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## FISCAL IMPACT REPORT

SPONSOR Rehm ORIGINAL DATE 2/2/2022  
LAST UPDATED \_\_\_\_\_ HB 28  
SHORT TITLE Felon in Possession of a Firearm Penalty SB \_\_\_\_\_  
ANALYST Tolman

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

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	\$616.3	\$1,187.8	\$1,804.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 68

### 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)  
Department of Health (DOH)  
Corrections Department (NMCD)  
Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

House Bill 28 amends Section 31-18-15(A) NMSA 1978 to increase the penalty for a felon in possession of a firearm from the three-year sentence for most third-degree felonies to a five-year sentence. Under current law, felon is defined as an individual convicted of a felony offense within 10 years of completing their sentence who has not been pardoned or received a deferred sentence.

The effective date of this bill is July 1, 2022.

## FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so the primary fiscal implications examined in this analysis relate to changes in the length of time individuals serve in prison that might result from this bill. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and long-term costs to the general fund. In addition to the potential of new crimes to send more individuals to prison, increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY21 was \$49.6 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 \$23.4 thousand per inmate per year across all facilities. This bill will likely increase the time individuals spend incarcerated.

Based on FY21 prison admissions where the offender's highest charge was felon in possession of a firearm, this analysis estimates the changes proposed by HB28 will impact approximately 39 individuals annually. Based on estimates of actual time served for a five-year sentence provided by the Sentencing Commission, these 39 individuals will spend an additional 474 days in prison each due to the increased sentence, a cost of \$30.5 thousand per offender. Overall, this analysis estimates HB28 will result in additional incarceration costs of \$1.2 million per year. These additional costs will begin to be realized in FY24, increasing over the following two years as more individuals serve longer sentences) and leveling out at \$1.2 million in FY27 (as offenders begin to be released from prison) and future fiscal years.

These costs are likely an underestimate, as felon in possession of a firearm is often not the highest charge for which someone is admitted to prison. NMCD estimates that an estimated 10 percent of the New Mexico prison population, or close to 540 individuals, are currently serving time for this crime.

Additional system costs beyond incarceration, such as additional costs to the judicial branch for increased trials, are not included in this analysis, but could be significant.

The Administrative Offices of the Court (AOC) notes that as penalties become more severe, defendants may be more likely to 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. AOC also indicates that 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.

The Public Defender Department (PDD) notes that cases with higher penalties tend to go to trial more often. Any increase in PDD 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. The conduct covered by the bill is already a crime, and the increased penalty would provide prosecutors with even more power in plea negotiations.

This analysis does not include potential benefits of crime deterrence due to increased punishment, as research shows sentence length has little to no deterrent effect. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the severity of punishment if convicted.

### **SIGNIFICANT ISSUES**

The Administrative Office of the District Attorney (AODA) notes that judges will have the ability, at their discretion, to sentence dangerous felons for longer periods of time, thus insuring community safety. However, research shows the certainty of being caught is a more powerful deterrent to crime than severity of punishment. As a result, increasing penalties for crimes is unlikely to produce a significant impact on crimes committed. Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful to community safety. In New Mexico, however, punishment has grown less certain as crime has increased, with fewer violent crimes solved and more violent felony cases dismissed. LFC's evaluation team has found in the 2<sup>nd</sup> Judicial District (Bernalillo County) specifically, neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and in 2020, when felonies began to rise, accountability for those crimes fell. Improving policing and increasing cooperation and coordination among criminal justice partners could help increase the certainty of punishment for the most violent offenses and provide a stronger deterrent to serious crime. Incarceration (and length of incarceration) has also been shown to have a criminogenic effect, meaning time in jail or prison may make people more likely to commit crimes in the future.

AOC and PDD both note that the penalty for this crime was just increased from a fourth-degree felony to a third-degree felony during both the 2020 and 2021 legislative sessions.

PDD and the Sentencing Commission (NMSC) both indicate that the increased sentence length creates an outlier outside the normal penalty structure. NMSC cites a review by the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota, which analyzed the New Mexico Criminal Code for its strengths and weaknesses. One item of concern for the Robina Institute was that the Criminal Code has a number of special statutes that fall out of the normal penalty structure in the state, and NMSC indicates that HB28 would add a further special penalty into the Criminal Code.

### **PERFORMANCE IMPLICATIONS**

AOC notes that this bill may impact measures of district court performance, such as cases disposed of as a percent of cases filed and percent change in case filings by case type.

### **RELATIONSHIP**

HB28 is related to House Bill 68, which implements differing changes to the sentencing enhancement for brandishing a firearm, and creates additional sentencing enhancements for possessing or discharging a firearm. The Attorney General's Office (NMAG) notes that there could be a potential conflict, because HB28 specifically amends the Criminal Sentencing Act to add a basic sentence for felon in possession of a firearm, and states this could create some confusion between the two statutes.

