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FISCAL IMPACT REPORT

SPONSOR <u>SJC</u>	ORIGINAL DATE <u>3/03/19</u>	LAST UPDATED <u>3/07/19</u>	HB		
					<u>CS/CS/328/SPACS/ SJCS/ aSF1#1/aSF1#2/ aSF1#3/aSF1#4/ aSF1#5/aSF1#6/ aSF1#7/aSF1#8/ aSF1#9</u>
SHORT TITLE <u>Orders of Protection and Firearm Ownership</u>			SB		<u>aSF1#9</u>
			ANALYST		<u>Edwards</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Possibly Significant	Possibly Significant	Possibly Significant	Possibly Significant	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 83, House Bill 87, House Bill 316, and Senate Bill 325.

SOURCES OF INFORMATION

LFC Files

Responses Received From (in response to Original Bill)

Law Office of the Public Defender (LOPD)

New Mexico Attorney General (NMAG)

Children, Youth and Families Department (CYFD)

Department of Public Safety (DPS)

SUMMARY

Synopsis of SF1 #1- #9

Senate Floor Amendments #1 through #9 make numerous amendments and clarifications to the bill.

In Section 1(3)(d), the reference to 18 U.S.C. 922 (Chapter 44. Firearms, Section 922: Unlawful Acts) is changed to 18 U.S.C. 921 (Chapter 44. Firearms, Section 921: Definitions).

In Section 3(C) and Section 4(E)(6), language on violation of protection order is clarified to include violation of state laws and 18 U.S.C. 922, et seq, which prohibits the possession of firearms by certain people.

In Section 4(D), (search warrants when the court has probably cause to believe a firearm has not been relinquished as ordered) is stricken in its entirety.

Section 4(G) (civil and criminal immunity for law enforcement for damage or deterioration of firearms stored or transported) is stricken in its entirety.

Section 4(H) is amended so that no evidence establishing ownership or possession of a firearm, pursuant to Section 4 of the bill, is admissible in any criminal proceeding.

Section 4(I) (requiring law enforcement to make a firearm available within 30 days of the receipt of the request from a party who is again eligible to possess the firearm) is stricken in its entirety and replaced with new language requiring a law enforcement agency or a federal firearms licensee to make a firearm available within three days of the receipt of the request from a party who is again eligible to possess the firearm.

References to “licensed firearms dealer” in Section 4(J), Section 4(J)(1), and Section 4(K) are changed to “federal firearms licensee.”

In Section 4(K) lengthens the time a law enforcement agency must hold a firearm relinquished pursuant to this act before disposal of the firearm from six months to 12 months.

Section 4(L), which reads “this section shall not affect the ability of a law enforcement officer to remove a firearm from a person pursuant to other lawful authority,” is stricken in its entirety. A new Section 4(L) is inserted which reads: “the provisions of this section shall not be interpreted to require a federal firearms licensee to purchase or accept possession of a firearm from a restrained party.”

Synopsis of Original Bill

The Senate Judiciary Committee Substitute for the Senate Public Affairs Committee Substitute for Senate Bill 328 amends 30-7-16 NMSA 1978 to make the possession of a firearm or destructive device by any person subject to an order of protection or convicted of certain enumerated state or federal crimes a misdemeanor.

The bill also amends 30-7-16 NMSA 1978 to make it unlawful for the following persons to receive, transport, or possess a firearm or destructive device in New Mexico:

- Felons;
- A person subject to an order of protection pursuant to Sections 40-13-5 or 40-13A-5 NMSA 1978; and
- Persons convicted of any of the following: battery against a household member, criminal damage to the property of a household member, a first offense of stalking, a crime listed in 18 U.S.C. 922

The bill adds definitions for firearms and law enforcement officers.

The bill makes the relinquishment of firearms and the prohibition of acquiring firearms by restrained persons a mandatory requirement of any order of protection entered pursuant to Section 40-13-5 NMSA 1978 with no exception for individuals required to possess firearms by virtue of their employment.

FISCAL IMPLICATIONS

County	Number of Domestic Violence Cases Where a Protective Order was Filed	Percent of All Domestic Violence Cases for which a Protection Order was Issued
Bernalillo	2,112	30%
Catron	10	0%
Chaves	238	3%
Cibola	116	2%
Colfax	70	1%
Curry	55	1%
De Baca	6	0%
Dona Ana	511	7%
Eddy	198	3%
Grant	58	1%
Guadalupe	21	0%
Hidalgo	2	0%
Lea	428	6%
Lincoln	60	1%
Los Alamos	29	0%
Luna	123	2%
McKinley	131	2%
Mora	21	0%
Otero	163	2%
Quay	63	1%
Rio Arriba	194	3%
Roosevelt	49	1%
San Juan	467	7%
San Miguel	169	2%
Sandoval	302	4%
Santa Fe	626	9%
Sierra	30	0%
Socorro	41	1%
Taos	130	2%
Torrance	80	1%
Union	12	0%
Valencia	443	6%
Total	6,958	100%

There is no presumed additional or lessened fiscal impact due to the amendments of this bill

Other than increased storage costs to law enforcement agencies to store relinquished firearms. No cost assumptions for these costs were provided.

