

<b>LFC Requester:</b>	<b>Scott Sanchez</b>
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**AGENCY BILL ANALYSIS - 2025 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO  
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*(Analysis must be uploaded as a PDF)***

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

**Date Prepared:** January 23, 2025 *Check all that apply:*  
**Bill Number:** HB 105 Original  Correction   
 Amendment  Substitute

**Sponsor:** Andrea Reeb **Agency Name and Code Number:** Administrative Office of the District Attorneys - #264  
**Short Title:** Traffic Offense Video Testimony **Person Writing:** M. Anne Kelly  
**Title:** Testimony **Phone:** 5052503302 **Email:** akelly@da.state.nm.us

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) indicate expenditure decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) indicate revenue decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

### **SECTION III: NARRATIVE**

#### **BILL SUMMARY**

##### Synopsis:

Section 1 adds new a new section to the Implied Consent Act to provide:

If a party subpoenas an analyst or toxicologist to testify at a court proceeding for any purpose, the analyst or toxicologist may appear by interactive video. An interactive video appearance shall provide a full and meaningful opportunity to question and cross-examine the witness in plain sight and clear hearing of the judge, the jury, all parties and counsel, with the witness able to clearly see and hear the proceeding.

Section 2 amends Section 66-8-107 – “Implied Consent to Submit to Chemical Test” to change the title to include the phrase “Court Appearance by Video”

*Subsection A* changes references to “his” to “the person.”

*Subsection C* is new material which provides “[i]f a laboratory analyst who performed a chemical test or a toxicologist from the laboratory where the test was performed who will testify as an expert on the results of the chemical testing is subpoenaed to testify at a court proceeding about the chemical testing that was performed pursuant to this section, the defendant shall be deemed to have given consent to the analyst’s or toxicologist’s appearance by means of interactive video.”

#### **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

This could result in increased DWI convictions, assuming that under the current system some cases are dismissed or non-prosecutable due to the unavailability of the testing analyst.

It would also save significant time and money for analysts, both in work time and travel.

#### **SIGNIFICANT ISSUES**

Twenty years ago, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause bars the admission at trial of an absent witness’s statements—however trustworthy a judge might think them—unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination. This bar applies equally to forensic/scientific evidence.

Recently, in *Smith v. Arizona*, 602 U.S. 779 (2024), the Supreme Court held that a substitute analyst in a drug possession case could not testify in the testing analyst’s stead without violating the Confrontation Clause. The Court held that the testing analyst’s report was hearsay because it was offered for the truth of the matter asserted because it only had value if it was in fact true.

Given *Crawford* and its progeny, using a substitute analyst to testify can violate the Confrontation Clause. But having the testing analyst available for trial in person can be extremely difficult. New Mexico is a large rural state and the practicalities of requiring analysts to travel long distances and be away from their jobs can be difficult if not impossible. And often analysts leave their employment and/or go out of state which only compounds the difficulty of getting them back for trial. The risk then is that cases are not tried or are dismissed, and defendants are not deterred or punished for their conduct.

This bill attempts to address this significant problem by allowing for interactive video testimony which would obviate the testing analyst's need to travel and appear in person for the trial.

Appearance of the actual analyst that did the testing does address the Confrontation Clause issue that *Smith* and *Melendez-Diaz* addressed. However, there is another part of the Clause that is implicated by this bill; the defendant's right to confront his accusers in person.

"The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by '[t]he combined effect of . . . physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.'" *State v. Thomas*, 2016-NMSC-024, ¶ 24, 376 P.3d 184 (citing to *Maryland v. Craig*, 497 U.S. 836, 846 (1990)).

A witness's appearance through interactive video testimony in a trial can violate the Confrontation Clause if certain conditions are not met. New Mexico courts have adopted the standard set forth in *Maryland v. Craig*, which requires a factual finding of necessity to further an important public policy before allowing two-way video testimony. The court must ensure that other elements of confrontation, such as the administration of the oath, the opportunity for cross-examination, and the observation of the witness's demeanor by the trier of fact are preserved. *Thomas*, 2016-NMSC-024, ¶ 29. In *Thomas*, the Court held that the use of two-way video testimony violated the defendant's right to confrontation because the district court did not make the necessary findings to justify its use. *Id.* ¶ 30. "Inconvenience to the witness is not sufficient reason to dispense with this constitutional right." *Id.*

During the recent COVID pandemic, the use of virtual hearings and proceedings greatly increased and the New Mexico Supreme Court issued several orders addressing such issues during the pandemic. In Administrative Order 21-8500-024, entitled "In the Matter of the Amendment of the New Mexico Judiciary Public Health Emergency Protocols for the Safe and Effective Administration of the New Mexico Judiciary during the COVID-19 Public Health Emergency" the Court allowed for "the judge [to] make a factual finding on the record of the necessity for allowing audio-visual testimony to further an important public policy, which may include finding that the witness is unavailable for testimony in the courtroom because of the need to protect public health during the current public health emergency." In the absence of the articulation of an important public policy to justify the video testimony, the bill could be challenged on Confrontation Clause grounds.

Because face to face confrontation is a part of the Confrontation Clause, the second part of the bill which expands implied consent to imply consent for video testimony of the analyst witness could also be challenged on those grounds. *See Thomas*, 2016-NMSC-024, ¶ 20 (defendant's waiver of his right to confront the witness testifying by Skype could not be inferred from a silent record and had to be a knowing and voluntary waiver on the record).

The purpose of the implied consent law in New Mexico is primarily to deter driving while intoxicated and to aid in discovering and removing intoxicated drivers from the highways. This is achieved by deeming that any person who operates a motor vehicle within the state has given consent to chemical tests of their breath or blood to determine the alcohol or drug content if they are arrested for offenses related to driving under the influence. *See McKay v. Davis*, 1982-NMSC-122, ¶ 4, 99 N.M. 29 (“The Implied Consent Act is intended to deter driving while intoxicated and to aid in discovering and removing the intoxicated driver from the highway.”); *In re Suazo*, 1994-NMSC-070, ¶ 10, 117 N.M. 785 (“The chief purpose behind the Implied Consent Act is to get drunk drivers off the road. . . . By requiring a driver to take a blood alcohol test, those who are too impaired to drive can be quickly and accurately identified. Their case can be efficiently and fairly processed by the MVD and those who drive while intoxicated will suffer the consequences of their conduct and be deterred from making the same mistake again”).

#### **PERFORMANCE IMPLICATIONS**

n/a

#### **ADMINISTRATIVE IMPLICATIONS**

The use of interactive video would need to be fully available in courtrooms. Presumably, this is already the case given the recent need for video hearings during the COVID pandemic.

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None.

#### **TECHNICAL ISSUES**

None.

#### **OTHER SUBSTANTIVE ISSUES**

None.

#### **ALTERNATIVES**

None.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

#### **AMENDMENTS**

n/a