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FISCAL IMPACT REPORT

SPONSOR <u>Rehm/Lord/Reeb</u>	LAST UPDATED _____
	ORIGINAL DATE <u>1/31/2023</u>
SHORT TITLE <u>Felon in Possession of Firearm Penalty</u>	BILL NUMBER <u>House Bill 61</u>
	ANALYST <u>Rabin</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY26	FY27	FY28	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$573.4	\$893.3	\$893.3	\$2,359.9	Recurring	General Fund

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

Duplicates appropriation in the General Appropriation Act
Relates to appropriation in the General Appropriation Act

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 House Bill 61

House Bill 61 (HB61) increases the penalty for a felon in possession of a firearm or destructive device (a third-degree felony) from the three-year sentence for most third-degree felonies to a five-year sentence. Under current law, a felon is defined as an individual convicted of a felony offense within 10 years of completing their sentence who has not been pardoned or received a deferred sentence. The bill further adds “or destructive device” to the language of the sentencing provisions for this crime.

HB61 moves a provision increasing the basic sentence for felon in possession of a firearm to six years for individuals whose felony offense constituted a serious violent offense (as defined in Subparagraphs A through N of Paragraph 4 of Subsection L of Section 33-2-34 NMSA 1978);

the bill moves this provision from the criminal statute to the Criminal Sentencing Act, and does not appear to have a substantive impact.

The effective date of this bill is July 1, 2023.

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. In addition to the potential for new crimes to send more individuals to prison and jail, longer sentences could result in fewer releases relative to admissions, driving up overall populations. 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. HB61 is anticipated to increase the time individuals spend incarcerated.

Because the basic sentence for serious violent felons in possession of a firearm was previously enhanced and is not further enhanced by this bill, this analysis only considers the impact of the sentencing enhancement for offenders whose crimes were not classified as serious violent offenses.

In FY22, 1,196 people were admitted to prison for offenses that were not serious violent offenses, 82 percent of overall admissions. Assuming a similar share of the 39 individuals admitted to prison with their highest charge being felon in possession of a firearm in FY21 were admitted for offenses other than serious violent offenses, this change would increase the sentences of about 32 individuals each year. Based on estimates of actual-time served for a two-year sentence enhancement provided by the Sentencing Commission (NMSC), these 32 individuals will spend an additional 383 in prison each due to the increased sentence, a cost of \$27.9 thousand per offender. Overall, this analysis estimates HB61 will result in increased incarceration costs of \$893.3 thousand per year. These additional costs will begin to be realized in FY26, increasing over the following year (as more individuals serve longer sentences) and leveling out at \$893.3 thousand in FY27 (as offenders begin to be released from prison) and future fiscal years.

These costs are likely an underestimate, as felon in possession of a firearm is often not the highest charge for which someone is admitted to prison. Last year, NMCD estimated 10 percent of the New Mexico prison population, or close to 540 individuals, were serving time for this crime.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials (if more defendants invoke their right to a trial when facing more serious penalties), are not included in this analysis, but could be significant.

SIGNIFICANT ISSUES

Research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment, and although laws and policies designed to deter crime focus mainly on increasing the severity of the punishment, this does little to deter criminals because most know little about sanctions for specific crimes. These findings suggest 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 than increasing penalties. 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 heightened penalties.

The Administrative Office of the Courts and the Public Defender Department (PDD) note the penalty for this crime was recently increased from a fourth-degree felony to a third-degree felony during the 2020 (for serious violent felons) and 2021 (for all other felons) legislative sessions. PDD adds the Legislature increased the basic sentence for serious violent felons in possession of a firearm to six years in 2022, noting HB61 would be the fourth penalty increase related to this crime in as many years.

PDD further writes:

It is important to note that, unlike sentencing enhancements for using a firearm during the commission of a crime, Section 30-7-16 punishes a felon simply possessing a gun, even if they never *use* it. The statute represents a policy determination that felons should not possess a firearm. However, doing so hardly presents the same level of risk or danger associated with violent felonies, like armed robbery or aggravated burglary. Felon in possession is a crime of *mere possession*. It includes storing a gun in one’s closet and does not require having it on their person or using it in any way, nor the commission of any contemporaneous crime. It is at its foundation, a *regulatory* offense, and the current penalty, which reflects three increases in the last three years, is sufficient.

TECHNICAL ISSUES

PDD provides the following analysis on a potentially significant technical issue:

The creation of new “special” third-degree felonies in Section 31-18-15 is unlikely to have its desired effect due to a 2022 amendment to Section 31-18-15.

Prior to the 2022 amendment, the preamble to Section 31-18-15(A), which enumerates the basic sentences for all non-capital felonies, read: “If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as

follows,” followed by a list of felonies and their maximum period of incarceration.

In 2022, the Legislature amended Subsection A to specify: “**As used in a statute that establishes a noncapital felony, the following defined felony classifications** and associated basic sentences of imprisonment **are**,” followed by the same list of basic sentences, which remained unchanged. § 31-18-15(A) (as amended by L. 2022, Ch. 56, § 29, eff. May 18, 2022).

The only discernible legislative intent in making this change is to limit use of the “special felony” sentences (those involving the qualifying “resulting in” language) to crimes **defined as such** in the “statute that establishes [that] noncapital felony.” In other words, Section 31-18-15 requires the use of the *actual language* defining the basic sentence in the defining criminal statute so that maintaining the designation of “a third degree felony” in Section 30-7-16 would actually maintain a regular third-degree felony carrying a basic sentence of three years. To receive the 5- and 6-year penalties the bill appears to intend, Sections 1(A) and 1(B) would have to explicitly state that the person is guilty of a “third degree felony for possession of a firearm or destructive device by a felon pursuant to Subsection B of Section 30-7-16 NMSA 1978,” or a “third degree felony for possession of a firearm or destructive device by a serious violent felon pursuant to Subsection C of Section 30-7-16 NMSA 1978.”

The office of the New Mexico Attorney General makes the following technical suggestion:

For the sake of clarity and stylistic consistency, the amendments to Section 31-18-15 could consider removing “pursuant to Subsection B of Section 30-7-16 NMSA 1978” so that it would read only: “third degree felony for possession of a firearm or destructive device by a felon.” This would mimic the structure of the language for the rest of Section 31-18-15. Similarly, clarity and stylistic consistency could be improved by removing “pursuant to subsection C of Section 30-7-16 NMSA 1978” so that it reads: “third degree felony for possession of a firearm or destructive device by a serious violent felon.”

OTHER SUBSTANTIVE ISSUES

NMSC adds the following:

The New Mexico Sentencing Commission is presently undertaking a review and update to the state’s Criminal Code. As part of this process, the Commission engaged the services of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota to analyze the Criminal Code for its strengths and weaknesses. One item of concern for the Robina Institute was that the Criminal Code has a number of special statutes that fall out of the normal penalty structure in the state. HB61 would add two additional special penalties into the Criminal Code.