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## FISCAL IMPACT REPORT

SPONSOR SJC ORIGINAL DATE 2/13/17  
LAST UPDATED 2/27/17 HB \_\_\_\_\_

SHORT TITLE Prohibit Possession of Devices by Prisoners SB 99/SJCS/aSFC

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>	Minimal	Minimal	Minimal	Minimal	Minimal	Minimal

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Not Received From

New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of SFC Amendment

The Senate Finance Committee amendment to Senate Bill 99 adds language allowing use of electronic communication or recording devices that aid prisoners who have hearing or speech deficiencies or other conditions that requires the use of the devices.

#### Synopsis of SJC Substitute

The Senate Judiciary Committee substitute for Senate Bill 99 indicates that the bill does not prohibit the use of hearing aids, voice amplifiers or other medical equipment needed to aid prisoners or their visitors, and that rules for such devices must be established by the relevant warden of each jail, detention center and prison. SB 99 defines “electronic communication or recording device” to exclude any device that is or will be used by prison or jail personnel in the regular course of business or that is otherwise authorized by the warden.

The substitute reduces the proposed penalty for an inmate in possession of an electronic communication or recording device from a fourth degree felony to a misdemeanor. Fourth degree felonies carry a potential incarceration term of 18 months, while misdemeanors only carry a potential incarceration term of less than twelve months.

## FISCAL IMPLICATIONS

NMCD states the fiscal impact of the bill would likely be minimal due to a minimal number of new misdemeanor convictions for this reason in any given year.

## SIGNIFICANT ISSUES

New Mexico's state prisons were more dangerous in FY16 than in the previous two years. There were 21 inmate-on-inmate assaults and 9 inmate-on-staff assaults resulting in serious injury, compared to an average 11 inmate-on-inmate assaults and 4 inmate-on-inmate assaults in FY14 and FY15.

Some of the violence can be attributed to the department moving from a security and containment incarceration model to a rehabilitation model. The change allows for more congregate movement among inmates which can lead to violent clashes. The department has established the Predatory Behavior Management Program to help decrease violent occurrences and is working towards alternatives to incarceration for non-violent offenders to reduce overcrowding.

State prisons maintain high vacancy rates among correctional officers, 22 percent in December 2016, which could make enforcing this bill difficult. The department has experienced chronic vacancy rates among custody staff, resulting in high overtime costs and a dangerous prison environment. Unfilled vacancies lead to increased overtime costs because officers are forced to work additional hours to cover shift vacancies.

NMCD submits the following analyses:

In 2013, SB 40 was passed, making it a third degree felony for visitors and staff to bring in a cell phone or other electronic communication device if done for the purpose of transferring it to a jail or NMCD prison prisoner. However, it is still not a crime for an inmate to be in subsequent possession of the cell phone or device. NMCD has only been able to minimally administratively deter the possession by giving the inmate a misconduct report resulting in a forfeiture of a small amount of good time. If the inmate has already forfeited his good time due to other misconduct, or if the inmate is eligible to earn only four days of good time per month at most due to having been convicted of a serious violent offense, either or both of which is often the case, then the threat of the administrative loss of good time for possession of a cell phone is meaningless and lacks any deterrent effect. This bill, if passed, would enable NMCD for the first time to criminally deter its inmates from being in possession of cell phones and other electronic communication devices.

Such deterrence is important to protect prison and public safety. Inmates often use the cell phones to engage in drug trafficking and other criminal and disruptive activity which endangers the safety and security of the prison and the community. Such activity includes, but is not limited to, using the cell phones to harass or intimidate victims and witnesses, conduct illegal business related to white collar crimes and gang related prison and street crimes, and to plan prison/jail escapes and disturbances. NMCD correctional staff have no way to monitor or record phone calls made from cell phones, so criminally deterring inmates from attempting to gain possession of cell phones in the first place is a reasonable and efficient way to try to prevent its inmates from improperly using cell phones for criminal

activity.

However, the substitute's reduction of the criminal penalty from a fourth degree to only a misdemeanor may reduce the deterrent effect of the proposed legislation. Since Section 31-18-21 NMSA only applies to felonies committed in prison (and requiring the new felony run consecutively and never concurrently to the inmate's prison sentence), a sentencing judge would have the authority under this substitute bill to run the inmate's misdemeanor conviction for possession of a cell phone concurrently with his current prison sentence. In some cases, this would result in no additional prison time for an inmate convicted for being in possession of a cell phone, therefore actually eliminating any deterrent effect of the bill.

If the substitute bill passes, it will only constitute a misdemeanor for an inmate to be found in possession of a cell phone, while existing law passed in 2013 makes it a third degree felony for visitors or staff to bring a cell phone into a prison facility. Inmates should be punished at least as severely as visitors and staff members.

### **PERFORMANCE IMPLICATIONS**

NMCD tracks the number of inmate-on-inmate and inmate-on-staff assaults. By criminalizing and deterring the possession of a cell phone or other communication device in prison, it is likely that these numbers will decrease and that staff and other inmates will be less likely to be injured or killed.

### **ADMINISTRATIVE IMPLICATIONS**

NMCD states "each year, several inmates are found in possession of a cell phone in NMCD prisons. As noted above, inmates use such phones to engage in criminal activity and to plan escapes and prison disturbances. The current substitute, while designed to criminalize an inmate's possession of a cell phone, will have less of a deterrent effect if the criminal penalty delineated in the substitute remains only a misdemeanor."

### **OTHER SUBSTANTIVE ISSUES**

NMCD explains in 2010, the Federal government amended Section 18 USC 1791 to include "a phone or other device used by a user of commercial mobile services as defined in Section 332(d) of the Communication Act of 1934 in connection with such services" into the list of prohibited items an inmate in a federal prison can make, possess, obtain or attempt to obtain. Other states have also made possession of a cell phone by its inmates a crime, and there appears to be a nationwide concern about inmates getting hold of cell phones and other electronic devices while in prison.

### **ALTERNATIVES**

NMCD suggests amending the substitute to reinsert the fourth degree felony penalty in order to better deter criminal activity and prison disturbances by inmates seeking unauthorized access to cell phones.

TR/al/sb/jle