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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/19/2017  
 SPONSOR HJC LAST UPDATED 2/23/2017 HB 52/HJCS  
 SHORT TITLE Felon in Possession of Firearm Penalty SB \_\_\_\_\_  
 ANALYST Rogers

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Up to Moderate, see Fiscal Implications	Up to Moderate, see Fiscal Implications	Up to Moderate, see Fiscal Implications	Up to Moderate, see Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 17.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of HJC Substitute

The House Judiciary Committee Substitute for House Bill 52 would change the crime of Felon in Possession of a Firearm from a fourth to a third degree felony if the offender had previously been convicted of a serious violent felony offense and the sentencing court makes specific findings that the prior felony was a violent felony offense, that justice will be served and that there are compelling reasons (stated on the record) to sentence the offender to the punishment of a third degree felony. Additionally, the bill amends Section 30-7-16(C) NMSA 1978 to add clarifying language regarding devices excluded from the definition of “destructive device,” amounting to a technical rather than substantive change.

## FISCAL IMPLICATIONS

New Mexico Sentencing Commission (NMSC) analysis shows on June 30, 2016, there were 53 offenders committed to the custody of the New Mexico Corrections Department (NMCD) who had a conviction for felony receiving, transporting, or possessing a firearm or destructive device as their highest charge. NMSC calculated a NMCD inmate spends an average 1.76 years incarcerated for a third degree felony, calculating time between calendar years 2010 halfway through 2016. Using the NMCD's FY16 average cost to house an inmate per year of \$44.5 thousand, it costs about \$2 million per year to incarcerate the 53 prisoners convicted under the law. Assuming the number of inmates charged with felony in possession of a firearm as their highest charge does not flux dramatically, the costs associated with this bill are minimal.

According to the AOC, 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. 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. Additionally, an increase in the number of jury trials and appeals is possible, given the increase in the penalty. In general, prosecutions brought pursuant to laws with increased penalties can take up a considerable amount of judicial and staff time and court resources.

LOPD states the conduct targeted is already illegal under the existing statute, albeit at a lesser penalty level. Higher-penalty cases are somewhat more likely to go to trial. If more higher-penalty trials result, LOPD may need to hire more trial attorneys with greater experience. These 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. The Associate Trial Attorney's mid-point salary including benefits is \$93.2 thousand. Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation of the proposed higher-penalty.

NMCD estimates that the bill could result in a minimal to moderate increase in its prison population and parole supervision caseloads in the long term.

NMCD states "while the bill will not likely cause an increase in the number of convictions involving a felon in possession of a firearm, those felons convicted of this crime under this bill if it passes would serve more incarceration time in a NMCD prison (if the felon is sentenced to prison time). While the bill would not increase the probation term if the felon is placed on probation in lieu of incarceration, the parole term would increase from one year (for a fourth degree felony) to two years (for a third degree felony) if the felon is incarcerated for his crime."

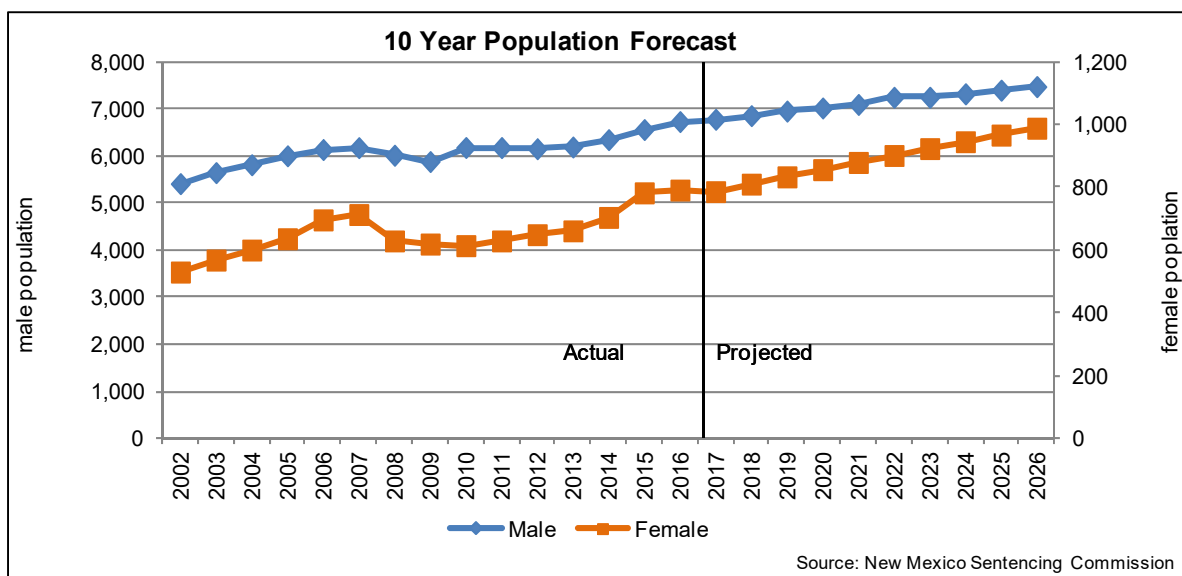
NMCD adds:

