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FISCAL IMPACT REPORT

ORIGINAL DATE 2/22/19
LAST UPDATED 3/06/19 **HB** 342/HJCS/aSPAC

SPONSOR HJC

SHORT TITLE Criminal Justice Reforms **SB** _____

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	\$824.8, but may also generate savings	\$824.8, but may also generate savings	\$1,649.7, but may also generate savings	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 267.

Companion to House Bill 267 and House Bill 564.

Portions of the entire bill duplicate or are very similar to HB43, SB282, SB63, SB69, and SB75.

SOURCES OF INFORMATION

LFC Files

Responses Received From (on the bill as introduced)

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorney (AODA)
 New Mexico Attorney General (NMAG)
 New Mexico Sentencing Commission (NMSC)
 Crime Victims Reparation Commission (CVRC)
 Department of Public Safety (DPS)
 Law Office of the Public Defender (LOPD)
 Corrections Department (NMCD)
 Human Services Department (HSD)

Responses Not Received From (on the bill as introduced)

Adult Parole Board (APD)
 Association of Counties
 Municipal League

SUMMARY

Synopsis of SPAC amendment

The Senate Public Affairs Committee Amendment for House Bill 342 amends Section 31-22-14 NMSA 1978 to remove the requirement the crimes covered by the act have to be reported to the police within 30 days. The amendments do not remove the current statutory requirement the application for reparation be made within two years after the relevant injury or death from a covered or designated crime. The amendment removes the reporting within 30 days waivers for victims of domestic violence, sexual assault, and for certain crimes against children reported to CYFD. The amendments also revise the Victim's Rights Section of New Mexico law (Section 31-26-4 NMSA) to require that victims be notified by the district attorney of the availability of and procedures to apply for crime victims reparation.

The SPAC amendment also amends Section 31-22-7 which governs eligibility for reparation for victims. Amends proposed language so an order for reparation can be made whether or not someone is prosecuted or convicted of a crime if the crime is reported to police or reported from “to a medical or mental health care provider, victim counselor or other counseling provider” to “to a licensed medical, mental health or counseling provider or tribal health provider.”

Synopsis of Bill

Key reforms proposed in House Bill 342 include:

- Requiring the Behavioral Health Services Division (BHSD) of the Human Services Department (HSD) to, subject to appropriation, create, implement, and evaluate a framework of interventions for adult and juvenile offenders incarcerated in New Mexico to address offender's needs while they are incarcerated and continue serving their needs upon release with the aim of reducing recidivism.
- Creates a new section of the Human Services Department Act to create a county funding program to assist counties in providing behavioral health services to individuals incarcerated in county correctional facilities.
- Expands limited immunity for those who seek medical assistance for someone experiencing a drug-related overdose to include alcohol overdose. Exempts property from forfeiture and adds certain immunities. The bill also provides similar protections for the person who is experiencing an overdose who seeks assistance. House Bill 342 also creates the limited liability for those who seek medical assistance for someone experiencing alcohol- or drug-related overdose for a violation of the statutory provisions against selling or giving alcohol to minors.
- Amends the procedures for post-conviction consideration of DNA evidence by mandating a petitioner has prompt proceedings, that DNA samples shall be testing according to the DNA Identification Act and that the results of the testing shall be entered in in the FBI national DNA index system, and mandates that the Rules of Evidence and Rules of Civil Procedure of the District Court shall apply to proceedings.
- Changes the statutory eligibility requirements for preprosecution diversion so all that is required in statute is that the defendant have no prior felony convictions for violent crime and is willing to participate in the program and submit to program requirements while allowing the district attorney to set any additional requirements. Removes the mandatory reimbursement of costs presently in statute to participate in preprosecution diversion and

makes removal from a program discretionary, rather than mandatory, for failure to comply with requirements of a program.

