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FISCAL IMPACT REPORT

ORIGINAL DATE 2/05/2020

SPONSOR Baca LAST UPDATED _____ HB _____

SHORT TITLE Stayed Sentence for Some Youth Offenders SB 197

ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$213.9	\$213.9	\$427.8	Recurring	General
		Indeterminate- See Fiscal Implications	Indeterminate- See Fiscal Implications	Indeterminate- See Fiscal Implications	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Offices of the Public Defender (LOPD)
 Office of the Attorney General (NMAG)
 Adult Parole Board (APB)
 Corrections Department (NMCD)
 Sentencing Commission (NMSC)
 Administrative Office of the Courts (AOC)
 Children, Youth & Families Department (CYFD)

No Response Received

Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

Senate Bill 197 creates new “dual disposition” sections in the Delinquency Act of the Children’s Code. The new sections authorize the imposition of 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 twenty-one years of age to protect the public’s safety.

If an 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.

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 the 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 stayed adult sentence, and the offender will be placed under the custody of adult corrections and the jurisdiction of adult courts.

The bill directs that a hearing must be held before a youthful offender who has received a suspended adult sentence turns twenty-one. At that hearing, the court must determine whether to: 1) revoke the suspension, order execution of the adult sentence 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.

To order execution of 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 in 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)). Those factors concern the child’s behavior and conduct while on probation or committed to a facility for the care and rehabilitation of adjudicated delinquent children, the results of a report provided by CYFD using an “accepted risk assessment tool,” and any other factor stated on the record.

If the offender is ordered to serve probation and 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 have all time served under the earlier juvenile disposition credited to the adult criminal sentence.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

AOC states that by creating a dual sentencing structure for youthful offenders, the bill may increase the amount of work that needs to be done by the courts, thus requiring additional resources to handle the increased workload. According to AOC, there were 32 youthful offender cases filed in New Mexico in 2018, and 66 filed in 2019. The bill requires courts to make a number of findings at various stages in a youthful offender proceeding and requires additional hearings if there is an alleged violation of the conditions for a stayed adult sentence and when the youthful offender turns twenty-one.

AOC also notes that the dual sentencing scheme would likely result in additional administration for both juvenile and adult courts, such as the development and implementation of:

- training for all children’s court and criminal district court judges;
- court processes specific to dual dispositions for court staff statewide.
- analysis and reconfiguration of the Odyssey case management system

LOPD states that the bill’s proposed review of a person at age twenty-one might require additional attorneys well-trained in juvenile defense as well as additional staff and funds for expert witnesses. Depending on the volume of cases in a geographic location, there may be a significant recurring increase in needed FTEs for the office and contract counsel compensation. LOPD cannot predict how many additional attorneys might be required if the bill were enacted, but states that the cost of employing an Associate Trial Attorney, including benefits, is approximately \$213,870.

NMCD anticipates a minimal fiscal impact if SB 197 were enacted, since the bill allows a stay of an adult sentence given to a youthful offender that is amenable to treatment. NMCD believes that the requirement that youthful offenders receive a stayed sentence only if they are amenable to treatment makes it more likely that the youthful offenders will meet the conditions of the stay, and reduces the likelihood that they will enter the adult prison population.

SIGNIFICANT ISSUES

CYFD states that under current law, a court has discretion to impose an adult sentence or juvenile sanctions on a youthful offender, but not both. If the court finds that the juvenile is amenable to treatment, then they must be given a juvenile sanction pursuant to Section 32A-2-19 NMSA 1978. Even if the juvenile does not respond to treatment, or commits new, violent offenses, the term of commitment cannot be extended beyond their 21st birthday. NMAG notes that SB 197 addresses the present limitations of the law by amending the Delinquency Act to establish a dual sentencing option for youthful offenders who are amenable to treatment. Under the proposed dual sentencing option, a court could impose both a juvenile disposition and an adult sentence that is stayed unless the youthful offender violates any condition of the stayed sentence or commits a new offense.

According to CYFD, the vast majority of clients committed to CYFD facilities are “non-youthful offenders” sentenced as juveniles. The total number of clients committed to CYFD facilities between fiscal year 2009 and fiscal year 2019 was 2,815. Of these, non-youthful offenders totaled 2,635 (93.6 percent) and approximately 180 clients (6.4 percent) were committed on youthful offender dispositions. During the same period, there were a total of 17,671 non-youthful offender and 164 youthful offender probation dispositions.

Also between fiscal year 2009 and fiscal year 2019, CYFD states there were 339 clients charged as youthful offenders. Of these, 72 (21.2 percent) were not considered amenable to treatment and, therefore, received adult sanctions. The other 267 clients (78.7 percent) were considered youthful offenders amenable to treatment and received juvenile sanctions. SB 197 affects only youthful offenders considered amenable to treatment, which is the majority of the applicable population at this time.

