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FISCAL IMPACT REPORT

SPONSOR Garratt/Hickey/Rehm/Little LAST UPDATED _____
ORIGINAL DATE 2/10/2023
BILL
SHORT TITLE Drug Trafficking & Firearm Penalty NUMBER House Bill 212
ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY27	FY28	FY29	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$215.2	\$526.2	\$526.2	\$1,267.6	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 59

Sources of Information

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)

Public Defender Department (PDD)

New Mexico Attorney General (NMAG)

Sentencing Commission (NMSC)

Department of Health (DOH)

Corrections Department (NMCD)

Department of Public Safety (DPS)

SUMMARY

Synopsis of House Bill 212

House Bill 212 creates a new fourth-degree felony penalty (punishable by up to 18 months incarceration) for carrying a firearm while engaging in the existing crime of drug trafficking. Although the bill creates a new crime, it requires that the offender must have committed the base offense of trafficking a controlled substance, effectively serving as a sentencing enhancement for the existing crime.

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 moderate 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. In addition to the potential for new crimes to send more individuals to prison and jail, longer sentences could result in fewer releases relative to admissions, driving up overall populations. 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. HB212 is anticipated to increase the amount of time individuals spend incarcerated.

Overall, this analysis estimates HB212 will result in additional incarceration costs of \$526.2 thousand per year. According to a 2019 report from the U.S. Department of Justice's Bureau of Justice Statistics, 20.9 percent of state prisoners possessed or used a firearm during the offense for which they were incarcerated, including 9.4 percent of offenders incarcerated for drug trafficking. A total of 0.9 percent of offenders incarcerated for drug trafficking used the firearm during the commission of the crime (meaning showing a firearm to or pointing a firearm at anyone or discharging a firearm during the offense), with the remaining 8.5 percent of drug trafficking offenders merely possessing the firearm during the offense.¹ Because existing sentencing enhancements for brandishing or discharging a firearm while drug trafficking carry higher penalties than proposed by this bill and it is unlikely courts would permit prosecutors from pursuing both this new charge and a sentencing enhancement for the same conduct, this analysis assumes this penalty would apply only to the 8.5 percent of offenders who only possessed the firearm during the offense.

Applying these rates to FY22 prison admissions for drug trafficking (164), this analysis estimates the changes proposed by HB212 will impact approximately 14 individuals annually. Based the average length of sentence for a fourth-degree felony in FY21, these 14 individuals will spend an additional 516 days in prison each due to the new crime created by this bill, a cost of \$37.6 thousand per offender and \$526.2 thousand overall. Because it is unlikely inmates currently serving a sentence for drug trafficking will subsequently be charged for carrying a firearm while doing so, the impact of this bill will likely only be realized after offenders convicted after the implementation of this bill of both trafficking controlled substances and carrying a firearm while doing so have served the term of their sentence for trafficking and are beginning the additional term for carrying a firearm imposed by this bill. These additional costs will begin to be realized in FY27, increasing over the following year (as more individuals serve longer sentences for this new crime) and leveling out at \$526.2 thousand in FY28 (as offenders begin to be released from prison) and future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials (if more defendants invoke their right to a trial when facing more serious penalties), are not included in this analysis, but could be moderate.

¹ <https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf>

The provisions of this bill effectively increase sentences for some acts which are already criminalized. 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

Public Safety Impacts. 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. 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.

Prioritizing solving crimes and securing convictions, particularly for serious offenses, could be much more impactful to community safety. In New Mexico, 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 2nd Judicial District (Bernalillo County) that neither arrests, convictions, nor prison admissions have tracked fluctuations in felony crime, and when felonies rose in 2020, 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.

The Department of Health (DOH) reports New Mexico had the eleventh-highest drug overdose death rate in the nation between 2016 and 2020,² primarily attributable to fentanyl (and analogues) and methamphetamine. DOH further notes the state’s rate of age-adjusted firearm-related injury deaths was 23.1 deaths per 100 thousand residents in 2020, 55 percent higher than 2010.³ However, DOH adds “While increased penalties for substance use related crimes have widely been used at both federal and state levels, there is no evidence that increased sentencing will decrease rates of substance use and overdose mortality, or drug related criminal activity.”

Legal Issues. The Administrative Office of the District Attorneys (AODA) and the Public Defender Department (PDD) note this bill raises double jeopardy concerns under what PDD calls “a double description multiple punishment theory.” AODA explains:

...Section 31-18-16...enhances the sentence for drug crimes by one, three, or five years when a firearm is used, brandished or discharged in the commission of the crime. This new felony would present another option for the prosecutor in charging, and the court in sentencing, the offender. If an offender is convicted of this new crime, the court would need to either vacate the conviction in order to enhance the sentence under Section 31-18-16, or it could sentence the offender for this new fourth degree felony without a firearm enhancement.

² <https://www.nmhealth.org/data/view/substance/2682/>

³ <https://www.nmhealth.org/news/awareness/2021/12/?view=1760>

PDD adds “Litigation around the firearm enhancement and its enhancement of other crimes is ongoing and this bill would likely spur further litigation.”

