LFC Requester:	

AGENCY BILL ANALYSIS
2025 REGULAR SESSION

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Date Feb. 24, 2025

Original ___ **Amendment** 2X
Correction ___ **Substitute** X

Bill No: HB 8 S-Floor/a to SJC/a to HJC-Sub

Sponsor: Christine Chandler
Short Title: Criminal Competency & Treatment

Agency Name and Code Number: 280-LOPD

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	**FY26**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	**FY26**	**FY27**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **SB 25** (fentanyl trafficking enhancement), **SB 166** (amending competency determinations)

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Amendments adopted by the Senate Judiciary Committee are discussed in bold-italics below.

Amendments adopted by the Senate Floor are addressed in bold-italic-underline.

The House Judiciary Committee Substitute for House Bill 8 ("HB 8/HJC-Sub") combines six previously separate bills, summarized and analyzed separately below:

- Sections 1-9 contain what was previously HB 4
- Section 10 contains what was previously filed as HB 38
- Sections 11-15 contain what was previously filed as HB 50
- Section 16 contains what was previously filed as HB 31
- Section 17 contains what was previously filed as HB 16
- Sections 18-24 contain what was previously filed as HB 106

Sections 1-9 (HB 4)

Largely, HB 4 is consistent with the **current process** for raising, evaluating, or determining competency, and the overarching outcomes. Under current law: If a defendant is found competent to stand trial, then a case proceeds to trial. If not competent, charges for non-dangerous defendants "may be dismissed" (and no alternative to this option is explicitly provided.) If dangerous, the court temporarily "commits" defendants to NMBHI to try and "restore competency" (and thus proceed to trial) and, if unsuccessful, defendants who are not competent but are found liable (by clear and convincing evidence) for enumerated "dangerous" charges are criminally committed. Defendants who are not found "dangerous" have their criminal cases dismissed without prejudice. A prosecutor has the discretion to seek civil commitment if a criminal case is dismissed.

Maintaining this overarching framework, HB 4 would:

(1) provide an outpatient option for restoring non-dangerous defendants to competency

(currently, only inpatient competency restoration is available at NMBHI for "dangerous" defendants);
(2) expand the criteria justifying dangerousness findings (both at the stage triggering inpatient restoration to competency, and triggering criminal commitment if not competent); and
(3) if non-dangerous but not competent and the charges are dismissed, extend existing "assisted outpatient treatment" programs as a community-based alternative to civil commitment.

The CPAC amendments to HB 4:

- added reference to dismissal based on "diversion" in Section 1
- reinstated the phrase "psychologist or psychiatrist" in identifying those qualified to perform competency evaluations
- ~~changed commitment for competency restoration and criminal commitment from a "department of health" facility to a "licensed inpatient psychiatric hospital"~~
    - change reverted by HJC-Sub
- reinstated the calculation of deadlines during competency restoration from the hospital's *receipt of necessary documents* rather than the court's order, and similarly require documents be provided for evaluating developmental or intellectual disability under Section 31-9-1.6.
- returned the obligation of competency restoration progress reports and involuntary treatment eligibility to the "treatment supervisor" specifically (rather than the department generally)

<u>The HJC-Sub for HB 8:</u>

- replaces references to an evaluator's "belief" with their "opinion" throughout the bill
- in Section 3(A), amends the list of dangerousness factors two ways:
    - adds the threat of committing first or second degree murder
    - replaces the threat of "committing a felony involving the use of a firearm" with committing any 'serious violent offense,'" as defined by Section 33-2-34(L)(a)-(n)
- in Section 3(C), simplifies references to "competency restoration programs" for consistency and clarity
- in Section 3(C)(1), removes the requirement for a renewed opinion regarding eligibility for involuntary treatment during the initial "progress report"
- in Section 4(B), removes the requirement for a renewed opinion regarding eligibility for involuntary treatment in the "progress report" submitted before a 90-day inpatient restoration review hearing
- in Sections 5(A) and 6(A), amends the list of offenses eligible for criminal commitment two ways:
    - adds the threat of committing first or second degree murder
    - replaces the threat of "committing a felony involving the use of a firearm" with committing any 'serious violent offense,'" as defined by Section 33-2-34(L)(a)-(n)
- Amends Section 6(F) to specify that the 7-day hold for pursuing involuntary treatment occurs at a "licensed psychiatric hospital" (as opposed to county jail)

The SJC amendments would

- ***remove the metropolitan court's ability to resolve competency;***

- ***set a firm 90-day deadline for a competency hearing;***
- ***set a shorter timeline (seven days instead of thirty) after an order of commitment for NMDOH to either admit a defendant for inpatient competency restoration, or certify its inability to meet the defendant's needs***
    - ***<u>The Senate Floor amendment restored the thirty-day timeline at NMDOH's behest.</u>***
- ***allow any party or the court to raise competency based on developmental or intellectual disability (currently limited to the defense) or to request a competency evaluation***

<u>Section 10 (HB 38)</u>

The HJC-Sub for HB 8 incorporates, as Section 10, HB 38 as-filed. Section 10 would create a new third-degree felony crime (basic sentence of up to three years) prohibiting possession or transportation of a "weapon conversion device," defined as "a part or combination of parts designed and intended to convert a semiautomatic weapon into a fully automatic weapon." The bill specifies that each device possessed "constitutes a separate offense."

