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FISCAL IMPACT REPORT

SPONSOR Ely/Maestas/Rehm/ Duhigg ORIGINAL DATE 1/27/2022 LAST UPDATED 2/4/2022 HB 79

SHORT TITLE Second Degree Murder Time and Sentencing SB _____

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)¹

	FY24	FY31	FY38	15 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$23.4	\$260.4	\$2,419.9	\$16,418.3	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 25, House Bill 140
Relates to House Bill 28, House Bill 31

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorney (AODA)
Sentencing Commission (NMSC)
Public Defender Department (PDD)
Department of Public Safety (DPS)
Attorney General's Office (NMAG)

SUMMARY

Synopsis of Bill

House Bill 79 proposes to amend three statutes. The first is Section 30-1-8 NMSA 1978, which covers statutes of limitations under the Criminal Code. Section (I) is amended to abolish the statute of limitations for second-degree murder.

The next statute is Section 30-28-1 NMSA 1978. The proposed amendment adds a section providing that, if a person is convicted of attempt to commit second-degree murder then,

¹ Because this bill would increase sentences for existing crimes, many of the fiscal impacts due to these increased sentences will not be felt for several years. This table provides an estimated impact over 15 years to more effectively convey the actual costs of the proposal. Additional details and a table with cost impacts for each year between FY24 and FY38 is included in Fiscal Implications.

notwithstanding the sentencing guidelines of Section 31-18-15 NMSA 1978, “the basic sentence of imprisonment is nine years.”

Finally, this bill proposes to amend Section 31-18-15 NMSA 1978 of the Criminal Sentencing Act. Section (A) is amended grammatically and the penalty for a second-degree felony resulting in the death of a human being is increased from 15 to 18 years. The remainder of the statute is changed in formatting only. Instead of a list of felonies and their attendant basic sentences, the amendment changes the statute to contain a chart, with the felony classification on the left and the basic sentence on the right.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so the primary fiscal implications examined in this analysis relate to changes in the number of individuals in prison and the length of time served in prison that might result from this bill. The creation of any new crime, expansion of a crime’s scope or statute of limitations, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. The Corrections Department reports the average cost to incarcerate a single inmate in FY21 was \$49.6 thousand; however, due to the high fixed costs of the state’s prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$23.4 thousand per inmate per year across all facilities. This bill will likely increase the length of time offenders spend incarcerated and may slightly increase the number of offenders admitted to prison.

Overall, this analysis estimates HB79 will result in additional incarceration costs of \$2.3 million per year. These additional costs will begin to be realized in FY24, increasing over the following 11 years (as more individuals are admitted for and serve longer sentences for the crimes addressed by the bill), and leveling out at \$2.4 million in FY35 (as offenders begin to be released from prison) and future fiscal years.

Additional system costs beyond incarceration, such as additional costs to the judicial branch for increased trials, are not included in this analysis, but could be significant. As per the Public Defender Department (PDD)

Eliminating the statute of limitations for second-degree murder would create more cases in the long term. This would increase burdens and resource expenditures on all actors in the criminal justice system, including courts and public defenders. Increasing penalties for crimes all similarly imposes increased costs on communities and social institutions, that are borne by the public at large.

Penalty increases can make defendants more likely penalty increases can make defendants to go to trial rather than accepting a plea agreement and can provide prosecutors with greater plea bargaining power. That said, the primary fiscal impact of the penalty increase is likely to fall on Corrections if defendants end up with longer

sentences. PDD does not have accurate data regarding the number of people sentenced to Corrections for second-degree murder and attempted second-degree murder annually, but with the simultaneous amendment of the statute of limitations, that number may also increase.

This bill does not contain an appropriation.

Additional details on the calculations used to estimate the fiscal impact of increased incarceration due to HB79 are below.

Statute of Limitations. Eliminating the statute of limitations for second-degree murder is unlikely to impact many cases, as very few homicide cases (of any degree) are solved outside the current statute of limitations (six years). After examining all New Mexico State Police (NMSP) homicide cases initiated between 2006 and 2016, the Department of Public Safety (DPS) reported no arrests were made more than five years after the incident date, with the majority of arrests occurring within two years of the incident. DPS reported no NMSP homicide cases that were not charged because they exceeded the statute of limitations, and estimated no more than one to two cases statewide would be impacted by this change.

Assuming the expansion of the statute of limitations will result in one additional individual being admitted to prison each year and based on average actual time served for individuals released from prison in FY21 whose highest charge was second-degree homicide (4,047 days), this analysis estimates this change will result in increased costs of \$260 thousand per offender.

Attempted Second-Degree Homicide. Based on the number of individuals admitted to prison for attempted second-degree murder in FY21, this analysis estimates the change proposed in the basic sentence for this crime will impact one individual annually. Based on estimates of actual time served for serious violent felonies provided by the Sentencing Commission (NMSC), this individual will spend an additional 872 days in prison each due to the increased sentence, a cost of \$56 thousand per offender.

