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

SPONSOR Maestas Barnes **ORIGINAL DATE** 1/26/17 **LAST UPDATED** 3/03/17 **HB** 129/aHJC

SHORT TITLE DWI Blood Test Requirements **SB**

ANALYST Rogers

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$0.0	Indeterminate, but will have fiscal impact	Indeterminate, but will have fiscal impact	Indeterminate, but will have fiscal impact	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 22, HB 31, HB 49, and HB 74.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Taxation and Revenue Department (TRD)
Department of Public Safety (DPS)
Attorney General Office (AGO)
Administrative Office of the Courts (AOC)
Law Office of the Public Defender (LOPD)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Amendment to House Bill 129 strikes Section 2, detailing implied consent to submit to a chemical test, in its entirety.

Synopsis of Bill

HB 129 proposes to amend the Implied Consent Act, Sections 66-8-105 through 66-8-112 NMSA 1978, to allow law enforcement officers to obtain warrants for blood tests in all instances of DWI or DUID arrests in which they determine the test is necessary, not just in cases involving felonies, great bodily injury or death. In addition, the proposed law would eliminate blood test refusal as grounds for criminal charges of aggravated DWI while preserving criminal aggravated charges for refusal of a chemical breath test.

HB 129 amends Section 66-8-102 NMSA 1978 to clarify that the chemical testing that a driver refuses to submit to as part of aggravated driving under the influence is chemical breath testing. Section 66-8-107 NMSA 1978 is amended to provide that a chemical blood test may only be administered after a warrant has been obtained unless the person gives express consent.
Amendments are made to Section 66-8-111 NMSA 1978 to allow a warrant to be issued when there is probable cause that the person has driven a motor vehicle while under the influence of alcohol or a controlled substance. Language was previously included to require that a warrant only be issued if there was probable cause to further believe that the person had committed a felony or caused death or great bodily harm while driving under the influence.

The bill also amends Section 66-8-111.1 NMSA 1978 to add an additional statutory reference.

FISCAL IMPLICATIONS

DPS states the actual financial cost required to obtain search warrants in applicable cases is unknown. However, despite any fiscal implication, the department sees this as a necessary and important public safety measure.

The AOC states there will also be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. HB 129 would amend the statutory requirements for a law enforcement officer to obtain a blood sample from a suspected impaired driver, to bring the procedure in line with the constitutional protections outlined by the US Supreme Court in *Birchfield v. North Dakota, 136 S.Ct. 2160*. HB 129 would require a warrant to be issued, in most cases, before a blood sample may be taken from a person suspected of driving under the influence of intoxicating liquor and/or drugs. This would increase the number of warrant requests which need to be processed by the courts. Therefore, additional resources may be required to handle the increase.

Currently, according to the AOC, "DWI blood draws, which are obtained without a warrant, are inadmissible under the standard adopted by the Court in *Birchfield*. See also *State v. Vargas, NM Ct. App. No. 33,718 (October 25, 2016)*. In most case where the State is unable to admit a blood sample into evidence, it is forced to proceed under the impaired to the slightest degree theory of prosecution. The impaired to the slightest degree standard is more difficult to prove than a case where chemical testing reveals clear levels of intoxication. Since chemical testing of blood makes it easier to prove impairment, the amendments proposed by HB 129 may reduce the amount of time necessary to process these types of cases, as reduced uncertainty may lead to fewer trials."

SIGNIFICANT ISSUES

TRD submits the following analysis:

> HB 129 conforms to our statute, Section 66-8-102 NMSA 1978, and to case law that has established that a breath or blood test for concentrations of alcohol is not the officer's choice in a criminal DWI case anymore. The officer can choose to have a breath test or obtain a warrant for a blood test in conformance with *Birchfield v. North Dakota, 136 S. Ct. 614*) and *State v. Vargas, 2016 WL 6299385, No. 33,718 (N.M. Ct. App. Oct. 25, 2016)*. HB 129 also amends Section 66-8-107 NMSA 1978 pursuant to the above-referenced cases requiring a

search warrant for blood as well. Lastly, Section 66-8-111 NMSA 1978 is also modified to allow issuance of a search warrant for blood for driving while intoxicated (DWI) which is also required by the above cases. It expands the grounds for a search warrant which currently require that a search warrant be issued only if a person who has been driving has committed great bodily harm, death, committed a felony or the evidence is necessary for a felony prosecution. However, the modifications to the statutes by HB 129 may unintentionally impact gathering evidence for administrative hearings which have not held that the blood tests be done by consent or a search warrant. There could be circumstances in which a blood test could be taken for an administrative hearing, but not for a criminal hearing. The amendments do not distinguish between gathering evidence for a criminal matter and the difference in the requirements for admissibility in an administrative hearing.