The SJC amendments would strike the provision specifying a separate conviction for each device; and clarify language in the definition of "fully automatic weapon" without any change to the meaning. <u>The Senate Floor amendment further clarified the definition language.</u>

<u>Sections 11-15 (HB 50)</u>

The HJC-Sub for HB 8 incorporates HB 50 with some technical changes that clarify the intent of the bill. These sections of HB 8/HJC-Sub would consolidate applicable penalties for first and repeat offenders in four related Sections of Chapter 30, Article 16D NMSA (i.e., Unlawful Taking of a Motor Vehicle, 30-16D-1; Embezzlement of a Motor Vehicle, 30-16D-2; Fraudulently Obtaining a Motor Vehicle, 30-16-D3; and Receiving, or Transporting a Stolen Motor Vehicle, 30-16D-4).

The bill would remove now-identical penalty provisions from all four criminal statutes, instead referencing penalties in a new subsection 30-16D-5, which would provide one uniform penalty structure that would apply interchangeably to repeat offenders of any of the offenses defined in Subsections 1 through 4. In other words, a **first** time violator of the one statute would be considered a repeat offender of the larger statutory scheme if they have a prior conviction for a different Article 16D offense.

The penalties would be: a fourth degree felony for a first offense; a third degree felony for a second offense, regardless of which provision was the first offense; and a second degree felony for a third or subsequent offense, regardless of which provision was the first or second offense.

<u>Section 16 (HB 31)</u>

The crime of "Making a shooting threat" is currently a misdemeanor punishable by up to one year pursuant to a new statute enacted in 2022. HB 31 as-filed proposed to increase that punishment to a fourth degree felony punishable by 18 months in prison, without any other changes to current law.

The HJC-Sub for HB 8 would amend the approach in HB 31 by also amending the elements

of "making a shooting threat" to more closely match the felony crime of "making a bomb scare"; i.e., adding a requirement that the threat be made "maliciously," and by requiring that the intended harms actually result to incur felony liability.

Section 17 (HB 16)

Section 17 would enhance penalties for those convicted of trafficking fentanyl (as opposed to other controlled substances), in one of three ways. (1) The bill would enhance a basic trafficking sentence by **three** years where the person possessed either 100-500 pills/capsules/tablets or 10-50g of powder, whichever is less. (2) The bill would enhance a sentence by **five** years where the person possessed either more than 500 pills/capsules/tablets or more than 50g of powder, whichever is less. (3) The bill would also enhance a sentence by **five** years where the person "recruited, coordinated, organized, supervised, directed, managed or financed another to commit trafficking fentanyl."

The SJC amendments would strike the language "whichever is less" in provisions identifying fentanyl quantities in terms of pill quantity or weight.

Sections 18-24 (HB 106)

The HJC-Sub for HB 8 incorporates HB 106 in the form to which it was amended by HHHC. The provisions would expand the authorization for, and regulation of, blood-testing under the DWI (drugs and alcohol) statute.

Sections 18 and 23 would add EMTs and phlebotomists as persons qualified to draw blood for forensic chemical blood testing. Sections 19 and 24 clarify that law enforcement officers may initiate "chemical blood" testing within the scope of their official duties. Sections 21 and 22 make only technical drafting changes.

Section 20 expands the ability to seek search warrants for blood to circumstances where there is probable cause that only a misdemeanor has been committed. Current law only authorizes blood draw warrants for felonies, or where death or great bodily harm occurs. In so doing, Section 20 would also authorize imposing an "aggravated DWI" conviction for refusing such a blood draw (even if a warrant ultimately results in the blood draw occurring against their wishes).

The SJC amendments would remove the new language creating the ability to charge "aggravated DWI" after refusing a chemical test for a misdemeanor not involving physical harm.

FISCAL IMPLICATIONS

Sections 1-9 (HB 4): Competency

The number of LOPD cases closed (dismissed or criminally committed) due to incompetency is consistently 3% or less of LOPD cases. *See* chart, attached. That being said, this bill may increase LOPD workload in litigating criminal commitment if more cases qualify for that outcome under the amended "dangerous" definition. It may also result in a higher workload under the same number of cases as the bill adds additional issues to consider and potentially litigate by adding both inpatient and outpatient treatment alternatives based on often hard-to-

determine criteria. Although the bill requires a neutral expert's opinion on the criteria, the defense and state are also permitted to present their own experts in such hearings, and we could see an uptick of competing expert opinion litigation in those settings.

