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FISCAL IMPACT REPORT

ORIGINAL DATE 2/27/2017

SPONSOR Rehm LAST UPDATED _____ HB 328

SHORT TITLE Reckless Driving Penalties SB _____

ANALYST Rogers

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	Indeterminate, but will increase costs	Indeterminate, but will increase costs	Indeterminate, but will increase costs	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB 23 and HB 337.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorney (AODA)

Office of the Attorney General (OAG)

SUMMARY

Synopsis of Bill

House Bill 328 seeks to amend Section 66-8-101 NMSA 1978, regarding homicide or great bodily harm (GBH) by vehicle in violation of Section 66-8-113 NMSA 1978 (reckless driving), by increasing the penalties when the vehicle is stolen to be as follows:

- Creating a first degree felony for homicide by reckless driving in a stolen vehicle. Following other existing subsections of this statute regarding reckless driving, this subsection includes a caveat that the reckless driving cannot be based solely on violation of speeding laws.
- Creating a second degree felony for GBH by reckless driving in a stolen vehicle. This subsection also provides that violation of speeding laws is not per se reckless driving for this offense.

FISCAL IMPLICATIONS

The AODA states it is likely that the increased penalties will result in more litigation so more

personnel and financial resources will be needed for the courts, prosecutors, defenders, and the corrections department.

The AOC explains 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.

The AOC also states an increase in the number of jury trials and appeals can be anticipated, given the significant increase in the penalties related to homicide by vehicle and great bodily harm by vehicle, while violating Section 66-8-113 NMSA 1978 and while driving a stolen vehicle. In general, prosecutions brought pursuant to laws with increased penalties can take up a considerable amount of judicial time and resources.

Enhanced penalties and 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.

SIGNIFICANT ISSUES

The OAG states the following:

The proposed crime of homicide by reckless driving while in a stolen vehicle would become the highest crime of homicide by vehicle (first degree felony). Currently, homicide by vehicle while driving under the influence (DWI) is a second degree felony and homicide by vehicle while driving recklessly is a third degree felony (*see* Section 66-8-101(C) and (D)).

The proposed GBH by reckless driving in a stolen vehicle would become the highest crime of GBH by vehicle, a second degree felony. Currently, GBH by vehicle while DWI is a third degree felony and GBH by vehicle while reckless driving is also a third degree felony (*see* Section 66-8-101(E)).

The Court of Appeals recently held "Section 31-18-15(A)(4) was intended to be the basic sentence applicable to all second degree felonies that result in the death of a human being." *State v. Franco*, 2016-NMCA-074, ¶ 18, ___ P.3d ___. "The much more general language of the 2003 amendment undercuts any argument that Section 31-18-15(A)(4) can only be used in conjunction with the crimes of murder and voluntary manslaughter. Rather, given its clear language, the provision should be applied whenever a second degree felony involves a death." *Id.* ¶ 28.

Thus, under *Franco*, "sentenc[ing] pursuant to the provisions of Section 31-18-15" would likely fall under Section 31-18-15(A) (1) if the homicide by reckless driving of a stolen vehicle results in the death of a child. Whereas, homicide by reckless driving of a stolen vehicle that results in the death of an adult would likely be sentenced pursuant to Section 31-

18-15(A) (3).

Under *State v. Santillanes*, 2000-NMCA-017, ¶ 15, 128 N.M. 752 (overruled on other grounds by *State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464), convictions of both DWI and vehicular homicide while DWI violate a defendant's right to be free from double jeopardy. Conviction for vehicular homicide while driving a stolen vehicle may foreclose prosecution of unlawful taking of a motor vehicle under Section 30-16D-1 NMSA 1978, or receiving a stolen vehicle under Section 30-16D-4 NMSA 1978.

