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FISCAL IMPACT REPORT

SPONSOR HJC ORIGINAL DATE 02/10/21 CS/HB114/aSHPAC/
 LAST UPDATED 03/19/21 HB aSJC

SHORT TITLE Habitual Offender Judicial Flexibility SB _____

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Likely Cost Savings - See Fiscal Implications				Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 59, House Bill 140, House Bill 293

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to House Bill 114 removes the Senate Health and Public Affairs Committee amendment from the House Judiciary Committee substitute for House Bill 114 and strikes provisions that removed convictions for driving under the influence (DUI) and simple possession from being subject to habitual offender sentencing enhancements and removed convictions for simple possession from being considered as a prior felony conviction for purposes of these enhancements. (DUI is currently excluded from consideration as a prior felony conviction, which is not altered by this amendment.)

Under this amendment, simple possession offenses may be considered for discretionary sentencing enhancements and previous simple possession offenses are considered as prior convictions for purposes of such enhancements. Although the bill would no longer exclude DUI

as a felony subject to enhancement, existing case law prohibits such sentencing enhancements from being applied to DUI offenses, although statute does not reflect this.¹

Synopsis of SHPAC Amendment

The Senate Health and Public Affairs Committee amendment to House Judiciary Committee substitute for House Bill 114 repeats language added to Subsection A in Subsections B and C to ensure that the elimination of enhancements for simple possession felonies applies to all three enhancement tiers (one, two, or three prior offenses). This change does not substantively change the analysis.

Synopsis of Original Bill

The House Judiciary Committee Substitute for House Bill 114 would grant judges discretion as to whether and how much of a habitual offender sentencing enhancement to add to a basic felony sentence. Current law imposes generally nondiscretionary sentence enhancements for individuals convicted of noncapital felonies after previously being convicted of one or more felony offenses, and sentences are increased by one, four, or eight years (depending on the number of prior felony convictions), and judges are prohibited from suspending or deferring a four- or eight-year enhancement. HB114/HJCS would make these sentencing enhancements discretionary and their terms maximums, so judges may impose enhancements of up to one, four, or eight years, but are not required to do so. The bill also provides judges with the discretion to suspend or defer any of these sentencing enhancements.

HB114/HJCS also removes convictions for driving under the influence (DUI) and simple possession (defined as possession of a controlled substance pursuant to Section 30-31-23 NMSA 1978 or possession of a dangerous drug pursuant to Subsection E of Section 26-1-16 NMSA 1978) from being subject to these enhancements and removes convictions for simple possession from being considered as a prior felony conviction for purposes of these enhancements (DUI is currently excluded from consideration as a prior felony conviction). The bill further specifies that convictions for offenses equivalent to DUI or simple possession from another state, the United States, a territory of the United States, or Puerto Rico, are excluded from being considered as prior felony convictions.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

The Corrections Department (NMCD) and the Public Defender Department (PDD) expect this bill to decrease incarceration costs by decreasing the length of certain offenders' sentences; however, because this bill offers significant discretion to judges, it is difficult to estimate exactly how large those savings will be. 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.

¹ State v. Anaya, 1997-NMSC-010, ¶ 33, 123 N.M. 14, 23, 933 P.2d 223

Additionally, PDD notes the nature of addiction makes drug users particularly likely to be impacted by the Habitual Offender Act, and it is common to see offenders whose entire felony history is made up of simple possession convictions. In FY20, 318 individuals were admitted to New Mexico’s prisons with drug possession as their highest charge, comprising 11.6 percent of total prison admissions. Reductions in the sentences of even a small fraction of these offenders would result in significant cost savings for NMCD.

PDD also notes that, under current law, prosecutors often plea bargain defendants to their current charges, reserving invoking the habitual offender enhancements until the defendant violates a condition of probation or parole supervision. Because such violations are extremely common, defendants often enter what seems like a lenient plea only to have a lengthy mandatory sentence invoked later on down the road. PDD states that making these enhancements discretionary make it possible to enter a plea that might include the enhancement up front or where the risk of a mandatory enhancement later is reduced, making plea offers more desirable for more defendants and leading to a reduction in trials and their associated costs.

The Administrative Office of the Courts (AOC) states this bill is unlikely to have a fiscal impact on the courts, and may in fact reduce costs by eliminating the requirement for the court to conduct sentence enhancement considerations for simple possession cases.

SIGNIFICANT ISSUES

PDD states that allowing judges discretion in applying the Habitual Offender Act (HOA) to simple drug possession offenses could make significant strides in reducing over-incarceration for what is ultimately a public health issue and not deviant criminality. According to PDD, where the HOA was designed to address the “incurable” felon, a person struggling with substance use disorder is far from incurable; they are grappling with a serious medical condition that has no correlation with morality, intelligence, or a person’s law-abiding nature. The agency states that this bill would move the criminal system away from incarcerating drug addiction and – along with simultaneous measures to increase access to treatment and housing – would provide the possibility for true rehabilitation.

NMCD and the Administrative Office of the District Attorneys (AODA) note that making habitual offender enhancements discretionary runs the risk of creating sentencing disparities among judicial districts or among judges, while the current mandatory nature of the enhancements mean that they are applied uniformly statewide if the prosecution seeks enhancement.

AOC notes this bill would give the courts more discretion on how to apply habitual offender enhancements and would not require any additional work to be done by the courts.

The Administrative Office of the District Attorneys expresses concerns that HB114/HJCS/aSHPAC/aSJC “will eliminate the deterrent effect that it intended to have on repeat offenders. By eliminating mandatory time criminals will now think that they have a chance to avoid or suffer substantially less prison time if caught and convicted.”

ADMINISTRATIVE IMPLICATIONS

NMCD notes that judicial discretion in imposing habitual offender enhancements could create additional workloads, as sentences received by the department referencing prior felony convictions but not explicitly referencing enhancements would need to be clarified as to whether the omission was intentional or in error. According to the agency, under current law, the mandatory nature of the enhancement avoids any ambiguity.

CONFLICT

HB114/HJCS/aSHPAC/aSJC conflicts with House Bill 59, which proposes to include DUI offenses as both new felonies subject to enhancement and prior felony convictions. HB59 also proposes to extend the time period within which a prior felony conviction must have occurred in order to be used to enhance a sentence from 10 to 25 years.

HB114/HJCS/aSHPAC/aSJC conflicts with House Bill 140, which also seeks to amend statutes governing habitual offender enhancements. Similar to HB114/HJCS/aSHPAC/aSJC, HB140 removes language barring judges from suspending or deferring sentencing enhancements; however, it maintains such enhancements as mandatory and maintains the existing terms of the enhancements, rather than converting those terms to maximums. Additionally, unlike HB114/HJCS/aSHPAC/aSJC, HB140 does not exclude DUI or simple possession crimes from the provisions of these enhancements.

HB114/HJCS/aSHPAC/aSJC conflicts with House Bill 293 which proposes to amend Section 31-18-17 NMSA 1978 by increasing the years of incarceration imposed through habitual offender sentence enhancements.

TECHNICAL ISSUES

The Attorney General's Office notes the following possible technical issue:

If HB114 were to take effect, there may be a slight conflict with its new provisions and NMSA 1978, Section 31-18-20(C), which provides, "If the court finds that the defendant is the same person and that he was in fact convicted of the previous crime or crimes as charged, the court shall sentence him to the punishment as prescribed in Section 31-18-17 NMSA 1978." The use of the word "shall" in this current statutory provision conflicts somewhat with HB114's proposed amendment to Section 31-18-17, which instead provides that a habitual offender's sentence "may" be increased.