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## FISCAL IMPACT REPORT

LAST UPDATED 2/2/2023

SPONSOR Rehm/Hernandez/Pettigrew/Lord/Reeb ORIGINAL DATE 1/27/2023

BILL

SHORT TITLE Organized Retail Crime NUMBER House Bill 55

ANALYST Rabin

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\*

(dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to the state (NMCD)	\$328.2	\$563.0	\$592.7	\$1,483.0	Recurring	General Fund
Costs to counties	\$67.3 to \$134.6	\$67.3 to \$134.6	\$67.3 to \$134.6	\$201.9 to \$403.8	Recurring	County General Funds
<b>Total</b>	<b>\$395.5 to \$462.8</b>	<b>\$630.3 to \$697.6</b>	<b>\$659.0 to \$726.3</b>	<b>\$1,684.9 to \$1,886.7</b>	<b>Recurring</b>	

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 234

### 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)  
 New Mexico Attorney General (NMAG)  
 Sentencing Commission (NMSC)  
 Corrections Department (NMCD)  
 Department of Public Safety (DPS)

## SUMMARY

### Synopsis of House Bill 55

House Bill 55 (HB55) creates the new crime of organized retail crime, which consists of taking possession or concealing merchandise with the intention of converting the merchandise without paying for it or altering a posted price or transferring merchandise to another container with the intention of depriving the retailer of some or all of the value of the merchandise. The crime applies only when these acts are committed as part of a concerted plan with one or more coconspirators or a coordinated plan to deprive a retailer of merchandise on two or more occasions or deprive multiple retailers located in the state of merchandise over the span of a year.

Organized retail crime has tiered penalties ranging from a petty misdemeanor to a second-degree felony, depending on the aggregated value of the merchandise taken, concealed, altered, or transferred from any retailer over the course of a year, as outlined below.

Aggregate Value of Merchandise	Penalty	Basic Sentence
\$250 or less	Petty misdemeanor	Less than six months in jail and/or a fine up to \$500
Between \$250 and \$500	Misdemeanor	Less than one year in jail and/or a fine of up to \$1,000
Between \$500 and \$2,500	Fourth-degree felony	Up to 18 months in prison and a possible fine of up to \$5,000
Between \$2,500 and \$20,000	Third-degree felony	Up to three years in prison and a possible fine of up to \$5,000
More than \$20,000	Second-degree felony	Up to nine years in prison and a possible fine of up to \$10 thousand

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have significant fiscal impacts. 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 jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 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 \$26.6 thousand per year across all facilities. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. HB55 is anticipated to increase the number of incarcerated individuals and increase the time they spend incarcerated.

Overall, this analysis estimates HB55 will result in increased annual incarceration costs of \$591.7 thousand to the state and between \$67.3 thousand to \$134.6 thousand to counties. Costs to the state are estimated to be at least \$328.2 thousand in FY25 and will rise over the next two years to reach \$591.7 thousand in FY27 and future fiscal years. Costs to counties are anticipated to remain steady annually, as incarceration in jails is less than one year. More detailed information on these calculations is provided below.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB55, are not included in this analysis, but could be moderate.

This bill effectively increases sentences for acts that are already criminalized. This analysis does not include potential benefits of crime deterrence due to increased punishment because 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.

**Detailed Incarceration Cost Calculations.** The Sentencing Commission reports 470 people were arrested for larceny more than once within one year between 2017 and 2022, an average of 78 people arrested each year. It is estimated that about 27 percent of cases referred for prosecution ultimately result in cases being disposed by trial or plea agreement. If it is assumed that all individuals whose cases are disposed by trial or plea agreement are admitted to prison or jail as a result (likely an overestimate), this would result in about 21 people being admitted to prison or jail each year whose crimes might qualify them for prosecution under the provisions of HB55.

The differing penalty tiers established by this bill create some difficulties in estimating the fiscal impact, but it appears more likely individuals will be charged with the lower penalties established by this bill than the higher penalties. To estimate the impact, it is assumed seven people are admitted to jail for a petty misdemeanor or misdemeanor offense under this bill, while the remaining 14 are admitted to prison. For prison admissions, it is assumed half are admitted under the least severe penalty (a fourth-degree felony) and the other half are admitted under the most severe penalty (a second-degree felony). These are rough assumptions and may be revised as additional data becomes available.

Costs to Counties: For purposes of this analysis, it is estimated an individual could spend between six months and one year incarcerated in jail for a misdemeanor or petty misdemeanor under HB55. Based on the marginal cost of each additional inmate in New Mexico's jail system, each offender sentenced to jail for this crime could result in estimated increased costs of \$9,614 to \$19.2 thousand to counties. Assuming seven individuals are admitted to jail for these offenses under the provisions of HB55 annually, this bill is projected to result in increased costs to counties of \$67.3 thousand to \$134.6 thousand per year. To account for time to adjudication, these costs are not anticipated to be incurred until one year after the bill takes effect, in FY25.

Costs to the State: As outlined above, this analysis estimates the changes proposed by the fourth-degree felony penalty imposed by HB55 will impact approximately seven individuals annually. Based on estimates of actual time served for fourth-degree *property* felonies for individuals released from prison in FY21 provided by NMSC, these seven individuals will spend 522 days in prison each, a cost of \$33.5 thousand per offender and \$234.7 thousand overall. These additional costs will begin to be realized in FY25, increasing over the following year (as more individuals are incarcerated for this crime) and leveling out in FY26 (as offenders begin to be released from prison) and future fiscal years.