The AODA explains:

HB 328 specifically states the punishment for vehicular homicide or great bodily injury (“GBI”) for someone who was driving recklessly in a stolen vehicle shall be the punishment provided by Sect. 31-18-15 NMSA 1978. The punishment for a first degree felony would be eighteen years imprisonment and a possible fine of up to \$15,000. See, Sects. 31-18-15(A)(3) and 31-18-15(E)(3) NMSA 1978. The punishment for a second degree felony would be nine years imprisonment and a possible fine of up to \$10,000. Essentially, reckless driving requires a showing that a driver acted with “total disregard for the safety of others.” See, *State v. Blakeley*, 90 N.M. 74 (Ct. App. 1977), *State v. Ibn Omar-Muhammad*, 102 N.M. 274 (1985).

Prosecutors may choose, at least in the relevant cases, to pursue child abuse charges instead of vehicular homicide or GBI. The age of the child and their degree of injury could affect that decision but child abuse charges might provide more severe sanctions than are provided in HB 328, and could be an option if facts would not support reckless driving, or could support both charges. If abuse of a child results in great bodily harm to the child, it is a first degree felony. See, Sect. 30-6-1(E) NMSA 1978. Negligent abuse of a child resulting in death is also a first degree felony. See, Sect. 30-6-1(F) NMSA 1978. Intentional abuse of a child at least 12 years old but less than 18 years old which results in death is a first degree felony. See, Sect. 30-6-1(G) NMSA 1978. Intentional abuse of a child less than 12 years old that results in death of the child is a first degree felony resulting in death of a child. See, Sect. 30-6-1(H) NMSA 1978. The punishment for that crime would be life imprisonment and, possibly, also a fine of up to \$17,500. See, Sects. 31-18-15(A)(1) and 31-18-15(E)(1) NMSA 1978. The non-capital sentence enhancement for a felony resulting in death contained in Sect. 31-18-15(A)(2) has been held to not be limited to just second degree murder and manslaughter but also applied to conspiracy to commit murder. See, *State v. Shije*, 1998-NMCA-102. It has also been held the enhanced punishment because a death resulted, provided in Sect. 31-18-15(A)(4) can apply to vehicular homicide. See, *State v. Guerra*, 1999-NMCA-026.

In HB 328 someone convicted of driving a stolen vehicle recklessly and causing great bodily harm to a child would be guilty of a second degree felony, but if they committed child abuse and caused great bodily harm they would be guilty of a first degree felony. If the facts permit it and intentional child abuse was charged instead of the stolen vehicle reckless driving homicide proposed in the bill, then a sentence of life imprisonment (which carries a minimum sentence of 30 years imprisonment) might apply if a child, of any age, was killed. Since the punishment is so severe it is likely to be challenged, especially if they are not under age 12, on a claim that penalty was specifically intended for someone who committed in limited circumstances involving child abuse of a child under age 12 that was intentional and

resulted in the child's death.

Another charging consideration is that child abuse (first, second and third degree) can be adjudged to be a serious violent offense that is eligible for only limited "good time" meritorious deductions from a prison sentence. See, Sect. 33-2-24(L)(4)(o)(9) NMSA 1978. If HB 328 is passed it's not clear that the "good time" credits could be limited because of the way the statute is worded so presumably applies only to, "third degree homicide by vehicle or great bodily harm by vehicle." See, Sect. 33-2-34(L)(4)(o)(14) NMSA 1978. (Emphasis added.)

A challenge under the general vs. specific crime rule might be pursued if child abuse charges were filed instead of or in addition to reckless driving vehicular homicide charges with a stolen vehicle. In previous appellate decisions on this subject, prosecutors have charged child abuse instead of, or in addition to, vehicular homicide which was classified as a third degree felony. The decisions usually state they are fact-specific but a reckless driving charge was determined not to be the more specific charge than child abuse and did not preempt it. See, *State v. Guillez*, 2000-NMSC-020. In another case, it was determined that vehicular homicide was a lesser included offense of child abuse when a drinking driver was convicted of both child abuse and vehicular homicide, so the duplicative sentence on vehicular homicide charges was voided. See, *State v. Santillanes*, 2001-NMSC-018. See also, *State v. Gonzales*, 2011-NMCA-081 (Under unique facts of case, vehicular homicide was a lesser included offense of child abuse) aff'd. on different grounds, *State v. Gonzales*, 2013-NMSC-081.

