

LFC Requester: _____

**AGENCY BILL ANALYSIS
2025 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 1/29/2025
Bill No: SB 95-280

Sponsor: Crystal Brantley

Agency Name and Code Number: LOPD-280

Short Title: Fentanyl Dealing with Death as a Capital Crime

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HB 107 (creating life sentence for any trafficking resulting in death)**

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

SB 95 is identical to prior SB 6 from the First Special Session of 2024.

Synopsis:

SB 95 proposes to add a new section to the Controlled Substances Act, NMSA 1978 §§ 30-31-1 to 41, which would make it a capital felony (life sentence) to intentionally and unlawfully distribute “any amount” of fentanyl or “fentanyl-related substance” to another person whose death results from injecting, inhaling, absorbing, or ingesting it. The bill defines “fentanyl-related substance” in some detail in proposed subsection (c).

This bill specifies that the deceased’s intent to inject, inhale, absorb, or ingest the fentanyl or fentanyl-related substance would not serve as a defense for the individual charged with distribution of fentanyl resulting in death.

As a capital felony, this proposed crime would be punished by life imprisonment or life imprisonment without possibility of release or parole pursuant to NMSA 1978, § 31-18-14.

FISCAL IMPLICATIONS

While the LOPD would likely be able to absorb some additional cases under the new crime proposed in this legislation, the fact that the new proposed crime is a capital felony makes it more likely that such cases would go to trial because mandatory life sentences significantly decrease the parties’ ability to meaningfully negotiate in advance of trial.

This new proposed capital offense would necessitate assignment to higher-level attorneys (Trial Attorneys), often with a mid-level attorney serving as second chair. Depending on the volume of cases in the geographic location there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. A mid-level felony capable Associate Trial Attorney’s mid-point salary *including benefits* is \$136,321.97 in Albuquerque/Santa Fe and \$144,811.26 in the outlying areas. A senior-level Trial attorney’s mid-point salary *including benefits* is \$149,063.13 in Albuquerque/Santa Fe and \$157,552.44 in the outlying areas. Recurring statewide operational costs per attorney would be \$12,909.00 with start-up costs of \$5,210.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$123,962.51. Assessment of the impact on the LOPD upon enactment of this bill would be necessary after the implementation.

Additionally, any increase in the number of prosecutions, trials, and litigation expenses 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. Under the present statutory scheme, LOPD workload is so heavy in some offices that lawyers have been required to move to withdraw from new cases in order to provide constitutionally mandated effective assistance of counsel to their existing clients. Drug prosecutions already constitute a high percentage of the caseloads in our geographically outlying districts. Barring some other way to reduce indigent defense workload, any increase in the number of these high-penalty felony prosecutions would bring a concomitant need for an increase in indigent defense funding in order to keep this problem from spreading. Of course accurate prediction of the fiscal impact would be impossible to speculate; assessment of the required resources would be necessary after the implementation of the proposed statutory scheme.

There has been no research that has found that increasing penalties has a deterrent effect on the commission of crimes. Therefore, this change would, at most, lead to an increase in incarceration, which would increase costs and population in Department of Corrections.

SIGNIFICANT ISSUES

Range of conduct constituting a capital offense

The bill would create a new crime for the distribution of fentanyl or fentanyl-related substances that “results in” death. As a proposed capital offense, this crime would carry a mandatory sentence of life imprisonment or life imprisonment without possibility of parole pursuant to NMSA 1978, § 31-18-14. Despite the severity of the consequences for this proposed new crime, the bill is broadly drafted and would encompass a wide range of conduct to be punishable exclusively by life imprisonment. “Distribution” of a controlled substance, for example, encompasses not only sale, but any transfer to another person, including drug-sharing between users. *See* UJI 14-3103 NMRA.

Punishing any distribution that “results in death” without requiring the criminal standard of “proximate cause” does not account for factors like temporal proximity or intervening events. Additionally, the bill provides for the same severe punishment for the distribution of “any amount” of fentanyl or fentanyl-related substance, and it expressly rejects the consideration of the intent of the fentanyl user in determining guilt. Thus, as drafted, this bill would impose a mandatory life sentence on large-scale drug traffickers, but also on an individual fentanyl user who shares a single dose with another willing user.

