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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/8/16

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 35

SHORT TITLE Habitual Offender Sentencing Changes SB \_\_\_\_\_

ANALYST Sánchez

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

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate Increase	Indeterminate Increase		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 82  
Relates to HB 37 and HB 56

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Attorney General's Office (AGO)  
Administrative Office of the District Attorneys (AODA)  
New Mexico Sentencing Commission (NMSC)  
Public Defender Department (PDD)  
New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

House Bill 35 proposes to toughen habitual offender sentencing by removing the option of the court to suspend or defer the enhancement for a nonviolent felony offense allowed in Section 31-18-17(A) NMSA 1978 and eliminates the time requirement that a conviction have occurred within the last 10 years to be considered for enhancing the sentence (Section 31-18-17(D) NMSA 1978).

The bill's effective date is July 1, 2016.

## FISCAL IMPLICATIONS

AOC states that 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.

The PDD reports that habitual offender enhancement hearings are a separate phase of the trial process, often requiring a full-on evidentiary hearing which includes challenges to prior convictions. Although their caseloads are not likely to increase, the number of hearings attorneys must attend and argue will increase the amount of work and might require the assistance of investigators, which will increase costs.

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.

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.

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.

The NMSC provides following statement from the Right on Crime Initiative "Statement of Principles" published at <http://rightoncrime.com/>

*"Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches that enhance public safety. A clear example is our reliance on prisons, which serve a critical role by incapacitating dangerous offenders and career criminals but are not the solution for every type of offender. And in some instances, they have the unintended consequence of hardening nonviolent, low-risk offenders—making them a greater risk to the public than when they entered."*

## SIGNIFICANT ISSUES

According to the AOC, Section 31-18-17(A) NMSA 1978 provides the court with discretion to suspend or defer sentencing enhancement when the court makes a specific finding that the prior and instant felony convictions are for nonviolent felony offenses “and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.” HB35 removes that discretion.

Additionally, the AOC states that it can be argued that, in removing the court’s discretion to suspend or defer sentencing enhancement upon a specific finding and regarding nonviolent felony offenses, HB35 is in violation of the constitution’s separation of powers clause, as exercising powers properly belonging to the judiciary and that are not expressly directed or permitted by the constitution. Article 3, Section 1 of the New Mexico Constitution provides that

*The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.*

According to AGO, HB 35 is a return to the law as written in 2002. The elimination of the ten-year window would provide enhanced sentences for all repeat felony offenders. The two defendants in Shay, for instance, saw their sentences enhanced by felony convictions that would not be useable now (five out of the six priors were over ten years old, the oldest being 21 years old). Shay ¶¶ 3-4.

PDD notes that many different types of crimes qualify as felonies, ranging from non-violent to violent. 31-18-17’s ten-year cap acknowledges that those convicted of felonies can face punishment and then reintegrate to become productive members of society. To punish felonies past the ten-year point would remove this protection for those who actually do manage to turn their lives around following a felony conviction. For example, a person who previously had a drug problem and was convicted for possession of cocaine, serves time required by statute, successfully learns to healthfully manage that addiction, but then slips and relapses twenty years later, would be punished for that relapse and the court would be unable to consider his specific criminal history, including his achievements. Broad language and time frames in the habitual offender statute fail to take into consideration that lower-level felonies should be evaluated on a case-by-case basis to determine what particular harm needs to be addressed and what punishment best addresses that harm.

## PERFORMANCE IMPLICATIONS

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

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

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Conflicts with HB 82. (Also amending Section 31-18-17 NMSA 1978, to provide that a felony conviction for DUI shall be treated in the same manner as any other felony when sentencing a habitual offender.)

Relates to HB 37 – Three Strikes Law; HB 56 - Three Strikes Law

**ALTERNATIVES**

AGO suggests a further amendment to prevent offenders from serving one year of the enhanced sentence in a county jail.

PDD suggests increasing the resources to treat people with addictions to alcohol and drugs.

ABS/jle