LFC Requester:	

AGENCY BILL ANALYSIS
2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction ____ **Substitute** ____

Date Feb. 1, 2025
Bill No: HB 204-280

Sponsor: Meredith Dixon; Andrea Reeb
Short Title: REFUSAL OF CERTAIN PRETRIAL STATEMENTS

Agency Name and Code Number: 280 - LOPD
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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 Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HB 86 (also amending the Victims of Crime Act); HB 104 (also amending the Victims of Crime Act); HB 190 (also amending the Victims of Crime Act)**

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB 204 has some similarity to 2023's HB 173 and 2021's HB 143, all of which proposed to permit certain witnesses to refuse to submit to pretrial interviews. Where previous bills sought to amend the "Uniform Child Witness Protective Measures Act" within Chapter 38 of NMSA governing "Trials," HB 204 would add a new section to the Victims of Crime Act.

In broadest terms, HB 204 would permit child victims and witnesses in any criminal (or presumably civil) proceeding to refuse to submit to any pretrial interviews. No limitations or accommodations are discussed in Subsection A regarding children. Subsection B would also permit adult victims to refuse any statement or interview "initiated by a party in a criminal proceeding."

If an adult refuses such an interview, a party may seek instead to have approved questions asked by "an individual trained in forensic interviews, including a law enforcement officer." That adult may also consent to an interview, but impose conditions thereon, may have a victim's advocate present, and HB 204 would give the prosecutor "authority to protect the victim from harassment, intimidation or abuse during the interview and may seek a protective order." HB 204 would require that "All parties participating in the interview shall respect the victim's health, privacy and dignity."

In Subsection C, HB 204 would prohibit a defendant (or their attorney) from initiating contact with any victim in a criminal case except through the prosecutor's office. Subsection C would also mandate: "The prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of the victim's right to refuse the interview."

Finally, HB 204 would prohibit a defendant (or their attorney) from commenting at trial on a victim's refusal to undergo an interview.

FISCAL IMPLICATIONS

The fiscal impact of this proposal is difficult to quantify, but would likely be substantial. As it applies to all victims of those crime—including family members in some cases—HB 173 would likely result in more pretrial litigation in virtually every case involving one of these charges. This would increase the length of time cases are pending trial and significantly increase the complexity of pretrial investigations and litigation, decreasing the number of cases a given attorney or investigator could constitutionally handle. It also would prevent the factual inquiry that enables balanced plea bargaining and, in some cases, dismissal, resulting in more cases going to trial that are currently resolved more efficiently. This would result in a corresponding need for more attorneys, investigators, and support staff for LOPD.

SIGNIFICANT ISSUES

PERFORMANCE IMPLICATIONS

Subsection A would allow any child victim *or witness* to review any and all pretrial statements or interviews. Unlike Subsection C which requires prosecutors to "advise the victim of the victim's right to refuse" an interview requested *by the defense*, there is no corresponding requirement that a victim be advised of their right to refuse an interview or statement to law enforcement, forensic interviewer, or prosecutor. It is unclear how victims, especially children, would know if this right.

While adults may refuse a statement or interview initiated *by a party*, it does not give adults the right to refuse a pretrial statement or interview initiated by law enforcement.

Taken at face value, the deeply concerning implication of the refusal provisions are the intent to particularly hamper access to information sought by a defendant who stands accused of a crime, but retains a presumption of innocence. The primary function of "mounting a defense" is to test the accuracy and strength of the State's evidence. Interviewing victims and witnesses is the primary way in which a defendant does this. Blocking access to this investigative tool *across the board and without limitation* would deprive a defendant of their due process right to present a defense. *See March v. State*, 1987-NMSC-020, ¶ 8, 105 N.M. 453, 734 P.2d 231 ("The due process right carries with it the right to a reasonable amount of time to prepare a defense" and "the right to compulsory process for the attendance of necessary witnesses") (citations omitted). "A basic tenet of American jurisprudence is that a defendant is entitled to a fair trial with the right to appear and defend himself." *Id.* (citing U.S. Const. amend. XIV, § 1; N.M. Const. art. II, §§ 14, 18). Moreover, "[n]o more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant." *Id.* (quoting *State v. Orona*, 1979-NMSC-011, ¶ 8, 92 N.M. 450, 589 P.2d 1041).

