

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 204 creates a right of victims and witnesses in a criminal proceeding to refuse to provide an interview or a statement. For child victims or witnesses there would no longer be a means to compel them to give an interview or a statement. If an adult victim or witness chooses not to provide an interview or statement, the court may order that person to answer written interview questions.

HB 204 also requires that interviews or statements be coordinated through the prosecutor's office, who may attend and act to protect the witness or victim. The prosecutor's office shall not share the contact information of the victim or witness.

This bill proposes to change the current procedure where the defendant is entitled to take the statement of any witness. If a witness objects, they would have to seek an order from the court.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, appeals from convictions, and an increase in court and parole hearings. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The United States Constitution and the New Mexico Constitution both provide for the right of a defendant "to confront the witnesses against him." This has been developed by case law to require any testimony that is to be admitted at trial must be presented or have been obtained when the defendant had the opportunity to cross-examine the witness. The bill as drafted may run contrary to this principle, absent live testimony from the witness at trial for the first time.

The Supreme Court addressed whether the full constitutional right of confrontation in criminal prosecutions applies at a pretrial probable cause determination, see *State v. Lopez*, 2013-NMSC-047. The Supreme Court held that it does not, "because the right of confrontation in Article II, Section 14 of the New Mexico Constitution, as with the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution, applies only at a criminal trial where guilt or innocence is determined. We overrule the contrary precedent of *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to the extent that it held otherwise".

Although the Supreme Court has held that confrontation rights only apply at trial, see *State v. Lopez*, 2013-NMSC-047, in *State v. Steven H.*, A-1-CA-28866, 2011 N.M. App. Unpub. LEXIS 230 (N.M. Ct. App. June 2, 2011), the NMCA acknowledged that the right to an interview was part of the right to prepare a defense. That case cites *State v. Orona*, 1979-NMSC-011, 92 N.M.

450, in which the court prevented a defendant from interviewing the complaining witness and extent that it held otherwise.

N.M. Const. Art. 2, Section 24 provides for the rights of victims of crime, which are codified, verbatim, in NMSA 1978, Section 31-26-4. By providing limitations on interviews of witnesses and victims, HB 204 provides an expansion of the rights afforded by our constitution. While HB 204 grants witnesses more rights in the criminal justice process when they are alleged to be victims of crime, it may have the unintended consequence of limiting the ability for a defendant to conduct a thorough investigation of the charges during the discovery phase of a criminal case.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type
- This bill may have an impact on the Judiciary's performance measures without the additional resources to comply with the bill.

ADMINISTRATIVE IMPLICATIONS

There may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases. This legislation will likely result in litigation challenging the constitutionality of this bill. In addition, this legislation will also likely result in additional hearings dealing with whether interrogatories can be issued and the substance of the interrogatories.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

none

TECHNICAL ISSUES

none

OTHER SUBSTANTIVE ISSUES

Subsection C states that, "The defendant shall not initiate contact with the victim except through the prosecutor's office." This Subsection does not consider the instances where the victim is the defendant's child and there is an open child welfare case. (*See* Section 32A-4-22(D) NMSA 1978, "Any parent, guardian or custodian of a child who is placed in the legal custody of the department or other person pursuant to Subsection B of this section shall have reasonable rights of visitation with the child as determined by the court, unless the court finds that the best interests of the child preclude any visitation.")

It is unclear whether the well-intentioned intent of protecting victims and witnesses gives adequate consideration to a defendant's due process right to know the nature of the evidence against him/her/them, which is often discovered through the course of pre-trial interviews.

A practical consideration is that no pretrial interviews will occur as a result of HB 204, and this will result in an increase the number of jury trials. The bill also presents significant issues with respect to a defendant's right to a competent attorney. By placing a defendant's right to exculpatory evidence against a victim's right to refuse access to that evidence, HB 204 increases the chances of possible mistakes, abuse, and wrongful convictions.

As discussed above, it is through pre-trial interviews that both sides explore the limitations and strengths of their cases. The proposed changes in HB 204 could also lead to fewer pleas (one of the most common times for a plea is right after pretrial interviews) and an increase in trials.

In *League of Women Voters v. Boockvar*, No. 578 M.D. 2019 (Jan. 7, 2021), the Court declared the proposed amendment to Article I of the Pennsylvania Constitution unconstitutional. The proposed amendment sought to mandate a number of new and independent rights to victims of crime, including the right to refuse to be interviewed. The Court held that the proposed amendment will immediately, profoundly, and irreparably impact individuals who are accused of crimes, the criminal justice system as a whole, and most likely victims as well.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Without this legislation, witnesses/victims would not be afforded the statutory protections from being required to give an interview or statement.

AMENDMENTS