## TECHNICAL ISSUES

PDD questions the use of Section 31-18-15 NMSA 1978 as a mechanism for increasing the penalty for the crime of possessing a firearm by a felon. PDD indicates that the method of increasing the penalty in this bill is inconsistent with the statutory structure, creates an outlier basic sentence of five years that is inconsistent with New Mexico sentencing overall, and creates an inconsistently drafted provision within Section 31-18-15(A) NMSA 1978 by tying a basic sentence to a single unique crime. PDD further indicates that the criminal statute itself (Section 30-7-16 NMSA 1978) simply designates a third-degree felony, potentially creates due process concerns because a person of ordinary intelligence would not know that the penalty was anything other than three years.

NMAG suggests removing “pursuant to Section 30-7-16 NMSA 1978” from the bill (page 2, line 19) so it would read: “for a third degree felony for possession of a firearm by a felon, five years imprisonment.” This would then mimic the structure of the rest of the basic sentences in Section 31-18-15 NMSA 1978.

## OTHER SUBSTANTIVE ISSUES

***Violence in New Mexico.*** The Department of Health (DOH) reports that firearm death and injury is a growing problem in New Mexico. The 2020 New Mexico firearm death rate was 43 percent higher than it was in 1999, according to CDC’s Wide-ranging Online Data for Epidemiologic Research.<sup>1</sup> The firearm age-adjusted death rate in New Mexico was 67 percent higher than the US in 2020 (22.7 deaths per 100 thousand residents vs. 13.6 deaths per 100 thousand residents, respectively). Of the 276 firearm-related homicides reported to the New Mexico Violent Death Reporting System (NMVDRS) from 2018 to 2019, 42 (16 percent) involved drugs and 12 (5 percent) were directly gang-related.<sup>2</sup>

***Demographic Disparities and Impacts.*** DOH notes that there were a total of 479 firearm related deaths in New Mexico during 2020. Of those deaths, 303 were suicides, 149 were homicides, and 14 were legal interventions. Black residents of New Mexico were disproportionately impacted by firearm deaths with a rate of 46.4 per 100 thousand compared with 25.6 for non-whites, 21.1 for whites, and 9.4 for American Indian and Alaska Natives.

DOH also cites the United States Sentencing Commission’s 1991 report on Mandatory Minimum Penalties in the Federal Criminal Justice System, which states, “some of [t]he disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.”<sup>3</sup>

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<sup>1</sup> Centers for Disease Control and Prevention (Retrieved January 21, 2022). Wide-ranging Online Data for Epidemiologic Research. Available: <https://wonder.cdc.gov/>.

<sup>2</sup> National Violent Death Reporting Systems (Retrieved January 21, 2022). Available: <https://wisqars.cdc.gov/nvdrs/>.

<sup>3</sup> United States Sentencing Commission (1991). 1991 Report to the Congress: Mandatory minimum penalties in the federal criminal justice system. Commissioned by Congress in Pub. L. No. 101-647, § 1703, 104 Stat. 4846. Available: <https://www.ussc.gov/research/congressional-reports/1991-report-congress-mandatory-minimum->

DOH also notes that according to the Centers for Disease Control and Prevention (CDC), the firearm homicide rate among males was more than six times higher than the firearm homicide rate among females (12.1 deaths vs. 2.1 deaths per 100 thousand residents) in New Mexico during 2020. The homicide firearm death rate was nearly double among Hispanics (9.2 deaths per 100 thousand residents) than non-Hispanic whites at 4.9 deaths per 100 thousand residents.<sup>4</sup>

DOH further states that higher rates of incarceration are often seen among racial/ethnic minorities and people with lower levels of education. For example, Black and Hispanic people are disproportionately arrested and convicted of offenses. One study found that, among men ages 18 to 64, one in 87 white men were incarcerated, compared with one in 36 Hispanic men and one in 12 Black men. The data for incarcerated women shows similar racial and ethnic disparities.<sup>5</sup> Another study found the lifetime risk of being incarcerated is five per 1,000 for white women, 15 per 1,000 for Latinas, and 36 per 1,000 for Black women.<sup>6</sup> Disparities in incarceration are also evident at the community level, as some communities are disproportionately burdened by high rates. High rates of recidivism (being arrested or incarcerated again) are also seen in these communities, which tend to be predominately non-white and have higher rates of crime, poverty, and unemployment. Overall, incarceration and recidivism can negatively impact the well-being of communities and individuals.<sup>7</sup>

DOH also states that in regard to education, data indicate that people without high school diplomas or GEDs have a greater likelihood of being incarcerated than their more educated peers. These data also showed that, for White men ages 20-34, the rate of incarceration was only 1 in 57; however, the rate was 1 in 8 for White men in the same age group who did not have a high school diploma or GED.<sup>8</sup>

