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FISCAL IMPACT REPORT

ORIGINAL DATE 3/7/19

SPONSOR Ivey-Soto **LAST UPDATED** _____ **HB** _____

SHORT TITLE Grand Jury Changes **SB** 460

ANALYST Torres

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate but significant*			Indeterminate but significant*	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

*See fiscal implications.

SOURCES OF INFORMATION

LFC Files

No Responses Received

SUMMARY

Synopsis of Bill

Senate Bill 460 amends Section 31-6-11 NMSA 1978, governing “Evidence Before A Grand Jury”, to require that all evidence presented to the grand jury be lawful, competent and relevant, including the oral testimony of witnesses under oath and any exhibits presented through witnesses to the jurors. The bill clarifies that “lawful, competent and relevant evidence” is evidence that would be admissible at trial.

Additionally, SB 460 amends Section 31-6-11 NMSA 1978 to provide that:

- At least 24 hours before grand jury proceedings begin, the target or target’s counsel may alert the grand jury to the existence of evidence that would disprove or reduce a charge or accusation or that would make an indictment unjustified
- The target of a grand jury investigation shall be notified in writing of the essential facts of the charge or accusation, absent a determination that providing notification may result in flight by the target
- The target of a grand jury investigation shall be notified in writing of the target’s right to testify no earlier than 10 days after receiving the target notice if the target is in custody, and no earlier than 20 days after receiving the target notice if the target is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner, absent a determination that providing notification may result in flight by the target

- The target of a grand jury investigation shall be notified in writing of the target's right to alert the grand jury to the existence of evidence that would disprove or reduce the charge or accusation or that make an indictment unjustified by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence no later than 48 hours before the grand jury session is completed, absent a determination that providing notification may result in flight by the target
- The district court may review the grand jury proceeding, the target notice, the indictment and the relevancy, competency and lawfulness of the evidence that was presented to the grand jury to determine compliance with Section 31-6-11 NMSA 1978, and may dismiss the indictment without prejudice upon its finding a violation of that statutory section.

FISCAL IMPLICATIONS

The Administrative Office of the Courts and the New Mexico Attorney General anticipate a significant increase in judicial review of grand jury indictments and proceedings based on the amended evidentiary standards. The additional fiscal impact on the judiciary would be proportional to the enforcement of this law and any challenges to the admissibility of evidence presented to the grand jury.

Some of the additional costs associated with judicial review of the likely increase in litigation on indictments would be offset by fewer cases proceeding to trial, given the higher burden in reaching an indictment through a grand jury.

SIGNIFICANT ISSUES

The grand jury is a constitutional institution. *See* N.M. Const. art II, § 14. “The grand jury represents an important safeguard for individuals against unfounded criminal charges, its independence and functioning are matters of substantial public interest.” *State v. Martinez*, 2018-NMSC-031.

The Supreme Court, through a public rulemaking process, has promulgated Rule 5-302A for grand jury proceedings. A change in New Mexico statute would mean a change in the rule.

Evidentiary Standards

Section 31-6-11(A) was most recently amended in 2003 and currently provides:

Evidence before the grand jury upon which it may find an indictment is that which is lawful, competent and relevant, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. The Rules of Evidence shall not apply to a grand jury proceeding. The sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

Under the current statute, a prosecutor is not limited to presenting evidence admissible at trial to the grand jury.

The bill amends NMSA 1978, § 31-6-11(A) by requiring the prosecutor to present “lawful, competent and relevant evidence”, which is defined as “evidence admissible at trial,” and removes from the section that “[T]he Rules of Evidence shall not apply.” Thus, it can reasonably be construed that the intent of this amendment is to require the prosecutor to follow the Rules of Evidence in obtaining an indictment.

Target of Investigation

The bill amends the target notice requirements to include “the essential facts of the charge or accusation.” This appears to mean that any charges not referenced could not be filed, even if subsequent investigation reveals additional charges are warranted.

Giving adequate notice to witnesses and targets of a grand jury is essential so that targets can obtain counsel if desired, prepare with their attorneys, and make arrangements to appear. The bill proposes to increase the timeframe from four days’ notice to ten days’ notice for those persons in custody, and for persons not in custody, from ten days to twenty days. Expanding the timeframe for persons in custody does not align with the “10 day rule” which provides that a felony first appearance must be held within 10 days for a person in custody. Rule 702(A). The Supreme Court has previously held that four days’ notice is sufficient. *State v. Cruz*, 1983-NMSC-045, 99 N.M. 690, 662 P.2d 1357.

