LFC Requester:	Scott Sanchez

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: February 24, 2025 *Check all that apply:*
Bill Number: HB 8 Original __ Correction __
Amendment _x Substitute __

Sponsor: Last Amendment
Short Title: Criminal Competency & Treatment

Agency Name and Code Number: Administrative Office of the District Attorneys - #264
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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 revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(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:

Section 1 amends Section 31-9-1 – "Determination of Competency – Raising the Issue"

Subsection A changes the standard for raising competency from "whenever it appears there is a question" as to the defendant's competency to "when a party or the court raises a question as to a defendant's competency."

Subsection B is new material which provides that unless dismissed or deferred, if the question of competency is raised in a court other than district court, it will be transferred to the district court.

Amendment changes Subsection B to delete subsection 2 so that the provision simply states "if the question of a defendant's competency is raised in a court other than a district court the case shall be transferred to the district court."

Section 2 – amends Section 31-9.1.1 – "Determination of Competency – Evaluation and Determination"

Subsection A deletes the requirement that the defendant's competency be "professionally" evaluated.

Subsection B is new material and provides that the report shall "include a qualified professional's opinion" as to whether the defendant is competent and has "(1) a sufficient, present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding; (2) a rational and factual understanding of the proceedings against the defendant; and (3) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment."

Subsection C is new material that details what shall be included in the qualified professional's report if the professional believes the defendant is not competent. The report should detail whether the defendant

(1) satisfies the criteria for involuntary commitment in accordance with the Mental Health and Development Disabilities Code (MHDDC) *or*

(2) satisfies the criteria for involuntary treatment in accordance with the Assisted Outpatient Treatment Act (AOT).

Subsection D is new material and makes a change to the time limits for the competency hearing from no later than 30 days after the court is notified that the evaluation is complete (or 10 days from notification for an incarcerated defendant not charged with a felony) to *within* 30 days (or 10 days) from the date the report is submitted to the court. The subsection also adds a section that provides that a competency hearing shall be held "within a reasonable time" for a defendant who is not incarcerated.

Amendment amends Subsection (D)(3) to change the time limit for a competency hearing on a defendant who is not incarcerated from "a reasonable time" after the evaluation report is submitted to "within ninety days" after the report is submitted.

Section 3 amends Section 31-9-1.2 – "Determination of Competency – Commitment – Report"

Subsection A is amended to provide that if a court, after a competency hearing, determines that the defendant is not competent to stand trial, the court shall determine if the defendant is dangerous. A defendant who is not competent is dangerous if the court finds by clear and convincing evidence that the defendant presents a serious threat of (1) inflicting great bodily harm, as defined in Section 30-1-12; (2) committing CSP; (3) committing CSCM; (4) committing child abuse; (5) violating a provision of the Sexual Exploitation of Children Act; (6) committing human trafficking; (7) committing a felony involving the use of a firearm; or (8) committing aggravated arson.

The original Subsection D of Section 31-9-1.2 providing a definition of "dangerous" as a defendant presenting a serious threat of inflicting great bodily harm on another or violating Section 30-9-11 (CSP) or Section 30-9-13 (CSCM) is deleted in favor of the expanded definition of dangerous above. This subsection is deleted.

Subsection B is amended to expand the court's options if the defendant is not found to be dangerous and not competent. The court may order the defendant to participate in a community-based competency restoration program or dismiss the case without prejudice. If the court does dismiss the case, the court may (1) advise the district attorney to consider initiating proceedings under the MHDDC and may detain the defendant for 7 days to facilitate initiation of those proceedings (2) advise the district attorney to consider initiation of proceedings under the AOT but may not detain the defendant.

Subsection C is new material that provides that a "community-based restoration program" shall be approved by the court and provided in an "outpatient setting in the community where the defendant resides." The court may order a defendant to participate in such a program for no longer than 90 days and:

(1) Within 30 days, the person supervising the defendant's program shall submit a progress report that includes: (a) an initial assessment of the defendant and a description of the program; (b) the defendant's amenability to competency restoration; (c) assessment of the program's ability to provide appropriate programming for the defendant; (d) an opinion as to whether the defendant may be restored to competency within 90 days; and (e) an opinion as to whether the defendant meets the criteria for involuntary treatment under the AOT (the five criteria from Section 43-1B-11).