NMAG and LOPD observe that the bill appears to address what our Court of Appeals described as “an inadequacy in our juvenile justice sentencing scheme.” *State v. Ira*, 2002-NMCA-037, ¶ 27. As the court explained in *Ira*,

[W]hen a youthful offender is sentenced as a child, the court’s power over the

child must end when the child reaches the age of twenty one. However, in some instances, successful rehabilitation would require a longer commitment to the rehabilitative resources of the juvenile justice system. And unfortunately, in some cases, despite providing the best treatment options available, rehabilitation will prove impossible. Because of these very real possibilities and the obligation that every sentencing court also has to protecting public safety, many courts . . . will opt for a longer term of adult incarceration for a juvenile offender instead of risking a short-term, unsuccessful juvenile detention that would result in the premature release of a dangerous offender.

LOPD quotes from the special concurrence in *Ira*, which focused on the need for legislation addressing the inadequacies in the current law:

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.

2002-NMCA-037, ¶ 49 (C.J. Bosson, specially concurring.) *See also State v. Jones*, 2010-NMSC-012, ¶ 57 (“New Mexico desperately needs a legislative solution to the sentencing gaps created by the Delinquency Act and the criminal justice system.”).

The bill requires a court to find a child amenable to treatment before it can impose the stayed adult sentence. LOPD states that the requirement does not fully address the courts’ concerns with the current law. By tying the possibility of a stayed adult sentence to a court’s finding of amenability to treatment, the bill forecloses a stayed sentence in situations where a judge is unsure at the time of sentencing that a child is amenable, but would like time to see how the child does in the juvenile system’s rehabilitative programs. LOPD suggests that rather than requiring a finding that a child is amenable to treatment, the bill might provide for a presumption of amenability to treatment for purposes of determining whether to impose a stayed adult sentence.

NMSC notes that opponents of blended sentencing programs like that proposed in SB 197 criticize the programs because youthful offenders who do not receive the due process protections of the adult criminal justice system as a tradeoff for the relative leniency of the juvenile system often end up being subject to adult sentences anyway. *See* The Campaign for Youth Justice “Fact Sheet: Blended Sentencing” (available at www.campaignforyouthjustice.org/images/factsheets/Blended%20Sentencing%20Fact%20Sheet.pdf). Similarly, CYFD states that blended sentencing options providing for a stayed adult sentence may result in a higher number of youthful offenders initially transferred to juvenile facilities who receive adult sentences.

NMSC states that proponents of blended sentencing schemes argue that the schemes provide a good intermediary response to criminal offenses by juveniles. However, they also stress the dangers of racial bias in blended sentencing schemes, and point to the need for formal risk and

needs assessments and enhanced services and supervision for juvenile offenders. *See* Fred Cheesman, “A Decade of NCSC Research on Blended Sentencing of Juvenile Offenders. What Have We Learned About 'Who Gets a Second Chance?'” National Center for State Courts (2011), available at: <https://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Special-Programs/4-4-Blended-Sentencing-of-Juvenile-Offenders.aspx>.

Like NMSC, AOC raises the issue of racial bias in connection with inclusive blended sentencing programs. Referring to the same article by Fred Cheesman cited by NMSC, AOC notes that two studies found that minorities and young people of color were more likely to be subject to adult sanctions under statutory schemes similar to the one proposed in SB 197. CYFD comments that young people of color in New Mexico experience arrest rates, adjudication rates, and commitments that are not proportional to the share of their racial and ethnic groups in the general population. CYFD states that the bill may further deepen racial disparities, as has been seen in other states.

AOC refers to the bill’s provisions requiring a district court that finds that a youthful offender has violated the conditions of the stay to order execution of the adult sentence, absent mitigating factors that justify continuing the stay. AOC notes that the bill provides no guidance to courts about what constitute sufficient mitigating factors, which may lead to confusion and inconsistencies among jurisdictions about when it is appropriate to impose the adult sentence.

PERFORMANCE IMPLICATIONS

According to AOC, whether this bill would impact performance measures as they relate to judicial budgeting is unclear. For example, any court’s performance measure clearance rates may be impacted if increased penalties lead to an increased demand for adjudication on the issues, fewer plea bargains, and significant appellate litigation, thereby increasing the amount of judge and clerk time needed to dispose of cases.

TECHNICAL ISSUES

In Section 6 of the bill, NMAG notes that findings required by a judge under Section 32A-2-20.1(B)(1)-(4) refer to “the alleged offense.” Because the required findings are made after conviction, NMAG suggests that the adjective “alleged” be stricken.

Also in Section 6, AOC states that Section 32A-2-20.1(A)(3), on page 16, lines 20-25, appears to contain duplicative language. The provision first states that a condition of a stayed sentence is that “the offender not violate the provisions of the disposition order” and then provides that “successful completion of the juvenile disposition ordered shall be a condition of suspension of the adult criminal sentence.” It is unclear how conditioning the stayed sentence on not violating the disposition order is different from conditioning the stayed sentence on successful completion of the disposition order. If there is an intended difference, AOC suggests it be clarified to avoid any vagueness issues.

AOC notes that in Sections 6 and 7, the terms “stay” and “suspension” are used interchangeably to refer to the adult sentences addressed in the bill. *See* Section 32A-2-20.1(A)(3), p. 16 and Section 32A-2-20.2(D), (F), p. 19. Unless the two terms are intended to have different meanings, AOC suggests that the bill use only one of the two terms.