Finally, if the bill achieves its apparent goal of treating a greater number of incompetent defendants to competency, and thus permitting those cases to go to trial, the LOPD may see *some* unknown number of the current 3% of competency-resolved cases actually proceed to trial. While the LOPD would likely be able to absorb some additional workload under the proposed law, any increase in litigation brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

Sections 10-17 (HB 38, 50, 31, 16): New or Increased Penalties

Collectively, Sections 10-17 have the effect of creating or increasing penalties for automatic weapon conversion devices, vehicle theft, shooting threats, and fentanyl trafficking.

Defendants are generally more likely to go to trial to defend against felony charges, rather than to accept a plea. When felony penalties are created or increased, there is a workload impact for LOPD. It is difficult to predict the collective impact of these proposals on LOPD caseloads in any given year. Nevertheless, under the present statutory scheme, a recent workload study by an independent organization and the American Bar Association concluded that New Mexico faces a critical shortage of public defense attorneys. The study concluded, "A very conservative analysis shows that based on average annual caseload, the state needs an additional 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment."
https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf

Barring some other way to reduce indigent defense workload, any increase in the number of felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

Sections 18-24 (HB 106): DWI Blood Testing

To the extent that the bill increases the number of warrants for blood draws in the State, the immediate fiscal impact will fall on the judiciary (more warrants to consider --usually at night) and medical service providers, not the LOPD. However, because the blood draws might lead to more DWI cases being charged, that could lead to an increase in LOPD caseload.

When a DWI case based on blood testing proceeds to trial, the prosecution generally needs the additional testimony of the individual who drew the blood, the Scientific Laboratory Division technician(s) who tested the blood, the reviewer who ensured the proper laboratory procedures were followed and a toxicology expert to testify regarding the effects of the particular drug and quantity on the motorists' ability to safely operate a motor vehicle. Effective defense requires engagement of comparable defense experts in many such cases.

The impact on indigent criminal defense is hard to assess. Blood-draw evidence is typically decisive on the issue of guilt or innocence in DWI cases (where the offense is based on alcohol intoxication). The bill might result in more alcohol-intoxication cases being settled by plea bargain. On the other hand, whenever the State draws an unwilling person's blood, it implicates constitutional rights, and invites litigation on the lawfulness of the search.

LOPD could probably absorb the fiscal impact of HB 106 but depending on the volume of charges initiated by a given district attorney in a locale, there may be a recurring increase in needed LOPD FTEs for the office as well as a need for funds for contract counsel compensation. Such cases could likely be handled by entry-level Public Defender attorneys (Assistant Trial Attorneys). "The recurring agency cost of an LOPD Associate Trial Attorney's mid-point salary including benefits is $104,860 in Albuquerque/Santa Fe and $113,350 in the outlying areas (due to salary differential required to maintain qualified employees). For more experienced attorneys handling more complex felonies, those costs are $114,670 and $123,160, respectively. Recurring statewide operational costs per attorney would be $12,780 with start-up costs of $5,210; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total $102,226.

SIGNIFICANT ISSUES

The significant issues are addressed topically based on the originally filed bills.

HB 8, Sections 1-9 (HB 4)
modifying competency procedures to reduce dismissal rates
and expanding involuntary (forced) treatment

The SJC amendments do not impact the LOPD analysis for this section of the bill. The Senate Floor amendments do not affect the LOPD's analysis of Significant Issues.

It violates due process to prosecute, try, and criminally punish an incompetent defendant. To be competent a person must have 1) a factual understanding of the proceedings, 2) a rational understanding of the proceedings including the ability "to comprehend the reasons for punishment," 3) an ability to assist the defense, and 4) an ability to consult with the lawyer with a reasonable degree of rational understanding. If, by reason of mental illness or cognitive disability, a person cannot do any one of those things, the criminal case cannot proceed. *See State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246.

The procedure used to assess and determine competency is complex and fraught with competing interests. It is high time New Mexico refocused our efforts in addressing the intersection of behavior health and the criminal legal system. HB 4 presents some significant improvements to the current process. This analysis explains how the bill would change (or retain) the current process, raises some practical and policy concerns with specific provisions, and makes recommendations for more effective or more comprehensive reforms that ensure a humane response to a public health issue, while addressing public safety concerns.

