

When there is probable cause to believe a youthful offender sentenced under the dual disposition provision has violated a condition of the stayed adult sentence, or is alleged to have committed a new offense, the court may direct that the offender be taken into custody, the children's court attorney may petition for revocation of stay, and the offender is entitled to a hearing. If the court finds a violation applying the statutorily mandated reasonable certainty standard of proof, it may order execution of the previously imposed sentence, and the offender will be placed under the custody of adult corrections and the jurisdiction of adult courts.

Additionally, a hearing must be held before a youthful offender who has received a suspended adult sentence turns 21. At that hearing, the court must determine whether to: 1) revoke the suspension and transfer custody of the offender to the corrections department; 2) order execution of the adult sentence and place the offender on probation; or 3) release the offender. If the offender is placed on probation and successfully completes it, the adjudication shall not become a conviction for purposes of the Criminal Code and the court shall enter a conditional discharge. If an adult criminal sentence is ordered to be executed at such a hearing, the offender is entitled to credit toward for all time served under the earlier juvenile disposition.

FISCAL IMPLICATIONS

AOC estimates an operating budget impact of over \$150 thousand to develop and implement training, court processes, and analysis and reconfiguration of the Odyssey case management system to implement HB 183, based on a similar project for juvenile abuse and neglect cases which took over 14 months and one FT contractor to complete. This effort will involve both AOC and Judicial Information Division staff and resources. Because AOC is unsure if there are resources available to complete this work by the effective date of the bill (May 18, 2016), its estimate is reflected for FY 16 in the operating budget impact table above.

NMCD comments that it seems likely that none or only a minimal number of youthful offenders will be sentenced to serve an incarceration period in NMCD custody as a result of this bill. Any youthful offenders sentenced to the care of NMCD are more likely to be placed on adult probation with NMCD. The cost per client in Probation and Parole for a standard supervision program is \$2,766 per year. The cost per client in Intensive Supervision programs is \$2,174 per year. The cost per client in Community Corrections is \$4,236 per year. The cost per client per year for female residential Community Corrections programs is \$30,631 and for males is \$20,471. NMCD concludes that the fiscal impact on it seems minimal during the relevant three year fiscal period and thereafter.

In addition and more generally, HB 183 will increase recurring costs for the courts, public defenders and district attorneys. Courts will need to make additional determinations regarding which sentencing structure to apply, and additional hearings will be required to impose and administer dual sentencing provisions, even if HB 183 does not result in increased adult incarceration. These unquantified costs are represented in the operating budget impact table above with the ">" sign for FY 16, and the phrase "Minimal to Moderate" in succeeding years.

SIGNIFICANT ISSUES

AODA provides this explanation of the effect of HB 183:

The Delinquency Act currently provides that a youthful offender may be subject to juvenile sanctions or an adult sentence. Adult sentences are available only if the child is not amenable to treatment or rehabilitation as a child and is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. HB 183 establishes a new hybrid sentencing option for youthful offenders who are amenable to treatment. It combines juvenile sanctions with an adult sentence that is stayed unless the youthful offender violates any condition of the stayed sentence or commits a new offense. Before a youthful offender who has received a stayed adult sentence reaches age 21, the court shall hold a hearing and order execution of the sentence, place the offender on probation, or release the offender.

AODA believes that the imposition of a stayed adult sentence is a powerful deterrent, and provides an intermediate sanction between juvenile sanctions and adult sanctions. Before imposing a dual sentence a court must consider certain factors, including the seriousness of the offense, whether the offense was against persons or property, the maturity of the child, the previous history of the child, and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation. AODA asserts these procedures will result in a sentencing response tailored to the offender and the crime, imposing dual sentencing only when it appears appropriate, and that staying the adult sentence makes the youthful offender responsible for his or her future actions, with an understanding of the consequences of those actions.

