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FISCAL IMPACT REPORT

SPONSOR Lopez ORIGINAL DATE 02/11/21
LAST UPDATED 03/19/21 HB _____
SHORT TITLE Law Enforcement Disclosure of Evidence SB 192/aHJC
ANALYST Eckberg

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$67.0	\$67.0	\$134.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)
Department of Public Safety (DPS)
New Mexico Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)
Public Defender Department (PDD)

No Response Received

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 192 strikes “protracted class of personas” on page 2, line 8 and inserts “protected class of persons.”

Synopsis of Original Bill

Senate Bill 192 creates a new section of statute requiring law enforcement agencies and law enforcement officers disclose evidence favorable to an accused in a criminal case and amends Section 29-7-13 NMSA 1978, allowing for suspension or revocation of a police officer’s certification for failure to do so.

It requires any law enforcement officer who is named as a witness in a criminal case to comply with a prosecutor’s request to disclose all information identified or categorized by the prosecutor

as favorable to the accused including acts of dishonesty, investigations lacking integrity, discriminatory bias against a protected class of persons, and bias in favor or against a participant in the proceeding, criminal charges, and convictions. Knowingly failing to provide this information or hindering another law enforcement officer's disclosure could result in the suspension or revocation of the law enforcement officer's certification.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

Department of Public Safety (DPS) anticipates an increased number of requests from prosecutors will require the addition of at least one paralegal or law clerk to their Office of Legal Affairs at an estimated cost of \$67 thousand annually.

The bill does not include an appropriation.

SIGNIFICANT ISSUES

Disclosure of evidence favorable to a defendant (exculpatory or impeachment evidence) is constitutionally required under multiple United States Supreme Court decisions including, *Brady v. Maryland*, *United States v. Bagley*, *Giglio v. U.S.*, and *Kyles v. Whitley*. This bill ensures that such evidence is disclosed by law enforcement and provides for penalties if the evidence is withheld. The Public Defender Department (PDD) notes SB192 does not provide a remedy if the failure to disclose the required information is reckless, not intentional. However, PDD indicates cutting down on knowing and intentional violations of disclosure requirements by law enforcement would help ensure prosecutors receive required materials in criminal cases and that such information can then be provided to the defendant.

The New Mexico Office of the Attorney General (NMAG) notes the amendment to Section 29-7-13 that provides for suspension or revocation of an officer's certification for knowingly refusing to "recognize the legal efficacy of or enforce a provision of the constitution, laws, executive orders or rules of the state" raises an issue of what would constitute an officer's knowing refusal. Decisions made by officers in the field regarding constitutional issues are currently litigated in courts (district and appellate) throughout the state to determine if the officer's actions were constitutional which generally considers the reasonableness of the officer's actions rather than a "refusal" to abide by the Constitution.

DPS raises concerns that the bill as written is unconstitutionally vague on its face, as well as applied and that the bill raises separation of powers concerns. DPS notes concerns about differences in the information subject to disclosure under SB192, for example bias, because they do not all relate to truthfulness. DPS notes that thoughtful people will disagree on whether certain information or documents are subject to disclosure, who the information is disclosable to, and whether or not the information is admissible. DPS indicates that at least one district attorney in New Mexico and prosecutors across the United States intend to not follow certain policies:

At least one district attorney in New Mexico has publicly stated his intent not to follow the policies of the U.S. Department of Justice and prosecutors in many other states to protect both the right of the criminal defendant to a fair trial, and the rights of law enforcement officers and other governmental witnesses (e.g. scientists and other experts)

to pursue their chosen professions free from unwarranted harassment, publicity and vilification because information the officer or government witness is required to disclose is used to create a public “blacklist.”

DPS recommends, as an alternative to SB192, that the Legislature consider enacting a statute similar to the policy of the U.S. Department of Justice, or the State of New Jersey, Office of the Attorney General Department of Law and Public Safety, AG General Law Enforcement Directive No. 2019-6:

DPS believes that only after there are clear guidelines in place as to how *Brady/Giglio* disclosure requirements are to be interpreted – uniformly – in New Mexico, and enforced could a requirement to decertify officers for failing to follow the same be constitutionally acceptable.

Given the potential overlap between the powers of the judiciary and the powers of the legislature in enacting any statute aimed at enforcing the *Brady/Giglio* disclosure requirement, it might be prudent to first create a task force or working group to include members of the judicial branch, the Legislature, prosecutors, public and other criminal defense attorneys, law enforcement officers and members of the public to work toward a workable solution to the disclosure requirement.

Administrative Office of the District Attorneys (AODA) notes it will be very difficult for law enforcement to gather favorable or exculpatory evidence in an investigation and though the statute requires only disclosure of evidence of this kind, when the defense does their investigation such evidence may be found and used against the police as non-disclosure after the fact. Additionally, law enforcement officers will have to be trained on what favorable, exculpatory, and impeachment evidence is in order to recognize it in the course of an investigation. AODA also indicates SB192 may require law enforcement officers to do the work of an investigator for the defense:

Officers are not lawyers nor should they be required to do this kind investigation. Disclosing evidence favorable is not what police officers are trained to do. They seek evidence of criminal violations, and as such do not need added requirement to their job which is the job of defense.

TECHNICAL ISSUES

Line 8 of page 2 includes the phrase “protracted class of personas,” instead of “protected class of persons.”

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