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FISCAL IMPACT REPORT

SPONSOR Thompson **ORIGINAL DATE** 02/05/14
LAST UPDATED 02/16/14 **HB** 10/aHJC
SHORT TITLE DWI Sentencing & Interlocks **SB** _____
ANALYST Jorgensen/Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	See Narrative	See Narrative	See Narrative	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 Department of Health (DOH)
 Department of Transportation (DOT)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 10 clarifies that a prior conviction for driving under the influence that is used to enhance the punishment for a subsequent conviction for driving under the influence also shall be used to enhance the offender's sentence under the Habitual Offender Act.

Synopsis of Original Bill

If enacted, House Bill 10 would:

1. Expand the existing Habitual Offender Enhancement statute to explicitly include felony driving under the influence (DWI) (pursuant to § 66-8-102 NMSA 1978) under that statutory scheme.

2. Increase the requirements to be met for removal of an ignition interlock device before reinstatement of a driver's license by requiring no more than two breath scores above a .05 and at least one test per week.
3. Require the court to order that DWI offenders sentenced to home arrest obtain a home Breathalyzer, and also permits electronic monitoring in addition. The defendant would be responsible for costs unless "indigent". The Traffic Safety Bureau would determine indigent guidelines.

The effective date of this bill is July 1, 2014.

FISCAL IMPLICATIONS

Enactment of HB 10 may lead to a significant fiscal impact for multiple agencies, though a total cost is difficult to quantify.

The provisions requiring judges to order individuals sentenced to house arrest for DWI offenses to have a home breathalyzer will increase expenses to the interlock device fund. At the same time, there are no provisions which would increase revenue to the fund. DOT states that the current fund balance is approximately \$1.8 million.

NMCD would likely experience an increase in inmate population as the result of the enactment of HB 10. NMCD states that there are 242 individuals currently in custody who have a felony (fourth or subsequent) conviction for DWI. Though HB 10 will likely increase inmate population over time, is not likely to fiscally impact NMCD during the relevant three year period, as offenders sentenced under this bill would, in general, not begin serving the habitual offender sentence enhancements effectuated by the bill until after the three year period. It may impact NMCD in subsequent years, as offenders convicted of two or more felony DWI offenses or two or more other felony offenses start to serve longer prison sentences as habitual offenders.

PDD states that the increased penalties may result in an increased demand for trials. While the PDD did not provide an estimated fiscal impact resulting from enactment of this legislation, in 2013, the PDD stated that enactment of House Bill 31, the provisions of which are contained in HB 10, would result in an annual fiscal impact of \$464 thousand.

The increase in trials would impact the District Attorneys and the court system as well.

SIGNIFICANT ISSUES

Including DWIs under Habitual Offender Statute

The AGO states:

Under current "habitual offender" law, if an offender is convicted for most felony crimes, the offender's sentence for the new conviction may be enhanced by a set number of years if the offender had previously (within the last ten years) been convicted of other felony crimes. While there are a number of conditions that must be met in order for a prior felony conviction to be used to add prison time to an offender's sentence (under both statutory provisions and New Mexico

appellate case law requirements) the general provisions are that one prior felony conviction will add one year to an offender's new felony sentence; two prior felony convictions will add four years to an offender's new felony sentence; and, three or more prior felony convictions will add eight years to an offender's new felony sentence.

Currently, felony convictions of DWI cannot be used to add prison time to an offender's prison sentence under the habitual offender statutes. Thus, if an individual is convicted for a felony offense such as burglary, even if that same offender had previously been convicted multiple times for felony-level DWI's, the offender's prior DWI felony convictions could not be used to enhance the offender's new sentence for burglary. On the other hand, if the offender had a prior felony conviction for a crime such as forgery (that occurred within the last ten years and which occurred prior to this new crime of burglary) that prior forgery conviction could be used to add an additional one year onto the offender's new sentence.

This change to current law has the potential to increase the length of time an unknown number of felony offenders are sentenced to serve in state prisons.

AODA provides this explanation of the basis for Section 1 changes:

The bill addresses an issue raised by a 1996 Supreme Court decision, *State v. Anaya*, 123 N.M. 14, 933 P.2d 223, which held that someone convicted of felony DWI may not also be charged as a habitual offender without specific authorization of the legislature. The *Anaya* Court, in a 3-2 opinion, decided the legislature was unclear that felony DWI offenses should be treated like other felony convictions.