The office of the New Mexico Attorney General (NMAG) and PDD also note potential unintended consequences of HB212. NMAG writes:

A fourth degree felony for drug trafficking while carrying a firearm will also constitute a second degree felony for drug trafficking, which means courts may require the prosecution to charge only the fourth degree felony.⁴ The Legislature’s specific instructions for drug trafficking while carrying a firearm will likely act as an exception to the Legislature’s instructions for drug trafficking generally.⁵

PDD adds:

Subsection B defines the criminal offense of trafficking a controlled substance and specifies the punishment of a second degree felony for a first offense and a first degree felony for a second offense. This new crime would seem to limit a court to impose only a fourth degree felony for trafficking while carrying a firearm, regardless of a first offense or a second offense. In a sense, a trafficker would be better off trafficking with a firearm than without since it would result in a lesser punishment.

The bill contains no language that specifies how or whether the built-in enhancement of second and subsequent drug trafficking convictions applies to trafficking with a firearm. This ambiguity is likely to lead to litigation as a competent defense attorney would realize that if a client was charged with trafficking but also was carrying a firearm during trafficking should only receive a fourth degree felony instead of a second or first degree felony specified in Subsection B. This argument could be successful if made as a general/specific statute rule argument, *see State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464, since the Legislature is appearing to limit prosecutorial misconduct in specifying a specific punishment for trafficking with a firearm.

CONFLICT

Conflicts with House Bill 59, which creates a new crime for the same conduct, but which carries a third-degree felony penalty.

TECHNICAL ISSUES

⁴ *See State v. Cleve*, 1999-NMSC-017, ¶ 26, 127 N.M. 240, 250 (“If the elements of the two crimes are the same, the general/specific statute rule applies, and the prosecution must charge the defendant under the special law absent a clear expression of legislative intent to the contrary.” (citations omitted)).

⁵ *See State v. Blevins*, 1936-NMSC-052, ¶ 11, 40 N.M. 367 (“Here, in so far as each statute indicts sale of the property of another, they describe but one offense, and, one of such statutes being special and the other general, the special statute should control to the extent of compelling the state to prosecute under it. In other words, the general statute is not operative as to the special kinds of property described in the special statute.”)

HB212 does not provide a definition for the term “carry” or “carrying,” an essential component of the crime created by the bill and important for distinguishing between this crime and sentencing enhancements for using, brandishing, or discharging a firearm while drug trafficking.

NMAG notes the following:

As drafted, the bill creates a felony for carrying a firearm while violating NMSA 1978, Section 30-31-20(B) (2006). Subsection B covers drug trafficking generally. If a person were charged with drug trafficking in a school zone under Section 30-31-20(C) (2006), the new felony could not be charged because the new felony only applies to Subsection B. To effectuate its intent to enhance the penalty for drug trafficking committed while carrying a firearm, the Legislature may wish to make the new felony created under this bill available for all violations of NMSA 1978, Section 30-31-20 (2006).

PDD notes “there is apparent ambiguity as the title of the bill suggests it is enacting an enhancement but the language of Subsection D suggests not an enhancement but a new criminal offense.”

ALTERNATIVES

NMAG suggests several alternatives to this bill:

1. Create a separate crime for carrying a firearm while trafficking drugs and specify that a person may be prosecuted and punished for both the new offense for carrying a firearm and the existing offense of drug trafficking to make clear penalties for both crimes may be imposed in the same case.⁶
2. Redraft the new felony as an enhancement so that when a jury (or a judge in a bench trial) finds that a person was carrying a firearm during drug trafficking an additional 1.5 years is added to the sentence. Requiring an additional finding of fact by a jury (or judge in a bench trial) will safeguard against constitutional challenges for impermissible sentence enhancement under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).⁷
3. Redraft the bill so the penalty for drug trafficking while carrying a firearm is higher than the penalty for drug trafficking generally.
4. Amend the firearm enhancement statute in NMSA 1978, Section 31-18-16 (2022) to include a 3-year enhancement for drug trafficking. This would be the same penalty for being a felon in possession of a firearm.⁸

NMAG further offers a proposed amendment to Section D for the second alternative noted above:

⁶ This would ensure there is no question “the Legislature clearly authorized multiple punishments” when a gun is carried during drug trafficking. See *State v. Franco*, 2005-NMSC-013, ¶ 12, 137 N.M. 447, 451 (citations omitted).

⁷ “Any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt.” *Alleyne v. United States*, 570 U.S. 99, 103 (citing *Apprendi*, 530 U.S. at 483, n.10).

⁸ See NMSA 1978, Section 30-7-16(B) (2022) (felon in possession is a third degree felony); NMSA 1978, Section 31-18-15(A) (2022) (third degree felony carries a penalty of 3 years imprisonment).

Upon a separate finding of fact by a jury or a court that a ~~A~~ person who has knowingly ~~violates~~ violated Subsection B or C of this section while carrying a firearm shall have their sentence enhanced by eighteen months. ~~is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.~~

NMAG also offers a proposed amendment for the third alternative noted above:

A person who knowingly violates Subsection B of this section while carrying a firearm is guilty of a ~~fourth~~ first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

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