F I S C A L I M P A C T R E P O R T

SPONSOR Park **ORIGINAL DATE** 02/02/12 **LAST UPDATED** **HB** 216

SHORT TITLE Evidence in DWI Cases **SB**

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Note Below			Recurring	General Fund/Other State Funds
Total		See Note Below			Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Budgetary impact to DOH and DPS would be positive as neither will have to incur the cost for per diem and mileage for analysts to testify in court. Depending on the level of video conferencing capabilities at the courts, there could be a nonrecurring expense to the state to outfit the courts.

SOURCES OF INFORMATION

LFC Files

Responses Received From
Public Defender Department (PDD)
Administrative Office of the Courts (AOC)
Department of Health (DOH)
Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 216 proposes to add a new section to the Implied Consent Act, Section 66-8-105 NMSA 1978 to allow for the admission into evidence in any court proceedings of a certified report of findings and analysis of a test administered under the Act with the same force and effect as if the individual who conducted the analysis had testified.

Section B of the bill sets out a notice and demand process in which a party who wants to use a certified report in lieu of the analyst testimony at trial must serve a copy of the report on the opposing party at least 21 days before trial. If the opposing party objects to the absence of testimony, the opposing party must serve a written objection within 7 days of receipt of the report on the lab and the offering party. If the objection is timely served, the report shall not be

introduced without the analyst testimony. If the objection is not timely or not made, the report may be received into evidence at trial.

Section C of the bill allows a subpoenaed analyst to appear by interactive video which will be recorded.

Effective date of the bill is July 1, 2012.

FISCAL IMPLICATIONS

The Public Defender Department report that this statute as written would increase the burden on its already underfunded department. This statute could result in defendants being deemed to have waived their confrontation rights by default, which in the long run, could result in increased litigation costs for the State.

The statute would allow for a more efficient process if it allowed those parties who do agree, to stipulate to entry of the written report in lieu of live testimony.

According to the AOC, 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. Without a substantial appropriation to the AOC to fund the personnel and resources necessary to expand the video testimony capabilities in all the courts, it will be difficult to meet the purpose of the bill. As these have not been firmly settled in the New Mexico courts, there will be the possibility of continued litigation which is costly to the courts and other agencies.

It is rather difficult to determine from the AOC response whether this bill will or will not have a fiscal impact since first the fiscal impact is based on enforcement and prosecution and then it is dependent on expanding video conferencing. No data is readily available about which courts have video conferencing capabilities and the amount spent to provide those capabilities thus far.

SIGNIFICANT ISSUES

The Department of Health responds as follows:

HB216 was introduced by Representative Al Park on behalf of the Department of Health after the Governor issued an Executive Message in its support. It is intended to help the Department's Scientific Laboratory Division (SLD) cope with the increased demand for criminal DWI/DUID trial appearances by its analysts since the Unites States Supreme Court's decisions in *Melendez-Diaz v. Massachusetts* (2009) and *Bullcoming v. New Mexico* (2011). Those cases determined that laboratory analysts performing DWI/DUID tests are accusers of the driver whose blood they test, and that the defendant has the right to confront them in court. Since the Supreme Court's opinions were issued, subpoenas for the SLD's 15 analysts to appear at trial have increased 70%, to more than 1,600 subpoenas per year. In addition, as many as 4 SLD analysts are now routinely being subpoenaed for a single DWI/DUID trial.

Frequently, analysts are forced to drive several hours, wait a few more, then upon their appearance, the case is dismissed or pled out. This amendment is also intended to reduce analyst

"travel and wait" time for cases where they are required to appear by permitting live interactive video appearances at court. Some courts in New Mexico already allow this approach, but this amendment to the Implied Consent Act would specifically encourage it if the court determines that the transmission is sufficiently clear to allow full and meaningful opportunity for the jury to observe and the parties and judge to interact with the analyst, and likewise allows the analyst to see and hear the participants.

The use of live video testimony for SLD expert witnesses in DWI/DUID trials, as proposed by HB216, would also significantly reduce the adverse impact of court testimony on the productivity of SLD analysts. The use of 2-way live interactive video testimony, proposed in HB216, would replace 1-3 day out of town trips by SLD analysts to testify as to laboratory results, with a 45 minute session in the videoconference room at SLD. This would significantly reduce the impact of court testimony on the analysts' productivity.

