

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 2/7/2006

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 821

SHORT TITLE Consumption of a Controlled Substance SB \_\_\_\_\_

ANALYST McOlash

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	None		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to: HB 336

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

NM Board of Pharmacy (BOP)  
 Public Defender Department (PDD)  
 Corrections Department (CD)  
 Department of Public Safety (DPS)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

House Bill 821 amends Section 30-31-23 NMSA 1978 to add the following to the definition of possession:

A blood, urine or other medical test that indicates a detectable amount of a controlled substance not obtained through a valid prescription is present or has been metabolized is prima facie evidence of possession in the county where the test was obtained.

## 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. 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 (AOC).

## SIGNIFICANT ISSUES

### Corrections

This bill would not likely withstand Constitutional scrutiny under the Eighth and Fourteenth Amendments. It appears to punish a person for the status of being a drug user rather than for actually presently using, purchasing, selling, possessing, or for antisocial or disorderly behavior resulting from the controlled substances' administration in New Mexico. Moreover, it appears that a person can be guilty of an offense under the bill whether or not he has ever used or possessed any narcotics within the state of New Mexico, and whether or not he has been guilty of any antisocial behavior here. The New Mexico Court of Appeals has already ruled that ingestion, i.e. the mere presence of drugs in the urine or bloodstream.

### Board of Pharmacy

Medical biological testing information not obtained with a search warrant or subpoena would probably be a violation of the patient's right to privacy. If a hospital, clinic, private practice practitioner, medical testing laboratory, etc., reported positive tests for a controlled substance, they might be subject to a administrative or civil penalty for reporting protected health information to authorities unless given immunity from such action. A Schedule 1 controlled substance does not have a legitimate medical use and therefore may not be obtained by a valid prescription. A Schedule 2 thru 5 controlled substance may be obtained by a valid prescription but without a subpoena or search warrant, the protected health information would not be available to law enforcement. A positive test for a controlled substance in Schedules 2 thru 5 without additional information would probably not meet the probable cause level.

### Public Safety

It appears that this legislation seeks to over rule current case law in the State of New Mexico as set forth in the case of *State vs. McCoy*, 116 N.M. 491 (Ct. App. 1993), which overturned the conviction of two defendants who were charged with possession of a controlled substance when random urinalysis testing indicated the presence of controlled substances in their body. The court found that the positive drug results were relevant as circumstantial evidence that the defendant has possessed drugs at the time of ingestion. Furthermore, the court found that the state could rely on circumstantial evidence of possession to establish jurisdiction.

However, that additional proof of knowledge or intent to possess drugs beyond a positive drug test was required for a conviction. The current bill would make results of a positive drug test prima-facie evidence of possession in the county where the test was obtained. Prima-facie evidence is sufficient to establish a given fact, which if not rebutted or contradicted, will remain sufficient. In the *McCoy* matter, the court noted the argument of the state that because the positive drug test is circumstantial evidence of possession the states has exceeded in establishing a prima-facie case of possession of a controlled substance that argument would "impermissibly shift the burden of proof to defendants." The problem being that as the court noted, "it would be difficult,

if not impossible, for a defendant to present credible evidence that he or she ingested drugs unknowingly. Although it may be just as difficult for the state to show a lack of deception, coercion or involuntary consumption, we believe it is the state that should shoulder the burden of proof if it chooses to rely principally on a positive drug test to prosecute a defendant for possession of cocaine.”

## **RELATIONSHIP**

Relates to HB 336 (concerning drug-free residential zones)

## **TECHNICAL ISSUES**

### Corrections

Currently persons convicted for the possession of the controlled substance (e.g., marijuana) are sentenced based upon the amount of the substance they had in their possession. Under this bill a person could presumably be convicted based merely upon a positive drug test; however, the bill does not contain a clear sentencing structure that does not rely on the amount of the controlled substance in the convicted person’s possession, nor does it state what degree a felony will be for convictions based on positive blood tests.

## **POSSIBLE QUESTIONS**

If a person uses drugs but also has drugs for future use, can the person be prosecuted for both “possessions”?

BMC/nt