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FISCAL IMPACT REPORT

SPONSOR Rehm ORIGINAL DATE 1/28/19
LAST UPDATED _____ HB 103
SHORT TITLE 3 Strikes Equals Life Sentence SB _____
ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	\$1,660.6	\$3,321.2	\$4,981.8	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorney (AODA)
Law Office of the Public Defender (LOPD)
New Mexico Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 103 proposes to amend Section 31-18-23 NMSA 1978 regarding life imprisonment for three violent felony convictions.

<u>Currently Included</u>	<u>Additional Crimes</u>	<u>Expanded Scope</u>
First and second degree murder	Voluntary manslaughter	Criminal sexual penetration and aggravated criminal sexual penetration
Second degree shooting at or from a motor vehicle	Involuntary Manslaughter	Robbery while armed with a deadly weapon
Kidnapping resulting in great bodily harm by captor	Aggravated battery	
Aggravated, first degree criminal sexual penetration	Shooting at a dwelling or occupied building inflicting great bodily harm	
Armed robbery resulting in great bodily harm	Aggravated battery against a household member	
	Abuse of a child resulting in great bodily harm	
	Negligent abuse of a child that results in the death of the child	
	Intentional abuse of a child that results in the death of the child	
	Aggravated arson	
	Aggravated battery upon a peace officer	
	Homicide or great bodily harm by vehicle while under the influence of intoxicating liquor, under the influence of any drug, driving recklessly, or resisting, evading, or obstructing an officer	
	Injury to pregnant woman by vehicle while under the influence of intoxicating liquor, under the influence of any drug, driving recklessly, or resisting, evading, or obstructing an officer	

It also provides for violent felony convictions incurred under the age of eighteen to be considered for the purposes of the “three strikes” if in those convictions the youth was sentenced as an adult in New Mexico (according to one of the 17 violent felonies noted earlier) or in another state for a violent felony.

House Bill 103 includes a two-part qualifier to life imprisonment by stipulating eligibility for a parole hearing if the inmate has served 10 or more years and is 60 years old or older with the provision that the parolee be under supervision for the rest of their life.

The act applies to persons who have been convicted on, before or after July 1, 2019, of one of the violent felonies described in the act for the purpose of determining sentencing enhancements pursuant to that section for subsequent violent felony convictions on or after July 1, 2019.

FISCAL IMPLICATIONS

The fiscal impact of this bill will be large. The LFC and NMSC project (see attachment 1) incarceration costs alone over the next 15 years could cause a general fund impact of \$24.9 million. The courts state there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. 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.

See Attachment 1.

SIGNIFICANT ISSUES

The AOC explains:

A report titled *Impact of Three Strikes and Truth in Sentencing on the Volume and Composition of Correctional Populations* produced under funding from the U.S. Department of Justice and published in March of 2001 states, “Three Strikes was found to have no statistically significant nationwide impacts on any of the dependent variables that were studied, except for exits from parole, which appeared to grow about 8.7 percent faster after the law was implemented. These findings are not surprising, since the Three Strikes laws passed in most states are seldom used, or not used at all.”

The Legislative Analyst’s Office, a California nonpartisan policy group published [*A Primer: Three Strikes – The Impact After More Than a Decade*](#) in 2005 where they reported, “In 1994, analysts predicted that Three Strikes would result in over 100,000 additional inmates in state prison by 2003. Clearly, that rate of growth has not occurred. A number of factors have probably contributed to a lower prison population, including the use of discretion by judges and district attorneys to dismiss prior strikes in some cases. While courts do not track how often such discretion is used, some surveys of district attorneys conducted by Jennifer Walsh of California State University, Los Angeles, for example, suggest that prior strikes might be dismissed in 25 percent to 45 percent of third strike cases, resulting in shorter sentences for those offenders.

From these sources, it seems such expansions are used with little frequency.

The AODA submitted the following analysis:

Juveniles

House Bill 103 counts juvenile convictions, if the juvenile was sentenced as an adult. Therefore, an act committed when a person was under 18 could lead to a life sentence years later if the person commits two additional dangerous felonies. Currently, a felony committed by a person under 18 does not count under the “three strikes” law, even if the person was sentenced as an adult. The rationale for excluding juvenile convictions from a “three strikes” law is that juveniles are immature, which can lead to rash decision-making; are vulnerable to peer pressure; lack the cognizance to avoid dangerous situations; and their character is still

developing. In addition, a mandatory sentence does not allow consideration of the family and home environment that may have contributed to the crime.

