

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the Legislature. LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

## FISCAL IMPACT REPORT

SPONSOR Rehm/Terrazas LAST UPDATED \_\_\_\_\_  
ORIGINAL DATE 2/22/2023  
BILL  
SHORT TITLE Felons & Firearms Penalties NUMBER House Bill 458  
ANALYST Rabin

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

	FY25	FY28	FY31	7 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	At least \$26.6	At least \$8,847.3	At least \$16,485.0	At least \$60,303.1	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

Relates to House Bill 59 and House Bill 306

Conflicts with House Bill 61

### Sources of Information

LFC Files

#### Responses Received From

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 458

House Bill 458 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, creates a new seven-year penalty for a felon in possession of a firearm during the commission of a crime, and creates the new crime of transferring possession of a firearm or destructive device to another whom the person knows or should have known to be prohibited from possession of a firearm under the provisions of Section 30-7-16 NMSA 1978.

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. 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. HB458 is anticipated to increase the number of individuals incarcerated and the time they spend incarcerated.

Overall, this analysis estimates HB458 will result in increased annual incarceration costs of \$16.5 million to the state. Costs to the state are estimated to be at least \$26.6 thousand in FY25 and will rise to \$16.5 million in FY30 and future fiscal years. 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 HB458 are not included in this analysis, but could be significant.

This analysis does not include potential benefits of crime deterrence due to increased punishment, as 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.

***Detail of Incarceration Cost Calculations.*** Increased penalty for felon in possession of a firearm: 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 HB458 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.

New penalty for felon in possession of a firearm during the commission of a crime: The new penalty for felon in possession of a firearm during the commission of a crime is likely to impact an extremely large group of people, as high recidivism rates result in many felons returning to prison for a variety of crimes. The definition of felon used by HB458 includes anyone within 10 years of completing their sentence for a felony; a 2021 report from the Department of Justice’s Bureau of Justice Statistics (BJS) found 61 percent of state prisoners released in 2008 returned to prison within 10 years.<sup>1</sup>

In FY22, a total of 2,409 individuals were admitted to New Mexico’s prisons, with 1,450 incarcerated for new crimes. Assuming 61 percent of these individuals were within 10 years of completing a sentence for a felony (and therefore meet the definition of felon), this analysis estimates a total of 146 individuals admitted to prison in FY22 were felons who committed a new crime, and could therefore be subject to the seven-year penalty imposed by HB458 if they were in possession of a firearm at the time.

A 2019 BJS report found 20.9 percent of state prisoners were in possession of a firearm at the time they committed the offense for which they were imprisoned. Based on the estimated number of felons admitted to prison in FY22 and this data, this analysis estimates the changes proposed by HB458 will impact 146 individuals annually. The Sentencing Commission (NMSC) estimates a seven-year penalty increase will result in inmates serving an additional 1,463 days in prison (about four years), a cost of \$106.5 thousand per offender and \$15.6 million overall.

Because HB458 effectively enhances the sentence for existing crimes, the fiscal impacts of this change are not anticipated to be realized until the first group of offenders admitted under the enhanced sentence have served the term they would have served under the original sentence. The average time served in prison for individuals released in FY21 was almost two years, but this bill is anticipated to lead 252 individuals to serve an additional four years in prison. As a result, offenders admitted to prison in FY25 under these provisions of HB458 would begin to impact costs in FY26. As more people are admitted to prison, costs increase. Costs continue to rise in each year until FY30, when offenders admitted in the first year the change takes effect begin to leave prison after serving the additional time.

New crime of transferring possession of a firearm to a prohibited individual: The proposed new crime is a fourth-degree felony, which carries an 18-month prison sentence; NMSC reports the average length of time served by offenders released from prison in FY21 whose highest charge was for a fourth-degree felony was 516 days. Based on the marginal cost of each additional inmate in New Mexico’s prison system, each offender sentenced to prison for this crime could result in estimated increased costs of \$37.6 thousand to NMCD.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to prison each year for this crime, a cost of \$37.6

---

<sup>1</sup> <https://bjs.ojp.gov/library/publications/recidivism-prisoners-released-24-states-2008-10-year-follow-period-2008-2018>

thousand. Because the estimated time served is greater than one year, the costs of one year (\$26.6 thousand) would be incurred in the first year of incarceration, while the cost of the remaining 151 days (\$11 thousand) would be incurred in the second year of incarceration. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25. Because the estimated time served is greater than one year, costs are anticipated to increase in FY26, as an offender admitted in FY25 serves the remainder of their term and another offender is admitted but will level out that same year (as offenders begin to be released from prison) and remain level in future fiscal years.