As was recently found in Pennsylvania with respect to similar aspects of Marsy's Law, there are significant due process and confrontation issues in permitting victims the right to refuse interviews and in limiting defense access to critical discovery and impeachment material. *See e.g.*, Mike Stinelli, "Pa. Commonwealth Court declares Marsy's Law unconstitutional, referendum votes invalid," Pittsburgh Post-Gazette, Jan. 7, 2021, available at https://www.post-gazette.com/news/crime-courts/2021/01/07/marsys-law-pennsylvania-court-unconstitutional-ruling-amendment-votes-invalid-commonwealth/stories/202101070127; *cf. State v. Layne*, 2008-NMCA-103, ¶ 13, 144 N.M. 574 (recognizing limitation of discovery undermined defendant's

rights because "[i]mpeachment is crucial to effective cross-examination because it gives a party the opportunity to discredit a witness, so the jury properly has a way to determine whether a witness is untruthful or inaccurate").

As *Layne* describes, the ability to test an accusing victim's memory and reliability, and other aspects of their credibility, requires getting a full version of their account before trial and comparing it to their trial testimony. The New Mexico Supreme Court recognized this long before any such statute was proposed. In 1979, *State v. Orona*, held that a "trial court's order prohibiting defense counsel from interviewing the State's main witnesses" deprived him of a fair trial. While the Court recognized that defendants do not have an *absolute* right to pretrial interviews, it is unconstitutional when the effect is to "deprive defendant of his right to prepare a defense." 1979-NMSC-011, ¶¶ 7, 10. It requires a showing of prejudice to establish the violation, and *Orona* recognized that certain witnesses may require protective measures. However, the Court noted: "The trial court could fashion some means to ensure that the witnesses will be protected from intimidation without unduly impairing defendant's right to prepare a defense. However, in the absence of some demonstrable good cause, a trial court **may not impose an absolute restriction on defense counsel's access to the State's prospective witnesses**." *Id.* ¶ 12.

HB 204 requires no individualized showing of necessity, provides for no individual case-by-case assessment of prejudice, and instead declares a *victim's* right of refusal without exception. This approach is surely unconstitutional under *Orona*.

Without access to a pretrial interview, a defense attorney in *most* cases would be rendered ineffective and defendant is deprived effective confrontation of their accuser, and deprived due process in the discovery and trial preparation process, much less the ability to then present their defense at trial. As discussed further below in the Performance section, the constitutional ramifications cannot be understated.

Additionally, assuming certain persons are victims at the outset of the case—before any determination of guilt has been made—and insulating such persons from the discovery process is inconsistent with the presumption of innocence and the State's burden of proof. The presumption of innocence and burden of proof hold that a person is innocent until proven guilty beyond a reasonable doubt. *See e.g., State v. Henderson*, 1970-NMCA-022, ¶ 12, 81 N.M. 270; UJI 14-5060 NMRA. These presumptions afford defendants who are facing incarceration, convictions carrying life-long consequences, and the entire resources and force of the State (including the police, SLD, OMI, CYFD, the District Attorneys' Office, the Attorney General's Office, etc.), certain protections and rights consistent with these presumptions. The provisions of HB 204 would presume that a particular individual is a victim, another individual is guilty, and would specifically limit the defendant's access to evidence and information based on such presumptions.

Because defendants would be required to litigate any request for identification information as well as proposed interrogatories, the amount of litigation required for such cases would increase significantly. This, in turn, would create substantial delay in cases involving such charges and thereby endanger the right to a speedy trial guaranteed by the Sixth Amendment of the Federal Constitution and Article II, Section 14 of the New Mexico Constitution. *See e.g., State v. Serros*, 2016-NMSC-008, ¶¶ 71-73, 366 P.3d 1121 (discussing "the havoc" the State's policy of restricting interviews of the victim and victim's family in cases involving allegations of sexual abuse "can wreak on an accused's right to a speedy trial" and attributing delay caused by

"restricting interviews of the victim and the victim's family" to the State for "effectively prevent[ing] Defendant's attorneys from fully developing a defense").