Treating fentanyl distribution as a capital offense when the distribution ultimately “results in” a person consuming the fentanyl and dying from an overdose punishes the distributor for the death itself, regardless of any intervening events or the intent of the individual who consumes the fentanyl. Such treatment is inconsistent with New Mexico’s culpability requirements for homicide. For crimes designated as “resulting in death,” the law imposes both a high mental culpability *and* a “proximate cause” requirement. For example, second-degree murder, which has a non-mandatory 18-year penalty, a person must know that their acts created a strong probability of death or great bodily harm, and their acts must be the proximate cause of death. *See State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674 (rejecting a “should have known” standard for

culpability); UJI 14-134 NMRA (defining proximate cause to require the death was foreseeable and that the defendant's conduct was a "significant cause" of the death "uninterrupted by an outside event"). When distribution of fentanyl ultimately results in an accidental overdose by the user, the distributor has neither the mental culpability nor the causal culpability for a penalty exceeding that for second-degree murder.

Lack of judicial discretion in sentencing

Judicial discretion is a crucial aspect of sentencing proceedings. To ensure that the purposes of the criminal legal system are effectuated, a judge considers the specific circumstances of a case, including the defendant and the community and victim impact, to tailor a punishment that is just and appropriate. This bill divests judges of that discretion.

As explained above, this bill proposes to punish a vast range of conduct with life imprisonment and punishes all defendants—from large scale drug traffickers to fentanyl-users sharing a single dose—with the same brush. Judges should not be divested of their discretion to differentiate between these entirely distinct types of offenders and their relative impacts on the community. *See* Ashley Nellis, Ph.D., *How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It*, The Sentencing Project (Feb. 14, 2024) (“Widespread evidence shows that mandatory minimum sentences produce substantial harm with no overall benefit to crime control.”), available at <https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/>; Alison Siegler, *End Mandatory Minimums*, Brennan Center for Justice (Oct. 18, 2021) (noting that “mandatory minimums shackle judges” while giving prosecutors unfettered power, this results in pervasive racial disparities), available at <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums>; Jonathan P. Caulkins, *Are Mandatory Minimum Drug Sentences Cost Effective?*, Santa Monica, CA: RAND Corporation (1997) (to reduce substance consumption and the violence and theft that accompany the black market for controlled substances, “more can be achieved by spending additional money arresting, prosecuting, and sentencing dealers to **standard** prison terms than by spending it sentencing fewer dealers to longer, **mandatory** terms.”) (emphasis added), available at https://www.rand.org/pubs/research_briefs/RB6003.html; Tanya Golash-Boza, *5 charts show why mandatory minimum sentences don't work*, PBS News (June 1, 2017) (noting that “even after crime rates began to decline, legislators continued passing punitive laws,” even while “[i]ncarceration has had a limited impact on crime rates”), available at <https://www.pbs.org/newshour/politics/5-charts-show-mandatory-minimum-sentences-dont-work>.

Finally, this bill proposes a consequence for fentanyl distribution resulting in death that is out of step with New Mexico’s overall criminal statutory scheme. At present, New Mexico’s sole capital felony First degree murder (NMSA 1978, § 30-2-1(A)). The only other crimes carrying a life sentence are Intentional child abuse causing the death of a child under 12 (NMSA 1978, § 30-6-1(H) (a “special” first degree felony with a life sentence) and aggravated criminal sexual penetration (CSP of a child under 13 “with an intent to kill or with a depraved mind regardless of human life” (a “special” first degree felony with a life sentence). Fentanyl distribution resulting in death would be an inappropriate addition to that list, particularly given the range of conduct that falls within its broad parameters.

Chilling effect on users calling for help with overdoses

Recently, this State has taken several steps forward in the fight against overdoses, including those caused by fentanyl. This bill would be taking us several steps back. With the passage of our Good Samaritan Law, NMSA 1978, Section 30-31-27.1 (2007, amended 2019), our State (the first in the Nation to do so), made the decision to treat the overdose epidemic with humanity. This statute was passed in the midst of an effort in many states to combat an epidemic of overdose deaths through the proliferation of naloxone and enactment of 911 immunity laws. See Kelsey Bissonnette, *Anti-Death Legislation: Fighting Overdose Mortality from a Public Health Perspective*, 23 Temp. Pol. & Civ. Rts. L. Rev. 451, 451-59 (2014) (noting “[r]ecently, ‘911 immunity laws’ have been a popular method of legislating against drug deaths”); Valena E. Beety, *Prosecuting Opioid Use, Punishing Rurality*, 80 OHSLJ 741, 763-63 (2019) (“Good Samaritan laws were created to shield eyewitnesses from prosecution for drug-related crimes when they called for help.”); Nicole Schill, *The Fatal Shortcomings of Our Good Samaritan Overdose Statutes and Proposed Model Statute*, Cardozo J. Equal Rts. & Soc. Just. 123, 123-27 (2018) (noting Good Samaritan laws were a response to ever-rising overdose deaths, starting with New Mexico’s enactment of its Good Samaritan law in 2007). These policies came about because of the recognition “that sometimes people do not call 911 when they observe an overdose because they are afraid that they will be taken to jail, or face other legal consequences as a result.” Bissonnette, *supra*, at 451; see also *id.* at 453-54 (“Bystanders do not always call 911 when an overdose occurs. Overdose witnesses may hesitate to call for emergency assistance for any number of reasons, including fear of prosecution. These fears are not without justification. Persons found to have provided overdose victims with drugs may be subject to prosecution for drug-induced homicide.”).