Non-custodial alternatives

HB 4 prioritizes outpatient options at two critical stages. First, when a defendant is first found not competent, current law requires commitment to NMBHI in order to attempt to "restore"

a defendant to competency so that they can be tried. Recognizing that restoration to competency is not the same process used to "treat" a behavioral health issue for long-term maintenance or recovery, HB 4 describes the process as "programming." It is notable that this frank and accurate description maintains a distinction from treatment described in other portions of the process.

Moreover, under current law, dangerous defendants are committed to BHI to restore competency and non-dangerous defendant's cases are simply dismissed because the statute provides no mechanism for restoring non-dangerous defendants' competency. HB 4 creates an outpatient restoration programming alternative for non-dangerous defendant with a goal of restoring competency and proceeding to trial. By allowing non-dangerous defendants the option of outpatient, community-based restoration programming, the bill allows defendants to maintain often crucial community ties while making it possible for the State to hold them to account in the criminal case. Analyst flags that most New Mexico communities will not have any remotely appropriate option available until an infrastructure is funded and created.

Meanwhile, if unsuccessful in restoring competency, the bill also creates a non-custodial long-term treatment option if a defendant remains not competent but also not dangerous, and thus does not qualify for criminal commitment. There is clearly value in providing a non-criminal treatment-based response to low-level "public peace" crimes committed by incompetent people when criminal commitment is improper. HB 4 would create a direct path to existing programs for "assisted outpatient treatment" ("AOT") often referred to as "involuntary treatment." While many experts in the field question the efficacy of involuntary treatment, it does have a greater chance of success when implemented in a community-based outpatient setting. Analyst flags that expanding reliance on AOT statewide in this manner will place a significant strain on existing treatment providers and may not be available to effectuate the statutory mandate until additional AOT infrastructure is funded and created.

One practical concern is that imposing involuntary commitment and/or forced treatment for incompetent defendants, even if their criminal case is dismissed, could dis-incentivize raising competency where the criminal sanction may actually be more desirable to some individuals. This may also present an ethical quandary for defense counsel who may not participate in the prosecution of an incompetent client, but who may believe that a negotiated criminal plea would be in their best interests if available commitment or forced treatment options would not. That being said, having the options of community-based restoration to competency and assisted outpatient treatment upon dismissal could provide greater opportunities for resolution by plea and reduce the number of people involuntarily committed to custodial treatment facilities, which are not an ideal form of treatment.

Nevertheless, the bill appears to recognize that much of the criminal conduct in these cases is intrinsically linked with a behavioral health issue that can be treated. One gap that remains in HB 4 is the need for a long-term continuum of care after someone is released from a criminal or civil commitment. HB 4 maintains the existing option for judges to require NMDOH to continue treating an individual whose competency is either restored or cannot be restored "until the conclusion of the criminal proceedings." *See* [page 18, line 2; page 19, line 8-9] But there is no provision for ongoing *outpatient* care after the criminal proceedings are done, or after release from a civil or criminal commitment. HB 4 would benefit from a provision that provides for tapered treatment services after the criminal case is over, or when reentering the community from a term of commitment.

Consistent with the treatment-based interventions inherent to AOT, HB 4 could also be

more comprehensive and impactful if it offered an option of a treatment-based diversion, which would remove many of these cases from the judicial competency process entirely, if completed successfully. LOPD recommends considering incorporating this alternative as well, so long as the program is tailored to the unique needs of incompetent defendants (i.e., not requiring an admission of guilt that they are not legally competent give).

Expanding "dangerous" crimes qualifying for criminal commitment.

HB 4 would expand the definition of "dangerous" as used in Section 31-9-1.2, which is the stage at which the court determines *future dangerousness* based on a likelihood of *future* criminality. At the 1.2 stage, dangerousness determines whether a person may be committed for up to nine months for purposes of restoration to competency. If the person cannot be restored to competency in that amount of time, the dangerousness assessment reoccurs at the 31-9-1.5 stage, when the court decides whether to order long-term criminal commitment.

If a defendant is not competent and competency cannot be restored, the court may criminally commit them if it finds they did in fact commit one or more enumerated crimes, and that they are still dangerous under the -1.2 definition. The court must take evidence about the charges themselves to decide whether there is reason to believe the crimes were in fact committed. If the court finds the crimes were committed and that the defendant remains dangerous, it may commit a person for the duration of the maximum sentence they could have served if convicted.