Note that the U.S. Supreme Court has prohibited sentencing a juvenile to life without parole (for the reasons discussed above). Under House Bill 103, if a juvenile were convicted as an adult on three violent felonies while still a juvenile, he or she would be eligible for parole at age 60.

Parole

Currently, New Mexico's "three strikes" law does not allow parole. House Bill 103 provides that a person sentenced under its provisions becomes eligible for parole at age 60 if the person has served at least 10 years of the sentence. If granted parole, the person will be under the guidance and supervision of the board for the rest of his or her life.

Additional felonies

House Bill 103 adds many felonies to the law's definition of "violent felony," so many more defendants may be subject to the "three strikes" law.

Applicability

The applicability section of House Bill 103 is not entirely clear. It begins by stating that the act applies to persons who have been convicted of one of the violent felonies described in the act (and it does not matter when that conviction occurred), for purposes of determining sentencing enhancements for subsequent violent felony convictions on or after July 1, 2019. It appears that the "first strike" may be a conviction on any date, including a date before July 1, 2019. It also appears that the "third strike" must be a conviction occurring after July 1, 2019. It is not clear whether the "second strike" must also occur after July 1, 2019. It could be read that the first strike conviction may occur at any time, but the second and third strike convictions must occur after July 1, 2019. If that is not the intent of the drafters, the intent should be made clear.

If only the third strike needs to occur after July 1, 2019, it is possible that a defendant who committed three crimes that were not covered by the "three strikes" law before House Bill 103 could face a life sentence if the conviction for that third crime occurs after July 1, 2019.

The following analyses were submitted in prior years in response to similar "three strikes" bills:

NMAG suggests the bill provides "additional grounds for prosecutors to seek sentence enhancements for violent offenders." The NMAG suggests other offenses that may fairly be considered "violent" which the drafters may want to consider adding to the definition of violent felony are (1) third degree robbery, § 30-16-2, (2) criminal sexual contact, § 30-9-12(A), and criminal sexual contact of a minor, § 30-9-13.

NMSC states New Mexico's three strikes law (Sections 31-18-23 and 31-18-24 NMSA 1978) was enacted in 1994. Section 31-18-24 NMSA 1978 (not included in House Bill 103) sets forth sentencing procedures if a three strikes sentencing enhancement is pursued:

“31-18-24. Violent felony sentencing procedure.

- A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.
- B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.
- C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.”

New Mexico Sentencing Commission staff reviewed available New Mexico criminal justice data and were unable to find an instance when an offender received a three strikes sentencing enhancement. NMAG concurs, saying “the three strikes enhancement has rarely been filed in the State of New Mexico because the definition of violent offense has been limited to a very small set of criminal convictions. Research has shown that nobody in the State of New Mexico was sentenced under this statute. Adding thirteen additional convictions to the definition should increase the amount of three-strike prosecutions.”

Roughly half of the states have enacted some form of three strikes statutes, with most enacting theirs around the time New Mexico did in 1994. The most recent was Massachusetts in 2012. Notably, that same year California voters passed Proposition 36, which provides that a three strikes life sentence can only be imposed if the third felony is serious or violent; this was significant as the California three strikes law was in many ways the model for the national discourse on these laws. Most states have modified, sometimes extensively, their three strikes laws since they were initially adopted.

New Mexico has had habitual offender sentencing enhancements since 1977. The statutory provisions are set forth at Sections 31-18-17 NMSA 1978 through 31-18-20 NMSA 1978.

Many states, including New Mexico, have adopted “truth in sentencing” laws. Such laws typically require “serious violent offenders” to serve not less than 85 percent of their sentence. The following New Mexico Sentencing Commission [report](#) includes information on time served by serious violent offenders (males and females) in New Mexico.

LOPD submitted the following analysis:

Since a mandatory life sentence is at issue, a person charged with a third felony would be much more likely to demand a full trial in the hopes of either acquittal or at least conviction of a lesser included offense that would not trigger a life sentence. This bill would significantly increase the number of such trials.