PERFORMANCE IMPLICATIONS

There are significant performance implications for the LOPD should HB 204 be passed. In addition to the constitutional concerns outlined above, citing *Orona*, this bill is also risking constant claims of "unfair surprise" at trial, when new information come to light for the first time, resulting in increased motions for a mistrial or new trial based on discovery or *Brady* violations or on newly discovered evidence. *See Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (recognizing a defendant's due process rights are violated when the prosecution suppresses favorable evidence); Rule 5-614 NMRA (Motion for new trial).

Additionally, LOPD has adopted formal Performance Standards which attorneys are expected to adhere to. Standard 4.1 regarding Case Review and Preparation requires attorneys to conduct witness interviews unless there is a sound strategic reason not to perform them. *See* https://www.lopdnm.us/wp-content/uploads/2022/10/2016PerfStand.pdf. If HB 204 were enacted, it would force LOPD attorneys to violate LOPD standards for effective representation.

Any litigation disputes and constitutional objections raised by the defense that were denied below would then need to be litigated on appeal. Given the severity of the limitations sought to be imposed by HB 204, such matters would likely need to be litigated on appeal in a significant number of cases where the rights and procedures provided for in HB 204 were followed.

The increase in time and resources needed to litigate such matters would require a corresponding increase in personnel at every stage of the litigation process to compensate for the performance implications of HB 204.

ADMINISTRATIVE IMPLICATIONS

None for LOPD.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 86 (also amending the Victims of Crime Act); HB 104 (also amending the Victims of Crime Act); HB 190 (also amending the Victims of Crime Act).

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

The prosecution already can file motions in particular cases involving particular victims whom the prosecution has reason to believe would be significantly and adversely affected by being questioned by defense counsel or an investigator, and upon a showing of such need (such as the testimony of a mental health professional as to the victim's fragile mental state), the district court could fashion an appropriate remedy

Analyst further notes that the existing Child Witness Protective Measures Act provides for many witness protections, and prosecutors are already entitled to request individualized protective accommodations during witness interviews, such as those recommended by the Court in *Orona*. Prosecutors are present for pretrial defense interviews, victim witnesses are already entitled to have a victim's advocate with them, and if a defense attorney were to abuse the process to ask questions in a harassing or berating manner, the prosecutor would be well within the law to halt the interview and seek a remedy from the district court, potentially to include barring any further interview access, thereby satisfying the showing of justification that was lacking in *Orona*.

Anecdotally, LOPD attorneys have experiences in which a pretrial interview either revealed wholly exculpatory recantations or conflicts in reported allegations, but even more commonly such interviews may reveal the existence of additional evidence of which the defense was unaware, such as statements, videos, or other witnesses. Such evidence may point to fabrication or an alternate suspect, but even when not wholly exonerating, details revealed in pretrial interviews often leave to a reduction in charges or solid grounds for a plea agreement that can save all parties the burden of an adversarial trial.

On the other hand, there is also value to the justice system from a defense pretrial interview that is wholly consistent with the allegations, reveals no new information, no conflicts, and where the defense attorney instead *confirms the strength of the State's case*. Such interviews can lead to plea agreements that also avoid a trial, and where the victim only has to repeat their story in a private room with two lawyers and a victim's advocate instead of a public courtroom. If a defendant is barred from that investigative opportunity, counsel cannot predict what the victim-witness would actually say on the stand with enough certainty to advise a client (in good conscience) to accept a plea offer on the table. Whether pretrial interviews reveal new evidence or not, they often resolve cases.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Existing protective options for vulnerable witnesses would remain available in appropriate cases. The prosecution will still wield significant power in limiting the questioning of victims through the plea agreement process (refusing to plead cases where the defense insists on an interview) as described in *State v. Serros*, 2016-NMSC-008, ¶ 71.

AMENDMENTS

None noted.