# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** Rehm **ORIGINAL DATE** 02/03/21 **LAST UPDATED** **HB** 59

**SHORT TITLE** Habitual Felony Offender Consideration **SB**

**ANALYST** Rabin

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

| | FY21 | FY22 | FY23 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | $0.0 | Potentially Substantial – See Fiscal Implications | | | Recurring | General Fund |

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with House Bill 114

**SOURCES OF INFORMATION**
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Attorney General's Office (NMAG)
Sentencing Commission (NMSC)
Corrections Department (NMCD)

**SUMMARY**

Synopsis of Bill

House Bill 59 amends Section 31-18-17 NMSA 1978 to require a prior felony conviction within 25 years of a subsequent felony conviction be considered for the purpose of habitual offender sentencing. Convictions pursuant to Section 66-8-102 NMSA 1978 (Driving Under the Influence) are included as subsequent felony convictions to be considered.

The provisions of the bill apply to persons sentenced on or after July 1, 2021. The effective date of the bill is July 1, 2021.

**FISCAL IMPLICATIONS**

The Corrections Department (NMCD) states that the fiscal impact of HB59 is difficult to estimate,

as it would require conviction speculations. Requiring a longer period of time between felonies in order to avoid habitual-offender penalties could possibly increase prison population as it would likely include a larger amount of offenders with previous felonies under the umbrella of habitual offender. The basic sentence penalties as a result of habitual-offender status will result in longer sentences. Bringing DUI into the scope of prior felony convictions could also cause a moderate increase in prison population as it could include a larger number of offenders with DUI as a previous felony under the same umbrella of habitual offenders.

If sentences are extended due to habitual-offender penalties through these new inclusions, it will likely increase the population of the state's prisons and long-term costs to the general fund, as increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. NMCD reports the average cost to incarcerate a single inmate in FY20 was $44.8 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of $23.3 thousand per inmate per year across all facilities.

The Administrative Office of the Courts (AOC) notes that 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, and courtroom availability and jury fees. These additional costs are not capable of quantification. The imposition of longer, enhanced sentences, in additional cases, may spur more defendants to retain counsel and request jury trials. Indigent offenders are entitled to public defender services.

The Public Defender Department (PDD) provides the following analysis:

> [I]ncreased exposure to prison time for public defender clients will be caused by HB 59, as it more than doubles the time period in which a prior conviction may be used against a person and, thus, greatly expands such individuals' exposure to mandatory incarceration under Section 31-17-17 NMSA. This will result in a substantial increase in the resources the LOPD will have to expend in order to provide effective assistance of counsel to effected individuals.
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> The expanded period will result in a larger number of clients facing mandatory prison time because all proceedings under Section 31-18-17 implicate mandatory prison time, and this will naturally result in more defendants challenging cases through jury trial, who might have resolved a case short of trial otherwise. LOPD cases effected by this change would cost more to defend because more would be at stake. Again, higher-penalty cases are somewhat more likely to go to trial. Any increase in LOPD expenditures brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.
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> Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation of the proposed higher-penalty scheme. If more higher-penalty trials result from enactment, LOPD may need to hire more trial attorneys with greater experience to stay ahead of the rush. Additionally, courts, DAs, AGs, and NMCD could anticipate increased costs.
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> If more trials result, LOPD may need to hire more trial attorneys with experience. Average

> felonies would be handled by mid-level felony capable attorneys (Associate Trial Attorneys). Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation.

On the other hand, the Administrative Office of the District Attorneys (AODA), suggests that increasing the period and offenses eligible for habitual enhancement may allow prosecutors to plea more cases.

**SIGNIFICANT ISSUES**

PDD states:

> The twenty-five year window for using prior felonies for sentence enhancement creates an inconsistency in the way offenders are perceived in the law in general. For instance, the rules of evidence use ten years as the window for which a person's credibility may be impeached through a prior conviction. HB59 creates an inconsistency and also expands the period from which a person cannot fully rehabilitate and reintegrate back into law abiding society. In essence, it stands to increase, not decrease, the likelihood of reoffending where individuals are branded as being criminals for longer periods.
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> Additionally, because it extends the ten-year limit by 15 years further beyond the completion of any sentence including any period of probation or parole, it is likely that the proposed legislation would affect primarily older defendants. Such defendants are more likely to be charged with nonviolent felonies. It would therefore increase mandatory periods of incarceration, and costs to the state, with a questionable nexus to public safety.