Such an increase in cases going to trial – for cases that, due to their seriousness, often involve more complex trials than others – would certainly impact resources of the Law

Office of the Public Defender [hereinafter LOPD], and those of the courts and DAs, as well. However, it is impossible to predict the number of such eligible charges or to quantify the number of these additional felonies would constitute third offenses for LOPD clients.

Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide effective assistance of counsel to their existing clients. The Legislature and LFC are well aware of the myriad constitutional concerns implicated in forcing indigent criminal defendants to proceed without effective assistance of counsel.

Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

LOPD stated that the purpose of the three strikes law as it currently exists is to identify recidivist criminals who show a “violent nature,” or “proclivity for violence,” and impose a life sentence for the safety of the public. LOPD expressed concern that “New Mexico has many felonies that are broadly worded enough to include both violent and non-violent conduct; the bill does not make the distinction to target only people who commit crimes in a violent way, and thus evidence a recidivist tendency justifying life in prison in order to protect the community.” LOPD stated that the lack of definition may sentence criminals who are not violent and may not warrant a life sentence.

LOPD previously provided examples of the broad nature of the bill, including the following: “kidnapping can include holding someone by the arm to make them take money out of an ATM. The bill does not limit itself to first degree kidnapping, and second degree kidnapping is defined as simply restraint with a particular intent; no actual harm need be suffered. Furthermore, even first degree kidnapping involves only ‘injury,’ and not great bodily harm, so that a scratch or bruise would suffice to be considered ‘violent’ under this bill.” The LOPD is concerned that accruing offenses eligible under the broad categories of the bill could quickly and unnecessarily sentence someone to life in prison.

LOPD previously stated that “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally. Section 31-18-17 NMSA 1978 already provides for significant sentencing enhancements for repeat felons, without imposing a life sentence. The life sentence provision should be targeting people whose level of violence justifies an extreme sentence for the safety of the community, recognizing that it is significantly greater than the penalty for any of the individual crimes, particularly where Section 31-18-23 NMSA 1978 does not allow any judicial discretion to find that a particular defendant is not in fact violent or a danger to the community.”

Finally, LOPD previously asserted that “the proposed additional felonies, as a third felony offense, would still be subject to a four-year mandatory sentencing enhancement under Section

31-18-17, the habitual offender enhancement statute applicable to all non-capital felonies (a fourth or subsequent felony offense incurs a mandatory eight-year enhancement). Because that enhancement term applies to each felony in a new proceeding, it is a practical reality that habitual offender enhancements in a single case often total 12 or 16 years.”

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, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.

PERFORMANCE IMPLICATIONS

The AOC is participating in performance-based budgeting. The bill may have an impact on the measures of cases disposed of as a percent of cases filed and percent change in case filings by case type.

The AODA explains, “as discussed above, some defendants facing a third violent felony charge may plead to a lesser charge to avoid the consequences. Others may insist on trial to attempt to avoid a third conviction. So, it is not clear whether House Bill 103 will increase or decrease trials for the district attorneys. There may be litigation over the applicability of the statute.”

ADMINISTRATIVE IMPLICATIONS

In previous analysis of similar bills, LOPD noted that the proposed legislation would “certainly affect LOPD attorneys’ representation in cases where a potential third violent felony is charged, increasing the number of these cases that go to trial.”

NMCD explains “if the bill were to increase the inmate population at some point in the future, a corresponding impact for the workloads of prison staff at current staffing levels could occur. Similarly, releasing these offenders on parole pursuant to the mechanisms contained in the bill could impact the workloads and caseloads of parole officers.”

ALTERNATIVES

In previous analysis of similar bills, LOPD previously stated “maintaining the great bodily harm requirement for all offenses that do not inherently require it is the best way to focus on individuals who repeatedly behave in a violent manner, and not just individuals who recidivate criminally.” LOPD also stated that Section 31-18-17 NMSA 1978 provides for sentencing enhancements for repeat felons, without imposing a life sentence. The LOPD believes that a life sentence should be retained only for those individuals whose actions truly warrant the sentence. As an alternative, the Legislature could revisit the basic habitual offender statute.