It should be noted that although punishment increases with a fifth DWI conviction, and increases for sixth and seventh DWI convictions which are classified as third degree felonies, other case law will probably still prohibit use of one of the prior, lesser, DWI convictions as a basis of further enhancement. Cf., *State v. Haddenham*, 110 N.M. 149, 793 P.2d 865 (Ct. App. 1990). (The same facts may not be used twice, both as an element of the crime and as a basis for enhancement of the sentence—in *Haddenham*, to increase a second offense armed robbery to a first degree felony and to enhance the sentence—unless the legislature specifically authorizes their double use.) In other words, if someone is convicted of a fifth, or a sixth, or a seventh or subsequent DWI, it would probably be impermissible to use their fourth DWI conviction as a prior felony for enhancement purposes on their fifth conviction, or use their fourth and fifth convictions as two prior felonies to enhance the sentence on their sixth conviction, and so on. If they have felony convictions unrelated to DWI, then those subsequent DWI felony convictions could, presumably, be used as separate felonies to enhance those sentences. It is unclear if someone could be convicted of their sixth DWI and have their sentence enhanced with one of their prior felony DWI convictions, or be convicted of their seventh DWI conviction and have two of their prior felony DWI convictions used for enhancement purposes.

PDD comments that the bill does not explicitly state whether the legislature intends for these changes be in place of the existing self-enhancement in the DWI statute, or if it is to be in addition to the self-enhancement in the DWI statute. Without clarification, the bill could be interpreted as superseding the current self-enhancement mechanisms in the DWI statute. Courts might struggle in determining which enhancement provision applies. *See, State v. Lacey*, 131 N.M. 684. It might be preferable for DWI to be covered under the habitual offender statute **or** be self-enhancing. Doing both at the same time could result in complicated sentencing issues and litigation.

Ignition Interlock Removal Requirements

AODA believes that the provision for at least 24 weekly ignition interlock tests, of which no more than two can have readings above a .05 percent breath alcohol content, in the six months prior to an application for reinstatement of an unrestricted driver's license will show behavior worthy of an unrestricted license. However, proving that the tests were performed by the DWI offender, and not by someone else, is likely to be problematic. The operational tests are typically done in the offender's vehicle and are not witnessed by an unbiased observer so someone else can blow into the device instead of the offender.

PDD advises that, because interlock technology is far from reliable, it is problematic to require less than two tests below a .05 for removal. Interlock devices use fuel cell technology which is inferior to the infra-red technology used by police agencies. Many substances have registered positive for alcohol on these devices: perfume, paint, cough drops, baked goods (especially pizza), and hairspray to name a few. Judges are so used to being confronted with these errors that they are reluctant to impose sanctions on the basis of the interlock evidence alone.

NMDOT points out that HB 10 will require evidence that the ignition interlock device show no more than two tests at a level greater than .05 alcohol concentration during the six months prior to reinstatement of an unrestricted driver's license. National standards and current regulations utilize a Blood Alcohol Concentration (BAC) of 0.025 grams of alcohol per 210 liters of breath, with an accuracy of plus or minus .05 grams of alcohol per 210 liters of breath – a different standard than HB 10 would require.

Court-Ordered Home Breathalyzers

PDD comments that the bill seems to assume that results from home breathalyzers can be used in court. Because there is no requirement that these devices be certified by the Scientific Laboratory Division, the reliability of these devices may be challenged in court.

Further, AGO notes that it is not clear whether the amount of payment for such devices that may be covered by the Ignition Interlock Fund (not more than \$30.00 per month) would fully cover the potential costs, nor is there information on whether the current funding level of the Ignition Interlock Fund is adequate to cover these new expenditures. Similarly, PDD comments there is no guarantee that there will be enough money in the fund for indigent clients, which could result in more court appearances and litigation.

Electronic Monitoring Devices

AODA points out there are no standards specified if the court orders an electronic monitoring

device to be placed on an offender. Presumably the monitoring authorities could alert the sentencing judge that the offender was using alcohol – if that was prohibited in the house arrest order – or if they weren't where they were supposed be while on house arrest (typically, at home or at work, or going to one of those places) and the judge could decide whether to continue house arrest but that is not clear.

PERFORMANCE IMPLICATIONS

NMDOT reports that does not currently oversee or administer home breathalyzers or GPS-style monitoring devices; nor does it currently have regulations in place to do so. HB 10 will require NMDOT to promulgate such regulations and undertake such oversight and administration, perhaps including oversight of the providers of such devices (as is currently the case with ignition interlock devices). This will likewise have staffing implications. Additional licensing, oversight and monitoring of indigent clients and home breathalyzer and electronic monitoring device providers may be necessary.

OTHER SUBSTANTIVE ISSUES

As to indigency determinations, PDD suggests the Traffic Safety Bureau may base its guidelines on those already in use by PDD.

DOH reports that drivers who are convicted of DWI have a large impact on the health of other highway users in New Mexico. In 2012, nearly 100 people were killed in alcohol-impaired driving crashes, accounting for nearly one-third (27 percent) of all traffic-related deaths in New Mexico (National Highway Traffic Safety Administration, Traffic Safety Facts, <http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>).

DOH also advises there is very little research on the deterrent effect of imposing longer jail terms on repeat offenders on alcohol-involved traffic crashes, injuries or fatalities.

CJ:MD/svb:jl