Second-Degree Felony Resulting in the Death of a Human Being. Data on the number of individuals admitted to prison for a second-degree felony resulting in the death of a human being in FY21 was not available, so this analysis estimates the proposed change in sentencing for this crime will impact at least the number of offenders admitted for second-degree homicide in FY21 annually (a low-end estimate). Based on estimates of actual time served for serious violent offenders provided by the Sentencing Commission, these 36 individuals will spend an additional 872 days in prison each due to the change in sentence, a cost of \$56 thousand per offender and \$2 million overall.

Timing of Fiscal Impacts. HB79 expands the second-degree murder cases eligible for adjudication and incarceration in prison by abolishing the statute of limitations for this crime. This will potentially result in an additional offender serving a prison term of 4,047 days (just over 11 years). As a result, the fiscal impact of one additional offender being imprisoned for second-degree murder in FY24 extends over that entire term at an estimated cost of \$23.4 thousand per year, until that individual is released in FY35. An additional offender admitted in FY25 impacts costs between FY25 and FY36. Costs continue to rise for each year until offenders admitted in FY24 begin to leave prison in FY35, after which it is assumed admissions and releases net out, resulting in a steady increased population as a result of this change.

Because HB79 enhances the sentence for the existing crimes of attempted second-degree murder and a second-degree felony resulting in the death of a human being, the fiscal impacts of these changes are not anticipated to be realized until the first group of offenders admitted under the enhanced sentences have served the term they would have served under the original sentences.

Under the original sentence for attempted second-degree murder, offenders serve an average of 1,227 days (based on the average time served for offenders released from prison in FY21 whose highest charge was for that crime), but under the enhanced sentence, they are anticipated to serve an additional 872 days in prison. As a result, offenders admitted to prison in FY24 for attempted second-degree murder under HB79 would begin to impact costs in FY27. Costs would continue to rise for each year until FY29, when offenders admitted in FY24 begin to leave prison after the change in time served resulting from HB79 (872 days, a little under 2.5 years).

Under the original sentence for a second-degree felony resulting in the death of a human being, offenders serve an average of 2,914 days (based on the average time served for offenders released from prison in FY21 whose highest charge was for that crime), but under the enhanced sentence, they are anticipated to serve an additional 872 days in prison. As a result, offenders admitted to prison in FY24 for a second-degree felony resulting in the death of a human being under HB79 would begin to impact costs in FY31. Costs would continue to rise for each year until FY35, when offenders admitted in FY24 begin to leave prison after the change in time served resulting from HB79 (872 days, a little under 2.5 years).

The timing of these fiscal impacts is outlined in the table below.

15-Year Fiscal Impact of Changes Proposed by HB79

Fiscal Year	Statute of Limitations	Attempted Second-Degree Homicide	Second-Degree Felony Resulting in the Death of a Human Being	Total Fiscal Impact
2024	\$23.4	\$0.0	\$0.0	\$23.4
2025	\$46.9	\$0.0	\$0.0	\$46.9
2026	\$70.3	\$0.0	\$0.0	\$70.3
2027	\$93.8	\$15.0	\$0.0	\$109.4
2028	\$117.2	\$38.4	\$0.0	\$157.3
2029	\$140.7	\$56.0	\$0.0	\$199.1
2030	\$164.1	\$56.0	\$0.0	\$222.5
2031	\$187.6	\$56.0	\$13.9	\$260.4
2032	\$211.0	\$56.0	\$857.9	\$1,163.9
2033	\$234.5	\$56.0	\$1,702.0	\$2,067.4
2034	\$257.9	\$56.0	\$2,015.6	\$2,417.9
2035*	\$260.0	\$56.0	\$2,015.6	\$2,419.9
2036	\$260.0	\$56.0	\$2,015.6	\$2,419.9
2037	\$260.0	\$56.0	\$2,015.6	\$2,419.9
2038	\$260.0	\$56.0	\$2,015.6	\$2,419.9
15-Year Fiscal Impact:	\$2,587.3	\$613.3	\$12,651.9	\$16,418.3

*In FY35, impacted offenders begin leaving prison, resulting in steady ongoing costs.

Source: LFC analysis of NMSC data

SIGNIFICANT ISSUES

Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful. In New Mexico, however, punishment has grown less certain as crime has increased, with fewer violent crimes solved and more violent felony cases dismissed. LFC’s evaluation team has found in the 2nd Judicial District (Bernalillo County) specifically, neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and in 2020, when felonies began to rise, accountability for those crimes fell. Improving policing and increasing cooperation and coordination among criminal justice partners could help increase the certainty of punishment for the most violent offenses and provide a stronger deterrent to serious crime than severe penalties. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

As per PDD

Section One: Second-degree murder charges for which the statute of limitations has already passed cannot be revived. *State v. Morales*, 2010-NMSC-026, 148 N.M. 305.

