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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 2/27/19  
**SPONSOR** Rehm **LAST UPDATED** \_\_\_\_\_ **HB** 607

**SHORT TITLE** Use Of Prior Felonies In Sentencing **SB** \_\_\_\_\_

**ANALYST** Edwards

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	Potentially substantial	Potentially substantial	Potentially substantial	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 317 which also amends Section 66-8-102.

Conflicts with House Bill 370 and Senate Bill 493.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of Bill

House Bill 607 amends 31-18-17 NMSA 1978 to require a prior felony conviction within 25 years of a subsequent felony conviction be considered for the purpose of habitual offender sentencing. Convictions pursuant to 66-8-102 (Driving Under the Influence) are included as subsequent felony convictions to be considered.

### FISCAL IMPLICATIONS

Enhanced sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. According to the Corrections Department (NMCD), the cost per day to house an inmate in public state prisons in FY18 was an average of \$123.90 per day, or about \$45,224 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, grew by an average of 2 percent between FY15 and FY19 and the FY19 legislative budget recommendation is 9 percent higher than FY15, closely mirroring the inmate population growth of 10 percent. LFC reported in its FY19 budget recommendation that NMCD ended FY18 with a \$3.5 million budget shortfall.

Societal benefits, particularly to potential victims, could 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.

NMSC does not have data to inform an estimated cost impact for House Bill 607. However, a law that increases the penalties for a criminal offense after it has been committed may be challenged as being an ex post facto law in violation of the state constitution. See Art. II, Sec. 19 of the New Mexico Constitution: "No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."

AOC analysis explains "as penalties become more severe, defendants may invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, and courtroom availability and jury fees. These additional costs are not capable of quantification. The imposition of longer, enhanced sentences, in additional cases, may spur more defendants to retain counsel and request jury trials. Indigent offenders are entitled to public defender services."

Similarly, AODA states:

House Bill 607 will increase the number of felonies that will be subject to enhanced sentences under the habitual offender statute. It is difficult to tell whether the threat of a longer sentence will result in more plea bargains, or more cases going to trial. If House Bill 607 results in more trials, that will mean increased costs to the district attorneys.

AOC also believes 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.

NMCD explains:

The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. It is difficult to predict or estimate with certainty the ultimate effect of any criminal penalty enhancement bill. However, by including prior DUI felony convictions and prior felony convictions which are less than 25 years old, a substantial number of offenders will have their basic sentences enhanced as habitual offenders.

Since the bill will result in longer or enhanced basic sentences for a significant number of

offenders, it will likely have a substantial fiscal impact on the NMCD. It could eventually, at some point, cause the department to have to expand its available beds to have enough room to house these offenders serving longer basic sentences for noncapital felony crimes. The bill might deter some crimes, but this is not known for certain. There is no appropriation in the bill to cover these increased costs.

LOPD provided the following analysis:

[I]ncreased exposure to prison time for public defender clients will be caused by House Bill 607, as it more than doubles the time period in which a prior conviction may be used against a person and, thus, greatly expands such individuals' exposure to mandatory incarceration under Section 31-17-17 NMSA. This will result in a substantial increase in the resources LOPD will have to expend in order to provide effective assistance of counsel to effected individuals.

The expanded period will result in a larger number of clients facing mandatory prison time because all proceedings under Section 31-18-17 implicate mandatory prison time, and this will naturally result in more defendants challenging cases through jury trial, who might have resolved a case short of trial otherwise. LOPD cases effected by this change would cost more to defend because more would be at stake. Again, higher-penalty cases are somewhat more likely to go to trial. Any increase in LOPD expenditures brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation of the proposed higher-penalty scheme. If more higher-penalty trials result from enactment, LOPD may need to hire more trial attorneys with greater experience to stay ahead of the rush. Additionally, courts, DAs, AGs, and NMCD could anticipate increased costs.

If more trials result, LOPD may need to hire more trial attorneys with experience. Average felonies would be handled by mid-level felony capable attorneys (Associate Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. An Associate Trial Attorney's mid-point salary including benefits is \$92.5 thousand in Albuquerque/Santa Fe and \$99.7 thousand in the outlying areas (due to necessary salary differential to maintain qualified employees). Recurring statewide operational costs per attorney would be \$2,300 with start-up costs of \$3,128; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$77.1 thousand.

## **SIGNIFICANT ISSUES**

AOC explains:

House Bill 607 will result in more offenders being habitual offenders subject to sentence enhancement. As penalties become more severe, defendants may invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees. These additional costs are not capable of quantification. The imposition of longer, enhanced sentences, in

additional cases, may spur more defendants to retain counsel and request jury trials. Indigent offenders are entitled to public defender services.

AODA analysis states the bill includes in the definition of “prior felony conviction” a felony committed under Section 66-8-102, driving under the influence of intoxicating liquor or drugs (a fourth or subsequent offense under that section is a felony).

LOPD states:

The twenty-five year window for using prior felonies for sentence enhancement creates an inconsistency in the way offenders are perceived in the law in general. For instance, the rules of evidence use ten years as the window for which a person’s credibility may be impeached through a prior conviction. House Bill 607 creates an inconsistency and also expands the period from which a person cannot fully rehabilitate and reintegrate back into law abiding society. In essence, it stands to increase, not decrease, the likelihood of reoffending where individuals are branded as being criminals for longer periods.

LOPD also explains:

Under Section 66-8-102, DWI is already a self-enhancing penalty. If it is permitted to be used in the ordinary habitual offender scheme, it becomes unclear on which statute a judge would rely in sentencing a felony DWI if the offender had a prior felony DWI; it is unclear whether such sentencing would be administered according to the enhancements enumerated in Section 66-8-102 or according to the provisions of Section 31-18-17 NMSA.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

House Bill 317 amends Section 66-8-102.

House Bill 370 and Senate Bill 493 would allow convicted defendants to expunge records of their felony convictions, in some cases before the 25-year period set out in House Bill 607.

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