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## FISCAL IMPACT REPORT

SPONSOR HCPAC ORIGINAL DATE 1/19/2017  
LAST UPDATED 2/27/2017 HB 54/HCPACS

SHORT TITLE Additional Felonies for Sentencing SB \_\_\_\_\_

ANALYST Rogers

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$1,095.8 - \$2,095.8	\$2,177.1 - \$4,177.1	\$3,272.9 - \$6,272.9	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 13.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Office of the Attorney General (OAG)  
New Mexico Sentencing Commission (NMSC)  
Law Office of the Public Defender (LOPD)  
New Mexico Corrections Department (NMCD)

#### Responses Not Received From

Administrative Office of the District Attorney (AODA)

### SUMMARY

#### Synopsis of HCPAC Substitute

The House Consumer and Public Affairs Committee substitute for House Bill 54 adds additional violent crimes to the five crimes covered in the current “three strikes” law. The bill increases the number and type of qualifying felonies under which a person being sentenced for a third conviction must be given a mandatory life sentence.

HB 54 applies to persons who have been convicted on, before, or after the effective date of the Act of one of the violent felonies described in Section 1 for the purpose of determining sentencing enhancements pursuant to that section.

OAG analysis states HB 54 amends the existing life imprisonment for three violent felony convictions statute to change the definition of what constitutes a violent felony by removing the “great bodily harm” requirement, then expands the list of applicable felony crimes to mirror the serious violent offense definition in Section 33-2-34(L)(4) NMSA 1978.

<b>Currently Included</b>	<b>Additional Crimes</b>
First and second degree murder	Voluntary manslaughter
Shooting at or from a motor vehicle resulting in great bodily harm to another person	Aggravated battery resulting in great bodily harm
Kidnapping resulting in great bodily harm to the victim	Shooting at a dwelling or occupied building that results in great bodily harm to another person
Criminal sexual penetration	Aggravated battery against a household member by inflicting great bodily harm with a deadly weapon or where great bodily harm or death can be inflicted
Armed robbery resulting in great bodily harm	Abuse of a child that results in great bodily harm to the child
	Aggravated criminal sexual penetration
	Aggravated arson
	Aggravated assault upon a peace officer
	Assault with intent to commit a violent felony upon a peace officer
	Aggravated battery upon a peace officer inflicting great bodily harm

**FISCAL IMPLICATIONS**

The fiscal impact of this bill will be large. NMSC projects (see attachment 1) incarceration costs alone over the next 30 years could cause a general fund impact of \$32.4 million. AOC explains as penalties become more severe, defendants may invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees. These additional costs are not capable of quantification. The courts state there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

See attachment 1.

**SIGNIFICANT ISSUES**

NMSC explains New Mexico’s three strikes law (Sections 31-18-23 and 31-18-24 NMSA 1978) was enacted in 1994. Section 31-18-24 NMSA 1978 (not included in HB 54) sets forth sentencing procedures if a three strikes sentencing enhancement is pursued:

“31-18-24. Violent felony sentencing procedure.

- A. The court shall conduct a separate sentencing proceeding to determine any controverted

question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.

B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.

C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.”

NMSC staff reviewed available New Mexico criminal justice data and were unable to find an instance when an offender received a three strikes sentencing enhancement.

According to NMSC, 28 states, including New Mexico, have a form of three strikes laws. Other states include Texas, Utah, Arizona, Colorado, and Nevada.

The AOC submits the following information:

1) The substitute retains the definition for “great bodily harm” in Section 1(E)(1). As other agencies have noted, the removal of the definition and the need for it in the original HB 54 appeared to take the bill and its intentions away from the desire to punish an offender for the commission of violent crimes that had caused physical harm to others and to protect the public from repeat violent offenders. The inclusion of Section 1(E)(2)(m) Crime of Assault with Intent to Commit a Violent Felony Upon a Peace Officer (Section 30-22-23 NMSA 1978) in the list of violent felonies appears to dilute the original intent of the mandatory sentence of life imprisonment without the possibility of parole for three violent felonies causing physical harm to another.

2) A person convicted of three violent felonies, where at least the third conviction is in New Mexico, is subject to a mandatory sentence of life imprisonment. The sentence of life imprisonment is to be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violent felony conviction, pursuant to Section 31-18-24 NMSA 1978. A violent felony conviction incurred by a defendant before the defendant reaches 18 years old shall not count as a violent felony conviction under Section 31-18-23.

3) It should be noted that as penalties increase, potential life imprisonment tends to inspire defendants to retain attorneys and demand jury trials. Indigent offenders are entitled to public defender services.

4) Life imprisonment cases take up a considerable amount of judicial time. Expanding the list of violent felonies for a “three strikes” case may increase the amount of work that needs to be done by the courts, thus requiring additional resources to handle the increased workload.

5) See, Criminal Justice Reform Subcommittee of the Courts Corrections and Justice Interim Committee, June 25, 2015; specifically, exhibits for presentations relating to mandatory

minimum sentencing reform.

### **PERFORMANCE IMPLICATIONS**

The AOC is participating in performance-based budgeting. The bill may have an impact on the measures of cases disposed of as a percent of cases filed and percent change in case filings by case type.

### **ADMINISTRATIVE IMPLICATIONS**

LOPD noted that the proposed legislation would “certainly affect LOPD attorneys’ representation in cases where a potential third violent felony is charged, increasing the number of these cases that go to trial.”

### **TECHNICAL ISSUES**

The OAG points out Section 1(A)(2) is missing part of the name of the crime, specifically “manslaughter.” Some of the enumerated crimes include cites to subsections which correlate to the degree felony, while others only indicate the degree felony without the subsection citation. This should be consistent throughout the statute.

