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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/2022

SPONSOR Baca LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Youthful Offender & Stayed Adult Sentence SB 167

ANALYST Mulvaney

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY27	FY28	FY29	FY30	FY31	5 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$11.7 to \$152.4	\$35.2 to \$457.2	\$58.7 to \$762.0	\$82.1 to \$1,066.8	\$83.6 to \$1,86.8	\$271.2 to \$3,525.3	Recurring	General Fund

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorneys (AODA)  
 Administrative Office of the Courts (AOC)  
 Corrections Department (NMCD)  
 Attorney General’s Office (NMAG)  
 Department of Public Safety (DPS)  
 Sentencing Commission (NMSC)  
 Children, Youth and Families Department (CYFD)  
 Public Defender Department (PDD)

### BILL SUMMARY

#### Synopsis of Bill

Senate Bill 167 provides for “dual” or “blended” sentencing of youthful offenders who are found to be “amenable to treatment,” allowing the court to impose a juvenile disposition and an adult sentence, which is stayed on the condition the offender does not violate provisions of their juvenile disposition order, successfully completes their juvenile disposition, and does not commit a new offense. If the offender fails to meet these conditions, the court may revoke the stay on the adult sentence and adult sanctions may be imposed. If the offender is sent to prison, all time served under their juvenile disposition would be credited to their adult criminal sentence.

The bill defines “amenable to treatment” as “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.”

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**

SB167 could potentially increase the number of offenders serving time in adult correctional facilities. Incarceration drives costs in the criminal justice system, so the primary fiscal implications examined in this analysis relate to changes in the number of individuals in prison that might result from the bill. The Corrections Department reports the average cost to incarcerate a single inmate in FY21 was \$49.6 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$23.4 thousand per inmate per year across all facilities.

Overall, this analysis estimates SB167 could result in additional incarceration costs between \$83.6 thousand and \$1.1 million annually. This analysis estimates the changes proposed by SB167 could result in incarceration of between one and 13 additional individuals in New Mexico's prisons per year, and estimates these individuals will serve an average of 1,302 days in adult correctional facilities, a cost of \$83.6 thousand per offender. These additional costs will begin to be realized in FY27, increasing over the following four years (as more individuals are incarcerated under the provisions of this bill) and leveling out at between \$83.6 thousand and \$1.1 million in FY31 (as offenders begin to be released from prison) and future fiscal years.

Key assumptions underlying this analysis include:

- Youthful offenders who have an stayed adult sentence revoked and are admitted into prison will be serving a total term equal to the average length of stay of a serious violent offender. There is significant overlap in the crimes that define a "youthful offender" and those that are considered "serious violent offenses."
- Youthful offenders admitted to prison under SB167 will have served an average of 3.5 years of their juvenile term, which is counted towards their total sentence. Serious violent offenders serve an average of just over seven years in adult correctional facilities, so it is assumed youthful offenders will have just over 3.5 years remaining to serve in adult correctional facilities.
- Between one and 13 additional offenders may be admitted to prison under this law. The Children, Youth and Families Department (CYFD) reports 13 youthful offenders were unsatisfactorily discharged from supervision in FY21, although it adds that the current system allows some offenders who violate the conditions of their juvenile disposition order may still achieve a satisfactory discharge, so this may not fully account for all offenders who could be subject to having their stayed adult sentence revoked under this bill.

As per the Corrections Department

It is estimated that less than one percent of the current incarcerated population is a youthful offender sentenced as an adult, so any [increase] in population size due to an increase in delayed adult sentences imposed by the courts would have a minimal fiscal impact on the agency. If passed, the statute would permit a youthful offender amenable to treatment to have an adult sentence imposed and stayed, which could result in a minor increase in inmate populations. However the high standard of proof to revoke the stay on the adult sentence makes any significant increase in inmate population unlikely.

As per the Administrative Office of the Courts (AOC)

There will be a minimal administrative cost 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 the need for additional hearings and orders regarding dual disposition of a youthful offender amenable to treatment and challenges to the same. 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.

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. There were 32 youthful offender cases filed in New Mexico in 2018, and 66 filed in 2019. SB 167 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. 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; and
- Analysis and reconfiguration of the Odyssey case management system.

## SIGNIFICANT ISSUES

As per the Sentencing Commission

The dual disposition scheme outlined in SB167 is a type of blended sentencing program for juvenile offenders, known sometimes as “juvenile and criminal inclusive blended sentencing”. Advocates are critical of this and other blended sentencing schemes for often it means that youth who have not had the due process protections of the adult criminal justice system in a trade-off for the relative leniency of the juvenile system end up being subject to adult sentences anyway. *See*, for example, The Campaign for Youth Justice “Fact Sheet: Blended Sentencing” (available at:

<http://www.campaignforyouthjustice.org/images/factsheets/Blended%20Sentencing%20Fact%20Sheet.pdf>).