Like AODA, AOC recognizes that HB 183 offers a third alternative in the sentencing scheme for youthful offenders. It suggests that this new sentencing option may offer an important middle ground for a judge struggling to predict how a child will respond to treatment in the limited time available under the delinquency act. It advises that New Mexico's appellate courts have previously recognized the sentencing challenge courts face in sentencing youthful offenders in light of the balance that must be struck between promoting public safety and recognizing that children differ from adults in their "diminished culpability and greater prospects for reform." AOC believes a dual sentencing law could provide children's court judges a significant sentencing alternative, but only with the proper procedural rights and safeguards in place.

CYFD advises that under current law, a youthful offender amenable to treatment can be given a commitment up the age of 21. If that offender *does not* respond to treatment, or commits new, violent offenses, the term of commitment *cannot* be extended beyond the offender's 21st birthday. Dual sentencing would allow the court to require an offender who violates the conditions of the stayed adult sentence serve that sentence. CYFD summarizes the benefits of a dual sentencing structure:

- First, it provides the youthful offender an incentive to actively and sincerely participate in programming and treatment. Some of these offenders, as their 21st birthdays approach, simply wait to "time out", knowing that their commitment periods and corresponding responsibilities will end.
- Second, for those in need of additional services, an extension of supervision through the adult sentence (which may include probation) is an opportunity to receive the needed support.
- Third, for those exhibiting repeated violent behavior, the adult sentence provides increased public safety.

CYFD advises that dual sentencing is a component of the Missouri Model of juvenile justice that New Mexico began implementing in 2008 (and was fully implemented in all secure juvenile facilities in 2013). *Cambiar* is a secure treatment method which is intended to provide a more supportive environment for juvenile offenders to improve lifelong outcomes and prevent at-risk youth from engaging in the adult correctional system. CYFD comments that dual sentencing provides the opportunity to more fully assess an offender's response to treatment programming over time, instead of having to predict rehabilitative amenability at the earlier disposition phase of the juvenile justice process and before the offender is placed in treatment.

On the other hand, PDD provides this analysis of the dual disposition/sentencing process:

The creation of this blended sentencing scheme goes against the unique scheme New Mexico has devised to deal with serious offenses committed by children. It reverses the default position of New Mexico law that is supported by science that recognizing the differences between youth and adults compel a different, and often more protective, treatment for youth. It also is contrary to the current trend in law that recognizes the unique vulnerabilities of children. *See e.g., Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

AOC does express concern that HB 183 as drafted likely is missing some procedural rights and safeguards. First, AOC as well as PDD specifically challenge the reasonable certainty standard to be employed in any proceeding that seeks the revocation of a stay of an adult sentence. As PDD points out:

This new standard of reasonable certainty is contrary to the requirement in Section 32A-2-24, NMSA 1978 that any probation violation be proven beyond a reasonable doubt. Using the reasonable certainty standard for any condition increases the overall risk that juvenile-age offenders will be sanctioned as adults. While the current scheme has passed constitutional scrutiny, this new scheme will require additional litigation to determine its constitutionality. *See State v. Rudy B.*, 2010 -NMSC- 045.

AOC warns that any standard other than proof beyond a reasonable doubt must satisfy constitutional due process.

HB 183 may also raise questions about the standard of proof as to amenability in the context of dual disposition/sentencing. AOC points out that under existing law, the standard of proof is on the children's court attorney to establish that a youthful offender is not amenable to treatment or rehabilitation as a juvenile when seeking an adult sentence. *See* Section 32A-2-20(B). But under HB 183, the court is required to find that the offender "is amenable to treatment". Section 5(A). The language of these two provisions does not appear to be consistent: HB 183 may change the burden of proof from the children's court attorney ("is not amenable to treatment") to the youthful offender ("is amenable to treatment").

