double jeopardy clause, as incorporated via the Fourteenth Amendment); N.M. CONST. art. II, § 15 (double jeopardy clause). Multiple convictions for the same act raise double jeopardy concerns, even where the actions are prohibited by different statutes. *See e.g. Swafford v. State*, 112 N.M. 3, 8, 810 P.2d 1223, 1228 (1991) (describing “double-description” cases where “the defendant is charged with violations of multiple statutes that may or may not be deemed the same offense for double jeopardy purposes.”)

Because legislative intent is normally unknown in a double jeopardy analysis, the addition of this language attempts to make legislative intent clear in an attempt to bypass a double jeopardy analysis. However, a double jeopardy analysis aiming to discern unclear legislative intent closely examines the language of two (or more) separate statutes, requiring findings of specific distinctions in the crimes to justify multiple punishments for the same conduct. Subsection D in this statute seeks to skirt this careful analysis by declaring that the State is always permitted to prosecute this crime in tandem with the prosecution for another crime, even where the other statute might intend to punish the same/similar conduct. The legislature cannot add this kind of overly-broad language to criminal statutes simply to avoid double jeopardy concerns. The right to be free from double jeopardy remains a constitutional right and multiple punishments for the same conduct may be unconstitutional after a careful analysis of the statutes at issue.

## PERFORMANCE IMPLICATIONS

According to the AOC, This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

**TECHNICAL ISSUES**

The Attorney General’s Office (AOG) opines in its response that this bill clarifies the existing statute and makes logical additions to the statute. There is an internal conflict between the language “intentional” used within the title and the words “malicious” and “willful” used within the statute. This issue was addressed in *In re Gabriel M.*, 132 N.M. 124, and *State v. Dennis*, 80 N.M. 262 (1969), and apparently malicious was used to distinguish that the burning was not an intentional but otherwise lawful act (i.e. for the purpose of lawful destruction). The language used under proposed subsection (D) may be problematic and violative of double jeopardy, see *State v. Bahaney* 2012 NM App Lexis & (2012), where the Court of Appeals stated that Defendant’s intent to commit conspiracy to commit Aggravated Arson and Conspiracy to commit Kidnapping was the same. The language under subsection (D) does not prevent a double jeopardy challenge under this statute.

This bill adds much needed clarification and changes to 30-17-5, however, the language “willful” and “malicious” needs clarification within the statute. The title of the bill provides that it pertains to “intentional arson” though this is not the language contained within the statute. See Significant Legal Issues section.

ABS/lj