A significant change in HB 4 is that it would expand the list of "enumerated offenses" qualifying for criminal commitment under -1.5, and then replaces the 1.2 dangerous definition in terms of *future* risk of committing that same list of crimes. LOPD raises concern about inclusion of the following crimes, for the following reasons:

(1) child abuse by endangerment includes negligent conduct resulting in no harm at all, and questions whether this should be included in the list of presumptively dangerous behavior;
(2) sexual exploitation of a child includes the possession of child pornography images, typically downloaded from the internet to an electronic device, an offense that is appropriately criminal but involves no interaction with minors or further dissemination of the material;
(3) human trafficking is a broad statutory crime that includes some conduct that presents a *risk* of great bodily harm or rape (such as "transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity") but does not actually require the resulting harm ever occur, and also includes culpable but non-dangerous conduct such a "benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity." Human trafficking is not an inherently "dangerous" crime; if it is to be included, it should at least be more narrowly tailored to "human trafficking that results in the infliction of great bodily harm or a sexual offense";
(4) <u>although HB 4 originally listed any felony involving the "use of a firearm," the HJC-Sub require a "serious violent felony" which is more narrowly tailored; and</u>
(5) aggravated arson, which by definition requires the infliction of great bodily harm, and is therefore redundant of the existing first criteria of a felony resulting in great bodily

harm, and it is therefore unnecessary to separately list it.

Evaluations & Reports

Section 2 of the bill requires a qualified professional prepare a report addressing first their opinion of competency based on constitutional requirements. If the expert believes the defendant is competent to stand trial, the report is complete. If, however, the expert believes the defendant is not competent, they must also provide their opinion as to whether the defendant (1) qualifies for "involuntary commitment" (based on criteria from existing law); or (2) qualifies for AOT/involuntary treatment (based on criteria from existing law). Preparing both of these opinions on a rapid timeline is problematic because competency evaluations are non-diagnostic so they can be done after minimal interaction with the defendant, but the other criteria they would have to address for commitment or AOT *are* diagnostic and require observations over time. LOPD recommends breaking these assessments into two separate reports, by amending the bill at page 4, line 5-8, as follows:

> If a qualified professional believes a defendant is not competent to stand trial, the forensic evaluator will promptly submit the competency findings to the court. No less than twenty-four hours before the competency hearing, the evaluator will submit a report addendum to reflect ~~an evaluation report shall include~~ the qualified professional's opinion as to whether the defendant [satisfied criteria for civil commitment and/or AOT)]

Based on the initial evaluation, the court must hold a hearing to determine if the defendant is competent. If they are competent, the case proceeds to trial. If not, the court may dismiss the case without prejudice (meaning charges could be re-filed in the future if the defendant became competent) and, if it does so, HB 4 indicates the court may advise a DA to consider initiating civil commitment (and may detain the defendant for up to 7 days to allow the DA to take that step) or may advise the DA to consider initiating AOT (without detention). Section 8 of the bill authorizes the DA to use the original evaluation's findings on those issues for those purposes.

If the court does not dismiss, the court may attempt competency restoration. To do so, the court must assess future dangerousness under Section 31-9-1.2. If dangerous, commit to a locked DOH facility for restoration programming. If not dangerous, the court may send the defendant to an outpatient restoration program.

For not dangerous defendants sent to outpatient restoration, Section 3 of the bill requires a 30-day "progress report" from an outpatient restoration program containing (1) an "initial assessment" of the programming that "will be provided" and (2) the program's ability to provide it, (3) the defendant's amenability to the programming, as well as (4) "an opinion as to the probability of the defendant being restored to competency within ninety days." HB 4 requires a hearing before 90 days of community restoration programming to see if the defendant is now competent. The restoration program "shall" provide a report seven days prior to that hearing containing various competency-related opinions, the defendant's medication information, and what would now be a *third* opinion on qualifying for involuntary commitment or AOT. Again, LOPD recommends limiting the restoration program's opinions on qualification for involuntary commitment or AOT to this 90-day report to avoid redundancy and to tie the opinions more closely to the relevant time when such referrals might actually be made.

If the court finds competency was restored, the court would set the case for trial. If

competency was not restored, the court shall dismiss the criminal case without prejudice and may advise the DA to consider initiating involuntary civil commitment or AOT.

For dangerous defendants sent to DOH facilities for restoration, Section 4 would amend Section 31-9-1.3 dictating timelines and reporting requirements as DOH endeavors to restore competency. If the court finds competency was restored at 90 days, the court would set the case for trial and may order DOH to provide ongoing treatment "until the conclusion of the criminal case." But if the court finds competency is not restored, it may continue efforts for custodial restoration programming if "the defendant is making progress" for up to a total of nine months.

When Restoration of Dangerous Defendants is Not Possible

Section 5 maintains three primary options in Section 31-9-1.4. If after nine months, there is no likelihood of competency restoration, the court may: (1) if charged with enumerated crimes, hold a criminal commitment hearing under -1.5; or if **not** charged with enumerated crimes, (2) release the defendant and dismiss the criminal case with prejudice; or (3) dismiss the case *without* prejudice *and* -- if the nine-month report indicates they met the criteria -- DOH *shall* (or the prosecutor may instead) initiate involuntary **civil** commitment (allowing the court to hold the defendant for up to 7 days to enable that process).