The SLD has been requesting permission to use video testimony to appear in DWI/DUID cases since 2009 and in 2011, SLD analysts were granted permission to testify by video in 35 trials in Municipal, Magistrate and District courts across the state. However, to date there has been no direction provided from the NM Supreme Court regarding the permissibility of live video testimony for SLD expert witnesses in DWI/DUID cases and many judges and District Attorneys are hesitant to allow it in the absence of direction regarding its acceptability.

With so many analysts being subpoenaed, laboratory analysis in DWI/DUID and OMI cases is delayed. HB216 should help cut down on analyst time taken away from actual testing work, thus helping eliminate those delays.

The PPD in its response writes:
1. The 21-day deadline should be changed to 45 days, with 20 days for the defense to respond.
2. Service of defense objections to admission of reports without testimony should be on the prosecutor only, and not on the laboratory.
3. The parties should be allowed to voluntarily stipulate in writing to entry of a written report in lieu of live testimony.
4. Analysts testifying about their reports must appear in court in person.

Subsection B: Because the New Mexico Public Defender Department represents most of the criminal defendants in this state, this statute would have the largest impact on indigent defendants. The right to confront and cross-examine witnesses at trial is the defendant's right. U.S. Const. amend. VI, N.M. Const. art. II, § 14. Any waiver of a constitutional right must be knowing, intelligent and voluntary, and "there is a presumption against waiver of constitutional rights." *State v. Zamarripa*, 2009-NMSC-001, ¶ 38, 145 N.M. 402, 199 P.3d 846. Section B attempts to ensure that a defendant does not waive the right to confront by default; however, the short time limit for service of objections would unfairly increase the likelihood that indigent defendants could be deemed to have waived their confrontation rights by default. The 7-day deadline is unrealistic, given the reality that many Public Defender clients lack the resources to stay in constant contact with their attorneys. The 21-day deadline should be changed to 45 days, with 20 days for the defense to respond. This would benefit both sides, by giving analysts sufficient notice when they will be required to testify.

Second, the Public Defender Dept. should not be required to serve an objection on the laboratory

directly, when it serves notice to the District Attorney. This requirement as written would unfairly shift a portion of the prosecutor's litigation costs to the Public Defender Department and make it more difficult for the Public Defender to meet the requirements of this statute. Notification of a witness is the responsibility of the party that is offering that witness' testimony.

The parties should be allowed to voluntarily stipulate in writing to admission of a written report in lieu of live testimony, rather than allowing a waiver by default. This would better ensure that the defendants' constitutional rights have been preserved, and benefit all parties by reducing litigation costs, but only in cases where the defendant knowingly waives the right to confront the witness.

Subsection C: This subsection as written would result in violation of defendants' confrontation rights. The Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *United States v. Yates*, 438 F.3d 1307, 1314-15, 1319 (11th Cir. 2006) (holding that witnesses' testimony at trial by means of two-way video teleconference violated the defendant's Sixth Amendment rights).

On June 23, 2011, in *Bullcoming v. New Mexico*, the US Supreme Court opined that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. This bill responds to US Supreme Court ruling.

According to the Administrative Office of the Courts, HB 216 creates a fix for the US Supreme Court case State v. Bullcoming, 2010-nmsc-007, rev'd by ___U.S.___, 131 S.Ct. 2705 (2011) by first creating a process by which a certified report of the findings and analysis of a test administered pursuant to the Implied Consent Act is entered into evidence without having the analyst testify and secondly, by allowing the analyst to testify by interactive video. This bill affects cases where a DWI is the basis of the charge and there is testing of a blood or breath test.

The AOC also reports that there could be an issue with Section C of the bill in that the New Mexico Court of Appeals issued an opinion on January 24, 2012 in State v. Patrice Chung, No. 30, 384 holding that it was error to grant the State's opposed motion for video testimony by a state crime lab analyst because it does not meet the requirements of the Confrontation Clause and State v. Almanza, 2007-NMCA-073.

PERFORMANCE IMPLICATIONS

According to the AOC, 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

ADMINISTRATIVE IMPLICATIONS

According to the PDD, it will need to establish procedures for meeting the required deadlines, and budget for the increased workload.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the DOH, **"**notice and demand," and video testimony provisions related to lab analyst testimony about certified blood sample reports in DWI and DUID cases would not added to the Implied Consent Act.

POSSIBLE QUESTIONS

ABS/amm