See also Schaefer & Uggen, “Blended Sentencing Laws and the Punitive Turn in Juvenile Justice”, *Law & Social Inquiry* (2016), which argued, in summary:

In many states, young people today can receive a “blended” combination of both a juvenile sanction and an adult criminal sentence. We ask what accounts for the rise of blended sentencing in juvenile justice and whether this trend parallels crime control developments in the adult criminal justice system. We use event history analysis to model state adoption of blended sentencing laws from 1985 to 2008, examining the relative influence of social, political, administrative, and economic factors. We find that states with high unemployment, greater prosecutorial discretion, and disproportionate rates of African American incarceration are most likely to pass blended sentencing provisions. This suggests that the turn toward blended sentencing largely parallels the punitive turn in adult

sentencing and corrections—and that theory and research on adult punishment productively extends to developments in juvenile justice.

(Available at: [http://users.soc.umn.edu/~uggen/Schaefer\\_Uggen\\_LSI\\_16.pdf](http://users.soc.umn.edu/~uggen/Schaefer_Uggen_LSI_16.pdf))

Advocates of blended sentencing schemes argue that it provides a good intermediary response to juvenile offending, but stress the dangers of racial bias in blended sentencing schemes and the need for use of formal risk and needs assessments and the use of enhanced services and supervision for juvenile offenders in these schemes (*See*, for example, 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) (the Cheesman paper is attached to this response.)

As per the Attorney General’s Office (NMAG)

Section 7(H) provides that, if a dual disposition youthful offender successfully completes his term of probation, the adjudication will not count as a criminal conviction and the court “shall enter a conditional discharge as provided for in Section 31-20-13 NMSA 1978.” It appears that the intent of the provision is to terminate the offender’s involvement with the criminal justice system without imposing a criminal conviction.

A conditional discharge under Section 31-20-13, however, does not directly do this. When a court enters a conditional discharge, it holds the conviction in abeyance and places the offender on probation. If the offender violates the terms of his or her probation, the court may enter an adjudication of guilt.

It is unclear whether the drafters intended for the underlying criminal allegation to go away entirely when a youthful offender completes his term of probation or if they intended the offender to serve additional time on a conditional discharge. If the drafters intended the first result, they could replace all language following “Criminal Code and the court” with something to the effect of “dismiss the adult prosecution without entering an adjudication of guilt.”

In addition, an offender may only qualify for only one conditional discharge. Furthermore, a court cannot enter a conditional discharge for an individual convicted of DWI. It is unclear what would happen if a youthful offender had already received a conditional discharge or was convicted of DWI and fell under Section 7(H).

As Per AOC

1) SB 167, Section 7(D) requires 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. SB 167 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.

2) The National Conference of State Legislatures (NCSL) reported in 2014 that many states enacted juvenile sentencing reforms in 2013, often in response to that year’s U.S. Supreme Court case, *Miller v. Alabama*, 567 U.S. 460, 470, which prohibits mandatory juvenile life without parole sentencing.

In April of 2021, however, the U.S. Supreme Court, in *Jones v. Mississippi*, 593 US \_\_\_\_ 2021, rejected restrictions on life without parole for juveniles. As reported by NPR,

Over the past two decades, the law on juvenile sentencing has changed significantly. The Supreme Court — primed by research that shows the brains of juveniles are not fully developed, and that they are likely to lack impulse control — has issued a half dozen opinions holding that juveniles are less culpable than adults for their acts. And the court has also ruled that some of the harshest punishments for acts committed by children are unconstitutionally cruel and unusual punishment.

After striking down the death penalty for juvenile offenders, the court, in a series of decisions, limited life without parole sentences to the rarest cases — those juvenile offenders convicted of murder who are so incorrigible that there is no hope for their rehabilitation.

But all of those decisions were issued when the makeup of the court was quite different than it is now. This case was the first time the court has heard arguments in a juvenile sentencing case with three Trump appointees on the bench, including new Justice Amy Coney Barrett, who replaced the late Justice Ruth Bader Ginsburg.

Previously, Justice Anthony Kennedy, who retired in 2018, repeatedly was the deciding vote in cases involving life sentences and other harsh punishments for juvenile offenders. But with Kennedy retired and replaced by Kavanaugh, and with Ginsburg replaced by Barrett, the court in this case indicated that it is not inclined to go the extra mile to protect juvenile offenders from the harshest punishments.

See <https://www.npr.org/2021/04/22/989822872/supreme-court-rejects-restrictions-on-life-without-parole-for-juveniles>.