(2) Within 90 days, the court shall hold a review hearing to determine if the defendant has been restored to competency and the person providing the treatment to the defendant shall submit a written report, at least seven days before the hearing, that includes: (a) an opinion as to whether the defendant is restored to competency; (b) information about defendant's medications and their effect on defendant; (c) if the defendant remains not competent, an opinion as to whether defendant satisfies the criteria for involuntary commitment under the MHDDC; (d) if the defendant remains not competent, an opinion as to whether the defendant satisfies the criteria for involuntary treatment under the AOT.

(3) After this hearing, if the court finds the defendant is competent, the case will proceed to trial. However, if the court finds the defendant is not competent, the case shall be dismissed without prejudice and the court may advise the DA to initiate proceedings under the MHDDC or the AOT.

Subsection D is amended to change the language used to deal with a defendant who is not competent and is found to be dangerous. Instead of "treatment to attain competency", the court may order the defendant to "competency restoration" commitment. The defendant shall be provided with treatment available to persons subject to civil commitment and (1) shall be detained in a secure, locked facility; (2) shall not be released absent an order from the court that committed the defendant.

Subsection E is amended to add the language that the "department of health shall admit a defendant for competency restoration within 30 days" of the court's order. This subsection also makes stylistic changes to the language allowing the department of health to provide written certification to the committing court and the parties that it does not have the ability to meet the defendant's needs.

Subsection F is amended to provide that within 30 days of admission to a "department of health" facility or "an inpatient psychiatric hospital", the department shall file a report. The references to a "facility" are omitted and changed to "department of health."

Amendment changes Subsection E to shorten the time limits for the DOH to admit a defendant for competency restoration, upon receipt of a court's order of commitment for an incompetent defendant, from 30 days to seven days. The time limit for DOH to submit a written certification that it does not have the ability to meet the needs of the defendant shall be made within seven days, rather than 14 days.

Senate Floor Amendment changes Subsection E's time limit for DOH to admit a defendant for competency restoration, upon receipt of a court's order of commitment for an incompetent defendant, from thirty days to fifteen days.

Section 4 amends Section 31-9-1.3 – "Determination of Competency – Ninety-Day Review – Reports – Continuing Treatment"

Subsection A is amended to make stylistic changes to the requirement that a court conduct a review hearing of an incompetent defendant within 90 days of the order committing the defendant for "competency restoration." "Attain" or "attainment" of competency is deleted in favor of "restore" and "restoration."

Subsection B is amended to change "attain" to "restoration."

Subsection C makes stylistic changes to the requirement that the court shall set the matter for trial if it finds the defendant is competent but may also order continued care or treatment for the defendant until the criminal proceedings are included. "Supervisor of defendant's treatment" is changed to "department of health."

Subsection D makes stylistic changes to the requirement that if the defendant remains not competent.

Subsection E makes stylistic changes to the requirement that the court shall proceed pursuant to Section 31-9-1.4 if it finds the defendant is not making progress toward restoration of competency.

Section 5 amends Section 31-9-1.4 – "Determination of Competency – Incompetent Defendants"

Subsection A deals with the eventuality that the court determines the defendant will not retain competency within nine months from the date the court determined the defendant was not competent to stand trial. If the defendant is charged with various violent crimes, the court may hold a criminal commitment hearing pursuant to Section 31-9-1.5 within three months of when the defendant was charged with murder, felony involving infliction of great bodily harm, CSP, CSCM, child abuse, crimes under the Sexual Exploitation of Children Act, human trafficking, felony involving a firearm, or aggravated arson.

Subsection B makes a minor stylistic change to the court's option to dismiss the criminal case with prejudice.

Subsection C provides that the court may dismiss the case without prejudice in the interest of justice "provided that" if the treatment supervisor "reports to the court" that the defendant satisfies the criteria for involuntary commitment under the MHDDC, the department shall initiate those proceedings and the court may confine the defendant for seven days to

facilitate that process.

Section 6 amends Section 31-9-1.5 – "Determination of Competency – Evidentiary Hearing"

The title is changed to include "Criminal Commitment" between the two other phrases.

Subsection A makes minor changes to the requirement that a criminal commitment hearing be held if the "court determines that there is not a substantial probability that a defendant not competent to stand trial will be restored to competency." The hearing is to determine the sufficiency of "the defendant's guilt" when the defendant is charged with the expanded list of crimes: a felony involving infliction of great bodily harm, CSP, CSCM, child abuse, Sexual Exploitation of Children crime, human trafficking, or aggravated arson.