## SIGNIFICANT ISSUES

**Public Safety Considerations.** HB458 effectively enhances a sentences certain circumstances. 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 2<sup>nd</sup> 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 Public Defender Department (PDD) notes 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 HB458 would be the fourth penalty increase related to this crime in as many years.

**Legal Considerations.** Existing law provides for sentencing enhancements when a firearm is used during the commission of a noncapital felony; these enhancements were increased during the 2022 legislative session. The Administrative Office of the District Attorneys notes this may raise double jeopardy concerns.

The office of the New Mexico Attorney General provides the following legal analysis:

As it relates to Subsection (C), “A felon found in possession of a firearm **during the commission of a crime** shall be guilty of a third degree felony...” may be challenged as unconstitutionally vague. When analyzing a challenge to the constitutionality of a statute for vagueness, New Mexico courts apply a two-part test. *State v. Tsosie*, 2011–NMCA–115, ¶ 31, 150 N.M. 754, 266 P.3d 34. Courts consider whether the statute “(1) fails to provide persons of ordinary intelligence

using ordinary common sense a fair opportunity to determine whether their conduct is prohibited, or (2) fails to create minimum guidelines for ... enforcement ... and thus encourages subjective and ad hoc application of the law.” *Id.* See also, *State ex rel. Children, Youth & Families Dep’t v. Shawna C.*, 2005–NMCA–066, ¶ 32, 137 N.M. 687, 114 P.3d 367 (noting that due process also requires that the statute not encourage arbitrary or discriminatory enforcement). Under the first prong of this test, it will be difficult for a reasonable person to determine whether certain conduct may be prohibited. For example, a felon who is unknowingly exceeding the posted speed limit, pulled over and found to be in possession of a firearm could face a greater penalty of seven years based on a violation of a strict liability, traffic crime. Under the second prong of this test, it is likely that this statute fails to create minimum guidelines for enforcement and will inevitably lead to ad hoc application of the law by law enforcement. Essentially any crime as low as city code penalty assessments would qualify as crime under this proposed change to the statute.

As to Subsection (E), establishing proof of whether a person “knows or should have known (someone) to be prohibited from possession” of a firearm or destructive device may be challenged and may be so subjective in most cases that it proves this subsection impossible to prove. Compare the knowledge element for possession of stolen property. A defendant’s knowledge that property is stolen may be circumstantially proved by a defendant’s unexplained possession of that property. *State v. Sizemore*, 1993–NMCA–079, ¶ 6, 115 N.M. 753, 858 P.2d 420. The fact finder should not however, infer a defendant’s knowledge from mere possession without some basis in fact for the initial inference. *Id.* The State will be tasked in finding some basis in fact to prove that a person in violation of this subsection of the statute had knowledge of the firearm recipient’s criminal history at the time the transfer of the firearm was made. Establishing circumstantial evidence of this nature would be much more difficult under this subsection. Most transfers of this nature are between two people, thereby necessitating potential testimony from the firearm-recipient felon (who retains a 5<sup>th</sup> Amendment privilege against self-incrimination) in order to prove the firearm-donor’s knowledge.

## CONFLICT, RELATIONSHIP

HB458 conflicts with House Bill 61, which makes differing (although similar) changes to the sections of law HB458 proposes to amend.

HB458 relates to House Bill 59, which creates a third-degree felony crime of unlawful carrying of a firearm while trafficking a controlled substance; HB458 creates a new penalty for felons carrying a firearm while committing any crime.

The Sentencing Commission (NMSC) explains:

There is a small overlap between HB458 and HB306, as both bills would, in effect, penalize the transfer of a firearm to an individual who is prohibited from possessing firearms. However, this bill criminalizes the act of transferring the firearm, while HB306 criminalizes the act of purchasing the firearm for another.

If both bills are enacted, each of those two acts would be a fourth degree felony.

## TECHNICAL ISSUES

NMSC notes:

Although HB458 would apply a third degree felony to a felon in possession of a destructive device, as it is currently applied to a felon in possession of a firearm, the proposed text in HB458 does not penalize felons in possession of a destructive device during the commission of a crime as it penalizes felons in possession of a firearm during the commission of a crime.

PDD notes the following 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 7-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.”

## OTHER SUBSTANTIVE ISSUES

NMSC reports:

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 outside of the normal penalty structure in the state. HB458 would add a further special penalty into the Criminal Code.

ER/al/ne