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FISCAL IMPACT REPORT

SPONSOR: Adair DATE TYPED: 03/01/01 HB _____
 SHORT TITLE: Castration as Alternative Punishment SB 511
 ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
		See Narrative		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to appropriation in the General Appropriation Act

SOURCES OF INFORMATION

- LFC Files
- Corrections Department (CD)
- NM Public Defender (NMPD)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Attorney General (AG)
- Children Youth and Families Department (CYFD)

SUMMARY

Synopsis of Bill

SB511 requires that a person convicted of criminal sexual penetration in the 1st degree when the victim is less than thirteen (13) years of age shall be treated with medroxyprogesterone acetate, pursuant to a schedule of administration monitored by CD. The bill provides that a court order that requires an offender to undergo treatment with medroxyprogesterone acetate shall be contingent upon the determination by a court-appointed medical expert that the offender is an appropriate candidate for the treatment. The bill provides that a court order that requires an offender to undergo treatment with medroxyprogesterone acetate shall specify the duration of the treatment.

The bill provides that notwithstanding the foregoing provisions, the court may order the offender to undergo physical castration if the offender presents the court with a written motion that sets forth the offender's intelligent, knowing and voluntary consent to physical castration as an alternative to treatment with medroxyprogesterone acetate

The bill requires the CD to provide the services necessary to administer medroxyprogesterone acetate

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treatment to an offender. Continued treatment is not required when such treatment is not medically appropriate.

The bill also provides that if an offender ordered by the court to undergo such treatment refuses to allow the administration of that treatment, the offender is guilty of a 2nd degree felony.

The effective date of the bill is July 1, 2001

Significant Issues

CD reports the bill only applies to those offenders convicted of criminal sexual penetration in the 1st degree when the minor is less than thirteen years old. Under current sentencing law, those persons convicted of 1st degree felonies receive a mandatory prison sentence of eighteen (18) years. This prison sentence may not be suspended or deferred. Presumably, the primary purpose of the bill is to protect the general public from these sex offenders. However, it may not be an efficient use of resources to require “chemical castration” for those sex offenders during the period of time while incarcerated in prison, because while they are in prison, they are not likely to prey on the general public.

The bill requires the CD to provide the services necessary to administer medroxyprogesterone acetate treatment to an offender. These treatments are continual in nature and the cost of such continued treatments would be substantial. The department’s current contract for medical care does not include such services. Also, CD does not currently provide medical services to any parolees or probationers. CD only provides medical services for those offenders housed in its prisons. Therefore, this will be the first time that CD will be required to either provide medical services to parolees, or to monitor such medical treatments. It may be somewhat difficult to monitor an offender’s compliance with this program.

There also appears to be an internal conflict with the language contained in the bill. On one hand, Section A mandates treatment with medroxyprogesterone acetate. On the other hand, Section B states that such treatment is contingent upon a determination by a court appointed medical expert that the offender is an appropriate candidate for treatment.

There will also be an increase in costs to CD if any of these offenders choose physical castration as an alternative to “chemical castration.” Again, CD’s current contract for medical care does not include this type of service.

CD reports the department’s Medical Director has the following concerns and recommendations:

- 1) If the offender refuses to accept the injections voluntarily, it would be medically unethical for health staff to administer it.
- 2) If this bill were to become law and occasion rose whereby the Department was required to administer medroxyprogesterone acetate, the department would likely arrange with an outside practitioner for procurement and administration of the drug.

Finally, there will be an increase in costs to CD as a result of the new 2nd degree felony for those offenders who refuse to allow the administration of such treatment.

PERFORMANCE IMPLICATIONS

CD reports this bill will result in an increase in the performance burden upon CD personnel who will be required to arrange for the provision of these treatment services to offenders in the CD custody and under the department's supervision through contractual arrangements with medical service providers. In the long term, the bill will also increase the performance burden upon department prison personnel, as well as parole officers. The bill would require a high level of parole supervision; it would be staff intensive, and would in all likelihood require an increase in staff with a reduction in caseload capability.

FISCAL IMPLICATIONS

According to CD, there is no appropriation in the bill to cover the increase in costs to the department. Since CD has no experience with the administration of such treatment, it is difficult to estimate the increase in costs that will result. While it is difficult to estimate the number of individuals who will be convicted of 1st degree criminal sexual penetration of a victim less than 13 years-old, providing these medical treatments to any number of such offenders will cause a significant increase in costs to the department.

The AG reports an additional FTE may be required to manage additional appeal. This would entail an expenditure between \$50,000 and \$70,000 depending upon the level of experience of the attorney selected.

AOC reports if the court or the judiciary is required to pay for the medical experts, this could be a very expensive endeavor. This will have an impact on the administrative office of the court's jury and witness fee fund which is used to pay for expert witnesses. Of course, it will depend on how many of these cases actually come before the courts. It will cost the judicial system \$400 for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

ADMINISTRATIVE IMPLICATIONS

According to CD this bill will result in an increase in the administrative burden upon CD personnel who will be required to arrange for the provision of these treatment services to offenders in CD's custody and under the department's supervision through contractual arrangements with medical service providers. In the long term, the bill will also increase the administrative burden upon department prison personnel, as well as parole officers, who will be required to track and schedule the administration of these treatment. This would require a high level of parole supervision; it would be staff intensive, and would in all likelihood require an increase in staff with a reduced caseload capability.

