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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/26/12

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 31

SHORT TITLE Amend Time Limitations for Certain Crimes SB \_\_\_\_\_

ANALYST Sánchez

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

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI	NFI	NFI	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Public Defender Department (PDD)
- Administrative Office of the District Attorneys (AODA)
- Department of Public Safety (DPS)
- New Mexico Corrections Department (NMCD)
- Attorney General's Office (AGO)
- New Mexico Sentencing Commission (NMSC)
- Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

House Bill 31 amends Section 30-1-8 NMSA 1978 adding to the time limitations for commencing prosecution a

- first degree felony for which an indictment is found or information or complaint is filed within ten years from the time the crime was committed;
- conspiracy within the same time period as the crime conspired to be committed would be prosecuted;
- tampering with evidence within the same time period for which the tampering with evidence was committed would be prosecuted; and
- strikes first degree violent felony and inserts murder in the second degree.

The effective date of the change to the law is July 1, 2012.

## FISCAL IMPLICATIONS

According to the Public Defender Department (PDD), cold case prosecutions are exceedingly rare so there is no fiscal impact.

The Administrative Office of the Courts reports that impact to the judiciary would be proportional to the enforcement of this law.

The fiscal impact to the New Mexico Corrections Department (NMCD) is unknown. As with any inmate admitted into the NMCD system, classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The cost to incarcerate a male inmate ranges from an average of \$36,700 per year in a state owned/ operated prison to \$30,093 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed). The cost to house a female inmate at a privately owned/operated facility is \$32,408 per year. Because the capacities of medium and higher custody state owned prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility.

The cost per client in Probation and Parole for a standard supervision program is \$2,608 per year. The cost per client in Intensive Supervision programs is \$1,068 per year. The cost per client in Community Corrections is \$5,524 per year. The cost per client per year for female residential Community Corrections programs is \$39,149 and for males is \$16,805.

## SIGNIFICANT ISSUES

The Public Defender Department cites Listokin, Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law, 31 J. Legal Stud. 99 (2002) regarding that “appropriate time limits for prosecution do exist for various crimes”. According to PDD, Professor Listokin posits “the costs of choosing an overly long statute of limitations are smaller than those of choosing a statute of limitations that is too short.” *Id.* at 112. Other authors have reviewed the field and made the case for abolishing *all* criminal statutes of limitations. *See Robin & Anson, Is Time Running Out on Criminal Statutes of Limitations?*, 47 Crim. Law. Bull. No. 1 (Winter 2011).

The Department of Public Safety (DPS) report that the most significant issue presented by the proposed legislation is the now 10 year time limitation for first degree felonies. In the current section of the act, first degree violent felonies have no time limitation. It should be noted that all first degree felonies are considered crimes of violence with the exception, possibly, of trafficking controlled substance, second offense, to a minor; this then would be a considerable change in the law.

The New Mexico Sentencing Commission reports that HB 31 sets forth a ten year time period for prosecuting all first degree felonies and provides that no time limitation for commencing a prosecution be reserved for a capital felony or second degree murder.

The Attorney General’s Office (AGO) reports “[C]riminal statutes of limitations are to be liberally construed in favor of a defendant because their purpose ‘is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.’” State v. Kerby, 2007 NMSC 14, at ¶13 (citing

Toussie v. United States, 397 U.S. 112, at 114 (1970)). However, this does not bar the use of longer statutes of limitation or the elimination of statutes of limitation for certain crimes so long as the legislature clearly intends such an outcome. Therefore, the fact that this bill seeks to narrowly tailor its effect to specific crimes would likely shield it from negative judicial review.

There is no language in HB31 tying an expanded statute of limitations with any metric of diligence on the part of law enforcement in investigating crimes and concluding such investigations. Similarly, there is no language requiring diligence on the part of the prosecution in formally laying charges. Therefore, it is possible that cases may be indicted long after a law enforcement agency has concluded its investigation. This could give rise to allegations of pre-indictment delay violations. However, an aggrieved Defendant will still have to demonstrate actual prejudice on his part and tactical delay on the part of the prosecution.

