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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/13

SPONSOR Harper LAST UPDATED _____ HB 432

SHORT TITLE DWI Evidence Tests and Testimony SB _____

ANALYST Crespin-Trujillo

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$561.0	\$561.0	\$1,122.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 362: DWI Chemical Test Search Warrants

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Department of Health (DOH)
 Department of Transportation (NMDOT)
 Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 432 (HB 432) proposes to create a new section of the Implied Consent Act, Sections 66-8-105 through 66-8-112 NMSA 1978, allowing parties to submit certified reports of blood sample analyses in DWI and DUI cases into evidence without an analyst providing testimony in person. Under the provisions of the bill, a certified report and analysis of a test administered pursuant to the Implied Consent Act would be received into evidence by a court with the same force and effect as though the person who conducted the analysis had testified in person as long as the prosecution served notice to the defense counsel 21 days before trial, provided the defense counsel did not object within seven days of receipt of the toxicology report. HB 432 would authorize the use of interactive video testimony by laboratory analysts in DWI and DUI cases in lieu of in person testimony if the analyst is subpoenaed to testify in court proceedings.

FISCAL IMPLICATIONS

The Public Defender Department (PDD) states the provisions of HB 432 would require the Department to expend additional attorney time to adequately preserve the constitutional rights of the Department's clients. This could result in the need to hire additional employees to assure all deadlines are met and documents timely filed and served on all necessary parties. The PDD estimates an additional five FTE will be required to address additional caseload concerns around the state at a cost from the general fund of \$67 thousand per FTE per year and a start-up cost of \$72 thousand.

The Attorney General's Office (AGO) reports that if HB 432 is enacted, the bill will allow for the Department of Health's (DOH) Scientific Laboratory Division (SLD) to have their analysts available via Skype or other interactive video technology to allow the analyst experts to stay in their lab and testify at the location, thereby decreasing the amount of travel costs. The bill would save the district attorneys' offices money because they will not have to provide transportation and lodging expenses to lab witnesses who have to travel statewide to testify.

The Administrative Office of the Courts (AOC) estimates a range of recurring costs between \$64 thousand and \$154 thousand for improved technology infrastructure and one FTE for support and maintenance of video operations due to the heavy volume of testimony that would occur. The implementation of the provisions of HB 432 would also require the purchase of video equipment for some district courts that currently lack video capacity at a cost of \$34,500. The judiciary has made a request for video equipment for courts in House Bill 2 that, if funded, would cover this cost.

The Administrative Office of the District Attorneys (AODA) reports that if HB 432 is enacted, the state will save money through:

- Reducing the need for laboratory analysts to appear in court;
- Decreasing the necessity to hire more analysts to keep up with the lab work that must be done while they are in court; and
- Preventing cases from being dismissed because a laboratory analyst was not present.

The AODA indicates the state has already made a substantial investment in video links for all magistrate courts and most, if not all, district courts in New Mexico, but there might be a minimal fiscal impact on the district attorney offices that will have to insure laboratory reports are provided to defendants in a timely manner.

SIGNIFICANT ISSUES

HB 432 is a DOH bill and the Department reports that the intent of the legislation is to help the State Laboratory Division handle the increased demand for criminal DWI and DUI trial appearances by its analysts. Two United State Supreme Court decisions, *Melendez-Diaz v. Massachusetts* (2009) and *Bullcoming v. New Mexico* (2011) determined that under the Sixth Amendment of the United States Constitution right of confrontation, laboratory analysts performing DWI and DUI tests are accusers of the driver whose blood they test and the defendant has the right to confront them in court. Additionally, the laboratory reports cannot be introduced into evidence unless the analyst appears in court. The AOC states this type of confrontation serves multiple important purposes:

- Allowing the fact finder to observe the demeanor of the witness;
- Relating to the witness the seriousness of the matter; and
- Assuring the identity of the witness and that the witness is not being improperly influenced.

The Supreme Court decisions led to an increased number of subpoenas in New Mexico, approximately 1,800 subpoenas per year, for the SLD's 15 analysts to appear at trials throughout the state. The DOH reports that it is sometimes necessary for analysts to drive several hours, stay in a hotel overnight, wait additional hours, and then upon their appearance, the case is dismissed or pled out. HB 432 would allow analysts to make live interactive video appearances at court and thereby reduce travel, wait time and expense for cases where analysts are required to appear in person.

The AGO reports that many states have enacted statutes similar to those proposed by HB 432 to address the increased caseload of state laboratories due to the Supreme Court decisions.

PERFORMANCE IMPLICATIONS

The DOH notes that with so many SLD analysts currently being subpoenaed, laboratory analysis in both DWI and DUI and Office of the Medical Investigator (OMI) cause of death investigations is delayed. The DOH believes that with the implementation of HB 432, the amount of time analysts are taken away from actual testing work will be reduced and lessen the delays in analysis and investigation.