Section 6 amends Section 31-9-1.5, the process for criminal commitment. As with current law, the court must factually decide whether the defendant committed one or more of the enumerated crimes, *and* their future dangerousness/risk of committing those same crimes, but the list of applicable crimes is expanded. *See* "Expanding 'dangerous' crimes," discussion *supra*.

Consistent with current law, if the court finds the defendant did commit an enumerated crime, remains incompetent, and remains dangerous, then the court orders criminal commitment for up to the maximum sentence they could have received if criminally convicted, with ongoing hearings "at least every 2 years" to reassess competency and dangerousness. If, based on those two-year review hearings, they ever become competent, the case proceeds to a criminal trial. If they ever become not dangerous, they shall be released, but HB 4 would newly add a proviso that the DA can initiate civil commitment "at any time" and can request up to 7 days' detention in order to do so.

LOPD recommends an additional amendment to Section 31-9-1.5, which is not a consequence of HB 4, but is unaddressed under current law. The criminal commitment process addresses only enumerated charges, but does not tell courts how to resolve any other charges within the same case that are not enumerated, and are thus not "resolved" by the criminal commitment. If a defendant remains not competent at the expiration of the commitment period (either by release due to non-dangerousness, or by fully serving the maximum sentence), HB 4 should mandate dismissal with prejudice of all pending charges, including those resolved by commitment and any remaining charges not enumerated for commitment.

Current law and HB 4 require release from criminal commitment upon expiration of the maximum available criminal sentence regardless of competency or dangerousness status, although it incorporates provisions mandating involuntary civil commitment proceedings if recommended. As noted above, LOPD further recommends making available ongoing tapered treatment services when the individual is released to the community from criminal commitment to ensure continuity of care during reentry.

HB 8, Section 10 (HB 38)
felonizing possession of automatic weapon conversion devices (per device)

Specifying that mere possession (not use) of these devices shall be charged as a separate third-degree felony per device could result in significant sentences if people possess multiple devices, which are presently legally owned by law-abiding New Mexicans.

Without adequate public notice and a process for large-scale relinquishment would help, the legislation risks making these law-abiding citizen criminals. *See State v. Montoya*, 1977-NMCA-134, ¶ 14, 91 N.M. 262 (stating the "general rule is that ignorance of the law is not a defense"). Hopefully enforcement would balance the intent and potential mistake of offenders if enacted. LOPD performance in these cases would likely be focused heavily on negotiating plea deals or dismissal in exchange for relinquishment, as felonies carry significant collateral consequences.

The SJC amendments would strike the provision specifying a separate conviction for each device; and clarify language in the definition of "fully automatic weapon" without any change to the meaning. This amendment will avoid unintended lengthy sentences, and would leave the determination of the number of counts to traditional double jeopardy analysis on a case-by-case basis.

HB 8, Sections 11-15 (HB 50)
making vehicle theft crimes interchangeable for repeat offender sentencing

The SJC amendments did not impact this section.

The vehicle theft penalty scheme would penalize offenders under any of the four subsections as repeat offenders if they had previously violated **any** of the four subsections. All of these offenses are already fourth-degree felonies for first offenses; with increased penalties if the person "repeats" the same crime. If they commit a *different* felony thereafter, they are already subject to Habitual Offender sentencing enhancements for priors from the other statutes.

The four subsections apply to different acts in furtherance of theft of or possession of a stolen motor vehicle. This may lead to further litigation since an accused person could challenge the legality of an enhanced punishment for "repeating" conduct they have not actually repeated. The rationale is inconsistent with the typical "repeat offender" justification for increasing penalties, and is better left to the habitual offender sentencing scheme to address.

HB 8, Section 16 (HB 31)
Increasing penalty for "making a shooting threat"

The SJC amendments did not impact this section.

In 2022, SB 34 was introduced and proposed creating the new crime of making shooting threats. Initially, it proposed to punish the crime as a felony, as does HB 31. Eventually, the bill was amended to a misdemeanor, and thus became part of HB 68, an omnibus crime bill which passed and was signed into law. The misdemeanor shooting threat crime was chaptered as NMSA 1978, § 30-20-16 (B) and (D) (2022).

The LOPD analysis for HB 31 as-filed raised concerns that the mental culpability for "shooting threats" requires a person act with an intent to cause fear, interrupt activities, or cause a law enforcement response, but that there is no resulting harm required. The "act" requirement is to "communicate" a person's intent to "bring a firearm to a property or use the firearm"; despite the name of the offense, it does *not* require communicating an intent to *discharge* a firearm or to *shoot* any person. And while proponents of the bill indicate the intent to address a discrepancy with the felony penalty for a bomb scare, the mental state for bomb scares requires the person act *maliciously*.