DPS provided the following breakout in response to the SPACS substitute, still pertinent to the SJC substitute:

Senate Bill 328 provides that a restrained party would be required to relinquish their firearm(s) to a law enforcement agency while the order of protection is in effect. It is unclear how many cases under this law would be filed per year and, further, how many firearm(s) each year would be relinquished should Senate Bill 328 be enacted. However, given the number of domestic violence cases that occur annually in New Mexico, it may be significant.

Anecdotally, an analysis of 2017 data from the New Mexico Interpersonal Violence Data Central Repository on Incidence and Nature of Domestic Violence in New Mexico noted that in 2017 that “the district courts issued 6,958 domestic violence-related protection orders,” which suggests that law enforcement agencies may need to become equipped to store, potentially, thousands of firearms.

**Number of Domestic Violence Cases in District Courts for Which a
Protection Order Was Issued, by County, 2017**

There may be a significant fiscal impact related to the storage and administration of relinquished firearms, and the costs associated with training on the administrative changes associated with the receipt, tracking and relinquishment of firearms. This financial burden will be placed on state and local law enforcement agencies related to civil proceedings, which may or may not be evidence in a related criminal matter. These firearms may need to be stored apart from criminal evidence in order for law enforcement such as the Department Public Safety’s New Mexico State Police to maintain its CALEA certification. It is also unknown how many firearms any law enforcement agency may be forced to store, but it is easy to imagine that the number may be large, and additional secured lockers and storage may be required to maintain possession of these items. The bill is silent as to whether the law enforcement agency may charge a fee for storage.

AOC explains “there will be 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. New laws, amendments to existing laws and new hearings have the potential to increase the caseloads in the courts, thus requiring additional resources to handle the increase. It is highly likely that all district courts, which are responsible for issuing orders of protection, would be significantly impacted by the additional requirements under CS/CS Senate Bill 328, in particular allocating resources to ensure compliance with the order of protection requiring the surrender of firearms.”

While it is likely that LOPD would be able to absorb some increase in cases under the proposed law, 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.

SIGNIFICANT ISSUES

NMAG explains “federal law already restricts those either convicted of misdemeanor crimes of domestic abuse or subject to a domestic order of protection from owning or possessing firearms or ammunition pursuant to 18 USC § 922(d)(8)-(9). However, there is not a mechanism or identifiable process providing for the transfer of these firearms from a restrained party, as is proposed in Senate Bill 328. The US Supreme Court has clearly stated that its opinion in *District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) does not overturn the longstanding prohibition on the possession of firearms by felons and other prohibited persons. The right to possess firearms is not beyond the reach of all government regulations so long as the individual is afforded sufficient due process, including the right to a hearing, before an individual Constitutional right is taken away. Senate Bill 328 appears to satisfy this standard because a restrained party has an opportunity to be heard prior to the issuance of an order of protection.”

CYFD analyzed state domestic violence deaths and submitted the following to the bill as originally introduced:

Of the cases reviewed by the Intimate Partner Death Review Panel for case year 2015 (CY15) in calendar year 2018, 26 out of 45 decedents deaths were the result of gunshot wounds (57.8 percent). The team identified nine individuals (IPV perpetrators) who were prohibited by federal law from owning a firearm. The Intimate Partner Death Review Panel Team recommended in the 2019 publication that the NM legislature should create legislation such as this. CYFD Protective Services Division is a member of the Panel. Particularly “Having a state prohibitor would resolve the current dilemma [in New Mexico] associated with the differences between New Mexico’s household member definition and the federal definition of intimate partner, which makes reporting these individuals to NICS overly burdensome and imprecise”.

The Department of Health stated, in response to the original bill, “an abusive partner’s access to a firearm increases the risk of homicide eight-fold for women in physically abusive relationships (Children’s Hospital of Philadelphia, Center for Injury Research and Prevention, Gun Violence: Facts and Statistics).” DOH also explained that 13 other states have passed legislation for extreme risk protection orders. An evaluation of the impact of risk-based firearm seizure laws in the years after the laws passed in Connecticut and Indiana found suicide rates decreased by 13.7 percent in Connecticut and 7.5 percent in Indiana.

In 2016, the rate of women killed in domestic violence situations in New Mexico was 1.33 per 100 thousand, making New Mexico 22nd in the nation for females murdered by males. One federal study of homicide among intimate partners found that female intimate partners were more likely to be murdered with a firearm than all other means. This same report indicates that nationally, in 2016, for victims who knew their offenders, 63 percent of women killed were wives or intimate acquaintances of their killers, and 292 women were shot and killed by either their husband or intimate acquaintance during the course of an argument. Firearms were the weapon most commonly used in domestic violence homicides.

LOPD explains “To some degree, this legislation appears unnecessary in New Mexico. First, under current law, if a household member or officer witnesses an individual acting in a negligent manner with a gun, threatening a family member with it, or committing a crime involving a

firearm, the weapon can be seized as evidence of the crime and the individual's conditions of release can prohibit possession of a firearm. In addition, for persons convicted of crimes in the past or certain categories of individuals, state and federal law already prohibit possession of firearms. See NMSA 1978, § 30-7-16 (2018) (felon in possession); 18 U.S.C. § 922(g).