Subsection B is added and adds the term "criminal commitment" to modify "hearing."

Subsection C provides that the court shall dismiss the criminal case with prejudice if the evidence does not establish by clear and convincing evidence that the defendant committed "the crime charged." This phrase is used to replace the previous shorter list of the crimes that qualify for a criminal commitment hearing. The reference to allowing the state to initiate proceedings under the MHDDC is deleted.

Subsection D provides that if the court finds by clear and convincing evidence that the defendant did commit the crime charged but has not made a finding of dangerousness, the court shall dismiss the criminal case without prejudice. The reference to allowing the state to initiate proceedings under the MHDDC is deleted.

Subsection E provides that if the court finds by clear and convincing evidence that the defendant committed the "crime charged" (again deleting the previous shorter list of crimes) and find that the defendant remains "not competent to stand trial", and remains dangerous, the defendant will be detained by the department in secure, locked facility with review hearings at least every two years. This subsection makes stylistic changes and deletes the reference to the treatment supervisor recommending that the defendant be committed pursuant to the MHDDC.

Subsection F is new material providing that "at any time", the department or the district attorney may initiate involuntary commitment proceedings under MHDDC or AOT and the court may detain the defendant for seven days if MHDDC proceedings are initiated.

Section 7 amends Section 31-9-1.6 – "Hearing to Determine Developmental or Intellectual Disability"

Subsection A adds the phrase "is not competent due to" a developmental or intellectual disability.

Subsection B adds the phrase "is not competent to stand trial due to" a developmental or intellectual disability and changes "become competent" to "restored to competency."

Subsection C deletes the reference to an "evaluation" by the department and provides only that the department "determine" that the defendant presents a danger to self or others, the department shall initiate involuntary commitment proceedings under MHDDC if the defendant was charged with the list of violent crimes as in the previous sections. The requirement that the department initiate these proceedings "within 60 days" of their evaluation is deleted.

Subsection D makes stylistic changes to the requirement that the case be dismissed without prejudice after the involuntary commitment hearing, or upon expiration of fourteen months from the initial determination that the defendant is not competent to stand trial.

Amendment changes Subsection A from requiring "the defense" to make a motion for a hearing to "a party or the court."

Section 8 amends Section 31-9-2 – "Mental Examination"

The title is changed to "Competency Evaluation – Mental or Functional Examination"

Subsection A makes stylistic changes to the requirement that, upon motion of a defendant, the court shall order a mental examination of the defendant before making any competency determination.

Subsection B is added to provide that the court may authorize a district attorney or the department of health to use a report of "any examination ordered before a determination of defendant's competency to stand trial for the purpose of initiating proceedings in accordance with" MHDDC or AOT.

Amendment changes Subsection A from requiring "any defendant" to make a motion for a mental examination to "a party or the court."

Section 9 amends Section 43-1B-4 – "Petition to the Court"

This section is part of the Assisted Outpatient Treatment Act. The amendment adds "a district attorney or the attorney general" as persons who can file a petition in district court for an order authorizing outpatient treatment.

Section 10 is new material to be included in Chapter 30, Article 7 entitled "Unlawful Possession of a Weapon Conversion Device – Penalty"

Subsection A provides that it is illegal to knowingly have in one's possession an unlawfully obtained conversion device or knowingly transporting an unlawfully obtained conversion device.

Subsection B provides that each weapon conversion device constitutes a separate offense.

Subsection C provides that the crime is a third degree felony.

Section D defines "fully automatic weapon", "semiautomatic weapon", and "weapon conversion device."

Amendment deletes Subsection B and changes Subsection D (now subsection C) to change the definition of "fully automatic weapon" from one that can "shoot more than one shot" to one that can "fire each cartridge or shell."

Senate Floor Amendment changes Subsection C to amend the definition of "fully automatic weapon" from a weapon that can "shoot one more shot" to one that can "fire more than one cartridge or shell."