In fact, 2002 data of Albuquerque drug users showed that of 101 heroin users, 95 of whom had personally witnessed an overdose, only six immediately called 911, 36 others only called “after an average delay of 18.7 minutes,” and 49 individuals said they did not call or delayed calling 911 because of “police.” Bissonnette, *supra*, at 455-56. Put another way, over half of these surveyed individuals reported hesitancy, if not outright failure to call 911 because of the fear of prosecution. Section 30-31-27.1 was our state’s public health response to the ever growing tragedy of overdoses.

While distribution is not included in the immunity provisions, there is still a serious risk that fentanyl-users who only meant to share a single dose will be less likely to call law enforcement and first-responders for help if they witness an overdose. The proposed legislation presents a threat that such individuals could be prosecuted as murderers and face a mandatory life sentence. Such concerns may cause people to abandon individuals suffering from treatable overdose out of fear for their own lives. While this bill ostensibly proposes to recognize that fentanyl is a life-threatening substance for which society should have zero tolerance, it could have significant chilling effects on a population already skeptical of law enforcement and in turn lead to more preventable deaths.

Imposing exceedingly harsh penalties for individuals who distribute fentanyl or fentanyl-related substances is not a solution for overdose deaths. Overdose is a public health issue that requires a public health response; not a criminal issue calling for a punitive response. The most effective ways to reduce overdose deaths are to expand access to overdose rescue medications, expand the “Good Samaritan” law to incentivize seeking emergency assistance without fear of prosecution, and expand substance abuse treatment more generally.

Analyst also notes that overdose deaths have declined 8% statewide since 2021, according to the New Mexico Department of Health. *See* <https://www.nmhealth.org/news/awareness/2025/1/?view=2169#:~:text=Overdose%20deaths%20have%20declined%208,948%20overdose%20deaths%20in%202023>.

PERFORMANCE IMPLICATIONS

It is difficult to predict the implications on criminal defense when a new capital offense is introduced. Designating crimes as capital offenses removes all sentencing discretion from the judges, and defendants who have viable defenses, including actual innocence, are extremely likely to accept a non-beneficial plea agreement solely to avoid the danger of a mandatory sentence if convicted at trial. Meanwhile, mandatory sentences take away prosecutorial options because any plea bargain to the charged offense mandates the penalty, so that defendants with very little defenses are compelled to take their chances in the hopes of avoiding mandatory prison time. Public defenders would have to place exponentially more resources into these cases to avoid massive injustices, or risk violating our constitutional mandates.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 107 (creating life sentence for any trafficking (of any drug) “resulting in death”)

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

Although laws may reasonably be directed at criminalizing and punishing those who recklessly cause or facilitate fatal overdoses, punishing what is ultimately a negligence crime with more or equal fervor to intentional killings would be wholly inconsistent with New Mexico law. For crimes punishing people who contribute to drug deaths, a 2021 national study found that 50% of prosecutions were against friends, family, or romantic partners of the deceased, and 47% were against individuals who rarely sold drugs or did so in small quantities. *See* Goulka, Jeremiah, Valena Beety, Alex Kreit, Anne Boustead, Justine Newman, and Leo Beletsky, *Drug Induced Homicide Defense Toolkit*, Health in Justice Action Lab, Northeastern University (July 2021).

Many people who “distribute” drugs in New Mexico are themselves experiencing substance use disorder. While incarcerated, individuals are commonly denied care. In fact, most people do not receive any sort of treatment or counseling during incarceration. *See* Prison Policy Initiative, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than They Treat It*, Prisonpolicy.org (2024), available at <https://www.prisonpolicy.org/blog/2024/01/30/punishing-drug-use/>; Prison Policy Initiative, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, Prisonpolicy.org (2022), available at <https://www.prisonpolicy.org/reports/chronicpunishment.html>. Indeed, the NM Corrections Department is not required to establish and operate a medication-assisted treatment program for all people in state correctional facilities in need of medication until the end of fiscal year 2026. Lack of treatment actively contributes to the staggering rates of drug overdose in jails and prisons.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS