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FISCAL IMPACT REPORT

ORIGINAL DATE 2/3/16
LAST UPDATED 2/16/16 **HB** 36/aHSCAC/aHF1#1
SPONSOR Rehm
SHORT TITLE Time Limit for Prosecuting Certain Crimes **SB** _____
ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			Indeterminate Increase	Indeterminate Increase	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of House Floor Amendment #1

House Floor Amendment #1 to House Safety and Civil Affairs Committee amendment to House Bill 36 add first degree felony trafficking in controlled substances to the list of crimes with no time limitation.

Synopsis of HSCAC Amendment

House Safety and Civil Affairs Committee amendment to House Bill 36 adds the statutory citation for conspiracy and tampering with evidence and “highest” when referring to the crime conspired to be committed or for which tampering with evidence was committed. The amendment addresses the concerns expressed and changes suggested by the several of the agencies responding to the original bill, which remain in this analysis strictly for reference purposes.

Synopsis of Bill

House Bill 36 proposes to amend Section 30-1-8 NMSA 1978 to include the crime of conspiracy with the same time period as the crime conspired to be committed and the crime of tampering with evidence with the same time limits as the crime for which tampering with evidence was committed. It also adds murder in the second degree to the list of crimes with no time limitation. Lastly, the bill removes “violent” from a first degree felony so that there is no time limitation to prosecute a first degree felony.

The effective date of the bill is July 1, 2016.

FISCAL IMPLICATIONS

The AOC, AODA and PDD state that HB36 may have minimal fiscal impact, however, an increase of these cases may require additional resources. Although it is difficult to accurately estimate the cost of increased trials because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly for the district courts, district attorneys and public defenders are as follow:

- PDD: \$152.1
- District Attorneys: \$195.4
- District Courts: \$335.6

NMCD states that if the bill is enacted and results in substantially more convictions, it would increase NMCD’s prison population and probation/parole caseloads, and would impede the performance of prison-related and probation/parole supervision-related services at current levels of staff by requiring staff to do more work with more offenders.

Although the NMCD’s budget may not be negatively impacted in FY16 or FY17, it will be impacted if this bill becomes law. Increased length of stay will increase the cost to house an offender in prison. The average cost to incarcerate one inmate over the last three years has increased 6.5 percent. Based on this trend, the cost to house one inmate will increase to \$51.2 thousand and \$54.1 thousand in FY17 and FY18, respectively.

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. According to the NMCD, the cost per day to house an inmate in state prison (public and private combined) is an average of \$123 per day, or about \$45,250 per year. Increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions pushing the overall prison population higher. NMCD’s general fund budget, not including supplemental appropriations, has grown \$5 million, or 7 percent, since FY11 as a result of growing prison population.

According to NMCD, ultimately it seems likely that this bill, in conjunction with other bills increasing the criminal penalties of various crimes, will result in the Department reaching its full capacity at some point in the near future. At that point, the Department will have to build, purchase or lease additional bed space, and such space is expensive. Using probation or diversion programs to avoid sending non-predatory, nonviolent offenders in order to make room for the predatory DWI offenders in prison is going to be needed to reduce or alleviate the

Department’s fast approaching lack of bed space. NMCD predicts it will reach 98 percent of its prison capacity by the summer of 2016.

SIGNIFICANT ISSUES

AODA provides the following regarding HB36 as it relates to conspiracy

- HB36 ties the statute of limitations for “conspiracy” and “tampering” to the statute of limitations applicable to the crime conspired to be committed, or the crime for which tampering is committed. But a single conspiracy or tampering count may be associated with multiple crimes. For this reason, the basic statutes for conspiracy and tampering look to the highest underlying crime to determine the degree of the tampering or conspiracy offense. See NMSA 1978, Section 30-28-2 and NMSA 1978, Section 30-22-5. It would be helpful to use the same language in Section 30-1-8, so that the statute of limitations for conspiracy or tampering is linked to the highest crime conspired to be committed, or the highest crime for which tampering is committed.
- When Section 30-1-8 sets a special time limit for a specific crime, it identifies that crime by its statutory citation. HB36 contains special provisions for “conspiracy” and “tampering with evidence,” but does not give statutory citations for those crimes. Unless HB36’s special provisions are intended to apply to all “conspiracy” and “tampering” crimes, this could cause confusion. For example, there is the general statute for conspiracy to commit a felony (NMSA 1978, Section 30-28-2), and there are other specific “conspiracy” crimes, such as conspiracy to violate the Election Code (see NMSA 1978, Section 1-20-15).

