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FISCAL IMPACT REPORT

ORIGINAL DATE 3/2/15

SPONSOR Dines **LAST UPDATED** _____ **HB** 570

SHORT TITLE Habitual Offender Sentencing and DWIs **SB** _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (AGO)
 New Mexico Department of Transportation (NMDOT)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

HB 570 would amend the habitual offender statute to include any non-capital felony conviction, and would specifically include felony driving while intoxicated (“DWI”) convictions, that could be considered as a prior felony conviction to determine if someone is a habitual offender. The current habitual offender law includes only non-capital felonies in the Criminal Code and Controlled Substance Act. It also provides that a prior DWI conviction “...that is used to enhance the punishment for (DWI) shall also be used as the basis for enhancement of the offender’s sentence” as a habitual offender.

FISCAL IMPLICATIONS

AODA stated that it is likely that persons with one or more prior felony convictions, who are charged with a DWI felony will litigate the case and go to trial instead of risking the increased incarceration period for being a habitual offender. More personal and financial resources will be needed for the courts, district attorneys, defenders and—ultimately corrections department to cope with the increased workloads.

NMCD stated that the bill does not appear to fiscally impact NMCD during the relevant three year period. However, the bill will impact NMCD in subsequent years, as offenders convicted of two or more felony DWI offenses (or convicted of one felony DWI and one or more other noncapital felony crimes) start being sentenced to NMCD as habitual offenders who then serve longer or enhanced prison sentences. At some point in the future, these longer or enhanced prison sentences will impact NMCD's inmate population. It should also be noted that offenders already in NMCD's custody or in the judicial system will not be impacted by this bill.

The average cost to house an NMCD inmate in 2014 was \$100.83 per day or \$36.8 thousand annually. The cost to house inmates varies depending on custody level and whether the inmate is housed in a private or public facility.

SIGNIFICANT ISSUES

NMDOT stated that one of their safety goals is to reduce motor vehicle related DWI crashes, injuries and deaths. Increasing penalties for repeat DWI offenders would likely reduce recidivism and thus have a positive impact on NMDOT's safety goal.

AOC stated that escalating sanctions for DWIs are defined by existing statute at 66-8-102 NMSA 1978. If this bill becomes law, there will be two separate sections of law that impose mandatory minimums and increasing sanctions for subsequent felony convictions for DWI. There is thus a foreseeable constitutional double jeopardy question in whether escalated sanctions can be accumulated with habitual offender sanctions. It is not clear how the courts will resolve this question.

AODA provided the following:

HB 570 will close a gap in the habitual offender statute that has allowed persons with felony DWI convictions to avoid those felony convictions being used to enhance their sentences if they are otherwise qualified as habitual offenders. Although the bill expressly includes "...a conviction pursuant to Section 66-8-102 NMSA 1978" (the DWI statute), presumably persons convicted of vehicular homicide or great bodily injury by vehicle could also have their sentences enhanced as habitual offenders if they have the other predicate felony convictions required by statute since the bill would cover any "non-capital felony." Since it is not limited to any particular codification of felony offenses a wide variety of crimes could serve as predicate felonies for sentence enhancements as habitual offenders. The usable felony convictions could range from crimes as diverse as election malfeasance to violations of environmental standards. See, e.g., Sect. 1-20-9, NMSA 1978 (Falsifying election documents.), Sect. 1-20-14 and Sect. 3-8-76, NMSA 1978 (Intimidation of voters or election officials) and Sect. 74-6-10.2, NMSA 1978 (Violating water quality requirements.)

HB 570 expressly states that a prior DWI conviction "...that is used to enhance the punishment for driving under the influence of intoxicating liquor or drugs shall also be used as the basis for the enhancement of the offender's sentence" under the habitual offender statute. Ordinarily the State is forbidden from using a single conviction to both fulfill an essential element of a crime and then again to enhance a defendant's sentence under the habitual offender statute, i.e., it could not use the defendant's prior felony conviction to prove the defendant was a felon in possession of a firearm, and then use the same felony conviction to enhance his sentence as a habitual offender. See, *State v.*

Haddenham, 110 N.M. 149 (1990). “Such duplication offends double jeopardy unless the Legislature has clearly expressed its intent otherwise.” If a felony DWI conviction is only one of the felony convictions used to prove someone is a habitual offender there should be no issue at all. Defendants may claim that if two or more of the felony convictions used to prove they are a habitual offender are based on prior DWI’s, the State will have to elect between using prior convictions to have the offense punished as a fourth, fifth, sixth, or seventh or subsequent, conviction (each of which has different penalties) and whether to utilize one, or more, of the prior DWI convictions to enhance the defendant’s sentence as a habitual offender. By its clear language this bill should permit a defendant’s prior DWI convictions to support making the offense a fourth or third degree felony, and to also use the conviction(s) to support enhancement of the sentence as a habitual offender.

EC/je/aml