PDD and the Attorney General's Office (NMAG) both raise concerns due to the fact that DWI is already a self-enhancing penalty. According to NMAG:

> The manner in which the bill attempts to count DWI convictions under Section 66-8-102 as prior felonies could be ineffective under New Mexico Supreme Court precedent.
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> Section 66-8-102 contains its own enhancement scheme for repeat offenders by punishing classifying subsequent DWI convictions as more serious felonies. This bill would impose habitual offender penalties on top of already-enhanced DWI convictions. In *State v. Anaya*, the New Mexico Supreme Court ruled that the State could not impose habitual offender enhancements under a prior version of Section 31-18-17 for already-enhanced DWI convictions. 1997-NMSC-010, ¶¶ 22-36, 123 N.M. 14. When the Supreme Court decided *Anaya*, the habitual offender statute did not expressly include or exclude DWI convictions. *Id.* ¶ 26. Anaya and other repeat offenders claimed that enhancing their sentences under both statutes would constitute impermissible double punishment, likely on double jeopardy grounds. *Id.* ¶ 27. The Court did not decide the case on double jeopardy grounds, but instead concluded as a matter of statutory interpretation that the Legislature did not intend to impose habitual offender enhancements in addition to Section 66-8-102's internal enhancements. The Court noted that the habitual offender statute was "completely silent as to the applicability of" the DWI statute's enhancement provision. *Id.*
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> By removing any reference to Section 66-8-102, Section 31-18-17 would once again be

> "completely silent" as to whether it applied to enhanced DWI convictions. Habitual offenders would therefore have a fair argument that *Anaya* would apply again and the State could not enhance sentences under both statutes. This argument would not necessarily succeed; a court might hold that the Legislature made its intent clear by removing the exception for DWI offenses. The likelihood of its success, however, would be difficult to predict if Section 31-18-17 does not expressly include DWI convictions.

NMCD notes that Section 2 purports to apply the new statute to pending criminal cases in which sentencing has not taken place, which the agency believes appears contrary to Article IV, Section 34, of the New Mexico Constitution ("No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.") It may also create due process issues if defendants were advised of former potential penalties at criminal arraignment. Alteration to apply to new cases filed on or after July 1, 2021, would avoid those issues.

AOC states:

> The HB 59 amendment to Section 31-18-17(D) NMSA 1978 clarifies that a conviction for a felony pursuant to Section 66-8-102 NMSA 1978 is included within the definition of "prior felony conviction." To constitute a felony DWI, the offender has to have 4 or more DWI convictions. (Subsection (G))

AODA notes that it may be difficult to establish accurate and verifiable documentation to include felonies older than 25 years.

## ADMINISTRATIVE IMPLICATIONS

AOC believes 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.

## CONFLICT

HB59 conflicts with House Bill 114, also amends Section 31-18-17 NMSA 1978. HB114 provides judges discretion as to whether and how much of a habitual offender sentencing enhancement to add to a basic felony sentence and removes convictions for driving under the influence from being subject to these enhancements and maintains its exclusion from consideration as a prior felony conviction.

## TECHNICAL ISSUES

NMAG notes the following technical issue:

> Under Article IV, Section 16 of the New Mexico Constitution, the subject of a bill "shall be clearly expressed in its title." Although courts interpret this provision generously in favor of the legislature and do not require "the title…to be an index of everything in the act itself," it must be specific enough that it "give[s] notice" to the public. *Pierce v. State*, 1996-NMSC-001, ¶ 64, 121 N.M. 212. Notice is especially important in criminal matters.

The title to HB59 is "AN ACT RELATING TO CRIME; PROVIDING THAT A PRIOR FELONY CONVICTION WITHIN TWENTY-FIVE YEARS OF A SUBSEQUENT FELONY CONVICTION BE CONSIDERED FOR THE PURPOSE OF HABITUAL OFFENDER SENTENCING." Although this title clearly notifies the public that the bill will extend the look-back period for habitual sentencing, it does not mention that DWI convictions will now be counted as habitual felonies. This change could expose some habitual offenders to up to eight additional years in prison. As such, it may be safest to add something like the following to the title: "COUNTING FELONY DWI CONVICTIONS FOR THE PURPOSE OF HABITUAL OFFENDER SENTENCING."

**OTHER SUBSTANTIVE ISSUES**

AOC notes the following:

Sentencing reform nationwide has been trending toward enactment of laws and other measures that create or expand opportunities to divert people away from the criminal justice system, reduce prison populations, and support successful reentry into communities. Additionally, the trend has been to reserve sentence enhancement application for the most serious crimes by the most serious offenders. House Bill 59, by including convictions going back 25 years within the definition of "prior felony conviction," triggering habitual offender sentence enhancements without placing further limitations upon the type of older prior felony convictions, appears to run counter to the recent nationwide trends.

**ALTERNATIVES**

NMAG suggests the following alternative:

The cleanest way to avoid *Anaya* and provide notice for all offenders would be to explicitly include convictions under Section 66-8-102 as prior convictions under Section 31-18-17. Instead of striking the existing language entirely, HB59 could simply change the last clause of subsection (D)(1) to read "a prior felony committed within New Mexico whether within the Criminal Code or not, **including** a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978." An explicit statement authorizing punishment under both statutes would also address any double jeopardy concerns. *See Swafford v. State*, 1991-NMSC-043, ¶ 30, 112 N.M. 3 ("If the legislature expressly provides for multiple punishments, the double jeopardy inquiry must cease").

ER/sb