NMPD reports this legislation is likely to have significant impact upon the department by the numerous constitutional issues raised. As with most new "additional penalty" legislation, the harsher or more enduring the punishment, the less likely a plea will result. The accused simply has no reason to plea to any result that results in lifetime punishment or physical castration. This office estimates that passage of this legislation will require at least three PD III trial attorneys, two investigators, and two additional legal liaisons. Further, many inmates will undoubtedly raise the issue of cruel and unusual punishment, right to bear children, right to privacy and other due process issues after conviction. In addition to post-conviction appeal issues, any refusal to submit to the chemical castration will immediately result in another case punishable as a Second Degree Felony. In effect, the legislation guarantees that this department will be defending a significant number of offenders

facing life penalties. That, in turn, will probably also raise a significant number of Habeas petitions, particularly if the parolee has already been sentenced to a significant period of time in prison and subsequently declines chemical castration. Again, there is no reason for the convicted, who has already been sentenced to a lengthy period of incarceration, to voluntarily submit to chemical castration. He will undoubtedly refuse if only for reasons of 'machismo', because he has been relegated to a society where the concept of 'manhood', as misshapen and warped as it may be, is essential to survival. In effect, every sex offender case that meets the strictures of this statute will likely result in *two* cases: The case in chief and the refusal to accept chemical castration. As such this office also estimates that passage will also result in needing two PD III appellate/Habeas attorneys. Total cost may approach \$445,000 a year.

There may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

Related to HB 512 which proposes a sentencing requirement of mandatory synthetic hormone therapy for sex offenders whose victim(s) are under the age of thirteen. The treatment is required when the offender is placed on parole, with the first treatment administered one week prior to release.

TECHNICAL ISSUES

CYFD indicates Subsection 1(C) is stated somewhat awkward from a legal perspective, indicating that the court may order physical castration if the offender presents a written motion. The more usual legal phraseology is that the offender may request something, and the court may order it. Also, technically, the court should make a factual finding, and not just issue an order upon a motion setting forth certain formulaic items. See amendment below.

Section 1(C): Notwithstanding the provisions of Subsection A of this section, the offender may upon written motion request the court to order that a physical castration be performed upon the offender. The court may issue such an order upon a finding that the offender: (1) has been fully informed of both the medical consequences of his decision, and of all available information indicating the probable duration of continued chemical castration; (2) has the mental and psychological capacity to make an informed decision; and (3) voluntarily consents ~~court may order the offender to undergo physical castration if the offender presents the court with a written motion that sets forth the offender's intelligent, knowing and voluntary consent to physical castration as an alternative to treatment with medroxyprogesterone acetate.~~

AODA reports this bill does not provide for accompanying counseling and applies only to cases with penetration, not attempted penetration. Similar statutes have withstood scrutiny apparently because of the psychological counseling included with the medication. Also, it is not unusual for cases to plead to "attempted criminal sexual penetration in the first degree of a child under the age of 13", and merely because an offender is not successful or a child cannot adequately describe "penetration", does not mean the offender doesn't need treatment.

OTHER SUBSTANTIVE ISSUES

The AG reports this may constitute a violation of the prohibition on "cruel and unusual punishment" as contained in the Eighth Amendment of the U.S. Constitution.

Would this treatment be applied to women? Would this treatment have the same effect on women?

NMPD reports Subsection E creates a new felony second degree for what's already contempt of a court ordered treatment. Given the first degree sentence already being served, with potential consecutive sentences and habitual offender penalties, this second degree felony is unnecessary "piling on" and a waste of criminal court, prosecution and Public Defender resources.

CYFD reports chemical castration may eventually be shown to cause side effects or other medical consequences, that are presently unknown or unknowable. The only way an offender could escape those other consequences would be to request permanent physical castration. There may be some constitutional issues (i.e., can the request be truly "voluntary" in these circumstances). Also, S0512 provides that the parole board may recommend to the court, and the court could order, that chemical castration is no longer necessary for a particular offender. The offender may have to make a decision about physical castration without knowing when or why the parole board could make its recommendation to discontinue chemical castration. There could also be liability problems if, at a later time, chemical castration is shown to have other medical consequences.

Chemical or physical castration may not reduce the offender's capacity or likelihood to commit other violent crimes, including sexually motivated or sexually abusive crimes. There is a medical screening to determine whether chemical castration is appropriate, but it is unclear what standards will be applied. The screening does not appear to include a psychiatric component.

AODA indicates similar statutes have withstood scrutiny apparently because of the psychological counseling included with the medication. Also, it is not unusual for cases to plead to "attempted criminal sexual penetration in the first degree of a child under the age of 13", and merely because an offender is not successful or a child cannot adequately describe "penetration", does not mean the offender doesn't need treatment.

LAT/njw:ar