- Requires that a person shall be placed on parole only for a felony conviction when a person is sentenced of imprisonment of more than one year, unless the parties agree parole should be imposed.
- Amends the section of the Crime Victims Reparations Act on eligibility for reparations by broadening the language and including that the act or omission constituting a crime has been reported to a medical or mental health provider, victim counselor, or other counseling provider. Under present law, the report has to have been made to the police. Additionally, the Crime Victims Reparation Commission would need to make a finding that the claimant or victim fully cooperated with the appropriate law enforcement agencies, as in present law, or, in the new language, that they acted reasonably under the circumstances.
- Creates the Accurate Eyewitness Identification Act, requiring criminal justice entities that conduct eyewitness identification procedures to adopt and comply with written policies for using eyewitnesses in live lineups or showups, or in a photo lineup. These policies must be provided to the secretary of Department of Public Safety (DPS), who shall make them public. The policies shall be biennially reviewed to incorporate new scientifically supported protocols. The policies must adopt practices shown by reliable evidence to enhance the accuracy of identification procedures, and include practices to enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications. House Bill 342 also requires DPS to have training programs on these procedures.
- Requires the New Mexico Sentencing Commission to create fiscal impact statements for bills that create new crimes or repeal existing crimes for which imprisonment is authorized; increases or decreases the period of imprisonment authorized for an existing crime; imposes or removes mandatory minimum terms of imprisonment; or modifies the law governing release of inmates in such a way that the time served in prison will increase or decrease. The fiscal impact statement shall reflect the estimated change in annual operating costs for NMCD attributable to the bill if the bill were to become law.

FISCAL IMPLICATIONS

The behavioral health framework to be created, implemented, and evaluated by BHSD is to be subject to appropriation by the legislature; this bill does not include an appropriation for this purpose. The bill already creates a new section of the Human Services Department Act to create a county funding program to assist counties in providing behavioral health services to individuals incarcerated in county correctional facilities. It is unclear whether the bill is creating a new fund or referring to existing programs like the Community Assistance and Community Services Block Grants administered by HSD for programs including assistance for food, housing, medicine, work, and education.

HSD explains:

There is no appropriation tied to the requirements for BHSD to implement Sections 1& 2 of the bill. BHSD has a Justice Liaison to manage existing programs for justice-involved adults with behavioral health needs. BHSD would need another FTE at pay band 75 at \$75,838 to implement the programmatic expansion required by House Bill 342.

There are other funding streams and legal authorities that impact the services proposed by House Bill 342. 2018 House Bill 19, which was signed into law, requires correctional facilities to ensure behavioral health screening within thirty (30) days of incarceration. It also requires connection to care coordination for Medicaid-eligible incarcerated individuals prior to release. Furthermore, under Centennial Care 2.0, the Medicaid MCOs will be required to participate in care coordination efforts for justice-involved individuals prior to release to facilitate transition into the community. *HSD is prohibited under federal law from paying for direct services provided to individuals who are incarcerated, with the exception of inpatient hospital care that is rendered outside the correctional facility.* At the county level, county facilities are federally required and funded to provide health care services during incarceration, including behavioral health care. Under NM statute, Medicaid coverage is not terminated for individuals incarcerated for less than thirty (30) days. The overall cost of this legislation is therefore dependent on the extent of Medicaid coverage for the services required under House Bill 342, as well as any behavioral health interventions currently provided by correctional facilities during incarceration and upon re-entry.

House Bill 342 requires HSD to award funds to counties that apply for behavioral health services funding pursuant to guidelines established by the department. Although the distribution of funds is “as funding permits,” it should be noted that the lack of appropriation will translate into no available funding to implement this provision. House Bill 342 is nearly identical to House Bill 43, which included a \$1.5 million appropriation for funding to counties. HSD recommends this recurring appropriation be added to House Bill 342.

NMSC is concerned regarding the creation of fiscal impact statements by NMSC. The SPAC amendment to the HJC Substitute for House Bill 342 still does not include an appropriation to the Commission. While NMSC is well-placed to measure the fiscal impact of criminal justice bills on the NMCD, NMSC cannot perform this task without an additional appropriation. The NMSC at present has a small staff of only four FTEs, and only two of those positions are data analysts. Preparation of the fiscal impact statements requires thoughtfulness, careful analysis, and personnel. The New Mexico Sentencing Commission estimates the need for at least one additional employee to perform the fiscal impact analyses required by the bill, an estimated cost of up to \$84 thousand.

