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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/19/07

SPONSOR Neville LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Creating a new crime of consumption of a controlled substance SB 65

ANALYST Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Responses Received From  
 Attorney General Office (AGO)  
 Public Defender (PDD)

No Response Received From  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

Senate Bill 65 creates the new crime of consumption of a controlled substance, a petty misdemeanor. It provides that a blood, urine, or other medical test showing a positive result for a controlled substance is prima facie evidence that the defendant consumed a controlled substance in the county where the test was conducted.

### SIGNIFICANT ISSUES

This bill is related to NMSA 1978, § 30-31-23 (2005); Controlled Substances; Possession Prohibited. In *State v. Hodge*, 118 N.M. 410, 882 P.2d 1, (1994), the Supreme Court vacated the defendants' convictions on the charge of possession of a controlled substance where the only evidence of possession was a urinalysis that showed cocaine in the defendants' systems. "[T]he mere presence of drugs in the urine or bloodstream does not constitute possession." *State v.*

*McCoy*, 116 N.M. 491, 497, 864 P.2d 307, 313 (App.1993); *overruled on other grounds*, *State v. Hodge*, 118 N.M. 410, 882 P.2d 1 (1994).

The Supreme Court recognized the inherent problems in convicting someone for consumption of a controlled substance. The problem arises in that the presence of a drug in the body of a person may not be intentional. Given that possession is a specific intent crime, conviction for possession by consumption based only upon a drug test does not fulfill all requirements of the criminal act because the requisite intent is not shown.

This current bill seeks to change the burden of proof. Consumption is criminalized unless the *defendant* proves the consumption was not voluntary. This shifts an element of the crime from the State to the defendant. In a constitutional system such as ours, the State always has the burden of proving all elements of the crime beyond a reasonable doubt. This bill changes this burden and is, therefore, unconstitutional.

### **PERFORMANCE IMPLICATIONS**

Public Defender would be required to challenge the statute which would result in several lengthy appeals. This would burden the department but would be absorbed in the ordinary course of business.

EO/csd