**Health Impacts.** DOH reports that the New Mexico firearm death rate for 2020 was 22.7 deaths per 100 thousand residents.<sup>9</sup> According to the CDC, New Mexico had the seventh highest firearm age-adjusted death rate in the nation during 2020. Of the 479 firearm deaths in 2020, 149 (or 31 percent) were homicides. Of the total 216 homicides committed in New Mexico during 2020, 149 (or 68 percent) were committed using a firearm. Of the 149 violent homicides in New Mexico during 2019, 46 (or 31 percent) were precipitated by another crime or was in the process

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<sup>4</sup> Centers for Disease Control and Prevention (Retrieved January 21, 2022). National Center for Health Statistics Mortality Data on CDC WONDER. Wide-ranging Online Data for Epidemiologic Research. Available: <https://wonder.cdc.gov/Deaths-by-Underlying-Cause.html>.

<sup>5</sup> The Pew Charitable Trusts. Collateral costs: Incarceration's effect on economic mobility. Washington, DC: The Pew Charitable Trusts; 2010.

<sup>6</sup> Freudenberg N. (2002). Adverse effects of US jail and prison policies on the health and well-being of women of color. *American Journal of Public Health*, 92(12), 1895–99.

<sup>7</sup> Office of Disease Prevention and Health Promotion. ((Retrieved January 21, 2022). *Incarceration*. HealthyPeople.gov. Available: <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/incarceration#7>.

<sup>8</sup> The Pew Charitable Trusts. Collateral costs: Incarceration's effect on economic mobility. Washington, DC: The Pew Charitable Trusts; 2010.

<sup>9</sup> Centers for Disease Control and Prevention (Retrieved January 21, 2022). National Center for Health Statistics Mortality Data on CDC WONDER. Wide-ranging Online Data for Epidemiologic Research. Available: <https://wonder.cdc.gov/Deaths-by-Underlying-Cause.html>.

of committing a crime according to NMVDRS<sup>10</sup>

DOH also cites a 2019 National Academies of Science workshop, which identified incarceration as a major social determinant of health.<sup>11</sup> The summary of the proceedings concluded that the high rate of incarceration in the United States is a major contributor to the nation's health inequities. Black individuals are more than three times as likely to be incarcerated as White individuals, and incarceration rates are also elevated for Hispanic individuals, Native American individuals, and other population groups compared with the general population. In addition, people who are incarcerated differ from the general U.S. population in terms of poverty levels, geographic origins, gender, and a wide range of health indicators. Health equity, then, intersects with incarceration, reentry, and community health.

**Impacts of Incarceration.** DOH reports that there are potential harms of long-term incarceration to families, citing a review of the research published in the journal of *Environmental Research and Public Health* (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6427226/>). Incarcerated fathers are often excluded from the labor market, which deprives their families of a source of income and increases their vulnerability to food insecurity. Paternal incarceration also threatens the earning power of family members, who may sacrifice work time to perform tasks previously done by the father or struggle to cover incarceration related expenses (e.g., legal representation, costs of maintaining contact through visits). During incarceration, parental relationships tend to dissolve which can increase the likelihood of food insecurity as earnings may no longer be shared. Besides financial influences, paternal incarceration contributes to unfavorable outcomes such as household instability, impairments in mental and physical health, social exclusion, and behavioral challenges in children.

## ALTERNATIVES

DOH notes that other programs may be more effective in preventing violence than incarceration. Community-based programs and focused policing interventions have been found to be effective in reducing violence in some settings (e.g., high-risk physical locations) and appear to be more effective than prosecutorial policies like mandatory sentencing.<sup>12</sup> Currently, such legislative alternatives exist. House Bill 96 creates the Violence Intervention Program Act and appropriates \$10 million from the general fund to the violence intervention program fund for use by the Department of Health (DOH) to administer the act and to award violence intervention program grants to eligible state agencies, counties, municipalities, or tribal governments. The House Appropriations and Finance Committee substitute for House Bill 2 appropriates \$1.7 million recurring and \$9 million nonrecurring general fund to DOH to establish a statewide grant program for violence intervention programs. It also appropriates \$300 thousand general fund to DOH for an Office of Gun Violence Prevention.

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<sup>10</sup> National Violent Death Reporting Systems (Retrieved January 21, 2022). Available: <https://wisqars.cdc.gov/nvdrs/>.

<sup>11</sup> The Effects of Incarceration and Reentry on Community Health and Well-Being: Proceedings of a Workshop. Washington (DC): National Academies Press (US); 2019 Sep 18. 3, Mass Incarceration as a Public Health Issue. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK555719>.

<sup>12</sup> Institute of Medicine (2013). Priorities for Research to Reduce the Threat of Firearm-Related Violence. Washington, DC: The National Academies Press. Available: <https://doi.org/10.17226/18319>.

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