The HJC-Sub for HB 8 would amend that approach by also amending the elements of "making a shooting threat" to more closely match the felony crime of "making a bomb scare"; i.e., adding a requirement that the threat be made "maliciously," and by requiring that the intended harms actually result to incur felony liability.

While more in line with the existing felony for bomb scares, LOPD continues to caution against the expansion of felony crimes, as felonies carry significant collateral consequences, especially where this particular crime risks targeting very young adults (18-year-old seniors in high school or college students), and granting them "felon" status just as they embark on their futures for verbal acts that may be ill-advised but ultimately insincere. It is worth reiterating that this crime *does not involve any actual shooting.* A person need not even have *access* to a firearm or any intent to *actually* commit a shooting crime to be guilty of this crime, which is one of words only.

HB 8, Section 17 (HB 16)
Fentanyl trafficking sentence enhancements

Trafficking may be committed by proof of actual manufacture or distribution, *or* by possession with intent to distribute. *See* § 30-31-20. In the latter scenario, that "intent to distribute" requirement (which distinguishes trafficking from simple possession for personal use) is often established by expert law enforcement opinion testimony indicating that a particular amount is consistent with distribution, but not consistent with personal use. In the case of each of the enhancements related to the amount of fentanyl possessed, LOPD anticipates that the State will rely on the amount that the person possessed to prove both the requisite intent (elevating possession to trafficking) *and* to incur this sentencing enhancement. LOPD clients and experts provide a counterpoint, that fentanyl concentrations have gone down in recent years, so that heavy users can consume as many as 50 pills a day and often buy a multi-day supply. LOPD is hugely concerned that prosecutors will secure trafficking convictions based on 100 pills that were *actually* a user's personal use supply, such that the 3-year enhancement in HB 8 is not adequately targeting traffickers, much less high volume traffickers.

Moreover, to be guilty of possessing fentanyl with intent to distribute, a defendant must *know* it is the substance they are charged with "*or* believe it to be some drug or other substance the possession of which is regulated or prohibited by law." *See* UJI 14-3102 NMRA (elements of possession). The enhancement does not require knowledge either, so it could attach even if a person was convicted under a mistaken belief they had some other substance.

The addition of a sentence enhancement for facilitating someone else's trafficking is unnecessary and redundant, since such a crime already exists: NMSA 1978, § 30-28-3 (Criminal Solicitation). Criminal solicitation occurs when someone, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs, or

otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state. § 30-28-3(A); *see also State v. Pinson*, 1995-NMCA-045, 119 N.M. 752 (criminal solicitation may be charged when someone solicits someone else to traffic drugs, though not if they are a mere buyer). If the crime solicited is a first offense of trafficking a controlled substance, the penalty for solicitation would be a third-degree felony punishable by three years in prison; if the crime solicited is a second or subsequent offense of trafficking, the penalty for solicitation would be a second-degree felony punishable by nine years. *See* NMSA 1978, §§ 30-28-3(E); 30-31-20(B); 31-18-15(A). Each of these would be in addition to the nine years for a first-offense of trafficking and *mandatory* 18 years for a second or subsequent offense. Should HB 16 be enacted, this would certainly lead to extensive litigation about which statute can be applied, under principles of double jeopardy and/or a general-specific analysis. *See State v. Santillanes*, 2001-NMSC-018, ¶¶ 7-21, 130 N.M. 464.

The proposed subsection C explicitly states that the enhancement would be applied in addition to any prosecution for conspiracy. Though this obviates a double-jeopardy challenge as to that crime, it would lead to higher sentences since the requirements for enhancements will necessarily also establish guilt for conspiracy as well, which would exacerbate the impacts outlined in ***Fiscal Implications*** above.

Finally, there is copious evidence that increasing penalties for drug possession and sale have either no statistically significant effect or a deleterious effect upon reentry and recidivism because drug addiction is a public-health problem, not a result of moral failure or criminal nature. *See, e.g.*, Nora D. Volkow et al., *Drug use disorders: impact of a public health rather than a criminal justice approach*, 16(2) WORLD PSYCHIATRY 213 (May 2017), available at https://onlinelibrary. wiley.com/doi/10.1002/wps.20428 (inter alia, "criminal sanctions are ineffective at preventing or addressing [substance use] disorders" and recommending instead a "comprehensive public health approach [with] accessible evidence-based prevention, treatment, and recovery options to drug users, and engage those who commit criminal offences in evidence-based treatment during and following, or in lieu of, incarceration, to prevent relapse and recidivism"). Increasing penalties for possession or sale among low- to mid-level buyers and sellers ignores the root causes of drug trafficking, while also exacerbating the difficulties people face upon reentry into society after incarceration. *See, e.g.*, Federal Defender Fact Sheet on USSC's "Length of Incarceration and Recidivism" Report (Aug. 1, 2022), *available at* https://www.fd.org/sites/default/files/sentencing/incarceration_and_recidivism_factsheet_2022_0_0.pdf.

