

**LFC Requester:**

**AGENCY BILL ANALYSIS  
2020 REGULAR SESSION**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**        **Amendment**      
**Correction**        **Substitute**   

**Date** February 7, 2020  
**Bill No:** SB 5/SJCS-264

**Sponsor:** Cervantes, Ely, Garratt  
**Short Title:** Extreme Risk Firearms Protection Act

**Agency Name and Code Number:** Administrative Office of the District Attorneys 264  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY20	FY21		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY20	FY21	FY22		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY20</b>	<b>FY21</b>	<b>FY22</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

Senate Judiciary Committee Substitute for Senate Bill 5 provides as follows:

1. A civil process that can have firearms removed from a person who is deemed by a court to be a danger to themselves or to others in the community based on certain criteria set forth in the Act.
2. Sets forth the duties of certain officials in these types of cases.
3. Makes changes to §41-4-19, NMSA 1978 that deals with tort claims against government officials and agencies.

**FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

**SIGNIFICANT ISSUES**

Includes district attorney’s office in the definitions of “law enforcement agency.” (Page 2, Lines 9-4)

Includes an attorney employed by a district attorney in the definition of “law enforcement officer.” (Page 2 lines 17, 18). It should be noted that neither the constitutional provisions for district attorneys (see Art. VI, §24) or those duties outlined in §31-1-18, NMSA 1978, indicate that a district attorney or his assistants are vested by law with the power to maintain order, make arrests for crime or to detain persons suspected of committing a crime.

Paragraph G provides that an attorney employed by a district attorney is responsible for filing a petition under the Extreme Risk Firearms Protection Order Act (ERFPOA). (See page 2, lines 24, 25).

Paragraph A (page 4, lines 14-17) provides that a petition for an order under this act shall be filed only by a law enforcement officer employed by a law enforcement agency. This includes an attorney employed by a district attorney. It also appears that police agencies and law

enforcement officers who work for police agencies can file a petition. It does not appear that anything in the act limits the duty for filing a petition to the district attorneys or the Attorney General.

A petition for an order shall be accompanied by a sworn affidavit signed by the reporting party. This means that if the allegations made by the reporting party reporting party turn out to be false, the reporting party may be prosecuted for perjury.

Language added to §41-4-12 provides that failure to comply with duties established pursuant to statute or law is not immune from suit under the tort claims act. (Page 16, lines 23, 24). That means that a district attorney or his assistants can be sued for failing to file a petition even though, as prosecutors, they have discretion to file or not file criminal charges in their traditional roles.

Language contained in page 17, lines 2-7 appears to include district attorneys and their assistants as not being immune from a lawsuit for failure to file a petition under the Act. The language contained in page 17, lines 3-5 defines “law enforcement officer” as a “public officer vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of committing a crime.” Neither district attorneys or their assistants have any such power granted them by the Constitution or by statute.

Presently, district attorneys and their assistants are covered against lawsuits by the Risk Management Division. It is not clear if the changes made in 5/SJCS will subject district attorneys and their assistants to personal liability. There will need to be protections specified as it may become extremely difficult to have anyone run for district attorney or apply for a job as an assistant if they will possibly be exposed to personal liability for any of the provisions set forth in the ERFPOA.

Prosecutors have the discretion to file criminal charges or not. ERFPOA will provide consequences for a district attorney who declines to file a petition for whatever reason(s) under the ERFPOA thus eliminating any prosecutorial discretion.

Section 15 (pp. 17, 18) increases the amount of liability.

The increase in liability will mean more funding necessary to Risk Management and district attorneys will have to adjust their budgets (request more funding from the legislature) to account for premium increases should they be the subject of a lawsuit for violation of provisions of ERFPOA.

## **PERFORMANCE IMPLICATIONS**

## **ADMINISTRATIVE IMPLICATIONS**

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 7; Art. VI, §24; §36-1-18, NMSA 1978.

## **TECHNICAL ISSUES**

## **OTHER SUBSTANTIVE ISSUES**

ERFPOA is confusing as it relates to district attorneys. For example, ERFPOA considers district attorney offices to be law enforcement agencies and assistants to be law enforcement officers. There are no other constitutional or statutory provisions that consider district attorney offices to be law enforcement agencies or law enforcement officers. Making this designation would make district attorneys and their assistants eligible for the retirement provisions for law enforcement officers as presently provided in the PERA.

District Attorney offices prosecute violations of the criminal code. ERFPOA will add more duties/work to attorneys who will now have to become familiar with civil procedures in addition to criminal ones. Also, depending on the number of referrals, there may be problems prioritizing cases as serious violent felonies will always have to be addressed before any civil matter. If that happens, then under ERFPOA, the district attorney and/or his assistants can expect a lawsuit.

More duties for district attorney offices will mean more resources needed.

## **ALTERNATIVES**

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo

## **AMENDMENTS**

Remove “district attorney’s office” from page 2 lines 11, 12 and remove “attorney employed by a district attorney” as from page 2, lines 17, 18.

Recommend adding language in Section 15 (pages 17, 18) as follows:

“Attorneys employed by a district attorney, while acting within the scope of the attorneys duties, shall not be held personally liable in any action for damages for violation of the Extreme Firearm Risk Protection Order Act.”

“A district attorney, while acting within the scope of the district attorney’s duties, shall not be held personally liable in any action for damages for violation of the Extreme Firearm Risk Protection Order Act.”