The passage of time almost inevitably results in the loss of evidence available for both the prosecution and the defense of criminal charges. The loss of physical evidence and the fading of memories can make it difficult to mount legitimate defenses to allegations which arise many years after an alleged event. Statutes of limitations are designed to limit the ability of the state to reach back in time and charge suspects for past alleged deeds, and to provide a sense of certainty for all parties. The elimination of the statute of limitations may be felt particularly by defendants charged as accessories to second-degree murder, who did not actually commit the murder but are alleged to have been involved in some way. It is impossible to predict how many new cases would be charged under this proposed bill, but it could result in an increase in work for the Law Offices of the Public Defender.

One issue is that any resulting charges would be older and “colder” than cases charged within the existing time limits, and, because older, delayed cases tend to have issues as to the collection of evidence which has gone “cold,” resolution of such cases by plea agreements could be less likely, thus resulting in more cases going to trial, requiring more attorney work time as well as more court resources. Additionally, many such cases—those charged under the specified statutes as first or second degree felonies--will need to be handled by higher-paid, more experienced attorneys. But the number of such cases charged, and thereby, the cost to the LOPD, is impossible to predict. If more of these higher-penalty trials result, LOPD and the DAs will need to hire more trial attorneys with greater experience, and this will also require more investigators, experts and court resources.

Section Two: Under current law, attempted second-degree murder is a lesser included offense of attempted first-degree murder. *State v. Johnson*, 1985-NMCA-074, ¶ 20, 103 N.M. 364. Section Two would functionally overrule *Johnson* by increasing the punishment for attempted second-degree murder to be equivalent to the punishment for attempted first-degree murder. The amendment could therefore be read as eliminating a lesser-included defense to attempted murder.

Section Three: Assumption employed for analyzing Section Three: that the Legislature intends to amend Section 31-18-15(A) solely to increase the basic sentence for second-degree murder and not to increase the penalty for any other crimes.

Section Three reformats Section 31-21-18(A) which sets the “basic sentences” for all of the felony degrees corresponding with Chapter 30, which defines crimes and assigns felony degrees. This structural change clarifies that, for example, a “third degree felony resulting in death,” is not any “third degree felony” so designated in the criminal code that happens to result in death, but is limited to crimes expressly designated as a “third degree felony resulting in death” within its defining statute in Chapter 30. This is likely responsive to *State v. Franco*, 2016-NMCA-074, ¶¶ 17-34, 387 P.3d 279, which affirmed a “special” felony sentence for a “generic” felony.

That said, removing the numbering system in Subsection A could lead to some confusion. Analyst recommends maintaining subsections numbers for each basic sentence.

Finally, Section Three increases the basic sentence for second degree murder from 15 to 18 years. The deterrent effect of increasing the punishment for second-degree murder from fifteen-years to eighteen-years approaches zero. Analyst posits that the three-year penalty increase would have no deterrent effect.

As per the Attorney General’s Office

The proposed amendments that abolish the statute of limitations for second degree murder would apply to some crimes that were committed before the effective date of the legislation. While this amendment “cannot revive a previously time-barred prosecution” it could “extend an unexpired limitation period.” *State v. Morales*, 2010-NMSC-026, ¶¶ 1, 20, 148 N.M. 305.

As per DPS

New Mexico is currently the only state in the country with a statute of limitations for second degree murder. This will change a loophole that barred the state in some instances from holding the defendant accountable for murder.

It has never made sense that aggravated battery (GBH) was a more serious crime than attempted second degree murder. The changes to the penalties for second degree murder and attempted second degree murder fix this issue.

CONFLICT, RELATIONSHIP

HB79 conflicts in language, if not intent, with House Bill 25 and House Bill 140. HB79 abolishes the statute of limitation for second-degree murder by amending Subsection I of Section 30-1-8 NMSA 1978, while HB25 and HB140 accomplish the same purpose by amending Subsections A and I (and amend Subsection I with slightly different language than HB79).

HB79 relates to House Bill 28, which also amends Section 31-18-15 NMSA 1978 to add a basic sentence for possession of a firearm by a felon.

HB79 relates to House Bill 31, which generally deals with the Criminal Sentencing Act and second-degree murder.

TECHNICAL ISSUES

As per Attorney General's Office

The reformatting of NMSA 1978, Section 31-18-15 is somewhat difficult to follow. The purpose of this part of the bill is to “clarify noncapital felony sentencing provisions,” but as formatted, it is hard to determine which sentence is associated with which felony. For clarity, this amendment could be changed to a true chart with lines delineating each section or else leave the statute unchanged in the original list format.

As per the Sentencing Commission

It is unclear why the categories of felonies are reorganized in a chart. This will make referring to them in court opinions or other discussions of these statutes more cumbersome.

ER/rl/acv