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FISCAL IMPACT REPORT

ORIGINAL DATE 02/06/13

SPONSOR Cervantes LAST UPDATED 03/11/13 HB _____

SHORT TITLE Uniform Consequences Conviction Act SB 158/aSJC/aHJC

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	\$10.0-15.0	\$10.0-15.0	\$20.0-30.0	Recurring*	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*This range does not include all anticipated costs or savings. See Fiscal Implications.

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 158 as amended expands the restriction barring relief from the collateral sanction that renders a convicted felon ineligible for certification as a law enforcement officer to also include ineligibility for employment as a correctional officer.

Synopsis of SJC Amendment

The Senate Judiciary Amendment to Senate Bill 158 limits the scope of juvenile adjudications that qualify as a conviction under the provisions of this uniform act to adjudications as a youthful offender or serious youthful offender that result in adult sentences.

Synopsis of Original Bill

Senate Bill 158, introduced for the Courts, Corrections and Justice Committee, enacts the Uniform Collateral Consequences of Conviction Act (the Act). Collateral consequences are broadly defined to include both collateral sanctions and disqualifications. A collateral sanction is defined as a disability or penalty imposed on a person as a result of a felony conviction that applies by operation of law. A disqualification means a penalty that may be imposed by an administrative agency or court in a civil proceeding on grounds relating to such a conviction. The Act defines conviction to include adjudication as a juvenile (yet excludes in Section 9 delinquency adjudications in other jurisdictions from providing a basis for the authorization or imposition of collateral consequences in New Mexico).

The Act requires the NMSC identify and compile all New Mexico legal provisions that impose collateral sanctions or disqualifications, along with any provision that may afford relief from a collateral consequence. The compilation (and required updates) must be posted for public viewing on the NMSC's website.

Counsel representing accused individuals are required to give formal notice to their clients of additional legal consequences beyond just a conviction using the same or a similar informational form provided in the Act during pre-trial proceedings. Prior to accepting a plea of guilty or nolo contendere, a court must confirm that the defendant understands the notice and has had an opportunity to discuss the notice with counsel. The defendant's counsel must provide notice again before sentencing. The NMCD and other jails and detention facilities must give written notice (containing specified information) to all offenders being released from custody.

Under SB 158, a collateral sanction may be imposed only by statute, ordinance or authorized rule, and any ambiguity in a statute must be construed as authorizing only a disqualification. Disqualifications may be imposed by a state department, agency or officer or a state instrumentality (as defined and made subject to this Act by separate law) only after individually assessing whether the relevant benefit or opportunity should be denied to the individual, and after reviewing other relevant information, including any effect on third parties and whether an order of limited relief has been granted.

The treatment of other states' and federal convictions is addressed in SB 158. It provides, as well, that convictions that have been reversed, overturned, otherwise vacated or pardoned shall not serve as a basis for authorizing or imposing collateral consequences, unless the grounds for such action were due to rehabilitation or for good behavior.

SB 158 authorizes convicted individuals to present a petition to the sentencing court at or before sentencing requesting limited relief from one or more collateral sanctions related to employment, education, housing, public benefits or occupational licensing. The court must consider certain factors, including whether granting the requested relief would pose an unreasonable risk to the safety or welfare of the public or any individual. A court cannot grant petitions for limited relief to relieve the requirements of the Sex Offender Registration and Notification Act, motor vehicle license suspensions or revocations arising out of the Motor Vehicle Code, ineligibility for certification as a law enforcement officer, or prohibitions against convicted felons carrying or possessing firearms.

Victims are allowed generally under SB 158 to fully participate in all hearings regarding petitions for limited relief.

In civil lawsuits alleging negligent hiring or other forms of negligence, orders of limited relief are evidence of due care in hiring, retaining, licensing, leasing to, and otherwise transacting business with the convicted individual if the person being sued knew of the order at the time of the alleged negligence or fault.

Finally, SB 158 expressly does not provide a basis for invalidating a plea or conviction or a cause of action for monetary damages, and it does not affect the rights of crime victims.

The bill carries a delayed effective date of January 1, 2014.

FISCAL IMPLICATIONS

The NMSC estimates that the cost to the New Mexico Sentencing Commission of identifying, collecting and publishing a list of collateral consequences will be in the range of \$10,000 to \$15,000 in FY 14. Although the NMSC advises the cost of updating the list in succeeding fiscal years should be less than that amount, because it did not provide a figure the higher range is set forth for FY 15 in the table above. The PDD anticipates providing considerable assistance to the NMSC in its preparation of that listing, but suggests any cost to the PDD is likely to be absorbed in the ordinary course of business.

Additionally, while the AOC warns that SB 158 could lead to additional hearings when the collateral consequences are what are really at stake, as well as additional hearings on motions for orders of limited relief, the cost of which are unknown at this time, it is also possible that fewer pleas will be overturned as involuntary or uninformed, so fewer reversals for new trials or additional proceedings may occur than currently.

SIGNIFICANT ISSUES

The PDD first advises that in New Mexico, juvenile adjudications expressly do not have collateral consequences, in direct contradiction to the definition of conviction contained in the Act, which includes an adjudication as a juvenile. It first calls attention to the Children's Code's Delinquency Act, which declares its stated purpose is:

consistent with the protection of the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors, and to provide a program of supervision, care and rehabilitation, including rehabilitative restitution by the child to the victims of the child's delinquent act to the extent that the child is reasonably able to do so.