Noted by the Children’s Defense Fund (CDF) in May 2021

Last month, [the Supreme Court ruled](#) on the *Jones v Mississippi* case making it easier for children and teens to be sentenced to life without parole—a decision that shifts away from decades of law recognizing that children are distinct from adults and that their age should be considered in situations where they face severe punishment in the criminal justice system.

See <https://www.childrensdefense.org/blog/supreme-court-juvenile-life-without-parole/>.

The CDF further noted

Given this SCOTUS decision, it is even more important for states and Congress to take action to ban juvenile life without parole sentences.

[Twenty-five states and DC](#) have already banned life without parole for young people under 18. Other state legislatures must follow their example to ensure young people are not being cast aside and given up on for a mistake made as a teenager.

Congress should also enact a federal ban on juvenile life without parole sentences and pass legislation that would instead ensure young people and communities have the resources they need to prevent these harms in the first place.

[Representatives Karen Bass \(D-CA\), Tony Cárdenas \(D-CA\), David Trone \(D-MD\), and Bruce Westerman \(R-AK\) recently introduced legislation](#) that would prohibit federal judges from sentencing juveniles to life without parole as well as making [a number of other important juvenile justice reforms](#).

The United States is the only country that allows youth to be sentenced to life without parole. It's time we join the rest of the world and put an end to this cruel treatment of our children.

Likewise, with the changes in juvenile sentencing heralded in the *Jones v. Mississippi* case, states may wish to expedite legislation permitting dual sentencing of youthful offenders.

3) Evidence used in the above-mentioned *Miller* decision establishes that teenagers are a group especially susceptible to impulsive acts and failure to appreciate the consequences of their actions.

In the FIR for 2021's SB 47, substantially similar to SB 43 after multiple amendments, the LFC noted that the New Mexico Sentencing Commission concurs, citing a recent Sentencing Project report ([www.sentencingproject.org/publications/juvenile-life-without-parole/](http://www.sentencingproject.org/publications/juvenile-life-without-parole/)), including the following paragraph:

#### **What Makes Youth Different?**

In amici briefs written on behalf of the defendants in *Roper*, *Graham*, *Miller*, and *Montgomery*, organizations representing health professionals, such as the American Academy of Child Adolescent Psychiatry and the American Psychological Association, explained current research on immature brains. In *Miller*, Justice Kagan noted that adolescence is marked by “immaturity, impetuosity, and failure to appreciate risks and consequences,” all factors that limit an adolescent's ability to make sound judgments. Justice Kagan cited *Graham* and *J. D. B. v. North Carolina* in noting that juvenile defendants are at a substantial disadvantage in criminal proceedings; they are less able than adults to assist in their own defenses (working constructively with counsel) and they are likely to respond poorly to the high pressures of interrogation. Even before *Roper*, states routinely recognized differences between juveniles and adults in other contexts. Almost every state prohibits juveniles from voting, buying cigarettes and alcohol, serving on juries, and getting married without parental consent. Teenagers' drivers licenses are typically restricted through age 18. The *Graham* decision emphasized the importance of giving juvenile offenders a chance to become rehabilitated. These individuals have a substantial capacity for rehabilitation, but many states deny this opportunity: approximately 62% of people sentenced to life without parole as juveniles reported not participating in prison programs in large part due to state prison policies that prohibit their participation or limited program availability. They typically receive fewer rehabilitative services than other prisoners.

See <https://www.nmlegis.gov/Sessions/21%20Regular/firs/SB0247.PDF>.

4) See the NCSL's Juvenile Justice Bills Tracking Database at <https://www.ncsl.org/research/civil-and-criminal-justice/ncsls-juvenile-justice-bill-tracking-database.aspx>.

5) In response to the introduction of 2018's HB 190, proposing dual sentencing for some youthful offenders, the New Mexico Sentencing Commission provided 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).

See 2018 FIR for HB 190 at:

<https://www.nmlegis.gov/Sessions/18%20Regular/firs/HB0190.PDF>.

As Per the Administrative Office of the District Attorneys

Youthful offender is defined as a person 14 to 18 years of age at the time of the offense who is adjudicated for any one of several offenses or who has had 3 prior separate felony adjudications within a three-year time period or who is 14 years of age and adjudicated for first degree murder. The changes provided in this bill could potentially allow a person who commits first degree murder, but is 14 at the time, to not face adult sanctions and not have a record of the offense.

Amenability will have to be determined and as presently occurs, it usually winds up as a battle of the experts as to whether the offender is amenable to treatment and rehabilitation.

