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FISCAL IMPACT REPORT

SPONSOR <u>HCEDC</u>	LAST UPDATED _____ ORIGINAL DATE <u>3/14/2023</u>
SHORT TITLE <u>Organized Retail Crime</u>	BILL NUMBER <u>CS/House Bill 55/HCEDCS</u>
ANALYST <u>Rabin</u>	

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to the state (NMCD)	\$398.8	\$717.7	\$752.2	\$1,869.1	Recurring	General Fund
Costs to counties	\$67.3 to \$134.6	\$67.3 to \$134.6	\$67.3 to \$134.6	\$201.9 to \$403.8	Recurring	County General Funds
Total	\$466.1 to \$533.4	\$785.0 to \$852.3	\$819.5 to \$886.8	\$2,071.0 to \$2,272.9	Recurring	

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 234

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)
- New Mexico Attorney General (NMAG)
- Sentencing Commission (NMSC)
- Corrections Department (NMCD)
- Department of Public Safety (DPS)

SUMMARY

Synopsis of HCEDC Substitute for House Bill 55

The House Commerce and Economic Development Committee Substitute for House Bill 55 creates the new crime of organized retail crime, which consists of taking possession or concealing merchandise with the intention of converting the merchandise without paying for it or altering a posted price or transferring merchandise to another container with the intention of depriving the retailer of some or all of the value of the merchandise. The crime applies only when these acts are committed as part of a concerted effort by a person or a coordinated plan with one or more coconspirators to deprive a retailer of merchandise on two or more occasions or

deprive multiple retailers located in the state of merchandise over the span of one calendar year. Organized retail crime has tiered penalties ranging from a petty misdemeanor to a second-degree felony, depending on the aggregated value of the merchandise taken, concealed, altered, or transferred from any retailer over the course of a year, as outlined below.

Aggregate Value of Merchandise	Penalty	Basic Sentence
\$250 or less	Petty misdemeanor	Less than six months in jail and/or a fine up to \$500
Between \$250 and \$500	Misdemeanor	Less than one year in jail and/or a fine of up to \$1,000
Between \$500 and \$2,500	Fourth-degree felony	Up to 18 months in prison and a possible fine of up to \$5,000
Between \$2,500 and \$20,000	Third-degree felony	Up to three years in prison and a possible fine of up to \$5,000
More than \$20,000	Second-degree felony	Up to nine years in prison and a possible fine of up to \$10 thousand

HB55 clarifies that venue shall be proper in any county in which merchandise is stolen and also adds organized retail crime to the definition of racketeering.

HB55 further amends the definition of robbery to include the use or threat of force or violence to retain stolen property or escape from the scene of a theft.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have significant fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 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 \$26.6 thousand per year across all facilities. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. HB55 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

Overall, this analysis estimates HB55 will result in increased annual incarceration costs of \$752.7 thousand to the state and between \$67.3 thousand to \$134.6 thousand to counties. Costs to the state are estimated to be at least \$398.8 thousand in FY25 and will rise over the next two years to reach \$752.7 thousand in FY27 and future fiscal years. Costs to counties are anticipated to remain steady annually, as incarceration in jails is less than one year. More detailed information on these calculations is provided below.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB55, are not included in this analysis, but could be moderate. However, the

Administrative Office of the Courts (AOC) notes the bill could lead to cost-savings for prosecutors, defense attorneys, and courts by combining what would otherwise be multiple court cases over the course of several months into fewer cases, and more serious charges may result in more defendants being referred to treatment programs.

This bill effectively increases sentences for acts that are already criminalized. This analysis does not include potential benefits of crime deterrence due to increased punishment because research shows sentence length has little to no deterrent effect. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the severity of punishment if convicted.

Detailed Incarceration Cost Calculations. The Sentencing Commission reports 470 people were arrested for larceny more than once within one year between 2017 and 2022, an average of 78 people arrested each year. It is estimated that about 27 percent of cases referred for prosecution ultimately result in cases being disposed by trial or plea agreement. If it is assumed that all individuals whose cases are disposed by trial or plea agreement are admitted to prison or jail as a result (likely an overestimate), this would result in about 21 people being admitted to prison or jail each year whose crimes might qualify them for prosecution under the provisions of HB55 related to organized retail crime.

The differing penalty tiers established by this bill create some difficulties in estimating the fiscal impact of the provisions of the bill related to organized retail crime, but it appears more likely individuals will be charged with the lower penalties established by this bill than the higher penalties. To estimate the impact, it is assumed seven people are admitted to jail for a petty misdemeanor or misdemeanor offense under this bill, while the remaining 14 are admitted to prison. For prison admissions, the analysis averages the costs for 14 individuals being admitted for each of the three penalty options imposed.

Costs to Counties: For purposes of this analysis, it is estimated an individual could spend between six months and one year incarcerated in jail for a misdemeanor or petty misdemeanor under HB55. Based on the marginal cost of each additional inmate in New Mexico's jail system, each offender sentenced to jail for this crime could result in estimated increased costs of \$9,614 to \$19.2 thousand to counties. Assuming seven individuals are admitted to jail for these offenses under the provisions of HB55 annually, this bill is projected to result in increased costs to counties of \$67.3 thousand to \$134.6 thousand per year. To account for time to adjudication, these costs are not anticipated to be incurred until one year after the bill takes effect, in FY25.