The AGO provides the following:

Criminal statutes of limitation are a matter for legislative judgment. *See State v. Kerby*, 2007-NMSC-014, ¶ 13, 141 N.M. 413 (explaining that the purpose of a criminal statute of limitations “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”).

An issue may arise regarding the retroactivity of these new time periods if the act is passed. In *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, the Court considered the defendant’s claim that the new unlimited statute of limitations on first-degree murder, which replaced the older statute of limitation of 15 years for capital felonies and first-degree violent felonies, could not be applied to him because he committed his crime before the effective date of the new statute of limitation. The Court disagreed, primarily because the original statute of limitations had not yet run on his crime. The Court held that the statutory amendment applied to the defendant because prosecution for his crime was not time barred at the time of the effective date of the statutory amendment. Thus, “[b]ecause a defendant does not have a vested interest in an unexpired statute of limitation, a legislative amendment extending or abolishing the limitation period does not impair vested rights, require new obligations, impose new duties, or affix new disabilities to past transactions.” *Morales*, 2010-NMSC-026, ¶ 11.

However, the result will likely be different if the original statute of limitations has already expired. The Court specifically distinguished *Kerby* on this ground

in *Morales* – “In *Kerby*, the applicable statute of limitations had expired and, therefore, the defendant's right to be free from criminal prosecution had fully vested. Under these circumstances, the statute of limitations defense is a substantive right and subsequent statutory amendments cannot be “applied to revive [the] previously time-barred prosecution.” *Morales*, 2010-NMSC-026, ¶ 17.

The PDD opines as follows:

While statutes of limitation for most crimes have been a feature of American criminal law since the early days of the Republic, their application has been far from universal (England appears to have no general statute of limitation to criminal actions) and the time limits for prosecution of given crimes vary widely across the various states. *See Listokin, Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. Legal Stud. 99 (2002).

However, the passage of time almost inevitably results in the loss of evidence available for both the prosecution and the defense of criminal charges. The loss of physical evidence and the fading of memories can make it difficult to mount legitimate defenses to allegations which arise many years after an alleged event. Statutes of limitations are designed to limit the ability of the state to reach back in time and charge suspects for past alleged deeds, and to provide a sense of certainty for all parties.

AOC points out that HB36 does not contain a requirement that the prosecution act diligently in bringing charges against a defendant for those crimes for which there is no statute of limitations. The general purpose of statutes of limitation is to make sure that convictions occur only upon evidence that has not deteriorated with time. Convictions based upon stale or now unavailable testimonial evidence may be challenged as in violation of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and Section 14 of the New Mexico Constitution.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the following performance measures:

- NMCD:
 - Percent of prisoners reincarcerated back into the corrections department within thirty-six months due to technical parole violations;
 - Percent of prisoners reincarcerated back into the corrections department system within thirty-six months due to new charges or pending charges;
 - Percent of inmates testing positive for drug use or refusing to be tested in a random monthly drug test;
 - Percent of sex offenders reincarcerated back into the corrections department within thirty-six months; and
- District Courts:
 - Cases disposed of as a percent of cases filed;
 - Percent change in case filings by case type;
- District Attorneys:
 - Average caseload per attorney;
 - Number of cases prosecuted; Number of cases prosecuted per attorney;

- Public Defenders:
 - Percent of cases taken by contract attorneys;
 - Percent of cases that go to trial with clients defended by contract attorneys.

TECHNICAL ISSUES

AOC suggests including a statutory citation for the crimes of “conspiracy” and “tampering with evidence” to avoid the unintended inclusion of all “conspiracy” and “tampering” crimes (i.e. Section 30-28-2 NMSA 1978, general conspiracy crime; Section 30-22-5 NMSA 1978, general tampering with evidence crime).

AODA suggests the following change to clarify that the statute of limitations for conspiracy and tampering with evidence is determined by the highest level associated crime.

“E. for the crime of conspiracy, within the same time period as the highest crime conspired to be committed would be prosecuted; F. for the crime of tampering with evidence, within the same time period as the highest crime for which the tampering with evidence was committed would be prosecuted;”

OTHER SUBSTANTIVE ISSUES

Many states currently have no time limitations for prosecuting homicide cases. See the attached study, entitled “Statutes of Limitation in Federal Criminal Cases: An Overview” (Congressional Research Service) (October 2012). Appendix B sets forth a summary of state laws regarding statutes of limitation.

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