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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/22/13

SPONSOR Rue LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Chemical Tests for DWI SB 525

ANALYST Cerny

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

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate see analysis	Indeterminate see analysis	Indeterminate see analysis	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates HB 362, Relates to HB 162, SB 532

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of District Attorneys (AODA)  
 Office of the Attorney General (AGO)  
 New Mexico Sentencing Commission (NMSC)  
 Public Defender Department (PDD)  
 Department of Health (DOH)  
 Department of Public Safety (DPS)  
 New Mexico Department of Transportation (NMDOT)  
 Department of Finance and Administration (DFA)

### SUMMARY

#### Synopsis of Bill

Senate Bill 525 amends Section 66-8-111 NMSA 1978 (part of what is commonly known as the Implied Consent Act) that allows a law enforcement officer to request a court to issue a search warrant for blood when there is probable cause to believe that the person has driven a motor vehicle while under the influence of alcohol or a controlled substance.

SB525 will allow law enforcement to obtain a search warrant for blood in misdemeanor DWI cases. Currently, if a suspect in a misdemeanor DWI case refuses a blood test, law enforcement

cannot request a search warrant from the court as the law only allows search warrants for blood when there is probable cause for a homicide or great bodily injury by DWI or when a person has committed a felony while under the influence of alcohol or drugs.

## **FISCAL IMPLICATIONS**

SB525 carries no appropriation.

Based on the latest statistics from NMDOT from 2011, there were 3167 statewide refusal cases.

DOH estimates that the passage of SB525 may generate an additional 900 cases requiring analysis of blood for alcohol and drugs by the Scientific Laboratory Division (SLD), which would place a burden on the agency's budget. Because alcohol testing is much less complex, time consuming and costly than drug testing, the impact on SLD could be significant.

Similarly, this statute would make it more likely that driving while under the influence of drugs would be charged when illegal or prescription drugs are found in the blood. PDD analysis states that there are no guidelines as to what levels of these substances would constitute impairment. Consequently, such cases require the use of a defense expert (both pre-trial and in trial) and in their view are more likely to go to trial, thus resulting in more cost.

PDD analysis also states that it is likely that the PDD would be able to absorb some additional trials and expert evaluations under the proposed law, but any increase in the number of such cases would bring as well a concomitant need for an increase in indigent defense funding in order to ensure constitutionally mandated effective assistance of counsel. However, such costs are indeterminate at this time.

Under current state law only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician is permitted withdraw blood from any person in the performance of a blood-alcohol test. To satisfy this requirement, law enforcement agencies need to have such medical professionals immediately available to draw the blood. Since search warrants for blood draws under current law are limited to only those individuals suspected of a felony, under SB525 medical professionals available for blood draws would need to increase in number, a result that could be, according to AODA, costly.

AODA analysis also states that SB525 could have a significant fiscal impact on DA offices because of increased numbers of DWI cases and need for additional expert testimony.

NMDOT and DPS state no fiscal impact on their agencies.

## **SIGNIFICANT ISSUES**

The basic standard for a law enforcement officer to request a Blood Alcohol Content ("BAC") test from a driver is that the officer has probable cause, or reasonable grounds to believe, that the driver was operating in violation of the State's impaired driving law. In New Mexico, however, a person may refuse a chemical test even though he or she will then be charged with "aggravated DWI." SB525 would allow law enforcement to obtain a search warrant for blood (a blood draw) when probable cause has been established that the person is under the influence of alcohol or

drugs and when a person has refused a BAC test; they would no longer be limited to obtaining a search warrant only in cases of death, great bodily harm, or felony.

There are significant issues raised by SB525 that could prove challenging for law enforcement officials, DA's and the Courts:

- There may be a need for clearer standards to guide law enforcement in prioritizing search warrants in DWI refusal cases. The current law sets appropriate priorities on felony cases and the requirement for search warrants in refusal cases. How will officers distinguish one misdemeanor case from another in terms of priority?
- AGO states that if search warrants are requested on all DWI cases, including misdemeanor cases, courts will become busier and the court dockets would be even more jam-packed. Judges will have to accommodate graveyard officers' schedules even more to approve more nighttime warrants as most DWI offenses occur at night and search warrants must be approved by judges in a timely fashion.
- AGO analysis points out that during prosecution of refusal cases, both prosecutors and law enforcement officers may be held to an impossible standard—that is, to having to obtain blood search warrants in all such cases. Law enforcement officers may be subject to more scrutiny during cross examination if the State does not obtain blood search warrants in all refusal cases.
- Further AGO analysis states there may be some equal protection/due process issues raised by SB525. For instance, if Defendant A has committed a misdemeanor DWI, a search warrant is requested and issued and the blood is drawn and tested. Results are compiled by the Scientific Lab Division. But then consider Defendant B, who allegedly committed a misdemeanor DWI, but no search is requested in his case. Defendant B could argue that the State destroyed exculpatory evidence, or evidence that could have cleared him of guilt, because no search warrant was requested or issued on his case.

The proposed legislation may also place greater demands on the SLD's resources to do additional testing. DOH in their analysis notes that if SB525 is enacted, DWI and cause of death testing may become backlogged. This could result in delays of DWI prosecutions and the issuance of certificates of death to families.

On the other hand, SB525 could serve an important function if passed into law. Evidence obtained by a chemical test could be very important in proving the case beyond a reasonable doubt or in vindicating a suspect who has refused to be tested.

AODA analysis states that SB525 could also be helpful in identifying problem drivers and can provide more penalties and restrictions than just having driving privileges suspended under administrative sanctions. In criminal court someone convicted of DWI would be subject to controls like an ignition interlock device and other supervision available.

SB525 may also help victims have a better chance at obtaining full restitution if their worst loss was property and/or a personal injury not as serious as death or great bodily injury.

Further, according to AOC analysis, while SB525 may increase the workload of the judiciary, there is also the possibility that, based on the results of the blood test, there will be more plea agreements instead of trials.

## **TECHNICAL ISSUES**

AODA analysis points out an apparent technical issue with regard to the ability for a municipal court to approve a search warrant. The bill maintains the current language of 66-8-11A, which states “A municipal judge, magistrate or district judge” can approve a search warrant for chemical tests. However the municipal court rules state that court may issue a warrant to search for property obtained or possessed in violation of a municipal ordinance, property designed or intended for use to violate a municipal ordinance, or property that would be material evidence in prosecution for violation of municipal ordinance. (See, Rule 8-207(A)(1)—(3), SCRA) If there is not a municipal ordinance against driving while under the influence of liquor or drugs any warrant approved by a municipal judge would be subject to challenge. Since magistrates (and metropolitan court judges) and district judges hear the cases involving state law their warrants should be satisfactory.

## **OTHER SUBSTANTIVE ISSUES**

According to the NMSC, expanding search warrant authorization has been recommended by the National Highway Traffic Safety Administration (NHTSA) to decrease the number of alleged DWI offenders who refuse chemical tests. NHTSA had called this a “No Refusal Strategy.” In 2005, 18 percent of the alleged DUI offenders in New Mexico refused testing (NHTSA report entitled “Refusal of Intoxication Testing: A Report to Congress”).

NMDOT analysis similarly states that the NHTSA and the Governors Highway Safety Association (GHSA) urge states to enact tougher penalties for drunk driving offenders who refuse to take BAC tests, including allowing law enforcement to acquire a chemical test promptly to determine if the driver is under the influence.

CAC/blm