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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/14/11

SPONSOR Kintigh LAST UPDATED \_\_\_\_\_ HB 534

SHORT TITLE Recordings by Law Enforcement as Evidence SB \_\_\_\_\_

ANALYST Segura

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	None		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Unknown			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Attorney General's Office (AGO)  
 New Mexico Department of Public Safety (DPS)  
 Department of Public Defender (PDD)  
 Administrative Office District Attorney (AODA)

### SUMMARY

#### Synopsis of Bill

House Bill 534 proposes that any recording made by a certified law enforcement officer in any location and with any device, shall be presumed to meet all the requirements for admissibility in court if the officer was present when the recording was made. The effective date of the legislation if enacted is July 1, 2011.

## FISCAL IMPLICATIONS

House Bill 534 does not contain an appropriation. The AOC indicates that a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

## SIGNIFICANT ISSUES

“Recording” means an electronic recording created by visual or audio media, including videotape, audiotape or digital media.

According to AOC, Rule 11-1001 (A) NMRA 1978 of the NM Rules of Evidence defines “recordings” differently from the proposed act: “letter, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photo stating, magnetic impulse mechanical or electronic recording or other form of data compilation.” Section 29-1-16 NMSA 1978 sets out required procedures for law enforcement electronic recording of custodial interrogations and in Subsection H (2) defines “ electronic recording” as “ a complete and authentic electronic recording created by visual or audio media, including by motion picture, videotape, audio tape or digital media.”

Further, AOC indicates that utilization of sound recordings as evidence is accepted by New Mexico Rules of Evidence. *State.DMV v. Gober* 85 N.M. 457, 513 P.2d391 (1973). However, it is unclear how House Bill 534 would operate with existing rules of evidence and of criminal procedure requiring proper authentication of recordings and hearsay exceptions for out of court statements such as prior inconsistent statements, and non-hearsay admissions of a party opponent, some of which limit the use of such evidence to purposes of impeachment as opposed as for substantive content.

The PDD states that House Bill 534 may be deemed unconstitutional as being in conflict with the Rules of Evidence promulgated by the New Mexico Supreme Court. Because the bill shifts the burden of proof for establishing the admissibility of evidence away from the proponent of the evidence and because it relieves a party from having to follow the current rules of evidence governing the admissibility of recordings, it may conflict with the Rules of Evidence and be unconstitutional.

The PDD indicates that the Rules of Evidence in place now provide for the admission of recording, including recordings made by police officers. The current Rules were promulgated to ensure fairness in court proceedings and to protect the constitutional rights of litigants.

The AODA raises the issue that normally to be admitted a recording must at least be authenticated. It must be identified as the recording made by the officer on the date indicated and there must be testimony that the recording offered has not been tampered with. House Bill 534 creates a presumption that the recording is admissible without requiring that the officer who made the recording be present in court to identify the recording. House Bill 534 would be creating a presumption of admissibility negate the necessity of establishing a foundation as required by the rule of evidence.

RS/bym