OTHER SUBSTANTIVE ISSUES

NMCD explains “when the bill indicates that an offender (convicted of three violent felonies) is eligible for parole after serving ten or more years of his sentence, it is not clear if the offender has to serve an actual ten-year period or if ‘good time’ earned by the offender can be counted to

reduce the ten-year threshold. While it is likely that the bill intends to require a full ten-year period, litigation is likely to ensue if this is not clarified now.”

In previous analysis of similar bills, NMSC cautions care should be taken to ensure that the applicability section does not violate the provisions of Article II, Section 19 of the New Mexico Constitution preventing retroactive laws, bills of attainder, and impairment of contracts: “no ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.”

NMSC explained that many states, including New Mexico, have adopted “truth in sentencing” laws. Such laws typically require “serious violent offenders” to serve not less than 85 percent of their sentence.

NMAG states “other offenses that may fairly be considered ‘violent’ which the drafters may want to consider adding to the definition of ‘violent’ would be criminal sexual contact, § 30-9-12(A), and criminal sexual contact of a minor, § 30-9-13.”

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NMSC provided an extensive cost simulation, provided below:

In late 2015, the New Mexico Sentencing Commission ran a simulation assessing the possible impacts of three strikes legislation similar to House Bill 103. The results of that simulation follow.

Simulation of Number of Offenders 2000-2014

To determine the impact of expanding the list of qualifying offenses subject to mandatory life imprisonment for three violent felony convictions, the New Mexico Sentencing Commission (NMSC) used data provided by the courts to run a simulation. Table 1 contains the list of charges in House Bill 103 that were used in the analysis.

Table 1. Charges

First Degree Murder
Second Degree Murder
Manslaughter
3rd Degree Aggravated Battery
2nd Degree Shooting at a Dwelling or Occupied Building
2nd Degree Shooting at or from a Motor Vehicle
3rd Degree Aggravated Battery on a household member
Kidnapping with great bodily harm
1st Degree Child Abuse Intentional
1st - 3rd criminal sexual penetration
1st or 2nd Robbery
Aggravated Arson
Aggravated Battery Upon a Peace Officer
Homicide by Vehicle or Great Bodily Harm by Vehicle
Injury to Pregnant Woman by Vehicle

NMSC has data on court cases disposed from 2000 – 2014. For the simulation, NMSC tried to determine the effect if the law had been changed in 2000 to include the charges above. NMSC selected all cases that had a conviction on any of the above charges from 2000 – 2014. NMSC then counted the number of convictions by offender. Over the 15-year period, 8,977 individuals were convicted for one of the charges at least once. Table 2 contains the number of individuals that were convicted once, twice, or three times or more over the 15-year time period. The percentage of offenders who had three or more convictions was 0.3%. This would yield an estimated additional 27 offenders in the New Mexico Corrections Department serving life sentences over the first 15 years of the statute implementation. There were 386 offenders who had two convictions during the time period on these charges (4.3%).

Table 2. Number of Offenders by Number of Convictions

Once	8,564	95.4%
Twice	386	4.3%
3 times or more	27	0.3%
Total	8,977	100.0%

Estimating Differences in Sentence Lengths

To estimate the difference in sentence lengths, NMSC used NMCD release data. NMSC looked at the average time from sentence date to release date for each of the charges. NMSC found the averages varied widely by charge; ranging from 2-19.5 years. It is important to note that this average does not include any pre-sentence confinement credit so the actual amount of time served is probably higher.

We then calculated the weighted average, which takes into account the number of offenders who served time for each charge relative to the total number. For example, first degree murder has the longest average however there are fewer offenders who serve time on that charge compared to a charge like third degree aggravated battery which has a large number of offenders and a significantly shorter average sentence to release length. The weighted average from sentence date to release date across all these crimes was 5.1 years. If upon the third conviction for one of these crimes, the offender was subject to a 30-year sentence, NMSC estimate that the average time from sentence to release would be 25.5 years, if an offender earned all available meritorious deduction. This would be an increase in sentence of 20.4 years.

Estimate Cost of Increased Sentence Length

Using the department's average cost to incarcerate a male inmate of \$45,224 per year in a state-owned prison, the individual impact per inmate would be \$922.6 thousand across their prison sentence. The cost would be \$24.9 million if all 27 offenders who had three or more convictions on these charges received a 30-year sentence.