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FISCAL IMPACT REPORT

SPONSOR Youngblood ORIGINAL DATE 02/10/18
LAST UPDATED _____ HB 190
SHORT TITLE Dual Sentencing for Some Youthful Offenders SB _____
ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal to Moderate	Minimal to Moderate	Minimal to Moderate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicate of SB 243

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorneys (AODA) (2016)

New Mexico Attorney General (NMAG)

Law Offices of the Public Defender Department (LOPD)

Children, Youth and Families (CYFD)

New Mexico Department of Corrections (NMCD)

New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

House Bill 190 creates new “dual disposition” sections in the Delinquency Act of the Children’s Code. These provisions authorize the imposition of both a juvenile disposition with a suspended adult sentence for youthful offenders who are found to be amenable to treatment. “Amenable to treatment” means the ability of a child to be rehabilitated or treated sufficiently by the time the child reaches 21 years of age to protect the public’s safety.

If the offender is between the ages of fourteen and eighteen and has committed one of the felony offenses listed in Section 32A-2-3(K), NMSA 1978 (or has three prior felony adjudications within three years) and is amenable to treatment, the court may impose the following: 1) a fine; 2) a juvenile disposition; and 3) an adult criminal sentence that will be stayed on condition that the offender not violate the provisions of the disposition order and does not commit a new offense. Successful completion of the juvenile disposition is a condition of the suspension. See Section 6(A)(3).

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 beyond a reasonable doubt, it must make written findings of mitigating factors to justify continuing the stay. If the court finds no such mitigating factors, it shall 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.

In order to revoke the suspension and execute the adult sentence, a court must find that during the time the offender was placed on probation or committed to a facility for delinquent children, the child was not amenable to treatment at available facilities and that the child was not eligible for commitment to an institution for children with developmental disabilities or mental disorders. The court must also make findings on enumerated factors which mirror those in current law (Section 32A-2-20(C)), and, in addition, concerning the child's behavior and conduct while on probation or committed to a facility for the care and rehabilitation of adjudicated delinquent children in the instant proceeding, the results of a report provided by the CYFD using an "accepted risk assessment tool", and any other factor stated on the record.

At the conclusion of the hearing, the offender is placed on probation and then successfully completes it, the adjudication is not 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, the offender is entitled to credit toward all time served under the earlier juvenile disposition.

FISCAL IMPLICATIONS

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 offender sentenced to the care of NMCD is more likely to be placed on adult probation with NMCD. The cost per client in Probation and Parole for a standard supervision program is \$2,879 per year. The cost per client in Intensive Supervision programs is \$616 per year. The cost per client in Community Corrections is \$8,207 per year. The cost per client per year for female residential Community Corrections programs is \$23,758 and for males is \$18,805. NMCD advises offenders placed on probation for the crimes covered by this bill seem likely to be immediately or eventually placed on standard supervision, and concludes that the fiscal impact on it seems minimal during the relevant three year fiscal period and thereafter.

In addition and more generally, HB 190 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 190 does not result in increased adult incarceration. LOPD advises the impact of HB 190 is likely to result in a need for additional funds in order to provide constitutionally required effective assistance of counsel. These unquantified costs are represented in the operating budget impact table above by the phrase "Minimal to Moderate".

SIGNIFICANT ISSUES

In its 2016 analysis of a substantially similar bill (HB 183), in pertinent part, AODA provided this explanation of the new sanctions authorized in SB 243:

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. [The bill] 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 stated its belief 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 asserted 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.

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 on which Cambiar New Mexico (a secure treatment method that 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) is based. 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. This both promotes public safety, by diverting those who are not amenable, and offers the best opportunity for rehabilitation of young offenders, as the amenability prediction need no longer be made before the offender can be placed in treatment.

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

The creation of this blended sentencing scheme ignores the unique scheme New Mexico devised twenty-five years ago to deal with serious offenses committed by children. It reverses the default position of New Mexico law to date which is supported by science that recognizing the differences between youth and adults compel a different, and often more protective, treatment for youth. It also ignores the 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).

LOPD points out that under HB 190, a youthful offender who attempts to buy alcohol (a status offense) or violates terms of probation (such as curfew) could have the stay of his adult sentence revoked. The proposal increases the overall risk that juvenile-age offenders will be sanctioned as adults. AODA raised a similar point in its 2016 analysis: as to the hearing that must be conducted before any offender turns 21 pursuant to Section 7(F), AODA called 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 noted, 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. AOC expresses concern that such a result is a potential violation of the double jeopardy clause in the federal and state Constitutions. Additionally, Section 7(H), 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.

Both NMAG and LOPD call attention to the provision in Section 5(I) allowing the State to appeal an amenability determination. LOPD asserts that provision raises double jeopardy questions. NMAG advises this issue is currently being litigated in *State v. Nehemiah G.*, A-1-CA-35528, in which the State filed an appeal from a children's court determination of a juvenile sentence and the Court raised the issue as to whether the State had the right to appeal. NMAG suggests this addition would clarify the legislature's intent to provide for an appeal by either party.