Sections 11, 12, 13 and 14 amend, respectively, Section 30-16D-1 – "Unlawful Taking of a Vehicle or Motor Vehicle"; Section 30-16D-2 – "Embezzlement of a Vehicle or Motor Vehicle"; Section 30-16D-3 – "Fraudulently Obtaining a Vehicle or Motor Vehicle"; and Section 30-16D-4 – "Receiving or Transferring Stolen Vehicle or Motor Vehicles" to delete the Subsection (B) (1), (2), and (3), and replace with the language that a person who commits any one of these crimes is guilty of a "felony as provided in Section 30-16D-4.1 NMSA 1978."

Section 15 is new material entitled "Penalties"

Subsection A provides that for a conviction of any one of the above sections a person is guilty of a (1) fourth degree offense for a first offense; (2) third degree offense for a second offense; (3) second degree felony for a third of subsequent offense, regardless of which provision was the first of second offense."

Subsection B provides that a defendant who violates multiple provisions of these motor vehicle crimes with a single vehicle "shall be determined to have committed a single offense for the purposes of this section."

Section 16 amends Section 30-20-16 entitled "Bomb Scares and Shooting Threats Unlawful"

Subsection A – which prohibits making a bomb scare – changes the mens rea from "falsely and maliciously" to "intentionally and maliciously."

Subsection B – which prohibits making shooting threats – adds "maliciously" to the mens rea of "intentionally" so the two subsections have the same criminal intent. It also adds "a serious expression of" to the intent to place people in fear, prevent the occupation or use of a public building, or cause a law enforcement response. This subsection is further amended to provide that for all three scenarios – placing people in fear; disrupting public business; or causing a law enforcement response – must actually happen.

Subsection D changes the penalty for making a shooting threat from a misdemeanor to a fourth degree felony.

Section 17 is new material to be added to the Criminal Sentencing Act entitled "Trafficking of Certain Amount of Fentanyl – Alteration of Basic Sentence"

This section provides that when a separate finding of fact is made by a court or jury that person is in possession of fentanyl in relation to a crime of trafficking, the sentence "shall" be enhanced by up to three years for possession of between 100 and 500 fentanyl pills or the equivalent powder amount; five years for possession of more than 500 fentanyl pills or the equivalent powder amount; and up to five years if the person is found to have organized, controlled, supervised, or financed another to commit trafficking fentanyl.

Amendment changes Subsections A and B to delete the reference to "whichever is less" on the amounts of fentanyl.

Sections 18-24 amend Sections 66-8-103, 66-8-104, 66-8-111, 66-8-111.1, 66-13-1, 66-13-6, and 66-13-7 of the Motor Vehicle Code.

Section 18 Section 66-8-103 is amended to replace the term "laboratory technician" with "emergency medical technician or certified phlebotomist" with respect to who shall draw the blood sample, and replaces the term "blood-alcohol" with "chemical blood test."

Section 19 Section 66-8-104 is amended to change the title to include "chemical blood" to "test", delete "police, judicial or probation" before "officer", and delete "authorized by law." The intent of the statute stays the same; to clarify that officers are only allowed to make an arrest or direct the performance of a "chemical blood" test while on official duty.

Section 20 Section 66-8-111 entitled "Refusal to Submit to Chemical Tests – Testing – Grounds for Revocation of License or Privilege to Drive" is amended as follows:

Subsection A – which allows a court to issue a search warrant authorizing chemical tests upon finding in a law enforcement officer's written affidavit that there is probable cause to believe a person has driven a motor vehicle under the influence of alcohol or a controlled substance thereby causing the death or great bodily injury or another person *or* there is probable cause to believe the person has committed a felony while under the influence of alcohol or a controlled substance. This provision is amended to include misdemeanor liability, thereby allowing officers to seek search warrants for chemical testing for more than just felonies.

Subsection B is new material that if a person under arrest for an offense in the Motor Vehicle Code refuses upon request to submit to a chemical test designated in Subsection A, and the person did not cause great bodily injury or there is probable cause to believe the person committed a misdemeanor while under the influence, the person's charges may be aggravated under Section 66-8-102.

Amendment deletes the new material in Subsection B which allows for aggravation of the sentence for refusal to submit to a chemical test.

Section 21 amends Section 66-8-111.1 entitled "Law Enforcement Officer Agent for Department – Written Notice of Revocation and Right to Hearing" to make Section 66-8-111 applicable to obtaining a chemical test and serving notices.

Section 22 amends Section 66-13-1 to update the section references to the "Boating While Intoxicated Act."

