

**LFC Requester:** \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2025 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

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*{Analysis must be uploaded as a PDF}*

**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** January 22, 2025

**Bill No:** House Bill 107-280

**Sponsor:** Andrea Reeb  
PENALTY FOR DRUG  
TRAFFICKING & DEATH

**Agency Name  
and Code  
Number:** Law Offices of the Public Defender  
-280

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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
<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:

This bill would make multiple significant changes to the Controlled Substances Act, which prohibits “trafficking” certain substances, where trafficking includes *either* distribution of the substance to another, *or* possession with the intent to distribute.

First, the bill would create a mandatory sentence for a first offense trafficking conviction, which currently carries a basic sentence of 0-9 years in prison, *see* NMSA 1978, § 31-18-15 (setting basic sentence for a second-degree felony). This bill would change that penalty to a mandatory nine years, removing judicial discretion to suspend or defer any portion of the incarceration.

Note: The phrasing of a “mandatory minimum of nine years” for first offense trafficking suggests the potential for a *greater* sentence than nine years without setting an outer limit even though the bill does not create a longer basic sentence for second degree felony trafficking. Analyst therefore assumes the bill mandates a mandatory nine-year sentence; no more and no less.

The bill also adds a counterfeit Schedule I and II substances (which are narcotic drugs) to the definition of “traffic”, which would increase penalties for distributing counterfeit substances from a fourth-degree felony (0-18 months) to a second-degree felony subject to the mandatory nine years (increasing by a factor of six, plus making it mandatory). This addition also suggests that distributing counterfeit Schedule I and II substances in a school zone would result in a first degree felony (18 mandatory years) from the existing penalty of a third degree felony (0-3 years).

The bill also **creates a new crime of trafficking “resulting in death.”** For a first offense, this crime would constitute a “special” second-degree felony with a new basic sentence defined in Section 31-18-15 of 18 years (the same penalty as second-degree murder) while *also* requiring a mandatory minimum of twelve years served in prison, and thus a basic sentence of 12-18 years in prison (where second-degree murder carries 0-18 years and may be entirely suspended at the judge’s discretion).

A second or subsequent conviction would be a new basic sentence in Section 31-18-15 for a “special” first-degree felony carrying a *life sentence*. (The only other life sentences in New Mexico law are for (1) first-degree murder, (2) intentional child abuse resulting in the death of a child under age 12, and (3) aggravated rape (“perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life”).)

In creating special basic sentences for trafficking resulting in death, the bill specifies a \$17,500 fine for first degree felony trafficking resulting in a death of a human being and \$12,500 for second degree felony trafficking resulting in the death of a human being.

The bill also makes *distribution* of Schedule I and II narcotic drugs and methamphetamine to a minor a first-degree felony (mandatory 18 years).

## FISCAL IMPLICATIONS

While the LOPD would likely be able to absorb some additional *cases* under the new crimes proposed in this legislation, the dramatic penalty increases, including mandatory sentences, makes existing numbers of trafficking cases much more likely to go to trial because mandatory sentences remove the parties’ ability to negotiate a suspended sentence and probation, the most common disposition for criminal cases.

The proposed penalties would necessitate assignment to mid-level felony capable attorneys (Associate Trial Attorneys), or for life-sentence charges, to higher-level attorneys (Trial Attorneys). 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 \$12,780.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$126,722.33.

Analyst notes that in “possession with intent to distribute” trafficking prosecutions, the State typically relies on law enforcement witnesses to provide expert opinions that certain amounts (often relatively small amounts) are more consistent with trafficking than personal use (simple possession). Because of the *dramatic* increase in penalty for even first-offense trafficking, it may become necessary to hire defense experts to rebut those opinions in cases, should HB 107 become law.

Moreover, 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.

## SIGNIFICANT ISSUES

### Mandatory “Minimum” Penalties

Judicial discretion is a crucial aspect of sentencing proceedings. To ensure that a punishment fits the crime, 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. The law treats possession of a few grams of individually wrapped baggies of substances as trafficking by possession with intent to distribute, the same crime as a person who possesses kilos of the same substance in a high level operation. As law enforcement expert witnesses regularly acknowledge, it is not uncommon for drug addicts to sell some portion of their stash in order to fund their own habit. A judge needs to be able to differentiate between these two entirely distinct offenders and their relative impacts on the community. Mandatory sentences paint all defendants with the same cloth.