The selection of charges by prosecutors may be challenged on other grounds. Whenever people are treated differently for the same offense, it frequently results in an equal protection challenge. A person convicted of vehicular homicide in a stolen vehicle would receive a more severe sentence than someone convicted of second degree murder, which is punishable by fifteen years imprisonment and, possibly, a fine of up to \$12,500. See, Sects. 31-18-15(A)(4) and 31-18-15(E)(4) NMSA 1978.

A defendant convicted of first degree "depraved mind" murder (after a high speed chase and running a road block before he ran over a police officer who was out of his patrol car) was found to have acted in a way "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life," and showed more than just "total disregard for the safety of others" that could have reduced the charge to reckless driving vehicular homicide. See, *Ibn Omar-Muhammad*, supra. Depraved mind murder has four significant elements: the accused's acts must have endangered more than one person; the acts must have been intentional and of an extremely reckless character; accused must have subjectively intended to commit an act that has a great likelihood of resulting in death; and the accused must have known that his acts were greatly dangerous to others. See, *State v. Dowling*, 2011-NMSC-016. It is conceivable that a defendant charged with reckless driving vehicular homicide in a stolen vehicle might argue for a second degree murder charge, as a lesser offense of murder in the first degree, since it carries a lesser penalty than what is provided in this bill for reckless driving vehicular homicide in a stolen vehicle. This is more likely if the crime resulted in the death of a child and the defendant was facing life imprisonment as set out above but might apply even for an adult victim because the punishment would presumptively be a 15 year sentence, instead of the 18 year sentence prescribed by HB 328, and the sentence for any crime which is not a capital or first degree felony may be suspended or

deferred. See, Sect. 31-20-3 NMSA 1978.

HB 328 would provide enhanced penalties for reckless driving vehicular homicide and GBI if the offender was driving a stolen vehicle. There is no enhancement for vehicular homicide and GBI in a stolen vehicle if the offender was under the influence of intoxicating liquor or drugs.

The AOC explains “Section 66-8-101(D) NMSA 1978 penalty for homicide by vehicle while violating Section 66-8-113 NMSA 1978 is a third degree felony penalty, while the Subsection E penalty for great bodily harm by vehicle while violating Section 66-8-113 NMSA 1978 is also a third degree penalty. HB 328 increases the penalty for homicide by vehicle from a third degree felony to a first degree felony and the penalty for great bodily harm by vehicle from a third degree felony to a second degree felony when the offender is driving a stolen vehicle. The basic sentence for a first degree felony is 18 years imprisonment, for a second degree felony is 9 years imprisonment, and three years imprisonment for a third degree felony. Additionally, the court may impose a maximum fine of \$15 thousand for a first degree felony, \$10 thousand for a second degree felony, and \$5,000 for a third degree felony. Section 31-18-15 NMSA 1978. As penalties become more severe, defendants may invoke their right to trial and their right to trial by jury more often, as well as seek to retain counsel. More trials will require additional judge time, courtroom staff time, courtroom availability and jury fees. Indigent offenders are entitled to public defender services.”

PERFORMANCE IMPLICATIONS

The AOC states the courts are participating in performance-based budgeting. HB 328 may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percentage change in case filings by case type

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The AOC explains HB 328 conflicts with HB 23 (amending Section 66-8-101(D) NMSA 1978 to increase the penalty for homicide by vehicle while driving recklessly pursuant to Section 66-8-113 NMSA 1978 from a third degree felony to a second degree felony) and HB 337 (also amending Section 66-8-101 to provide a second degree felony penalty for homicide by vehicle while violating Section 66-8-113 NMSA 1978 and for great bodily harm by vehicle while under the influence or while violating Section 66-8-113 NMSA 1978, governing reckless driving).

ALTERNATIVES

The OAG proposes the following amendments:

HB 23 seeks to amend Section 66-8-101(D), increasing the penalty for homicide by vehicle while reckless driving in violation of Section 66-8-113 from a third to a second degree felony.

SB 55 seeks to amend Section 66-8-113(B) to increase the fines for reckless driving.