F I S C A L I M P A C T R E P O R T

SPONSOR Maestas **ORIGINAL DATE** 2/23/15 **LAST UPDATED** **HB** 408

SHORT TITLE Preservation of DNA Evidence **SB**

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Public Defender Department (PDD)
Administrative Office of the District Attorneys (AODA)
Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 408 proposes to amend Section 31-1A-2 NMSA 1978 (Procedures for Post-Conviction Consideration of DNA Evidence). The bill cleans up language, removes the sanctions the district court may impose if the court determines the evidence was destroyed after the court has issued an order to secure the evidence, adds civil commitment or subject to sex offender registration to the list of conditions under which evidence must be saved, adds court appropriate sanctions if it finds biological evidence was destroyed, including dismissal of the petitioner's conviction, clarifies the conditions under which the state may destroy evidence.

FISCAL IMPLICATIONS

The AOC states that the increase in petitioner categories, requirement for notice, and authorization for evidentiary hearings pursuant to the new sections will require additional judge time, courtroom staff time, courtroom availability and jury fees. Additional costs cannot be quantification.

AODA reports that increasing the category of cases that would require evidence to be preserved to include civil commitments and persons required to register as sex offenders will require more storage, including some cases that would have to be kept for the remainder of the offenders'

lives. The requirement for the state to send certified mail notices to a group of persons before destruction of any evidence will also require more financial and staff resources.

SIGNIFICANT ISSUES

According to AODA, by requiring the state to preserve potential DNA evidence for not less than the period of time a person remains subject to civil commitment or subject to sex offender registration, HB 408 could significantly extend the period of time for preservation of such evidence. Sex offender registration, for example, can be required for the life of the registrant. Extending the time period in this manner, however, ensures that potential DNA evidence will be preserved during the time period when a petitioner is still affected by the felony conviction at issue.

AODA states that the relationship between existing Subsections M and K and the new subsections is unclear, and as a result, it is unclear when the state has authority to destroy potential DNA evidence. The sanctions for destroying evidence in violation of the statute are severe, and include the dismissal of the petitioner's conviction. So it is very important that the standard for destruction of evidence be clear. Here are possible sources of confusion:

- New Subsection N provides that the state may destroy evidence pursuant to Subsection M if the notice provisions are met, and there is no response. Because Subsection N talks about taking action pursuant to Subsection M, it appears that the state may destroy evidence only if all the requirements of Subsection M are met, and the notice requirements of Subsection N are met. (In other words, destroying evidence is treated as a special form of disposing of evidence that requires additional measures). Subsection M provides that the state may dispose of evidence if no other law, regulation or court order requires preservation of the evidence, the evidence must be returned to its rightful owner, preservation of the evidence is impractical due to the size, bulk or physical characteristics of the evidence, and the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing. Because of the "and" in Subsection M, all the listed requirements must be met. Evidence cannot be returned to its rightful owner (as required by Subsection M) and destroyed under Subsection N, so it is not clear how evidence can be destroyed pursuant to Subsection M.
- Assuming that Subsection M applies to both the "disposal" of evidence and the "destruction" of evidence, there is also confusion regarding when that disposal or destruction may take place. Subsection M provides that the state may dispose of evidence "before the expiration of the time period set forth in Subsection K of this section…" Subsection K addresses the right to appeal a district court's decision, and the only time period mentioned is the thirty day time limit for filing an appeal. Allowing disposal or destruction of evidence before an appeal can be taken on the issue of its preservation makes no sense. It is possible that the intent was to reference the time limits set out in Subsection L. That subsection requires the state to preserve evidence while a person remains subject to incarceration, supervision, civil commitment or sex offender registration. But as written, the confusing reference to the time period set forth in Subsection K applies.
- The bill would also require preservation of evidence for the period of time *inter alia* that a person remains subject to…"civil commitment." Presumably that is intended to refer to persons who were committed because of they were incompetent to stand trial because they were not mentally competent. See, Sect.31-9-1.2 and Sect. 43-1-1, NMSA 1978. However that is not made clear. In addition the proposed change regarding notice prior

to destruction of evidence states that it must go to "…(a) all persons who remain committed, in custody or under supervision, as a result of the criminal conviction; (b) the attorney of record for each person convicted…" (Emphasis added.) Persons who were civilly committed, or subject to civil commitment, would almost certainly not be someone who was convicted. Although rare, it is possible that they might be treated to competency and have their criminal case returned to the active docket so preservation until the criminal case had been finally adjudicated would be appropriate but the bill does not specify that.

PDD opines that the proposed changes appear to add both a layer of procedural protection for parties and a sensible guidance to help liberate the State from the burden of unnecessary evidence storage.

PERFORMANCE IMPLICATIONS

This bill may impact the courts' performance based budgeting measures, which may result in a need for additional resources.

ADMINISTRATIVE IMPLICATIONS

According to the AOC, HB 408 will have an effect on the finality of criminal and other judgments, which are generally deemed final a number of days after final judgment. Finality for purposes of appeal would remain unchanged, but if there remains a chance that someone who has been convicted can reopen the record for further biological testing, the finality of the judgment would potentially be undone. On the other hand, considering the reliability of good forensic testing, the soundness of a conviction can potentially be enhanced by this bill because any lingering questions about biological questions could be resolved.

According to PDD, HB 408 changes require notification of the Chief Public Defender before the proposed destruction of evidence. This apparent "safety valve' measure will require PDD to develop a system to cross-check to ensure the individual in question has been in communication with his/her attorney of record (also a person whom the State must notify) and is not in need of assistance. Individuals who had been represented by PDD may require additional litigation support, which would be absorbed in the ordinary course of business.

TECHNICAL ISSUES

AODA points out that Subsection N provides that evidence may be destroyed if proper notice is given, and none of the notified persons responds. If the court receives a response it "shall, at its discretion," hold an evidentiary hearing. "Shall" is usually mandatory language; "at its discretion," turns that mandatory language into permissive language. So, the court "may" hold an evidentiary hearing. Interestingly, there is no provision regarding hearings on the underlying issue of whether to grant a petition for DNA testing – Subsections A-J do not refer to hearings at all. In addition, Subsection N requires notice to the attorney of record for each person convicted. No provision is made for the attorney of record for a person subject to civil commitment.

AODA also indicates that HB 408 sets up a conflict between existing law regarding disposal of evidence and the proposed addition that requires advance notice about the potential destruction of evidence to a variety of persons and a waiting period of 180 days and then a possible hearing

by the court if any of them files a petition for testing, an objection to testing or a motion to preserve evidence. Presumably the same rights of appeal would apply to any decision rendered by the court after the notice regarding requested destruction had been sent.

Moreover, the current law permits disposal of evidence if it must be returned to its rightful owner, or continued preservation is impractical due to its size, bulk or physical characteristics and reasonable measures are taken to obtain portions that can be preserved for future testing. The new section proposed by the bill appears to require that all evidence that could be subject to DNA testing be preserved until after certified mail notices had been sent, the six month waiting period had expired and, if necessary, an evidentiary hearing had been held and the court approved the destruction, and if an appeal of the district court's decision was taken, the appeal had been resolved.

OTHER SUBSTANTIVE ISSUES

AOC points out that the language of subsection F in the existing statute authorizes the district court, upon a finding that evidence was destroyed after a court's order to preserve, to impose sanctions including removing a conviction and dismissing criminal contempt. This language is substantively moved to subsection L, but does not contain language-authorizing dismissal of contempt of court.

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