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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/16

SPONSOR Dines **LAST UPDATED** _____ **HB** 82

SHORT TITLE Habitual Offender Sentencing & DWIs **SB** _____

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate Increase	Indeterminate Increase	Indeterminate Increase	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB 35
Relates to HB 44, HB 74, HB 81, HB 83, SB 45, SB 118

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Attorney General's Office (AGO)
Department of Public Safety (DPS)

Responses Not Received From

New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 82 proposes to amend the habitual offender section of the Criminal Sentencing Act (Chapter 31, Article 18) to include conviction of a felony under Section 66-8-102. A prior conviction for driving under the influence of intoxicating liquor or drugs is added to enhance punishment for DWI and the offender's sentence

The effective date of the statute is July 1, 2016.

FISCAL IMPLICATIONS

Habitual offender enhancement could lead to more hearings adding costs to the PDD, AOC district attorneys and district courts. Additionally, incarceration costs will be impacted if more people are sentenced to prison for longer terms.

Although it is difficult to accurately estimate the cost of increased trials because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly for the district courts, district attorneys and public defenders are as follow:

- PDD: \$152.1
- District Attorneys: \$195.4
- District Courts: \$335.6

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 FY 11 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.

SIGNIFICANT ISSUES

The AGO states that the New Mexico Supreme Court in *Anaya* found that without clear legislative intent that felony violations §66-8-102 did not fall under the Habitual Offender Statute (HOS). HB 82 would clarify any ambiguity and affirmatively state they do. The defendant's in *Anaya* also raised "double use" constitutionality questions if §66-8-102 did fall under the HOS. The dissent in *Anaya* stated that "double use" may be allowable if there is clear legislative intent allowing for the double enhancement. HB 82 also clearly states that "double use" would be allowable.

According to AOC, escalating sanctions for DWIs are defined by existing statute at 66-8-102 NMSA 1978. If HB 82 becomes law, there will be two separate sections of law that impose mandatory minimums and increasing sanctions for subsequent felony convictions for DWI. There is thus a foreseeable constitutional double jeopardy question in whether escalated sanctions can be accumulated with habitual offender sanctions. It is not clear how the courts will resolve this question.

The PDD cites *State v. Diaz*, 2007-NMCA-026. The DWI statute, NMSA 66-8-102 is currently a self-enhancing statute, gradually increasing penalties for repeat DWI offenders. DWI sentences based on repeat convictions do not impose a separate sentence on top of a basic sentence, as occurs for a habitual offender enhancement; instead, repetition of offense is accounted for by increasing the basic punishment per numbered conviction.

AODA opines that HB 82 will close a gap in the habitual offender statute that has allowed persons with felony DWI convictions to avoid those felony convictions being used to enhance their sentences if they are otherwise qualified as habitual offenders. Although the bill expressly includes "...a conviction pursuant to Section 66-8-102 NMSA 1978" (the DWI statute), presumably persons convicted of vehicular homicide or great bodily injury by vehicle could also have their sentences enhanced as habitual offenders if they have the other predicate felony convictions required by statute since the bill would cover any "non-capital felony." Since it is not limited to any particular codification of felony offenses a wide variety of other crimes could serve as predicate felonies for sentence enhancements as habitual offenders. The usable felony convictions could range from crimes as diverse as election malfeasance to violations of environmental standards. See, e.g., Sect. 1-20-9, NMSA 1978 (Falsifying election documents.), Sect. 1-20-14 and Sect. 3-8-76, NMSA 1978 (Intimidation of voters or election officials) and Sect. 74-6-10.2, NMSA 1978 (Violating water quality requirements.)

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

ADMINISTRATIVE IMPLICATIONS

The proposed legislation may increase the work that needs to be done by the courts, PDD and district attorneys and require additional resources to handle the increased workload.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Conflicts with HB 35 – Habitual Offender Sentencing Changes

Relates to HB 44 – DWI For Certain Drugs & Interlocks; HB 74 – DWI Tests, Penalties & License Revocation; HB 81- Increase Certain DWI Penalties; HB 83 – Increase Certain DWI Penalties; SB 45 – Create Crime of DWI with Minor in Car; and SB 118 – Increase DWI Penalties

OTHER SUBSTANTIVE ISSUES

According to PDD, DWIs never expire for enhancement purposes in 66-8-102, but 31-18-17 defines a prior offense as a felony that occurred within the last ten years. So, questions about whether a ten-year old felony DWI could be used to enhance under 31-18-17 would need to be addressed.

Additionally, HB 82 also proposes to twice enhance a person in some instances. If a person picks up a 4th DWI charge along with some other felony charge, HB82 proposes that the defendant can be enhanced by 66-8-101 and by 31-18-17. This amendment could create drastically higher sentences for a non-violent offense, increasing incarceration time for non-violent offenses. Given the overcrowding of our prison system, there should be increased focus (by way of funding and resources) on treating alcohol and drug dependence instead of punishing a person with incarceration. To enhance a sentence that has already been enhanced minimizes the important objectives of habitual offender enhancement: to deter future similar conduct and to make the punishment fit the crime.

AODA states that ordinarily the State is forbidden from using a single conviction to both fulfill an essential element of a crime and then again to enhance a defendant's sentence under the habitual offender statute, i.e., it could not use the defendant's prior felony conviction to prove the defendant was a felon in possession of a firearm, and then use the same felony conviction to enhance his sentence as a habitual offender. See, State v. Haddenham, 110 N.M. 149 (1990). "Such duplication offends double jeopardy unless the Legislature has clearly expressed its intent otherwise." See, State v. May, 2010—NMCA—071. (Emphasis added.) If a felony DWI conviction is only one of the felony convictions used to prove someone is a habitual offender there should be no issue. Defendants may claim that if two or more of the felony convictions used to prove they are a habitual offender are based on prior DWI's, the State will have to elect between using prior convictions to have the offense punished as a fourth, fifth, sixth, or seventh or subsequent, conviction (each of which has different penalties) and whether to use one, or more, of the prior DWI convictions to enhance the defendant's sentence as a habitual offender. By its language this bill should permit a defendant's prior DWI convictions to support making the offense a fourth degree or third degree felony, and to also use the conviction(s) to support enhancement of the sentence as a habitual offender

ABS/jo/jle