The Crime Victims Reparation Commission (CVRC) estimates the bill’s expansion of eligibility to not only those who cooperate with law enforcement but also with medical or victim counselors would cost an additional \$550 thousand per year. To estimate costs, the agency explains:

CVRC collected data regarding the 200 cases from Sexual Assault Nurse Examiners (SANE) in our state for FY18 where there was no law enforcement report and from our Performance Measure Tool (PMT) which is the [data] collected and reported annually to the federal government of 90 cases which were not reported to law enforcement or 60 cases who failed to report to law enforcement. These two values indicate that 350 victims applied for or sought assistance but were ineligible under our current statute. CVRC collected from [the] FFY18 report the payments to 1,082 compensation claims and the total paid out of those claims which was \$1.7 million. The average for each of these compensation claims was \$1,579. From the 350 claims not accepted which would be eligible with this proposed legislation, [the] calculation is as follows: 350 (claims) x \$1,579= \$556,180 per year.

The Corrections Department expresses concern that no appropriation is included for HSD to create a behavioral health network for offenders and no funding for NMCD to assist HSD in creating the framework.

NMCD also explains:

To the extent that HSD can ultimately assist the NMCD to help locate effective housing, counseling or other services to former NMCD inmates in need, it could help prevent these offenders from committing new crimes to support their families or past criminal lifestyles. It therefore could help reduce the recidivism rates for these offenders, ultimately perhaps lowering NMCD's prison population (and costs) to some yet unknown degree. Any behavioral framework developed by HSD could be used to supplement the community services and resources the NMCD Probation and Parole Division (PPD) makes available to its parolees and other offenders through appropriations made to the NMCD.

AOC submitted the following:

Any fiscal impact on the judiciary would be proportional to the reduction in arrests, charges, and prosecution prevented by enacting this legislation. The scope is unknown without having data on the number of arrests, charges and prosecutions that will be eliminated by passing this bill.

Section 6 does not include an appropriation. The current statute authorizes the district attorney, as a condition of participation in a preprosecution diversion program, to require the defendant to pay costs related to participation in the program. If the defendant is not required to pay costs associated with participation, the district attorney will have to pay those costs from the operating budget. [Note: House Bill 267 [as introduced] includes \$260 thousand to AODA to replace the loss of fees from preprosecution diversion programs sustained in this bill].

Section 24 requires the judiciary to provide data to the sentencing commission for fiscal analyses of bills that create or repeal crimes. Many criminal bills are typically proposed or discussed during the legislative interim, and introduced during a legislative session. Timely production of accurate, relevant data may require a statistician at the Judicial Information Division. A full-time statistician or database administrator costs approximately \$115 thousand per year.

Other fiscal impacts on the judiciary would be proportional to the reduction in arrests, charges, and prosecution prevented by enacting this legislation. The scope is unknown without having data on the number of arrests, charges and prosecutions that will be eliminated by passing this bill.

AODA states “the most direct fiscal impact on the district attorneys from House Bill 342 is the loss of funds collected from persons in the preprosecution diversion programs. House Bill 267 [as introduced], (also titled “Criminal Justice Reform”) would appropriate \$260 thousand to the Administrative Office of the District Attorneys to replace the loss of fees from preprosecution diversion programs.

DPS believes “there may be fiscal impact in making all policies and procedures law enforcement agencies policies and procedures related to Eyewitness Identification Procedures available to the

public. Also updating all trainings related to those procedures will involve some unknown amount of expense to both the DPS Law Enforcement Academy and State Police Academy.”

The Law Office of the Public Defender (LOPD) explains that while “costs might be incurred by statewide agencies in the initial creation of the new provisions and alternatives created in House Bill 342, the long-term outcome would likely be a lighter workload for all justice system agencies including LOPD. House Bill 342 would result in LOPD clients facing fewer collateral consequences for prosecutions and convictions, which would likely result in more cases being resolved short of trial, whether by pre-prosecution diversion or plea agreement. Though a long-term outlook, LOPD, with these changes, might better begin to absorb its current workload, necessitating fewer additional attorney and staff hires over time.”