Section 32A-2-2, NMSA 1978. "Thus, unlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children." *State v. Jones*, 2010-NMSC-012, ¶ 35, 148 N.M. 1, 229 P.3d 474. Accordingly, Section 32A-2-18, NMSA 1978 of the Delinquency Act expressly provides that there are no collateral consequences for delinquency adjudications.

The AGO points out another potential conflict with existing law. The Criminal Offender Employment Act, Sections 28-2-1-6, NMSA 1978 sets forth procedures public boards or other public agencies must follow in making employment and licensing decisions when faced with an applicant who has been convicted of a felony or certain misdemeanors. In response, numerous licensing boards have procedures in place concerning applicants and licensees who have convictions. To the extent this Act may conflict with that law, it is not clear how those conflicts would be resolved.

More generally, the NMSC explains the concern raised by collateral consequences:

Collateral consequences are generally regarded as the negative effects on a criminal offender that persist after the completion of a sentence of imprisonment, probation or parole. Common examples include the loss of the right to vote, disqualification for employment opportunities and inclusion in criminal justice databases. Collateral consequences highlight the tension between the desire to punish criminal offenders and ensure public safety, while not placing unnecessary barriers on offenders attempting to successfully reenter society.

The NMCD suggests that, to the extent the bill ultimately results in the removal of social barriers for former inmates (in employment, public housing, and the other collateral sanctions identified in the bill), it could help reduce recidivism rates, and ultimately the NMCD prison population and probation/parole caseloads. It notes that any reduction is speculative, and unlikely to arise until after FY 15.

In light of these concerns, the absence in the Act of any procedure that allows for consideration of petitions for limited relief after an offender has completed serving a period of incarceration, or after completion of probation or parole may be significant. If an offender wants an order of limited relief issued, the Act requires it be requested at or before the time of sentencing. The Act provides no method to seek such relief once the offender is released from prison. Thus, this Act will not help an offender find housing and/or jobs when being released back to society if the offender does not think to apply for this relief at or before the time of sentencing.

PERFORMANCE IMPLICATIONS

The NMCD states it should be able to absorb the required notices to its paroling or discharging inmates with current staffing levels. The AODA predicts that SB 158 very likely will add following most criminal trials additional hearings at which defendants seek orders of limited relief.

TECHNICAL ISSUES

Page 13, line 7: If SB 158's procedures to seek a limited order of relief are intended to apply only to defendants convicted of an offense in New Mexico, adding language such as "in New Mexico" following "offense" may provide clarity.

OTHER SUBSTANTIVE ISSUES

The Act provides that if an offense in another jurisdiction is the same as an offense in New Mexico, by a comparison of elements, then it is deemed a conviction in New Mexico. If there is

no offense in New Mexico with the same elements, then the conviction is deemed a conviction of the most serious offense in New Mexico based on the elements of the offense from the other jurisdiction. A misdemeanor in the other jurisdiction is not deemed a felony in New Mexico and an offense less than a misdemeanor in the other jurisdiction shall not be deemed a felony or misdemeanor in New Mexico.

The PDD advises the New Mexico Supreme Court analyzes offense equivalency in a different and perhaps more expansive manner for purposes of the Sexual Offender Registration and Notification Act (SORNA):

In *State v. Hall*, the New Mexico Supreme Court announced a new test that considers the actual conduct that served as the basis of the underlying conviction, and requires the district court to make findings in accordance with the new test. The Court reasoned from legislative history that the legislature desires an expansive SORNA database that is inclusive rather than exclusive. If the statute from another jurisdiction has a clear equivalent with New Mexico SORNA enumerated crime, the offender is required to register. However, if there is not an equivalent, courts must analyze the actual conduct undertaken that resulted in the out of state conviction. If that conduct matches with the crimes enumerated in the New Mexico SORNA statute, the offender will be required to register, irrespective of whether the crime of which he was convicted has a New Mexico SORNA equivalent and “even when the elements are dissimilar.”

In terms of the requirements in the Act that a defendant be advised by counsel of the collateral consequences of a conviction, the AODA advises that in 2010, the United States Supreme Court held that a defense counsel was obligated, under the Sixth Amendment, to advise the defendant of the possibility that a guilty plea would lead to deportation. New Mexico courts had already imposed that requirement in 2004. SB 158 expands that requirement and provides a comprehensive process for notifying felony defendants of the collateral consequences of conviction, not just the collateral consequence of deportation.

Current law makes individuals with felony convictions ineligible to become correctional officers. The NMCD points out that because Section 11 does not exempt this collateral sanction from the scope of the relief that may be afforded under the bill, the bill could conceivably result in a convicted felon being eligible to become a correctional officer. The NMCD advises it would take the position that having a convicted felon (especially one who had previously served prison time in a NMCD prison) work as a correctional officer in a NMCD prison would pose an unreasonable risk to the convicted person as well as NMCD staff.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AODA comments that there will be no standard procedures for notifying felony defendants of collateral consequences, no standards for recognizing convictions from other jurisdictions and, no procedure in place for felons to seek any relief from collateral sanctions and disqualifications.