Exculpatory Evidence

The bill further amends the content of the target notice to also include the target’s right to inform the grand jury of “...the existence of evidence that would disprove or reduce the charge or accusation or that would make an indictment unjustified...” This provision is already promulgated in Rule 5-302A(f) and (B)(2). The bill sets forth a time requirement to notify the prosecutor within forty-eight hours before the grand jury convenes.

Scope of Review

The New Mexico Supreme Court “has consistently honored a strong policy of resisting dismissal of otherwise valid grand jury indictments based on disputes about the source or trial admissibility of the evidence considered by the grand jury.” *State v. Martinez*, 2018-NMSC-031, *citing*, *e.g.*, *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 83, 96 N.M. 692, 634 P.2d 1244 (*citing State v. Chance*, 1923-NMSC, ¶ 8). In *Martinez*, the Supreme Court addressed whether a court may dismiss an indictment due to evidence developed through the use of unlawful subpoenas. At issue was a recently promulgated version of Rule 5-302A(F)(2) which could be construed as authorizing “postindictment evidentiary review.” The language “but the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court” was withdrawn immediately as a result of *Martinez*. The Supreme Court concluded that:

...absent statutory authorization, a court may not overturn an otherwise lawful grand jury indictment because of trial inadmissibility or improprieties in the procurement of evidence that was considered by the grand jury.

SB 460 seeks to remedy this by providing for statutory authorization for the district court to review “the relevancy, competency, and lawfulness of the evidence that was presented to the

grand jury....” A violation may result in the dismissal of the indictment without prejudice.

Passage of new legislation would require a new Supreme Court rule and new case law interpreting the new statute

Furthermore, the Administrative Office of the District Attorneys highlights concerns in the litigating the admissibility of evidence. The office argues that:

The admissibility of evidence is a highly litigated issue, both at trial and at suppression hearings before trial. There is no process in the grand jury proceeding for such issues to be litigated (especially if the target and target’s counsel do not appear). Must each questionable piece of evidence be reviewed by the district court? Does that happen before presentation to the grand jury, or only on review of completed grand jury proceedings? Is review automatic, or does it occur only upon request of the indicted defendant? Must any evidentiary issues be raised at the time of indictment, or may the indictment be challenged at a later time?

Some commonly contentious evidentiary issues may not be relevant in a grand jury setting. For example, New Mexico has had many cases involving the confrontation clause in recent years. But are confrontation clause issues relevant at the grand jury stage, when the target may not even be present to confront the witnesses?

PERFORMANCE IMPLICATIONS

According to the Public Defender Department:

SB 460 would have positive performance implications. Presently, any person accused of a felony has the right to a probable cause hearing through a preliminary hearing or a grand jury. However, with no right to evidence being relevant or non-hearsay, and without a right of confrontation at a pre-trial probable cause hearing, *see State v. Lopez*, 2013-NMSA-047, ¶¶ 7-10, 314 P.3d 236, the State needs only, at present, to have a police officer read a report at the hearing, and that report may include as much unduly prejudicial information about the target as law enforcement or a prosecutor wish to include—evidence that would not be usable against the target at an actual trial. In essence, the grand jury process is stripped of its proper checks-and-balances function. Ultimately, passage of SB 460 is likely to lead to fewer largescale prosecutions, as the prosecution would no longer be permitted to proceed on dubious evidence that would be unlikely to survive the trial process. This would result in financial savings for New Mexico as a whole and would shorten the period in which criminal charges could have an improper, adverse impact on an individual, at least in instances where those charges were not based on competent evidence even from the outset.

The Administrative Office of the District Attorneys notes:

District attorneys will have to put the essential facts of the charge or accusation into the notice, increase the time period between the notice and the grand jury proceeding, make more detailed presentations to the grand jury to ensure that the evidence presented would be admissible at trial, and determine if there are any extraordinary remedies that might be pursued if the district attorney disagrees with an adverse ruling on an essential piece of

evidence. It is possible that the changes made by SB460 could cause prosecutors to decide to charge some cases through information and preliminary hearing rather than through grand jury indictment.

Allowing the district court the ability to review the grand-jury process would result in additional motions filed by defendants challenging the admissibility of the evidence presented to the Grand Jury. The additional review section proposed by this bill would require more resources spent by the district courts as needed to conduct additional hearings related to grand juries.

TECHNICAL ISSUES

In Section B of the bill it provides that the target or target's counsel must bring exculpatory evidence to the attention of the prosecutor at least twenty-four hours before the grand jury convenes, however in Section C(6), it requires notice "no later than forty-eight hours before the grand jury session is completed."

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