Further, as to the hearing that must be conducted before any offender turns 21 pursuant to Section 5(F), both AOC and AODA call attention to the lack of direction given courts when contemplating which of the authorized options to impose at such hearing. This omission could result, as AODA notes, in a situation where an offender who has honored and complied with any probation and other provisions of the original disposition order and has not committed a new offense may still be ordered to complete the adult sentence. Similarly, AOC points out that

Section 5(G), which declares that an adjudication shall not become a conviction under the Criminal Code upon successful completion of a probation imposed at the final hearing before an offender turns 21, fails to provide that same relief from a suspended sentence when an offender is ordered released at that hearing. In addition, although Subsection (G) directs that upon successful completion of a probation imposed under Subsection (F), the underlying adjudication does not constitute a conviction under the Criminal Code, Subsection (G) directs the court to enter a conditional discharge provided for another existing law governing adult sentencing. That law requires a court to place a person (in this instance a youthful offender) who has been conditionally discharged on probation. See Section 31-20-13(A), NMSA 1978. Such probation is inconsistent with the express provisions of Subsection (G), which applies only when an offender has successfully completed a previously imposed probation.

The inconsistencies and omissions just discussed as to Sections 5(F) and (G) may be examples of the confusion that appears to be present in dual sentencing proceedings in other states, which the AGO cites as one of the main issues that have been faced over time by states that have implemented these types of proceedings, leading to confusion both by the offender and legal officials carrying out dual sentences.

According to NMCD, the number of juvenile offenders in its custody has historically been very low (an average of one to four such offenders in NMCD custody/incarceration most of the time), and juvenile judges historically have been very reluctant to send juveniles to NMCD prisons. Judges may be more likely under the new provisions of the bill to place youthful offenders on adult probation in lieu of NMCD incarceration.

PERFORMANCE IMPLICATIONS

CYFD reports it has performance measures that relate to HB 183.

OTHER SUBSTANTIVE ISSUES

AOC points out that both New Mexico appellate courts have encouraged legislative action in this area:

Most recently, In *State v. Jones*, 2010-NMSC-012, the Supreme Court stated, “[t]he amenability hearing is the sole device provided by the Legislature to determine whether, for a specific youthful offender, the . . . consequences can be effective. The finding of non-amenability is the trigger for the court's authority to sentence a youthful offender as an adult.” A finding of non-amenability is the only way to “dislodge a youthful offender from the protective dispositional scheme of the Delinquency Act.” However, the facts in *Jones* frustrated the Court, causing it to conclude, “New Mexico desperately needs a legislative solution to the sentencing gaps created by the Delinquency Act and the criminal justice system.”

Eight years earlier, in *State v. Ira*, 2002-NMCA-037, the Court of Appeals urged the Legislature to consider sentencing alternatives for juveniles and providing examples of the approaches of other jurisdictions. *Ira* explained, “a number of states around the country have enacted blended sentencing alternatives that do give the sentencing judge the option of pursuing a juvenile, rehabilitative approach in marginal cases without sacrificing the ability to impose a long-term, adult incarceration if rehabilitation attempts

prove futile.” One of the jurisdictions that *Ira* mentioned was Minnesota, which has a juvenile sentencing scheme similar to HB 183.

Further, AOC advises that over the past decade, the U.S. Supreme Court jurisprudence has evolved regarding youth status in the criminal justice system. It advises that just this week, the U.S. Supreme Court issued its latest opinion in this line of cases, *Montgomery v. Louisiana*, 577 U.S. ____ (2016). The Court reiterated that, “children are constitutionally different from adults for purposes of sentencing.” “[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Montgomery* (quoting *Miller v. Alabama* 132 S.Ct. 2455 (2012)).

The term “youthful offender” is defined at Section 32A-2-3(J), NMSA 1978, and depends on the age of the offender at the time of the offense and the seriousness of the crime. For a child 14 to 18 years of age, the crimes include: second degree murder, assault with intent to commit a violent felony, kidnapping, aggravated battery, shooting at a dwelling or occupied building or shooting at or from a motor vehicle, dangerous use of explosives, criminal sexual penetration, robbery, aggravated burglary, aggravated arson and abuse of a child that results in great bodily harm or death. Any felony offense committed by a child 14 to 18 may make that child a youthful offender if the child has three prior separate felony adjudications within a three-year time period. And a 14 year old child adjudicated for first degree murder is also considered a youthful offender.

POSSIBLE QUESTIONS

Can this bill be implemented by May 18, 2016?

MD/al/jle/jo/jle