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FISCAL IMPACT REPORT

ORIGINAL DATE 2/5/16

SPONSOR Maestas/Ruiloba LAST UPDATED _____ HB 228

SHORT TITLE Revise 2nd Degree Murder Penalty SB _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			See Increase in Fiscal Implications Section	See Increase in Fiscal Implications Section	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 46

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 Corrections Department (NMCD)
- New Mexico Sentencing Commission (NMSC)
- Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 228 proposes to amend Section 31-18-15 NMSA 1978, regarding sentencing for noncapital felonies. The bill would increase the basic sentence for a second degree felony resulting in the death of a human being from fifteen years to eighteen years.

FISCAL IMPLICATIONS

Although the NMCD's budget may not be negatively impacted in FY16 or FY17, based on the average admissions over the last four years provided by the NMSC where the most serious charge is second degree murder, the table below shows the estimated increase to the general fund.

Most Serious Prison Admission Charge	Estimated Annual Admissions (average of last 4 years)	Increased Sentence length (in years)	Cost Per Offender	Estimated Increased Cost for all Offenders
Second Degree Murder	39	2.55	\$45,250	\$4,500,112

The total impact to the general fund is \$4.5 million for the increased sentence.

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. According to the NMCD, the cost per day to house an inmate in state prison (public and private combined) is an average of \$123 per day, or about \$45,250 per year. Increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions pushing the overall prison population higher. NMCD’s general fund budget, not including supplemental appropriations, has grown \$5 million, or 7 percent, since FY11 as a result of growing prison population.

According to NMCD, ultimately it seems likely that this bill, in conjunction with other bills increasing the criminal penalties of various crimes, will result in the Department reaching its full capacity at some point in the near future. At that point, the Department will have to build, purchase or lease additional bed space, and such space is expensive. Using probation or diversion programs to avoid sending non-predatory, nonviolent offenders in order to make room for the predatory DWI offenders in prison is going to be needed to reduce or alleviate the Department’s fast approaching lack of bed space. NMCD predicts it will reach 98 percent of its prison capacity by the summer of 2016.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage and losses in future earnings and intangible victim costs such as jury awards for pain, suffering and lost quality of life.

Enactment of any higher criminal penalty is likely to result in more trials, as more defendants will prefer to risk a trial than take a plea to the greater penalty. If more higher-penalty trials result from enactment, PDD may need to hire more trial attorneys with greater experience to stay ahead of the rush.

SIGNIFICANT ISSUES

AOC point out that the new proposed penalty of eighteen years imprisonment is the same as the penalty for a simple first degree felony, under Section 31-18-15(A)(3), NMSA 1978. Having a second degree felony which carries the same sentence as a first degree felony could cause some confusion.

AODA's responded as follows:

HB228 would increase the potential prison time from 15 years to 18 years for anyone convicted of a second degree felony resulting in death. As a non-capital or first-degree felony even the sentence for someone convicted of a second-degree felony resulting in death could be deferred or suspended in whole or in part. (See, Sect. 31-20-3(A) and (B), NMSA 1978).

There are currently only a few statutes that specify or otherwise prescribe the punishment as a second degree felony resulting in death. They are: murder in the second degree (See, Sect. 30-2-1(B), NMSA 1978); criminal abortion (See, Sect. 30-5-3, NMSA 1978); abuse of a resident (See, Sect. 30-47-4(D), NMSA 1978); and, neglect of a resident (See, Sect. 30-47-5(D), NMSA 1978). In addition, appellate courts in New Mexico have repeatedly upheld sentences imposed as a second degree felony resulting in death for persons convicted of conspiracy to commit first degree murder when the murder was carried out. They noted that conspiracy to commit a first degree felony is a second degree felony (See, Sect. 30-2-1(A) and Sect. 30-28-2(B)(1), NMSA 1978), and the victim's death resulted from the agreement forming the conspiracy. (See, *State v. Shije*, 1998-NMSC-102; *State v. Castillo-Sanchez*, 1999-NMCA-085; *State v. McDonald*, 2004-NMSC-033. That sentence was also affirmed when the defendant was found guilty of conspiracy to commit felony murder. (See, *State v. Lopez*, 2005-NMSC-036).

Intentional abuse of a child 12 to 18 years old that results in the death of a child is classified as a first degree felony. It is therefore possible that someone might be convicted of conspiracy to commit that crime and it would also be punished as second degree felony resulting in death. It seems unlikely that someone could be convicted of conspiracy to commit negligent child abuse resulting in death even though that crime is also a first-degree felony. Negligent abuse of a child requires that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child (See, e.g., *State v. Trossman*, 2009-NMSC-034; *State v. Gonzales*, 2011-NMCA-081; *State v. Nichols*, 2016-NMSC-001) so proving a conspiracy to act negligently and cause the death of a child will be difficult if not impossible.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the following performance measures:

- NMCD:
 - Percent of prisoners reincarcerated back into the corrections department within thirty-six months due to technical parole violations;
 - Percent of prisoners reincarcerated back into the corrections department system within thirty-six months due to new charges or pending charges;
 - Percent of inmates testing positive for drug use or refusing to be tested in a random monthly drug test; and
 - Percent of sex offenders reincarcerated back into the corrections department within thirty-six months

House Bill 228 – Page 4

- District Courts:
 - Cases disposed of as a percent of cases filed;
 - Percent change in case filings by case type;
- District Attorneys:
 - Average caseload per attorney;
 - Number of cases prosecuted; Number of cases prosecuted per attorney;
- Public Defenders:
 - Percent of cases taken by contract attorneys;
 - Percent of cases that go to trial with clients defended by contract attorneys.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 46 – Sentencing for Certain Felonies

OTHER SUBSTANTIVE ISSUES

PDD opines that HB228 appears to possess a negligible deterrent rationale. For instance, voluntary intoxication is a potential defense to first-degree murder thereby reducing culpability to second-degree murder. It is highly unlikely that an intoxicated individual will exercise the reason necessary prior to acting based upon the risk of an increased sentence. Without the presence of reason, there is no deterrent value to the increased penalty promised by HB228.

ALTERNATIVES

The AGO suggests that the proposed increase in the maximum term of incarceration does not quite address the concern that the penalty for second degree murder is not reflective of the potential egregiousness of the crime. To illustrate this point, an internet survey of the penalties across the country for second degree murder reveals the following: 21 states allow for the possibility of life in prison upon conviction for second degree murder. Of the states that do not allow for life in prison, two allow for a period of incarceration of up to 99 years. Accordingly, nearly half of the jurisdictions in the country effectively allow for life sentences for the crime of second degree murder. Additionally, 43 states, as well as the District of Columbia, require a mandatory minimum period of incarceration for second degree murder. Georgia, Connecticut, South Carolina and Texas do not have specific statutes for second degree murder. This leaves only New Mexico, Maryland and Minnesota as states not requiring a mandatory period of incarceration for persons convicted of second degree murder. The potential sentence in Maryland is 0-30 years of incarceration. The potential sentence in Minnesota is 0-40 years of incarceration. The only other state with a maximum period of incarceration for second degree murder of 18 years or less is Washington, which allows for an 18 year maximum sentence. However, Washington requires a mandatory minimum period of incarceration of ten years. If the drafters were to change the maximum penalty for second degree murder to 30 years with no mandatory minimum this would achieve the goal of the potential for adequate punishment for a very serious offense while at the same time giving judges the discretion impose a just sentence.

ABS/jo/al