It is important to consider the bill's impact on potentially deterring criminal activity of previously convicted felons. That is, less direct, more global savings are often overlooked in the fiscal analysis of public safety bills. For example, should the higher penalty imposed for this crime increase the public's sense of safety and reduce crime victimization, a host of savings for our state could result. These range from reducing the expenses and impact of crimes upon victims (loss of social adjustment and future productivity, as well as physical

and mental health treatment expenses); reducing the costs associated with specialized victim support and advocacy services; reducing court costs to adjudicate offenders; to reducing the impact of high crime rates upon the state’s economic recovery. If these savings are realized, they might reasonably offset the more direct and tangible costs of incarceration and probation/parole supervision.

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. An 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 base budget has grown by an average \$9.5 million per year, or 3 percent, since FY14 as a result of growing prison population and inmate’s needs.

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, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.



## SIGNIFICANT ISSUES

The Administrative Office of the Courts states:

- 1) The basic sentence for a third degree felony is three years imprisonment as compared to 18 months imprisonment for a fourth degree felony. Both sentences may be accompanied by a \$5,000 fine. Section 31-18-15 NMSA 1978.
- 2) Section 33-2-34(L)(4) NMSA defines “serious violent offense,” and Section 33-2-34(L)(3) defines “nonviolent offense” as any offense other than a serious violent offense. The substitute for HB 52, Section 1(B)(2) asks the court to make a specific finding that the prior felony conviction was a “violent felony offense.” There is no guidance for the court in the

substitute bill as to what would constitute a violent felony offense. Section 30-3-3 NMSA 1978 provides that assault with intent to commit a violent felony consists of a person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary. Section 31-18-17 NMSA 1978, governing habitual offenders, provides in Subsection E that, as used in this section, “nonviolent felony offense” means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense. Without appropriate definition of “violent felony offense,” convictions and sentences may be challenged on appeal.

The LOPD states:

Since the questions of the specific findings that justice would be served and that there are compelling reasons to sentence as a third degree felony are not facts alleged in an indictment and submitted to a jury, the sentencing scheme proposed in the HJC Substitute for HB 52 may well prove vulnerable to a Sixth Amendment challenge raised pursuant to the line of cases established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See also State v. Frawley*, 2007-NMSC-057, 143 N.M. 7. The United States Supreme Court does not mince words on the subject: “If the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.” *Cunningham v. California*, 549 U.S. 270, 290 (2007).

There could conceivably be a “double use” Double Jeopardy challenge under *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, based on the prior felony being used twice to enhance the sentence: once for the fact of the underlying felony establishing the crime of Felon in Possession of a Firearm and the second time in the additional procedure wherein the court determines a) it’s a violent felony offense, b) that justice will be served and c) that there are compelling reasons to sentence the offender to the punishment carried by a third degree felony.

## **CONFLICT**

Conflicts with HB 17 which increases the penalty to a third degree felony, regardless of circumstances.

## **OTHER SUBSTANTIVE ISSUES**

Also, see the attached document for a fact sheet on federal law regarding felon in possession of a firearm, published by the United States Sentencing Commission.

TR/sb/jle/al