SIGNIFICANT ISSUES

DPS explains the department “generally follows the delineated ‘Eyewitness Identification Procedures’ which would be required by the new law as a matter of best practices, but would have to revise its procedures to make the terms mandatory. Likewise its current New Mexico State Police and Law Enforcement Academy trainings related to line-ups procedures may need to be revised as a result. The DPS would also be required to accept all law enforcement agencies policies and procedures related to Eyewitness Identification Procedures, and make them available to the public.”

NMSC provides the following analysis:

Concerning the Accurate Eyewitness Identification Act, this section of House Bill 342 addresses the growing understanding that eyewitness recollections are not as accurate as has been commonly presumed. In 2014, the National Research Council published “[Identifying the Culprit: Assessing Eyewitness Identification](#)”. The NRC’s description of the study notes the following:

“Eyewitnesses play an important role in criminal cases when they can identify culprits. Estimates suggest that tens of thousands of eyewitnesses make identifications in criminal investigations each year. Research on factors that affect the accuracy of eyewitness identification procedures has given us an increasingly clear picture of how identifications are made, and more importantly, an improved understanding of the principled limits on vision and memory that can lead to failure of identification. Factors such as viewing conditions, duress, elevated emotions, and biases influence the visual perception experience. Perceptual experiences are stored by a system of memory that is highly malleable and continuously evolving, neither retaining nor divulging content in an informational vacuum. As such, the fidelity of our memories to actual events may be compromised by many factors at all stages of processing, from encoding to storage and retrieval. Unknown to the individual, memories are forgotten, reconstructed, updated, and distorted. Complicating the process further, policies governing law enforcement procedures for conducting and recording identifications are not standard, and policies and practices to address the issue of misidentification vary widely. These limitations can produce mistaken identifications with significant consequences. What can we do to make certain that eyewitness identification convicts the guilty and exonerates the innocent?

“Identifying the Culprit makes the case that better data collection and research on eyewitness identification, new law enforcement training protocols, standardized procedures

for administering line-ups, and improvements in the handling of eyewitness identification in court can increase the chances that accurate identifications are made. This report explains the science that has emerged during the past 30 years on eyewitness identifications and identifies best practices in eyewitness procedures for the law enforcement community and in the presentation of eyewitness evidence in the courtroom. In order to continue the advancement of eyewitness identification research, the report recommends a focused research agenda.”

Similarly, a 2017 [report](#) on Trends in State Courts from the National Center for State Courts addressed the growing understanding of problems with eyewitness identification.

AOC analyzed the following points, below:

Reduce recidivism: Consistent interventions for incarcerated adult and juvenile offenders with behavioral health diagnoses to provide resources is likely to reduce recidivism. Developing this framework would likely improve outcomes of our problem solving courts through the collaboration of case management.

Eyewitness Identification: In the article “[The Trouble with Eyewitness Identification in Criminal Cases](#),” author Greg Hurley discusses the research showing that eyewitness testimony can be very unreliable. Citing a paper by Professor Keith A. Findley, Hurley lists a number of recommended reforms to ensure more accurate, objective lineups including:

- Only One Suspect per Procedure
- Proper Selection of “Fillers”
- Unbiased Witness Instructions
- Double-Blind Administration
- Prompt Recording of Confidence Statements
- Sequential Presentation
- Limit the Use of Show-ups

Professor Keith A. Findley published “Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of the Eyewitness Identification Reform Issues” (Missouri Law Review, vol. 81, 2016). These recommendations are encompassed in the required practices enumerated in Section 22 (E)(1-13).

AODA explains House Bill 342 makes significant changes on the following issues:

Mental Health. House Bill 342 requires the human services department to create a framework of interventions for incarcerated adult and juvenile offenders with behavioral health diagnoses to address them both while the offender is incarcerated, and to connect them to resources immediately upon release.

Limited Immunity in Overdose and Substance-Related Poisoning Situations. House Bill 342 expands limited immunity, making it more likely that victims will seek help, and that others will seek help for them.

