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FISCAL IMPACT REPORT

SPONSOR Ivey-Soto/ Ferrary/Maestas Barnes
ORIGINAL DATE 01/22/18
LAST UPDATED _____
HB _____

SHORT TITLE DWI Testing Requirements
SB 26

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$2,586.4	\$2,586.4	\$5,172.8	Recurring	General Fund
		\$2.3		\$2.3	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB34, HB54
 Duplicates HB71
 Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Public Defender Department (PDD)
 Regulation and Licensing Department (RLD)
 Administrative Hearing Office (AHO)
 Administrative Office of the District Attorneys (AODA)
 New Mexico Department of Transportation (NMDOT)

SUMMARY

Synopsis of Bill

Senate Bill 26 proposes to amend the Motor Vehicle Code (Section 66-8-111) to remove the requirement for a search warrant to authorize chemical testing. The officer would only need to show probable cause that the person had caused death or great bodily harm or that the person had committed a felony while under the influence of alcohol or controlled substance. The bill also amends how a temporary license is issued.

FISCAL IMPLICATIONS

The Public Defender Department (PDD) states that expert witnesses are required in driving while under the influence of drugs cases, and that those are more complex than many other misdemeanor cases and require additional attorney time and longer trials. Enactment of the proposed legislation would incur greater costs for the courts, DAs and PDs, and possibly greater overtime costs for police agencies and state employees of the Scientific Laboratory Division.

Although it does not annualize the cost, PDD does the cost of an assistant trial attorney between \$83.7 thousand and \$90.9 thousand depending on the area of the state where additional attorneys would be needed of which it will need two. The cost outside of Santa Fe and Albuquerque are at the higher level because it has to provide a salary differential to maintain qualified employees. In addition to the assistant attorneys, PDD would also need to hire support staff, a secretary, investigator and social worker, which would cost on average \$77.1 thousand per attorney. Other annual operating costs per attorney are estimated at \$2.3 thousand. Nonrecurring costs to add a new attorney and support staff is estimated at \$3.1 thousand. The average impact to the general fund annual operating budget to add two attorneys and support staff is \$254.8 per year. In addition, based on 7,772 new misdemeanor DWI cases filed in FY16 reported in the courts annual report, PDD estimates it will need expert witnesses in approximately 10 percent of those cases at a cost of approximately \$3 thousand per case, resulting in an estimated increase to contractual services of \$2.3 million.

The Administrative Office of the Courts (AOC) does not anticipate a significant fiscal impact from this bill.

SIGNIFICANT ISSUES

AOC, PDD, and the Administrative Office of the District Attorneys (AODA) agree that this bill would allow officers to obtain warrants to test the blood of non-felony level DWI defendants, in compliance with constitutional requirements, which the current law does not allow.

PDD, AOC, AODA, and the New Mexico Department of Transportation (NMDOT) cite *Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160 (2016), and *State v. Vargas*, 2017-NMCA-023, which established that the Fourth Amendment does not permit warrantless blood tests incident to arrest for driving under the influence and that motorist cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. These cases establish the constitutional requirement of a warrant before a blood test can be compelled.

Under the current statutory scheme, law enforcement can only obtain a warrant for a blood draw on driving under the influence of alcohol and driving under the influence of drug arrests when there is probable cause that the person has caused the death or great bodily injury of another person or committed a felony.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the following performance measures:

Public Defenders:

- Percent of cases taken by contract attorneys;

- Percent of cases that go to trial with clients defended by contract attorneys.

NMDOT believes that this bill will positively impact its performance measure related to the reduction of alcohol-related traffic crashes and fatalities.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB 34 DWI Blood Quantums & Ignition Interlocks; HB54 Increase DWI Penalties

Duplicates HB71 DWI Suspect Blood Testing

OTHER SUBSTANTIVE ISSUES

According to PDD, currently, law enforcement is unable to obtain a warrant for a blood draw incident to arrest for driving under the influence unless the motorist has caused death or great bodily injury of another person, or there is probable cause to believe that the person has committed a felony. This bill would amend the statute to remove these requirements thus allowing law enforcement to obtain a warrant based simply upon probable cause that the motorist has driven a motor vehicle while under the influence of alcohol or a controlled substance.

AODA states that timing is an essential element of the crime of *per se* DWI. See, *State v. Baldwin*, 2001-NMCA-063. Three hours is the threshold for DWI chemical tests, although test results may be introduced even if they were taken after three hours. See, Sec. 66-8-102 and Sec. 66-8-110(E), NMSA 1978. Delays getting a search warrant affidavit prepared and presented to an appropriate judge to obtain a chemical test in under three hours from the time the suspected offender was driving is difficult even for the felony applications where it is now permitted. Law enforcement officers may not have timely information on whether a person injured by a suspected DWI driver suffered death or GBH, or the suspected driver had committed a felony while under the influence of alcohol or a controlled substance. This is especially so for traffic stops and motor vehicle crashes in rural areas of New Mexico where medical providers can be far from the scene and officers have limited assistance. Although a felony DWI can be the underlying felony justifying issuance of a search warrant to obtain a blood or breath sample for chemical testing (See, *State v. Duquette*, 2000-NMCA-006), many times law enforcement officers do not know or have timely access to information on whether the current DWI charge would be a felony and it is harder to research that issue outside of normal business hours. Even during a normal work day determining whether a person has three (or more) prior DWI convictions, so the current DWI would be a felony, is time consuming.

AODA further opines that the bill would change the process for issuing a temporary driver's license to anyone who refuses a breath test or has test results at least equal to the *per se* limits for their vehicle or age: .02 for minors, .08 for adults and .04 if they were driving a commercial vehicle. Instead of confiscating their license and issuing a temporary permit when they serve a notice of their right to a hearing on the license revocation which is the current practice, the written notice of revocation and right to a hearing issued by a law enforcement officer would be a temporary license. It would be valid for 20 days or, if the driver requests a hearing, until the date the administrative hearing officer issues an order following that hearing.