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## FISCAL IMPACT REPORT

SPONSOR Reeb/Rehm LAST UPDATED \_\_\_\_\_  
ORIGINAL DATE 02/01/2023  
SHORT TITLE Video Testimony for Traffic Offenses BILL NUMBER House Bill 159  
ANALYST Torres, J

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
AOC	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal			

Parentheses ( ) indicate expenditure decreases.  
\*Amounts reflect most recent version of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
Department of Public Safety (DPS)  
Administrative Office of the District Attorneys (AODA)  
Law Offices of the Public Defender (LOPD)  
New Mexico Attorney General (NMAG)

## SUMMARY

### Synopsis of House Bill 159

House Bill 159 (HB159) amends the Implied Consent Act by adding a section allowing for the interactive video appearance of the subpoenaed laboratory analyst. The Bill also expands the implied consent definition under Section 66-8-107, NMSA 1978. House Bill 159 deems that the defendant's implied consent to the analyst's video testimony is given when the laboratory analyst is subpoenaed.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

The LOPD states:

The fiscal impact of changes in criminal procedure is difficult to predict. LOPD might

have to engage in extensive litigation over constitutional challenges related to the legislation. *See Significant Issues*, below. Additionally, HB159 would make it easier to bring certain offenses to trial, it may have a concomitant impact on LOPD having to defend additional cases.

The AOC states:

The New Mexico judiciary previously implemented robust audio-visual procedures and the statewide use of software applications for holding remote proceedings in response to the public health emergency. There would be no fiscal implications to the Metropolitan Court as it currently has adequate mobile media units (see Technical Issues below) to allow for the testimony of a laboratory analyst by interactive video in the DWI jury trials that would come before the Court if this Bill is enacted.

The AODA states:

There will be cost savings because analysts will not have to travel and wait to testify. Analysts will also be able to appear at more hearings. The potential savings will be seen in all areas of the criminal justice system. This writer cannot predict the amount of savings.

## SIGNIFICANT ISSUES

NMAG states:

This bill raises significant concerns under the Confrontation Clause when applied to criminal trials. *See* U.S. Const. Amend. 6; N.M. Const. Art. II, Sec. 14. In *State v. Thomas*, 2016-NMSC-024, ¶ 29, the New Mexico Supreme Court “adopted” the rule generally requiring face-to-face confrontation from the United States Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990) in a case that reversed a conviction where a forensic analyst testified via video. Under *Craig*, “[a] criminal defendant may not be denied a physical face-to-face confrontation with a witness who testifies at trial unless the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact.” *The Court in Thomas* recognized that our Court of Appeals has consistently applied *Craig* when analyzing the admissibility of live two-way video testimony under the Confrontation Clause and that the “vast majority of courts from other jurisdictions, both state and federal, are in accord.” *Id.* ¶ 28. Our Court of Appeals has applied *Craig* to not include “convenience” as “necessity” to satisfy the *Craig* rule. *See State v. Smith*, 2013-NMCA-081, ¶¶ 9-10 (applying *Craig* and reversing a conviction based on improper video testimony from an SLD analyst in a DUI prosecution). Therefore, an analyst’s busy schedule, inconvenience to the employer laboratory, nor a prosecutor’s purpose of expediting a hearing is sufficient to constitute necessity under *Craig*. *Id.*; *see also Thomas*, 2016-NMSC-024, ¶ 30 (“Inconvenience to the witness is not sufficient reason to dispense with this constitutional right.”).

This bill would appear to violate the *Craig* standard. While it requires the video testimony to include other confrontation elements, it does not require specific findings from the trial court on necessity and furtherance of an important public policy before an analyst is allowed to testify via video. Although the bill would only apply to traffic

offenses such as DUI prosecutions, its categorical requirement of video testimony while obviating the need for individualized findings does not satisfy *Craig*, even if it generally furthers an important policy. *Craig* requires case-by-case, particularized findings of both necessity and furtherance of an important public policy before face-to-face confrontation can be denied. See *Smith*, 2013-NMCA-081, ¶ 5; *Thomas*, 2016-NMSC-024, ¶ 30.

LOPD states:

Analyst testimony is subject to the kind of face-to-face, in-court confrontation guaranteed by the constitutions of both the United States and the State of New Mexico. These constitutional rights cannot be modified by statute. Convenience does not constitute a valid exception to the confrontation requirement under *State v. Chung*, 2012-NMCA-049, 290 P.3d 269.

Because the bill provides no particular reason for avoiding in person testimony, reliance on the statute would not be sufficient to overcome constitutional mandates for in person testimony. As a result, this legislation could either be held to violate the constitutional mandate, or if the separate constitutional assessment needs to be applied anyway, the bill would simply maintain the status quo: if the prosecution has sufficient justification to request video testimony in a particular case (reasons beyond mere convenience for the witness) then the court may grant an individual request.

Incorporating the *Maryland v. Craig*, 497 U.S. 836 (1990) language into House Bill 159 may help deflect a Confrontation Clause challenge.

## PERFORMANCE IMPLICATIONS

LOPD states:

If HB159 were enacted, LOPD would possibly have to engage in extensive litigation over constitutional challenges related to the legislation. HB159 might have profound effects in other areas of criminal procedure that implicate constitutional rights.

AOC states:

Currently, by order of the New Mexico Supreme Court, there is a presumption that all criminal traffic hearings including criminal traffic bench trials will be conducted remotely whereas there is also a presumption that criminal jury trials (which would include DWI trials), bench trials, and preliminary examination hearings will be held in-person unless ordered otherwise by the Presiding Judge in consultation with the Chief Judge of the judicial district. However, in response to the COVID-19 public health emergency, the New Mexico Supreme Court has also implemented Emergency Court Protocols that include procedures for allowing for the testimony of a witness by audio-visual means in certain circumstances provided that there is simultaneous audio-visual communication between the witness and the Judge and attorneys in the courtroom for direct examination, cross examination, and other necessary communications during the testimony of the witness, and further provided that the Judge, court monitor or court reporter, the litigants and their counsel who are present in the courtroom, and all jurors are able to see, hear, and observe the demeanor of the witness while testifying. Lastly, under these Emergency Court Protocols, the Judge is required to make factual findings on the record of the necessity for allowing audio-visual testimony to further an important public policy.

## TECHNICAL ISSUES

According to the AOC:

In the Metropolitan Court, there are eight (8) mobile media carts (each with a PC, keyboard, mouse, 42 inch monitor, webcam, speakers, and USB WiFi stick) that can be moved as needed to any of the Metropolitan Court's twenty-one (21) courtrooms so that if there is a hybrid proceeding with any attorneys, parties, and/or witnesses appearing remotely through audio-visual means through Zoom™ or Google Meet,™ the person appearing remotely can hear the proceeding and can be heard and observed by the Judge, jury, attorneys, parties, and any other individuals present in the courtroom. The Metropolitan Court also utilizes language access functionality on its remote proceedings to allow for any needed language interpretation.

JT/rl/al