Section 23 amends Section 66-13-6 to include identify who is qualified to perform a chemical blood test, deleting the reference to laboratory technician and including "emergency medical technician or certified phlebotomist" and changes references to "blood-alcohol test" to "chemical test", including in the title.

Section 24 amends Section 66-13-7 changes references from "blood-alcohol test" to "chemical test" and clarifies that officers shall only make an arrest or obtain a chemical test under the Boating while Intoxicated Act while on official duty.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

Sections 1-9

The requirement of "community-based competency restoration programs" will require funding. It is unclear if there are existing facilities that would qualify as such a program and Section 3(C) of the bill requires such facilities to "be approved by the court."

In addition, the bill appears to contemplate increased civil commitments to be undertaken by the district attorneys. That could increase the workload of prosecutors and/or require training on how such commitment proceedings should be handled, as they are not often undertaken.

Section 10

Cost of enforcement and possible increased incarceration of individuals convicted of this crime.

Sections 11-15 - none noted.

Section 16 - none noted.

Section 17 – financial increases for courts, prosecutors, and public defenders.

Sections 18-24 – financial increases for law enforcement, prosecutors, and public defenders as well as costs for laboratory technicians.

SIGNIFICANT ISSUES

Sections 1-9

The amendment to Section 31-9-1.2 seeks to give the court more options if the defendant is found to be not competent and not dangerous. Under the current version, the court may only dismiss the case without prejudice and advise the district attorney to consider initiating proceedings under the MHDDC. This section provides for a community-based restoration program for 90 days to see if the defendant can be restored to competency. What form this program will take is unclear and funding will be needed for such programs, especially as they are required to be within the defendant's own community. It is unclear what "community" could mean or if there is meant to be a geographical limitation on such programs.

For a defendant who is not competent and is found to be dangerous, the amendment expands the definition of dangerous to include other dangerous crimes that the defendant is at serious threat of committing. Other than that, the changes to the procedure for commitment of a

dangerous defendant are mainly stylistic. However, the amendments make it clear that it is the department of health that is responsible for the reports to the court on the dangerous defendant.

The bill changes the language throughout from "attain" competency to "restore" competency. This term seems more appropriate as it infers that the defendant was once competent and simply seeks to regain that status.

The amendment to Section 31-9-2 in Section 8 allows the district attorney or department of health to use a report of a mental examination for purposes of initiating civil commitment proceedings. This new requirement may deter defendants from requesting such reports, given that they could then be used for purposes of involuntary commitment or treatment. Or it may deter frivolous motions from the defense.

Either way, such a motion should set forth the grounds for belief that mental capacity is lacking. Without such grounds, the motion can be denied. "The statute requires such an examination only when it is shown that there is reasonable cause to believe that an accused may be presently insane or otherwise mentally incompetent." *State v. Hovey*, 1969-NMCA-049, ¶ 17, 80 NM. 373. Simply "wondering" about a defendant's mental capacity, based on defense counsel's impression, is not reasonable cause to grant the motion. *Id*.

Section 10

Subsection A says it's a violation to have an "unlawfully obtained weapon conversion device." Given that the possession of the weapon conversion device is deemed to be a crime – i.e. unlawful – adding the phrase "unlawfully obtained" seems superfluous.

This section could be subject to a Second Amendment challenge. In *Garland v. Cargill*, 602 U.S. 406 (2024), the United States Supreme Court struck down a law that banned bump stocks. The issue in *Garland* was whether a "bump stock" is a machine gun as that term is defined in the 1934 National Firearms Act (NFA). In a 6-3 decision, the Court decided it was not and struck down a law illegalizing bump stocks.

Garland is a narrow holding that only held that, as a matter of statutory interpretation, a bump stock was not a machine gun as that term is defined in the NFA. The legality of restricting access to machine guns was not at issue.

In *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), the court concluded that assault weapons and high-capacity magazines, which can be modified to function like machine guns, are not protected by the Second Amendment because they are more akin to military-grade weaponry than firearms used for individual self-defense.