Similarly, a Defendant indicted under an expanded or removed statute of limitations will likely complain of a speedy trial violation. However, the prevailing body of case law on speedy trial uses the initiation of the case (by indictment, information, etc.) as the start point for calculation of time, rather than the commission of the underlying offense.

## **PERFORMANCE IMPLICATIONS**

Increases in the inmate population could impact inmate-on-inmate or inmate-on-staff assaults, and the community offender management performance measure of “percent of out-of-office contacts per month with offenders on high and extreme supervision on standard caseloads”.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Similar to or potentially in conflict with Senate Bill 37.  
Related to HB43 and HB44

## **TECHNICAL ISSUES**

According to the Administrative Office of the District Attorneys, to avoid any possible confusion a discussion of the relationship between amendments to §30-1-8 proposed in HB 31 and NMSA 1978, § 30-1-9.1 seems appropriate. §30-1-9.1 provides that “The applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.”

Paragraphs (E) (F) (G) and (H) of §30-6-1, the statute that makes it a crime to abandon or abuse a child, each define conduct that constitutes a first degree felony, as do paragraphs (C) and (D) of NMSA 1978, § 30-9-11, the statute that criminalizes unlawful sexual penetration. And as such the statute of limitations proposed in the new paragraph (A) of §30-1-8 added by HB 31 would require prosecution for any of these first degree felonies to commence within ten years from when the crime was committed. However, the time limit proposed by HB 31 would appear to be in direct conflict with the provisions of §30-1-9.1 which would not have the applicable statute of limitations begins to run on these first degree felonies until the victim becomes 18 or the crime is reported to the police.

However, the conflict is only apparent and not real. Nothing in HB 31 refers to §30-1-9.1. And since the legislature is presumed to know the existing law when a new statute is enacted, . *See Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2011–NMSC–002, ¶ 15, 149 N.M. 308, 248 P.3d 856 (“When the Legislature enacts a statute we presume that it is aware of existing statutes.”; *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 474, 853 P.2d 722, 725 (“[T]he [L]egislature is presumed to act with knowledge of relevant case law[.]”), HB 31 must not be intended to effect, amend or change §30-1-9.1. Therefore, the two statutes can be read together so as to give effect to both. In other words if HB 31 is enacted the statute of limitations for all first degree felonies will be 10 years from when the crime is committed except for those first degree felonies set forth in paragraphs (E)(F)(G) and (H) of § 30-6-1 and paragraphs (C)and (D) of §30-9-11. In these first degree felonies the statute of limitations will still be 10 years, but the time to commence prosecution will not commence to run until the victim attains the age of 18 or the crime is reported to the police.

According to the AGO, there may be a drafting error in Paragraph L, removes language eliminating the statute of limitations for all first degree violent felonies and would apparently substitute a ten-year statute of limitations by way of the language in Paragraph A.

## **OTHER SUBSTANTIVE ISSUES**

The AODA reports some insight into how the legislature has treated the issue of the statute of limitations for first degree felonies in the past. The statute of limitation for the prosecution of a first degree felony has been the subject of several legislative amendments. Section 30–1–8, in its original form, imposed a ten-year statute of limitations on all capital felonies and first-degree felonies. 1963 N.M. Laws, ch. 303, §§ 1–8. In 1979, the Legislature extended the limitation period from ten years to fifteen years. 1979 N.M. Laws, ch. 5, § 1. In 1997, the Legislature abolished the limitation period entirely, effective July 1, 1997. 1997 N.M. Laws, ch. 157, §§ 1, 2.

## **ALTERNATIVES**

Create more conditions which would toll the current version of the statute of limitations beyond what presently exists therein. For example, where an offender has effectively concealed a crime involving financial harm to a victim who, because of age, disability, military service, or other legitimate reason, is unable to detect the crime in a timely manner.

Include clear language making the bill’s applicability retroactive so as to cover any criminal act enumerated in this bill that is complete in its commission but is as yet undetected. Otherwise, appellate courts will have to determine if legislative intent existed to make the bill’s effect retroactive.

ABS/lj:svb