Mandatory sentences should be enacted extremely sparingly. *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](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>.

The proposed mandatory sentences in this legislation would not only be egregiously draconian under the circumstances of most cases, but would create a complete outlier in New Mexico’s overall criminal statutory scheme. Even if the nine-year mandatory sentence for first-offense trafficking is intended as a “mandatory nine years” (and not an indeterminate “minimum” of nine, with the potential for more, *see assumption, noted in bill synopsis*), it would be unprecedented in New Mexico’s sentencing scheme for a second-degree felony. No second degree felony has a fully mandatory sentence. Second degree criminal sexual penetration of a child carries fifteen years, but only has a *mandatory minimum of three years*. To punish distribution – of potentially a single dose quantity of cocaine or similar drug – more harshly than rape of a child would be an egregious incongruity in the law.

It is also worth noting that there is limited benefit in dramatically increasing “second or subsequent offenses” as repeat offenders already incur “habitual offender” sentencing enhancements, including up to 8 years of mandatory prison time depending on the number of

prior felonies. *See* NMSA 1978, § 31-18-17 (Habitual Offender Act).

### **New Crime of “trafficking resulting in death”**

The bill would create a new crime for trafficking "resulting in death" with a mandatory 12-year prison sentence, but provides little guidance on the requirements for such a crime. Where trafficking conduct might "result in" a person consuming a drug and then dying from an overdose, treating this as a heightened offense that punishes the trafficker for the death itself 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 a drug results in an accidental overdose by the user, the trafficker has neither the mental culpability nor the causal culpability for a penalty akin to second-degree murder.

These concerns are even more pronounced when one considers that trafficking includes possession with intent to distribute. Unlike manufacture and distribution (the two other forms of trafficking under Section 30-31-20), possession with intent to distribute requires no finding of volition on the part of the possessor, other than simple possession with some inference that they may distribute some amount in the future. These cases are typically litigated with the assistance of law enforcement “experts” who consistently testify that relatively small amounts of a substance meet the threshold of possession with intent to distribute (or trafficking) rather than an amount used for defendant's own personal use. Put simply, including possession with intent to distribute within a crime associated with “resulting in” another person's death creates the likelihood that an addict with a small, not obviously trafficking amount of a controlled substance could be considered a murderer a friend consumes part of their recreational stash.

Finally, imposing exceedingly harsh penalties for traffickers specifically to address overdose deaths is not the solution. Overdose is a public health issue that requires a public health response; they are not a criminal issue requiring 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 (*see below*), 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.>

### **Chilling effect on users calling for help with overdoses**

Recently, this State has taken several steps forward in the fight against overdoses. 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 trafficking is not included in the immunity provisions, by continuing to include possession with intent to distribute as a qualifying trafficking offense, there is a serious risk that individuals who are not cartel-affiliated traffickers, but instead drug users addicted to controlled substances, will be less likely to call law enforcement and first-responders for help in overdoses because of the risk that this bill **dramatically increases**: that they could be prosecuted now as murderers. These concerns obviously do not apply to individuals trafficking large amounts of drugs, (although the causation concerns outlined above are heightened when traffickers are strangers completely divorced from the consumption process).

Because our trafficking statute does not set a per se limit of what constitutes possession with intent to distribute, there is a serious concern that an individual who only meant to share a single dose of a drug with a fellow user, which then “results in” another’s overdose and subsequent death, can now be prosecuted as a murderer. Such concerns can have chilling effects. Put simply, while this bill ostensibly exists as a recognition that drugs are dangerous and life is precious, it could have significant chilling effects on a population already skeptical of law enforcement and in turn lead to more preventable deaths.

## **PERFORMANCE IMPLICATIONS**

It is difficult to overstate the implications on criminal defense when penalties are increased this dramatically. The level of plea bargaining power that these types of mandatory sentences puts into the hands of prosecutors is extremely concerning. This concern is even greater for cases involving close calls of simple possession versus possession with intent to distribute. When penalties are this high and remove all sentencing discretion from the judges, 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**

## **TECHNICAL ISSUES**

## **OTHER SUBSTANTIVE ISSUES**

Unlike other states, New Mexico does not have set thresholds as criteria for trafficking and distribution. This means street level sellers who may give away, share or sell minor amounts of drugs will be subject to the same extreme mandatory minimums as someone who sells copious amounts. People with minor roles in the drug supply chain are most likely to be prosecuted.

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**