NMAG also calls attention to new language requiring that the court "shall make findings" on the applicable factors. Sections 6(B) and 7(G). However, the existing law in which the court determines whether to sentence a youthful offender as a juvenile or adult says the court "shall consider" the factors. This change allows for consistency and clarity on appellate review.

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, but they still may not be very likely to send youthful offenders to NMCD prison.

PERFORMANCE IMPLICATIONS

CYFD reports it has performance measures that relate to HB 190.

OTHER SUBSTANTIVE ISSUES

CYFD provides this information regarding juveniles charged as youthful offenders versus those who receive adult sanctions: out of a total of 332 clients during FY07-FY16, 28.6 percent received adult sanctions (not considered amenable to treatment). The majority, 71.4 percent, were considered youthful offenders. SB 243 affects only those considered amenable to treatment, which is the majority of the applicable population. Overall, CYFD reports, the vast majority of juveniles committed to facilities are non-youthful offenders sentenced as children. The total number of clients committed to facilities between FY07 and FY16 was 2,902. Only 5.7 percent of those committed to facilities received dispositions as youthful offenders. Among those with probation dispositions, between FY07 and FY16, only 0.9 percent were youthful offender probation dispositions.

NMAG notes that HB 190 addresses a potential gap in the juvenile justice system that was recognized back in 2002 when then-Judge Bosson noted:

I enthusiastically join that portion of the majority opinion that calls for improvements in the Children's Code. Children's court judges need more flexible tools in order to adequately address the unique problems presented by youthful offenders. Judges need the power to sentence juveniles conditionally, first as juveniles and later as adults, depending upon whether subsequent review indicates that adult sentencing is warranted. With conditional sentencing, courts could take advantage of the therapeutic and rehabilitative services that are uniquely available for juveniles, and would have the opportunity to observe how a child actually performs until turning twenty-one. When the juvenile became of age, the judge would have a record of performance upon which to base a more informed, predictive decision about the probability for success versus the risk to society. Conditional sentencing affords the juvenile one last opportunity for redemption, while retaining institutional control over the juvenile for the protection of society; this seems to be a win-win proposition.

State v. Ira, 2002-NMCA-037, ¶ 49, 132 N.M. 8 (Bosson, J., specially concurring).

This change would also address an existing public safety risk, such as in the case of *State v. Nehemiah G.*, A-1-CA-35528, currently being litigated by the OAG, wherein the child murdered his parents and three young siblings, and was found by the court to be amenable to treatment and sentenced as a youthful offender, as opposed to an adult. Currently, a youthful offender must be sentenced as a juvenile and can be held only until age 21. There is no procedure under which a court can review a youthful offender's rehabilitative progress after the fact, to determine if a youthful offender has, in fact, been rehabilitated and/or if that youthful offender can be successfully and safety

The NMSC provides an excerpt taken from an article entitled, “*A Decade of National Center for State Courts Research on Blended Sentencing of Juvenile Offenders: What Have We Learned About Who Gets a Second Chance?*” (Cheesman) (2011). Blended sentencing enables some

courts to impose juvenile or adult correctional sanctions (or both) on certain young offenders (Sickmund, Snyder, and Poe-Yamagata, 1997). Blended sentencing emerged during a period of steadily increasing violent juvenile crime as a compromise between those who wanted to emphasize public safety, punishment, and accountability of juvenile offenders and those who wanted to maintain or strengthen the traditional juvenile justice system. It offers a means of resolving these disparate views because blended sentencing combines opportunities for rehabilitation in the juvenile justice system with the possibility of sanctions in the adult criminal justice system. Blended sentencing offers juvenile offenders a “last chance” within the juvenile system by providing “an incentive to respond to treatment in order to avoid the consequences of an adult sentence” (Redding and Howell, 2000: 147). NMSC provides this chart regarding dual sentencing in various states:

Type	Description	Adopted By	In Year
Juvenile-Exclusive Blend	The juvenile court imposes either juvenile (delinquency) or adult (criminal) sanctions.	New Mexico	1995
Juvenile-Inclusive Blend	The juvenile court imposes both juvenile and adult sanctions, typically suspending the adult sanction.	Illinois, Kansas South Dakota Minnesota Alaska, Arkansas, Connecticut Michigan, Montana, Vermont Ohio	1990 1993 1994 1995 1997 2002
Juvenile-Contiguous	The juvenile court imposes a juvenile sanction that would be in force beyond the age of its extended jurisdiction. At that point, the juvenile court determines whether the remainder of that sanction should be served in an adult criminal corrections system.	Texas Massachusetts, Rhode Island Colorado South Carolina	1987 1990 1993 1994
Criminal-Exclusive Blend	The criminal court imposes either juvenile or criminal sanctions.	Virginia, West Virginia Colorado Florida California, Idaho Michigan Oklahoma	1985 1993 1994 1995 1997 1998
Criminal-Inclusive Blend	The criminal court imposes both juvenile and criminal sanctions, typically suspending the criminal sanction.	Virginia Florida Arkansas, Michigan Iowa	1985 1994 1995 1997