It is further estimated the changes proposed by the second-degree felony imposed by HB55 will impact an additional seven individuals annually. Based on estimates of actual time served for second-degree *property* felonies for individuals released from prison in FY21 provided by NMSC, these seven individuals will spend 794 days in prison, a cost of \$84.5 thousand per offender and \$591.7 thousand overall. These additional costs will begin to be realized in FY25, increasing over the following two years (as more individuals are incarcerated for this crime) and leveling out in FY27 (as offenders begin to be released from prison) and future fiscal years.

## **SIGNIFICANT ISSUES**

The Administrative Office of the District Attorneys writes:

House Bill 55 address a growing trend in the State of New Mexico and the Country of groups of people coordinating to steal from retail merchants. This will protect retail merchants and consumer from the economic impact of these crimes. The Bill is structure to avoid issue of unitary conduct which invokes double jeopardy claims. The current criminal code does not address this new trend in criminal conduct.

On the other hand, the Public Defender Department (PDD) notes the crimes addressed in HB55 are already covered by existing larceny and racketeering statutes, and retailers also have civil remedies at their disposal.

The office of the New Mexico Attorney General (NMAG) notes the language of the bill prevents charging an individual with both organized retail crime and “a separate or additional offense arising out of the same transaction,” meaning organized retail crime cannot be charged along with shoplifting or conspiracy. However, NMAG notes it is common for larceny challenges to be pursued along with conspiracy charges under the circumstances contemplated by the bill, and prosecutors would be faced with a choice of pursuing either organized retail crime or charges of conspiracy and shoplifting together. NMAG explains “For a felony amount of merchandise for example (\$500-\$2,500), prosecutors would likely charge the latter two charges, amounting to two 4<sup>th</sup> degree felonies, as opposed to ‘ORC’ [organized retail crime] which is only a single 4<sup>th</sup> degree felony. Such a provision may limit the practical usefulness of the legislation.”

PDD, the Administrative Office of the Courts, and NMAG express concerns regarding the use of the terms “concerted effort” and “coordinated plan,” as used in this bill, with NMAG noting these terms are not defined in the bill, defined elsewhere in Criminal Code, or used as terms of art in any appellate case law. All three agencies raise concerns this lack of clarity could lead to vagueness challenges. PDD explains “a vagueness challenge looks at ‘whether the statute allows individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited’ and ‘whether the statute permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and *ad hoc* application.” PDD further notes the scope of “a coordinated plan” is unclear, and explains the crime of conspiracy requires only “agreement,” and not a plan.

PDD also notes issues with the bill’s definition of organized retail crime as one of the enumerated acts “committed as part of a concerted effort with one or more coconspirators or a coordinated plan to deprive a retailer of merchandise on two or more occasions or deprive multiple retailers located in the state of merchandise over the span of one year,” stating it main present confusion regarding the scope of the crime. PDD writes:

Grammatically, the language raises questions about whether the crime requires coconspirators *or* only requires a coordinated plan. One could read HB 29 as applying to one person, acting alone in a concerted effort and/or coordinated plan. The use of the disjunctive *or*, *see* Legislative Drafting Manual 195 (Sept. 22, 2015), complicates any understanding of this act because it appears that this conspiracy requirement does not apply to the next phrase using “coordinated plan.”

PDD also raises concerns regarding implications for the statutes of limitations, writing:

Another potential issue is how the continuing nature of this crime affects the statutes of limitations depending on the aggravated value of the merchandise taken, concealed, altered or transferred. Typically, the statutes of limitations is measured against the completion of a criminal act, but this bill creates a crime that captures continuing offenses, specifically, noting that the aggravated value is based on the total value over a calendar year. This is significant because the aggravate value determines the penalty imposed. It seems that the only issue would be for petty misdemeanors because the statute of limitation for such offenses is one year.

NMAG also notes:

The legislation contemplates criminalizing ORC for acts committed at retailers throughout the state. Venue ordinarily exists in any county in which a material element of the crime was committed. For acts constituting ORC under HB 55, that would likely be a single county for a single ORC act. However, the legislation contemplates the possibility of aggregating acts committed against multiple retailers throughout different parts of the state. This raises procedural and practical considerations related to:

- a. Which county will initiate the prosecution;
- b. Whether joinder of offenses will need to be sought if a defendant is already charged with an ORC act (likely a shoplifting) at the time a subsequent qualifying act is committed; and/or
- c. How to navigate the procedural hurdles created by the prosecution time limitations in certain jurisdictions.

## RELATIONSHIP

HB55 conflicts with House Bill 234, which also addresses organized retail crime.

## TECHNICAL ISSUES

NMAG notes the following technical issue:

Under Section I(A)(1), ORC can be committed if multiple retailers throughout the state are deprived of their merchandise *over the span of one year*. Contrast this language with the definition of ‘aggregated value’ in Section I(H)(1), which means the total value of merchandise taken/concealed/altered/transferred from any retailer *over the span of one calendar year*.

In both of the above sections, the language limiting the time period in which theft/shoplifting may be aggregated for purposes of being considered ORC may be confused. By stating *over the span of one calendar year*, it may be argued that only acts within a single calendar year (2022, 2023, etc) are sufficient for aggregation, whereas the intent of the drafter seems to be that all predicate acts within a continuous 365 day period be sufficient for aggregation. This language could be clarified.