HB 129 does not modify Section 66-8-111(C) NMSA 1978. HB 129 does not create an additional standard of proof in an administrative hearing case to relate the test results back to the time of driving or within a specified timeframe. Administrative case law has established that the alcohol concentration relates back to the time of the test unlike the criminal burden of relating the test back to the time of driving or within a specified timeframe. HB 129 also amends Section 66-8-111.1 NMSA 1978 to provide written revocation and right to hearing by a law enforcement to include the statute for implied consent and for refusal to submit to a chemical test under Section 66-8-111 NMSA 1978.

DPS states that the amendments contained in the bill are required by the United States Supreme Court's decision in *Birchfield v. North Dakota (June 23, 2016)*, in which the Court decided that consent to warrantless blood tests may not be implied in criminal cases under laws similar to New Mexico's Implied Consent Act.

Birchfield upheld implied consent for breath alcohol tests because it found those tests to be less intrusive, and therefore constitutionally acceptable. However, after *Birchfield*, for a blood test to be obtained other than with the driver's actual consent, or in exigent circumstances, a warrant must be obtained or the blood draw would be an unconstitutional search and seizure of evidence in violation of the Fourth Amendment.

Additionally, threatening criminal charges such as aggravated DWI in order to obtain consent is also not acceptable per *Birchfield*. Therefore, refusal to consent to a blood test, absent a warrant, cannot be the basis for aggravated DWI charges. Consent to blood tests can still be implied for civil purposes, therefore administrative license revocation for refusal to submit to a blood test is allowed. *State v. Laressa Vargas* (New Mexico Court of Appeals, October 25, 2016).

AOC submitted the following analysis:

The U.S. Supreme Court, in Birchfield, held "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Supra at 2186*. The Court reasoned that the invasive nature of a blood test affords suspected impaired drivers a greater right to privacy than that of a breath test. Therefore, constitutional protections prohibit states from criminalizing the refusal of a warrantless blood test. The Birchfield holding was recently applied to the New Mexico Implied Consent Act and aggravated DWI penalty statute by the New Mexico Court of Appeals in *State v. Vargas*, where the Court held that the defendant's refusal to submit to a warrantless blood draw could not be the basis for

aggravating her DWI sentence. *Vargas at ¶ 25*. Where a valid search warrant is obtained for a blood test, the constitutional requirements are satisfied, and the accused may be held criminally liable for a subsequent refusal to submit to testing.

Currently, Section 66-8-111(A), NMSA 1978, prohibits a court from issuing a warrant for chemical testing unless there is probable cause to believe that the person has committed a felony level DWI. There is no way for the State to obtain a search warrant for a blood draw on a misdemeanor DWI case.

The AGO states the bill could increase litigation:

The language HB 129 would add to Sec. 66-8-107 NMSA 1978 that is contained on pg. 12, lines 18-22 appear to invite significant litigation. The language reads: "Unless the person gives express consent to a chemical blood test or exigent circumstances exist, a chemical blood test shall only be administered after a warrant has been obtained pursuant to Section 66-8-111 NMSA 1978." HB 129 gives no definition of what constitutes "express" consent, which will invite ligation that will center on whether consent obtained by police in future cases constitutes the same knowing, intelligent and voluntary consent defined in other contexts. Additionally, the sentence says that no testing will occur unless "exigent circumstances" exist. Exigent circumstances is a legal finding made by a court after a warrantless search. It makes no sense to set into statute either "express" consent or "exigent circumstances," as both of those standards will be determined by a court. They need not be defined nor set into statute.

PERFORMANCE IMPLICATIONS

DPS analysis states the bill will require an officer to obtain a warrant for a blood test in cases in which a breath test is refused, or where the breath test results are inconclusive because the signs of impairment exhibited by the driver are not adequately explained by the alcohol results. However, since the United States Supreme Court's decision in *Birchfield v. North Dakota*, absent actual consent or exigent circumstances, warrants are required if an officer determines a blood test is necessary.

AOC states that courts are participating in performance based budgeting. HB 129 may impact the courts' performance based budgeting measures, which may result in a need for additional resources. For example, the courts' performance measure clearance rates may be impacted if increased requests for warrants increase the amount of judge and clerk time needed to process requests and issue warrants in a timely manner. However, since this may make some cases easier to prove, it may reduce case processing time, because it may result in fewer trials.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB 22, HB 31, HB 49, and HB 74.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Without passage of the bill, certain provisions of New Mexico's Implied Consent Act and a related DWI law in the Motor Vehicle Code could be held to be unconstitutional.

TR/sb/jle