HB 432 relates to the DOH's FY14 Strategic Plan Goal 5 objective to ensure that technology supports timely, data-driven decisions, public information, and improves business operations through assisting the SLD process its DWI and DUI testing on a timely basis and testifying about those results in a legally appropriate and efficient manner.

The DOT states one of its safety goals is to reduce motor vehicle related DWI crashes, injuries, and deaths. Successful Blood Alcohol Content (BAC) testing, reporting, and testimony, by any means, of such tests and reports in DWI cases will help reduce recidivism in DWI cases.

The AOC reports that HB 432 may have an impact on the performance measures of the district courts in the following areas: cases disposed of as a percent of cases filed and percent change in case filings by type.

ADMINISTRATIVE IMPLICATIONS

If the relevant DWI or DUI case is a criminal trial, the certified reports of blood sample analyses must be provided to the opposing party at least 21 days prior to trial with notice that it will be submitted without analyst testimony. If the opponent objects within seven days of the notice, then the report may not be submitted without supporting analyst testimony. In the event that an analyst is subpoenaed, then he or she may appear at court by live interactive two-way video, meeting certain criteria. If a laboratory analyst is subpoenaed to testify at a court proceeding, the defendant will be deemed to have consented to the analyst's appearance by interactive video. The PDD states the seven day deadline in which to file a written objection and the requirement that it be served on both the prosecution and testing laboratory could be challenged as arbitrary

and capricious requirements and result in per se ineffective assistance of counsel. Also, the changes to the Implied Consent Act proposed by HB 432 will place a heavier burden on the PDD to assure adequate and meaningful assistance of counsel because clients must be assured their confrontation rights are adequately preserved for trial.

The AGO notes that local rules for the courts may have to be changed and the Rules of Evidence may have to be changed.

The DOH is seeking to reduce the impact of court testimony on the SLD analysts' work by using live video testimony for the SLD expert witnesses in DWI and DUI trials. The use of 2-way live interactive video testimony being proposed by HB 432 would replace out of town trips by the analysts to testify as to laboratory results with a 45 minute session in the videoconference room at the SLD.

RELATIONSHIP

HB 432 relates to HB 362 which would allow law enforcement officers to obtain a search warrant for blood testing from a judge in misdemeanor DWI cases based on an officer's written affidavit that there is probable cause to issue a search warrant authorizing chemical testing.

TECHNICAL ISSUES

The PDD states that HB 432 proposes to shift the burden of the constitutional right to confrontation to the defense and the legislation may abrogate *Bullcoming v. New Mexico*, which found the blood analyst's report testimonial evidence requiring live testimony of the testing analyst to allow a defendant to exercise his right of confrontation. Allowing video testimony would also run counter to the Sixth Amendment right to confront witnesses, as held by both the New Mexico Court of Appeals and the United States Supreme Court in *State v. Chung* whereby both courts held that video appearance does not constitute face to face confrontation and the convenience to the testifying chemist and potential cost savings to the state does not satisfy the United States Supreme Court's requirement that face-to-face confrontation must be narrowly tailored and include only those situations where the exception is necessary to further an important public policy.

The AODA reports that if HB 432 became law, it would likely be challenged as a violation of the confrontation clause in the New Mexico Constitution. There are numerous cases in which the state supreme court has determined the New Mexico Constitution gives more rights to a defendant than the United States Constitution. The New Mexico Court of Appeals has previously held that convenience was an insufficient reason for the laboratory analyst to appear by telephone and reversed a conviction secured with telephonic testimony, *State v. Alamanza*, 2007-NMCA-073; however the United States Supreme Court has determined that video testimony may be appropriate in some cases. New Mexico already accepts video testimony on certain cases involving children and mentally retarded persons and a number of courts conduct felony first appearances and arraignments by interactive video.

The AODA states the New Mexico appellate courts will likely have to decide if persons have a right to physically confront witnesses and did not waive their rights to confront a laboratory analyst who would appear by video under the addition to the Implied Consent Act. However, the New Mexico Court of Appeals previously decided that it was not a due process violation to

disallow a challenge to the scientific reliability of the instrument conducting the chemical test pursuant to the Implied Consent statute, *State v. Onsurez*, 2002-NMCA-082.

OTHER SUBSTANTIVE ISSUES

The DOH states that the amendment to the Implied Consent Act proposed in HB 432 would specifically encourage use of video testimony if a court determines the transmission is sufficiently clear to allow full and meaningful opportunity for the jury to observe, and the parties and judge to interact with the analyst, and likewise allows the analyst to see and hear the participants. The AODA supports this statement by reporting that the process spelled out in HB 432 would require full opportunity for participation in “plain sight and clear hearing” for all participants and should be deemed sufficient. Testimony has already taken place in a limited number of trials (in district court in Bernalillo county), with consent of the parties, by interactive video and any technical issues were easily handled.

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