### **OTHER SUBSTANTIVE ISSUES**

NMSC and the OAG caution care should be taken to ensure that the applicability section does not violate the provisions of Article II, Section 19 of the New Mexico Constitution preventing retroactive laws, bills of attainder, and impairment of contracts: “no ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.”

NMSC explained that many states, including New Mexico, have adopted “truth in sentencing” laws. Such laws typically require “serious violent offenders” to serve not less than 85 percent of their sentence.

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NMSC provided an extensive cost simulation, provided below:

**Simulation of Number of Offenders 2000 – 2014**

To determine the impact of expanding the list of qualifying offenses subject to mandatory life imprisonment for three violent felony convictions, NMSC used data provided by the courts to run a simulation. Table 1 contains the list of charges in the bill that were used in the analysis.

Table 1. Charges

First Degree Murder
Second Degree Murder
Voluntary Manslaughter
3rd Degree Aggravated Battery with Great Bodily Harm
2nd Degree Shooting at a Dwelling of Occupied Building
2nd Degree Shooting at or from a Motor Vehicle
3rd Degree Aggravated Battery Against a Household Member
Kidnapping
1st Degree Child Abuse
1st Degree Criminal Sexual Penetration
1st or 2nd Robbery
Aggravated Arson
Aggravated Assault Upon a Peace Officer
Assault with Intent to Commit a Violent Felony Upon a Peace Officer
Aggravated Battery Upon a Peace Officer with Great Bodily Harm

NMSC has data on court cases disposed from 2000 – 2014. For the simulation, NMSC tried to determine the effect if the law had been changed in 2000 to include the charges above. The commission selected all cases that had a conviction on any of the above charges from 2000 – 2014 and then counted the number of convictions by offender. Over the 15-year period, 8,355 individuals were convicted for one of the charges at least once. Table 2 contains the number of individuals that were convicted once, twice or three times or more over the 15 year time period. The percentage of offenders who had three or more convictions was 0.4%. This would yield an estimated additional 35 offenders in the New Mexico Corrections Department serving life sentences over the first 15 years of the statute implementation. There were 379 offenders who had two convictions during the time period on these charges (4.5%).

Table 2. Number of Offenders by Number of Convictions

Once	7,941	95.0%
Twice	379	4.5%
3 times or more	35	0.4%
<b>Total</b>	<b>8,355</b>	<b>100%</b>

### **Estimating Differences in Sentence Lengths**

To estimate the difference in sentence lengths, NMSC used New Mexico Corrections Department (NMCD) release data. NMSC looked at the average time from sentence date to release date for each of the charges. The commission found the averages varied widely by charge, ranging from 2 to 21.5 years. It is important to note that this average does not include any pre-sentence confinement credit, so the actual amount of time served is probably higher.

NMSC then calculated the weighted average, which takes into account the number of offenders who served time for each charge relative to the total number. For example, 1st degree murder has the longest average. However, there are fewer offenders who serve time on that charge compared to a charge like 3rd Degree Aggravated Battery, which has a large number of offenders and a significantly shorter average sentence to release length.

### **Estimated Cost of Increased Sentence Length**

NMSC found the weighted average from sentence date to release date across all these crimes was 4.8 years. If upon the third conviction for one of these crimes, the offender was subject to a 30-year sentence, we estimate that the average time from sentence to release would be 25.5 years, if an offender earned all available meritorious deduction. This would be an increase in sentence of 20.7 years.

Using the department's average cost to incarcerate a male inmate of \$44.8 thousand per year in a state-owned prison, the individual added impact per inmate would be \$926.8 thousand across their prison sentence. For the entire 15-year period, the cost would be \$32.4 million if all 35 offenders who had three or more convictions on these charges received a 30-year sentence.

The Law Office of the Public Defender (LOPD) explained that when a life sentence is being considered, the defendant is more likely to retain a lawyer and go to trial with the goal of acquittal or lesser conviction instead of a life sentence. Both the Administrative Office of the Courts (AOC) and LOPD stated that the increase in the number of these complex cases will take more resources, leading to higher costs and could lead to a need for increased indigent defense funding to maintain constitutional compliance.

NMCD explains "it is always difficult to predict or estimate with certainty the ultimate effect of any criminal penalty enhancement bill such as this one. However, the expanded list of violent felonies created by this substitute, just like in the original bill, could potentially increase the number of life sentences being served by inmates in NMCD prisons. However, it is also important to consider the bill's potential impact on deterring criminal activity and the ultimate economic savings or benefits it could garner for the state. That is, less direct, more global, long term savings are often overlooked in the fiscal analysis of public safety bills. For example, should this bill deter

offenders from committing a third violent felony in order to avoid having to serve a life sentence, it would increase the public’s sense of safety by deterring and reducing crime victimization, and a host of savings could be realized by this state. These savings range from reducing the expenses and impact of crimes upon victims (loss of productivity, physical and mental health treatment expenses, and loss of quality of life), reduced costs associated with victim support and advocacy services, reduced court costs to adjudicate offenders, to reducing or eliminating the negative impact of higher crime rates upon the state’s economic recovery or growth). Significantly, if these savings are realized, they might ultimately offset or exceed the more direct and tangible costs of incarceration and prison management.”

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. An 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 base budget has grown by an average \$9.5 million per year, or 3 percent, since FY14 as a result of growing prison population and inmate’s needs.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage, losses in future earnings, and intangible victim costs such as jury awards for pain, suffering, and lost quality of life.