The New Mexico courts have held that the state constitutional provision on right to bear arms (N.M. Const. art. II, § 6), which is arguably broader than the Second Amendment (*see State v. Gutierrez*, 2004-NMCA-081, ¶ 13, 136 N.M. 18), is not absolute and subject to narrowly drawn exceptions that support public safety. *See e.g. State v. Rivera*, 1993-NMCA-011, ¶ 6, 115 N.M. 424 ("The right to bear arms under the state constitution is not absolute, and a defendant's right to bear arms is circumscribed by the conditions under which he or she seeks to assert the right."). *See also State v. Dees*, 1983-NMCA-105, ¶ 11, 100 N.M. 252 (upholding the constitutionality of Section 30-7-3 (unlawful carrying of a firearm into a license liquor establishment) – "When the legislature perceives that the carrying of a firearm may present a 'clear and present danger,'. . . if mixed with the opportunity for its bearer to succumb to the influence of intoxicating liquors, it serves a legitimate goal in a constitutionally approved manner when it regulates and limits an unfettered exercise of the citizen's right to bear arms").

Subsection B provides that each device shall be a separate offense in order to make the unit of prosecution explicit and clear for double jeopardy purposes. Recently, the Court of Appeals found the "unit of prosecution" for felon in possession of a firearm was "ambiguous" and therefore the rule of lenity must apply and the State must definitively prove two separate acts of possession to establish two offenses. In that case, two firearms were found in the defendant's bedroom pursuant to a search warrant. Unless the State can somehow prove on remand that the

defendant separately possessed those weapons, there can only be one conviction under the felon in possession of a firearm statute. *State v. Gonzales*, 2024-NMCA-062. This subsection would obviate a similar argument.

Amendment By deleting Subsection B, which specifies the unit of prosecution for the crime, the issue of double jeopardy will be left up to the courts. As noted above, the Court of Appeals recently found the unit of prosecution for felon in possession of a firearm to be ambiguous, which engendered pretrial litigation. Specifying the unit of prosecution for a crime can avoid double jeopardy litigation because "the polestar guiding courts is the legislature's intent to authorize multiple punishments for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3.

Sections 11-15

Subsection B of Section 15 states that if a defendant violates multiple provisions of Sections 30-16D-1 through 30-16D-4 with a single vehicle, it will only constitute a single offense. In terms of double jeopardy jurisprudence, this seems to limit a prosecutor's ability to charge more than offense in factual circumstances where more than one crime is committed and the crimes are sufficiently distinct for double jeopardy purposes. The proscription against double jeopardy can be raised at any time, and if the conduct if found to be unitary, then double jeopardy could apply. Given that, this subsection seems unnecessary.

Section 16 – none noted.

Section 17 - none noted.

Sections 18-19 – none noted.

Section 20

Adding the ability to seek a search warrant for a misdemeanor, as well as a felony, in Section 66-8-111, is known as the "*Birchfield*" fix. In *Birchfield v. North Dakota*, 579 U.S. 438 (2016), the United States Supreme Court held that breath tests are significantly less intrusive than blood tests and therefore could be the subject of implied consent laws as a warrantless search incident to arrest. However, as a blood test is more intrusive, a driver cannot be deemed to have consented to a blood test on pain of committing a criminal offense.

In *State v. Vargas*, 2017-NMSC-029, the New Mexico Supreme Court reversed the defendant's conviction for DWI based on her refusal to submit to a blood test. The Court relied on *Birchfield* in holding that a person cannot be criminally punished for refusing to submit a warrantless blood test. Similarly, in *State v. Franklin*, 2020-NMCA-016, the New Mexico Court of Appeals held that implied consent laws could no longer provide that a driver consents to a blood draw and reiterated that criminal penalties for refusing a warrantless blood draw are not permissible. The court remanded the case for reconsideration of the defendant's motion to suppress the blood evidence, emphasizing the need to evaluate the voluntariness of consent under the totality of the circumstances.

Allowing law enforcement officers to seek warrants for chemical tests for misdemeanors as well as felonies will allow officers to seek chemical tests for persons suspected of driving while impaired, even if they did not harm someone else, thereby increasing the likelihood of detecting drunk drivers on the roads of New Mexico.

Sections 21-24 – none noted.

Senate Floor Amendments – none noted.

PERFORMANCE IMPLICATIONS

None noted.

ADMINISTRATIVE IMPLICATIONS

None noted.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Sections 1-9 – HB 4 is basically identical.

Section 17 – HB 274 creates minimum incarceration penalties for trafficking fentanyl and SB 95 seeks to institute the death penalty for distribution of fentanyl that results in death.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

n/a

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

See above.