An offender may, if necessary, be taken into immediate custody if probable cause exists to believe that they have violated any condition of the state sentence or is alleged to have committed a new offense. Page 18, lines 1-6. This is commenced by the Children's Court attorney filing a petition for revocation of the state sentence. It will be more effective, given the fact that the offender is a "youthful offender" to make the custody determination mandatory. Therefore, change the word "may" in page 18, line 4, to "shall."

The Children's Court attorney is required to prove a violation of any condition of the stayed sentence. The Children's Court attorney is also required to show allegations to the court that the offender has committed a new offense.

When it has been proven that an offender has violated the terms of suspension of the stayed sentence, there is still the opportunity for the court to find mitigating factors to continue the stayed sentence.

Successful completion of probation imposed as part of the dual disposition, shall not become a conviction for purposes of the criminal code. This will mean that a youthful offender who commits first degree murder will not have that count against them as a prior for purposes of future criminal conduct (for purposes of this bill, a youthful offender who commits first degree murder is 14 years of age or younger as compared with a serious youthful offender who is 15 to 18 years of age).

The present scheme set forth in the Children's Code regarding youthful offenders has been effective and making the changes proposed in HB 167, even with its requirements of findings, etc., may well lead to juvenile offenders who commit serious crimes, escaping reasonable consequences and potentially committing other offenses.

## PERFORMANCE IMPLICATIONS

### As Per CYFD

This bill has potential implications on satisfactory and unsatisfactory discharges for Juveniles, which are Performance Measures for CYFD/Juvenile Justice.

Currently, a youthful offender who violates the conditions of their Juvenile disposition order may be able to achieve a satisfactory discharge. Under this bill, a youthful offender who violates their disposition order could potentially then be reverted to the adult sentence. This would result in an unsatisfactory discharge from Juvenile Justice under the current policy.

The disposition of a youthful offender is governed by NMSA 1978, Section 32A-2-20. Currently, the court may invoke either an adult sentence or juvenile sanctions, *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. Under that section, a youthful offender can be given a commitment up the age of 21. If the juvenile *does not* respond to treatment, or commits new, violent offenses, the term of commitment *cannot* be extended beyond their 21<sup>st</sup> birthday.

Under dual sentencing, the court evaluates the merits of imposing the stayed adult sentence at a hearing prior to the Child's reaching the age of 21 pursuant to Section 6 Paragraph F. This bill allows the court to impose the adult sentence on a youthful offender who violates the conditions of their stayed adult sentence while ensuring due process for the client. Due process includes hearings before the court on probation violations and adjudications as well as the hearing to determine whether imposition of the adult sentence is appropriate.

This change to statute may promote the following three things:

- First, it provides the juvenile an incentive to participate in programming and treatment actively and sincerely. Some juveniles, close to their 21<sup>st</sup> birthday, simply wait to "time out", knowing that their commitment period and corresponding responsibilities will



end.

- Second, for those in need of additional services, an extension of supervision through the adult sentence is an opportunity to receive the needed support.
- Third, for those exhibiting repeated violent behavior, the adult sentence provides increased public safety.

This statutory authority provides the opportunity to fully assess an offender’s response to treatment programming over time, instead of having to predict rehabilitative amenability at the disposition phase of the juvenile justice process.

With respect to the size of the population which would be affected by this bill, for the period of FY2021, 48 youthful offender (YR) cases were opened by CYFD/Juvenile Justice. Of those cases, 13, or slightly more than 25%, were unsatisfactorily discharged from supervision.

As Per AOC

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

## **ADMINISTRATIVE IMPLICATIONS**

As per CYFD

Any administrative implications to CYFD will be absorbed by existing resources.

This bill may require CYFD/Juvenile Justice Services to develop a new Risk Assessment tool, or revise the current tool, for use by the court in determining whether to impose the stayed adult sentence.

## **CONFLICT, RELATIONSHIP**

SB 167 relates to Senate Bill 43, prohibiting the imposition of a sentence of life without parole on a child, and conflicts with the same as they both amend Section 32A-2-20 NMSA 1978.

## **TECHNICAL ISSUES**

As per NMAG

In Section 6(B)(1)-(4) refers to the “alleged offense.” Insofar as the findings required by these subsections are made after conviction, the adjective “alleged” should be stricken.

Section 7(G)(i) requires the court to consider the “results of a report provided by the department of a risk assessment performed on the child using an accepted risk assessment tool.” It is unclear what risk the department would be assessing and what an “accepted risk assessment tool” is.

As per AOC

1) SB 167 Section 6, Section 32A-2-20.1(A)(2), on page 16, lines 17-22, 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.

2) In SB 167, 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)(2), p. 16 and Section 32A-2-20.2(D) and (F), pp. 18 and 19. Unless the two terms are intended to have different meanings, AOC suggests that the bill use only one of the two terms.

BM/acv