Costs to the State: As outlined above, this analysis estimates the changes proposed by the fourth-degree felony penalty imposed by HB55 will impact approximately seven individuals annually. Based on estimates of actual time served for second-, third-, and fourth-degree *property* felonies for individuals released from prison in FY21 provided by NMSC, this will result in an average cost of \$49 thousand per offender and \$686.3 thousand overall. These additional costs will begin to be realized in FY25, increasing over the following two years (as more individuals are incarcerated for this crime) and leveling out in FY27 (as offenders begin to be released from prison) and future fiscal years.

Without additional available data, the analysis estimates the broadening of the definition of robbery will result in at least one additional person being admitted to prison for the second-degree felony of robbery each year. Based on the average time served for a third-degree felony for individuals released from prison in FY21 provided by NMSC, this will result in an average

cost of \$66.4 thousand per offender. These additional costs will begin to be realized in FY25, increasing over the following two years (as more individuals are incarcerated for this crime) and leveling out in FY27 (as offenders begin to be released from prison) and future fiscal years.

SIGNIFICANT ISSUES

HB55 effectively increases the penalties for existing criminal acts. Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment. As a result, increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. 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.

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful to community safety. In New Mexico, 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) that neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and when felonies rose in 2020, 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.

The Administrative Office of the District Attorneys writes:

House Bill 55 address a growing trend in the State of New Mexico and the Country of groups of people coordinating to steal from retail merchants. This will protect retail merchants and consumer from the economic impact of these crimes. The Bill is structure to avoid issue of unitary conduct which invokes double jeopardy claims. The current criminal code does not address this new trend in criminal conduct.

On the other hand, the Public Defender Department (PDD) notes in its analysis of the introduced bill that the crimes addressed in HB55 are already covered by existing larceny and racketeering statutes, and retailers also have civil remedies at their disposal.

The office of the New Mexico Attorney General (NMAG) notes the language of the bill prevents charging an individual with both organized retail crime and “a separate or additional offense arising out of the same transaction,” meaning organized retail crime cannot be charged along with shoplifting or conspiracy. However, NMAG notes it is common for larceny challenges to be pursued along with conspiracy charges under the circumstances contemplated by the bill, and prosecutors would be faced with a choice of pursuing either organized retail crime or charges of conspiracy and shoplifting together. NMAG explains “For a felony amount of merchandise for example (\$500-\$2,500), prosecutors would likely charge the latter two charges, amounting to two 4th degree felonies, as opposed to ‘ORC’ [organized retail crime] which is only a single 4th degree felony. Such a provision may limit the practical usefulness of the legislation.”

In its analysis of the introduced bill, PDD also notes issues with the bill's definition of organized retail crime as one of the enumerated acts “committed as part of a concerted effort or a

coordinated plan,” stating it may present confusion regarding the scope of the crime. PDD writes:

Grammatically, the language raises questions about whether the crime requires coconspirators *or* only requires a coordinated plan. One could read HB [55] as applying to one person, acting alone in a concerted effort and/or coordinated plan. The use of the disjunctive *or*, *see* Legislative Drafting Manual 195 (Sept. 22, 2015), complicates any understanding of this act because it appears that this conspiracy requirement does not apply to the next phrase using “coordinated plan.”

In its analysis of the introduced bill, PDD also raises concerns regarding implications for the statutes of limitations, writing:

Another potential issue is how the continuing nature of this crime affects the statutes of limitations depending on the aggravated value of the merchandise taken, concealed, altered or transferred. Typically, the statutes of limitations is measured against the completion of a criminal act, but this bill creates a crime that captures continuing offenses, specifically, noting that the aggravated value is based on the total value over a calendar year. This is significant because the aggravate value determines the penalty imposed. It seems that the only issue would be for petty misdemeanors because the statute of limitation for such offenses is one year.

RELATIONSHIP

HB55 conflicts with House Bill 234, which also addresses organized retail crime and makes effectively similar, but technically distinct, changes to the crime of robbery.

TECHNICAL ISSUES

NMAG notes the following technical issue:

Under Section I(A)(1), ORC can be committed if multiple retailers throughout the state are deprived of their merchandise *over the span of one year*. Contrast this language with the definition of ‘aggregated value’ in Section I(H)(1), which means the total value of merchandise taken/concealed/altered/transferred from any retailer *over the span of one calendar year*.

In both of the above sections, the language limiting the time period in which theft/shoplifting may be aggregated for purposes of being considered ORC may be confused. By stating *over the span of one calendar year*, it may be argued that only acts within a single calendar year (2022, 2023, etc) are sufficient for aggregation, whereas the intent of the drafter seems to be that all predicate acts within a continuous 365 day period be sufficient for aggregation. This language could be clarified.