Furthermore, Article II, Section 6 of the New Mexico Constitution applies to "arms" and has long been viewed as more extensive than its federal counterpart in that it does not limit its application to military or self-defense purposes. *State v. Dees*, 1983-NMCA-105, ¶ 5, 100 N.M. 252 ("Although the federal Second Amendment's history is grounded squarely on the notion of a civilian militia, clearly New Mexico's provision is broader than that.") Thus, the law may be subject to second Amendment challenges but may also be subject to a state constitutional challenge on broader grounds (due process, unreasonable infringement on Article II, Section 6 rights) than are available under the federal constitution.

DPS submitted the following analysis:

Civil domestic violence courts already, arguably, have the inherent authority to order a restrained party from possessing a firearm, however it is unclear if such restriction would be upheld in New Mexico if challenged on Second Amendment constitutional grounds. In an unpublished opinion, *Derringer v. Derringer*, 2014 N.M. Unpub. LEXIS 216 (Ct. App. 2014), the New Mexico Court of Appeals noted at Para. 3:

The Second Amendment of the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." In accordance with 18 U.S.C. § 922(g)(8) (2012), which is referenced on the order of protection, Respondent was barred from possessing firearms or ammunition while the order of protection remained in effect. See 18 U.S.C. § 922(g)(8)(B) (providing that any person subject to a court order preventing "such person from harassing, stalking, or threatening an intimate partner" cannot possess a firearm or ammunition). Respondent contends that the order of protection violated his Second Amendment right. After a careful review of the record, including the recording of the hearing before the special commissioner, the objections filed by Respondent to the recommendations of the special commissioner, Respondent's memorandum in support of his objections, and the recording of the hearing before the district court, we observe that Respondent did not raise this issue prior to his appeal to this Court. We therefore hold that Defendant did not preserve his Second Amendment challenge and do not consider his argument on this point. See *Woolwine v. Furr's Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("Where the record fails to indicate that an argument was presented to the court below, unless it is jurisdictional in nature, it will not be considered on appeal.").

As the New Mexico Court of Appeals did not address the Second Amendment challenge in *Derringer*, it appears that this issue could be raised again should Senate Bill 328 be enacted.

However, the federal law cited in *Derringer*, 18 U.S.C. § 922(g)(8)(B), follows the approach taken in Senate Bill 328, and has survived challenge. See, e.g., *U.S. v. Luedtke*, 589 F.Supp.2d 1018 (E.D.Wis.2008) (Statute prohibiting the possession of firearms and ammunition while subject to a domestic violence injunction did not violate individual right to bear arms under the Second Amendment; Congress possessed significant evidence that

firearm violence by such persons presented a serious national problem.)

Likewise in *U.S. v. Reese*, 627 F.3d 792 (10th Cir. 2010) the Court concluded that this federal ban on firearms for those subject to domestic violence protective orders was sufficiently narrowly tailored to survive constitutional challenge. It stated:

That firearms cause injury or death in domestic situations also has been established. Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists. Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Medical Ass'n 3043 (1992). Part of this effect stems from the fact that some would-be abusers go buy a gun, see Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 94 Am. J. Pub. Health 1412 (2004), and much from *803 the fact that guns are more lethal than knives and clubs once an attack begins. See [Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J.L. Med. & Ethics 34 (2004) (collecting studies)]. The presence of a gun in the home of a convicted domestic abuser is “strongly and independently associated with an increased risk of homicide.” Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New England J. Medicine 1084, 1087 (1993). See also, e.g., Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1090 (2003); James E. Bailey, et al., *Risk Factors for Violent Death of Women in the Home*, 157 Archives of Internal Medicine 777 (1997); Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 Annals of Emergency Medicine 771 (2003). And for this purpose the victims include police as well as spouses, children, and intimate partners. **Responding to a domestic-disturbance call is among an officer's most risky duties. Approximately 8 percent of officers' fatalities from illegal conduct during 1999 through 2008 arose from attempts to control domestic disturbances.** FBI, *Law Enforcement Officers Killed and Assaulted 2008* Table 19 (2009). *Reese*, at 802-803.

PERFORMANCE IMPLICATIONS

LOPD explains “to the extent Senate Bill 328 may allow for duplicative punishment for the same conduct, it could increase the severity of the penalty facing some defendants resulting in more cases going to trial. Any constitutional challenge sought to be made by a defendant facing conviction for firearm possession would also require justice system resources. And, any increase in the number of trials or prosecutions would require a concomitant increase in resources for the courts, DAs, LOPD and Corrections.”

TECHNICAL ISSUES

It is unclear to LFC staff why, in Section 1(3)(d), the reference to 18 U.S.C. 922 (Chapter 44. Firearms, Section 922: Unlawful Acts) was changed to 18 U.S.C. 921 (Chapter 44. Firearms, Section 921: Definitions) with references to 18 U.S.C. 922 throughout the remainder of the bill.

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