Preprosecution Diversion. House Bill 342 expands eligibility for preprosecution diversion, and makes participation free for the participant. This will expand use of the program, and

make it more available to low-income individuals. While removing many of the requirements for eligibility, House Bill 342 gives the prosecutor increased discretion to deny eligibility.

Reparations. House Bill 342 expands eligibility for reparations, recognizing reports to a medical or mental health care provider, victim counselor or other counseling provider.

Lineups and Showups. House Bill 342 requires law enforcement to develop policies regarding lineups and showups, and sets minimum standards for those policies.

NMCD explains:

The bill appears to assume that there are no behavioral health services available for NMCD inmates while in prison. However, there are already behavioral health staff providing individualized services to inmates at each NMCD prison, and the medical services provider already provides individualized psychiatric services to inmates at each prison.

The bill also appears to assume that former NMCD inmates have no behavioral health services upon release discharge. However, behavioral health staff, recidivism reduction/transition coordinators, and NMCD Probation and Parole Division (PPD) staff already work with these offenders to plug them into community services and to pay for those services largely out of money appropriated to the NMCD PPD. The bill also appears to similarly assume that there are various community behavioral health and other services which are not being made available to NMCD former inmates, when PPD already utilizes those services. There is indeed a shortage of services in some communities, but the PPD already utilizes existing services to the extent that it can. Further, the NMCD already works with other state agencies to have qualified, eligible inmates signed up for Medicare before they are released from prison, and many inmates qualify for Medicare.

Therefore, the bill raises many questions. Is the HSD going to take over providing behavioral health services to NMCD prisoners, or is it going to evaluate the services being provided by NMCD? Will NMCD behavioral health staff become employed and supervised by HSD? Is the HSD going to pay for the community behavioral health services provided to former NMCD inmates, paying all of those costs or supplementing what is paid out of PPD's budget? Is HSD going to attempt to hire more state employees to provide more community behavioral health services, or attempt to locate or develop more private vendors to provide these services?

Also, the bill does not seem to focus on offenders who are placed on probation with the NMCD PPD without ever having been incarcerated in a NMCD prison. These offenders often need community behavioral health services as well, and those services also assist in reducing recidivism rates. Expanding the behavioral health framework discussed in this bill to include probationers would be reasonable, as such services could help prevent these offenders from violating their probation and being sent to NMCD prison as probation violators.

Generally speaking, finding additional ways to help any offender on probation or parole with NMCD pay for housing, public assistance, counseling, etc. makes it less likely that this offender will have to resort to committing other crimes in order to survive or support his family. Paying for these types of services should help lower recidivism rates for these

offenders, potentially creating more bed space in NMCD's prisons due to fewer convictions and incarcerations due to new crimes being committed by these offenders along with fewer incarcerations for violations of their probation or parole conditions. The requirement that the framework created for targeted, individualized interventions for the covered offenders must be continually evaluated for effectiveness will ultimately enable to fund and support only those interventions which prove to work for these offenders. Again, however, in many cases, these types of services are not readily available in many New Mexico communities, and anyone developing a network to provide behavioral health and other services in these communities must confront and solve this problem.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

NMAG explains "Twenty-nine bills either amend or reference Section 31-18-15, which HB 342 amends. It should be ensured that conflicts with changes to this statute should be checked.

TECHNICAL ISSUES

AOC submitted the following concern:

This bill is similar to House Bill 116, sponsored by Representatives Maestas and Youngblood in the 2018 regular session. That bill changed the eligibility requirements but specified "serious violent offenses" and included the definition of serious violent offenses as those offenses defined by section 33-2-34 NMSA 1978. This bill does not define violent offenses.

AODA submitted the following:

Paragraph D of Section 18, regarding reparations, recognizes reporting of an act or omission constituting a crime to a medical or mental health care provider, victim counselor or other counseling provider. It does not require that the reporting be done "in a reasonable time." The existing statute requires reports to police be done "in a reasonable time."

Sections 20-22 create the "Accurate Eyewitness Identification Act" setting out minimum requirements for showups and lineups. It does not describe the consequences for failing to meet those standards. Presumably, it will be up to the courts to determine if a defendant's constitutional rights have been violated by the failure.

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