People convicted of trafficking are already punished by either nine or a mandatory 18 years in prison (second or subsequent convictions). They can also already be charged with criminal solicitation and/or conspiracy for encouraging others to traffic, time which *can* be run consecutive to their trafficking sentence, at the judge's discretion. Other enhancements will continue to be applied, such as habitual offender and firearm sentence enhancements, when the particular facts of the case support them. New Mexico law does not lack options for punishing fentanyl traffickers.

The SJC amendments to not impact LOPD's analysis on this section. The bill would continue to allow enhancement for trafficking convictions related to quantities commonly associated with personal use, and based on mere trace concentrations of fentanyl.

SB 8, Sections 18-24 (HB 106)
DWI Blood Testing

Birchfield v. North Dakota, 579 U.S. ___, 136 S.Ct. 2160 (2016) and ***State v. Vargas***, 2017-NMCA-023 established that the Fourth Amendment does not permit warrantless blood tests incident to arrest for driving under the influence and that motorist cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. These cases establish the constitutional requirement of a warrant before a blood test can be compelled. Under the current statutory scheme, law enforcement can only obtain a warrant for a blood draw on driving under the influence of alcohol (DUI) and driving under the influence of drug (DUID) arrests when there is probable cause that the person has caused the death or great bodily injury of another person or committed a felony.

State v. Adams, 2022-NMSC-008, 503 P.3d 1130, established that the Implied Consent Act in its present form already allows the admission at trial of blood evidence collected by "emergency department technicians." The expanded statutory language in this regard is therefore unnecessary but would codify the *Adams* holding. (The same question with regard to collection by a contractor phlebotomist is currently pending in the Court of Appeals in *State v. Bailey*, No. A-1-CA-41442.)

***The SJC amendments would remove the new language creating the ability to charge "aggravated DWI" after refusing a chemical test for a misdemeanor not involving physical harm. This is a necessary change to comply with* Birchfield**.

Blood Evidence Not Always Necessary

The Implied Consent Act requires submission to a breath test. Refusal can be used as evidence of guilt – often to great success – at trial. This bill would therefore be most impactful on cases involving drugs, not alcohol, which cannot be detected by a breath test. In other words, these blood draw warrants are most desired if a person gives a breath test showing no alcohol, and the officer wants to test for drugs. While this is understandable, there is other evidence of impairment that the State can present at trial, including observations of bad driving and officer descriptions or videos of a defendant's behavior during the investigation and arrest process. Indeed, an officer's lapel camera video of a defendant can be highly effective, as jurors – in their life experience and common sense judgment – can see when a person is obviously impaired, despite a clean breath test for alcohol. The State can also present Drug Recognition evidence from an officer specifically trained to recognize impairment by common drugs and a defendant's refusal of testing can be used as evidence of consciousness of guilt.

Blood Evidence is Burdensome to Present

Increasing the number of cases involving a blood draw will be a strain on an already strapped system. To get a blood draw takes at least one officer off of the street, often for hours, in order to get the blood draw at a hospital in the first place. Then, the blood has to be tested by an authorized laboratory – labs that are already heavily inundated with crime-related testing and where felonies such as sexual assaults and homicides should be prioritized. Thereafter, to admit blood test results in court in the DUI case itself will require expert testimony from the scientific laboratory analyst who must be available for pretrial interviews, and thereafter has to appear for trial. Analysts often have to drive hours from the lab to sit around and wait for hours to testify. In many cases, it may also involve a defense expert witness, and where 80% of defendants are represented by Public Defenders, that cost is ultimately borne by taxpayers, too.

The law currently limits the incurring of these time and resource costs to felony DUI

cases and/or cases involving an accident where someone was injured. This is a rational and reasonable limitation in the interests of judicial efficiency and the recognition that blood results will not always be necessary to achieve a conviction.

PERFORMANCE IMPLICATIONS

See Fiscal Implications.

ADMINISTRATIVE IMPLICATIONS

None noted.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

With respect to the competency provisions, LOPD emphasizes that New Mexico lacks the behavioral health infrastructure necessary to implement the proposed changes. There are no facilities in existence to implement outpatient restoration to competency. Moreover, the NMBHI already struggles with bed capacity to handle inpatient restoration to competency, criminal commitment, and civil commitment, all of which would be expanded significantly by the proposals in this legislation. Unless and until New Mexico has facilities, treatment providers, and qualified evaluators to handle the demands of the bill, it simply cannot be implemented.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS

None noted.