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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/12

SPONSOR King LAST UPDATED \_\_\_\_\_ HB 293

SHORT TITLE Child Porn Evidence Reproduction SB \_\_\_\_\_

ANALYST Sánchez

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

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		NFI	NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General’s Office (AGO)  
 Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

House Bill 293 amends Section 30-6A-1 NMSA 1978, Sexual Exploitation of Children Act. A new section is added to the act titled Child Pornography Evidence – Reproduction Prohibited, in which visual or print medium that is considered child pornography that is part of a prosecution remains in the care, custody and control of the state or court. A defendant shall not be allowed to copy, photograph, duplicate or otherwise reproduce any visual or print medium that may constitute child pornography. The state shall make such evidence reasonably available to the defendant and the defendant’s attorney at the government facility. A defendant is allowed to file a motion with the court requesting the defendant be allowed to duplicate the material.

The effective date of the amendment to the Act is July 1, 2012.

### FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC), reports in its response that 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. The cost of the possible increase in hearings is unknown at this time. If the courts are required to

have care, custody and control over this evidence, there will be some cost for that requirement which is unknown at this time. Most courts do not have facilities for segregation of specific types of evidence. In general, custody of such evidence is maintained by law enforcement agencies.

According to the Administrative Office of the District Attorneys (AODA), there is no fiscal impact to the various district attorney offices. In fact, not having to duplicate all visual and print material that might be child pornography may save offices money.

## **SIGNIFICANT ISSUES**

The Attorney General's Office included the following information in its response:

Images containing the sexual abuse of children, child pornography, is illegal contraband. Child pornography is illegal to possess and is a fourth degree felony. Section 30-6A-3(A). It is illegal to manufacture child pornography and is either a fourth or second degree felony. Section 30-6A-3(E) or (D). It is illegal to copy and duplicate child pornography and is considered manufacturing. See State v. Smith, 145 N.M. 757, (Ct. App. 2088) (Defendant downloaded child pornography using his work computer and transferred some images to his home computer with a flash/thumb drive, and the Court of Appeals held that the copying of digital images created a new digital copy of the prohibited image and constitutes manufacturing). Child pornography is illegal to distribute and is third degree felony. Section 30-6A-3(B) or (F). Thus, when defendant's request and state courts order the duplication of child pornography in criminal proceedings, it is ordering illegal possession, manufacturing and distribution of contraband.

HB 293 is modeled after the federal statute, 18 USC 3509(m). A dozen federal district court cases which have interpreted and applied the federal statute have consistently found it constitutional on due process-5<sup>th</sup> Amend., effective assistance of counsel-6<sup>th</sup> Amend., right to confrontation-6<sup>th</sup> Amend., right to compulsory process-6<sup>th</sup> Amend., and access to experts. The federal courts have pointed out that the statute does not command that the defendant could never receive a copy under any circumstances, ever. They have described it as being conditional, and point to what they call the "safety value" language that the courts shall not allow the defendant to copy "so long as" government makes it "reasonably available", defined as giving an "ample opportunity" to inspect and examine at a government facility. They have stated that this must be "due process" level access. If the defendant feels they are not receiving "ample opportunity", they file a motion, the court conducts an evidentiary hearing on access, and decides whether the government should be ordered to provide a copy. The current bill provides the same "safety value" mechanism.

On issue of legislative rule-making, the NM Supreme Court has rejected any bright line rule that the power to regulate practice and procedure is vested exclusively with the Supreme Court, and has stated that the Legislature is not categorically prohibited from enacting legislation affecting practice and procedure but instead is only precluded from promulgating statutes that conflict with a procedural rule of the Supreme Court. See Albuquerque Rape Crisis Center v. Blackmer, 138 N.M. 398 (N.M. S.Ct 2005). Reflecting the Supreme Court's willingness to share rule-making authority with the Legislature, the Court indicated that if a legislative rule affects "arguably the same subject matter" as the Supreme Court rule, the courts must consider whether the purpose of the legislative rule is consistent with the Supreme Court rule. If it is consistent, both may be given effect absent a fatal conflict. See Albuquerque Rape Crisis Center. In Albuquerque Rape Crisis Center, the Supreme Court even points to some of its own rules which

allow the Legislature to affect practice and procedure, including Rule 11-402 of the Rules of Evidence, Rule 11-502 of the Rules of Evidence and Rule 5-102 of the Rules of Criminal Procedure.

HB 293 is consistent with Rule 5-501 which provides for state discovery in criminal cases, which declares that “the state shall disclose OR make available to the defendant” information subject to disclosure. Under HB 293, the State STILL notifies the Defendant of the existence of the child pornography in law enforcement possession, custody and control AND makes it available to the defendant to inspect and examine at a government facility. This is the way other illegal contraband, which possession outside of law enforcement custody is prohibited, has been handled for years.

The AOC recognizes that the court will need to develop rules and processes to ensure protection of this type of evidence while in the court’s care, custody and control.

### **PERFORMANCE IMPLICATIONS**

According to the AOC, 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

### **ADMINISTRATIVE IMPLICATIONS**

According to the AGO, defendants, defense attorneys and defense experts will be required to view and examine contraband child pornography images at state law enforcement or prosecution facilities. Where a defendant retains an out of state expert, New Mexico law enforcement can arrange for the materials to be delivered to one of the 15 Regional Computer Forensic Labs throughout the country, in addition to the Regional Computer Forensics Lab in Albuquerque, or another government facility local to the out of state defense expert.

### **TECHNICAL ISSUES**

According to the Department of Public Safety Section 30-6A-1 (2) (c) NMSA 1978 conflicts with the Adam Walsh Act as it does NOT allow for any court, in any proceeding, to copy, photograph, duplicate, or otherwise reproduce any property that constitutes child pornography. Below is an excerpt from the Adam Walsh Act –

TITLE 18 > PART II > CHAPTER 223 > § 3509 Prev | Next § 3509. Child victims’ and child witnesses’ rights

(m) Prohibition on Reproduction of Child Pornography.—

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)

(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or

otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

#### **ALTERNATIVES**

The DPS suggests removing Section 2 (c.) of the proposed bill.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

State courts continue to order the illegal copying and distribution of contraband child pornography.

ABS/svb