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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/06/11

SPONSOR Chavez, D. LAST UPDATED \_\_\_\_\_ HB 392

SHORT TITLE DWI Alcohol Concentration Levels SB \_\_\_\_\_

ANALYST Wilson

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

|              | FY11 | FY12          | FY13          | 3 Year<br>Total Cost | Recurring<br>or Non-Rec | Fund<br>Affected |
|--------------|------|---------------|---------------|----------------------|-------------------------|------------------|
| <b>Total</b> |      | \$0.1-\$240.0 | \$0.1-\$240.0 | \$0.1-\$480.0        | Recurring               | General<br>Fund  |

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 3, SB 127, SB 197, SB 306, SB 307, SB 308, SB 387, SB 405, SB 509, HB 49, HB 183, HB 263, HB 325, HB 329, HB 330 & HB 357

### 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 Health (DOH)  
 Department of Transportation (DOT)  
 Public Defender Department (PDD)  
 Taxation & Revenue Department (TRD)

### SUMMARY

#### Synopsis of Bill

House Bill 392 makes two changes to the current DWI law. First, it exempts persons from being charged with DWI based on drugs if the drug is a medication that is lawfully prescribed in the manner and amount as directed by the professional who prescribed the medication and for which there is no FDA prohibition or warning on driving while taking the medication. Second, the bill removes any presumption for a non commercial driver when the alcohol concentration is .04 to .08 as well as the no presumption for an alcohol concentration of less than .04.

### 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. The cost for the increase in possible expert testimony and complexity of cases as well as number of cases filed is unknown at this time.

As changes have been made in existing DWI law, there has always been litigation in the trial and appellate courts to interpret the changes.

The AGO states that it will be cost-prohibitive for the State to prove its case if it has to subpoena doctors for specific drug impaired driving prosecutions. More law enforcement officers will have to be trained on drug-impaired driving thereby costing law enforcement agencies more money for training purposes.

The average cost of a drug test by the Scientific Laboratory Division (SLD) is \$200 per case. At an estimated 30% in workload, an additional cost of \$240,000 per year could be needed--\$160,000 for additional chemists and \$80,000 for testing supplies. If law enforcement agencies request additional drug tests on all individuals who blow less than 0.08 g/dl on the breath analyzer rather than on a portion of them as is currently the case.

## **SIGNIFICANT ISSUES**

The PDD provided the following:

HB 392 simplifies the threshold standard of conduct to prove DWI by alcohol. This bill defines DWI by alcohol in terms of the breath/blood alcohol test results—currently identified as *per se* DWI by alcohol. It eliminates any confusion as to what intoxication evidence is necessary and sufficient to establish DWI by alcohol.

HB 392 finally addresses the driving population that is necessarily under the influence of lawfully prescribed drugs, taken in the manner as directed by the prescribing health care practitioner, and for which the FDA has no prohibition or warning regarding driving while under the medication.

It is unclear what the proposed amendment of the “condition precedent” necessary to charge a driver with aggravated DWI for refusing to submit to chemical testing under the Implied Consent Act. As proposed, the court would no longer make the preliminary finding that the driver was DWI by alcohol or drugs based upon “intoxication evidence”. It would seem shift the focus to the court’s assessment of whether the law enforcement officer requesting chemical testing had “reasonable grounds” to believe the driver was DWI. Broadening the scope of what is relevant evidence for the court’s consideration from “intoxication evidence” to “evidence” any kind appears to cast too wide a net.

HB 392 amends Section 66-8-110 by removing two of the three allowed presumptions regarding a driver’s impairment based on their BAC results. This could negatively affect civil actions. However, there is no real concern regarding the effect of the proposed amendment on criminal convictions based upon the amended definition of what constitutes DWI by alcohol.

Overall HB 392 improves DWI law—simplifying the standard used to define DWI. The bill also removes a class of drivers from having their driving criminalized. Rather their driving is a consequence of maintaining their health--they were simply following doctors orders in properly taking prescribed medication.

DOT noted that a 2007 roadside survey by the National Highway Traffic Safety Administration confirms a continuing decline in the percentage of drivers at .08 breath alcohol concentration or higher. The 2007 survey used new screening techniques that detected substances other than alcohol. The survey found 16.3 percent of nighttime weekend drivers were drug positive. The drugs most commonly used by drivers were: marijuana, cocaine and over-the-counter and prescription drugs.

### **ADMINISTRATIVE IMPLICATIONS**

If HB392 is passed, SLD estimates a 30% increase in requests for drug testing by law enforcement in cases where the breath test indicates a blood alcohol concentration of less than .08 g/dl, because such an individual would not be allowed to be prosecuted unless other drugs were present in the person's system. This increased volume of requests for drug analysis for breath alcohol tests less than 0.08 g/dl from the current volume could require up to three additional chemist positions at the laboratory to perform the tests and provide expert testimony in court.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 392 relates to the following DWI bills:

- SB 3, Blood Tests for Intoxication and Drugs
- SB 127, Prohibit Certain DWI Plea Agreements
- SB 197, Use of Electronic Sobriety Monitoring Devices
- SB 306, Home Breathalyzer for Certain DWI Offenders
- SB 307, Seizure of Vehicle for Certain DWI Offenders
- SB 308, Interlock Regulations for DWI Offenders
- SB 387, Chemical Tests with Probable Cause of DWI
- SB 405, DWI and Drug Standards Clarification
- SB 509, No Car Interlock for Certain Convictions
- HB 49, DWI as Drugs in Blood & Interlock for Alcohol
- HB 183, DWI First Offender Follow-Up Program
- HB 263, Vehicle Seizure W/DWI Arrest in Certain Cases
- HB 325, Make DWI Death a Serious Violent Felony
- HB 329, Consistent Felony DWI Convictions
- HB 330, Penalty Increase for DWI Offenders
- HB 357, Homicide by Boat & Great Bodily Harm by Boat

### **OTHER SUBSTANTIVE ISSUES**

The AGO offered the following:

The many skills involved in driving are not all impaired at the same BACs. For example, a driver's ability to divide attention between two or more sources of vital information can

be impaired by BACs of .05 percent or lower. However, it is not until a BAC of .05 percent or higher are reached that impairment occurs consistently in eye movements, glare resistance, visual perception, reaction time, certain types of steering tasks, information processing, and other aspects of psychomotor performance.

These impairment indicators help contribute to injury related and fatal crashes.

Drugs affect every person differently. Just because someone is lawfully prescribed a medicine does not mean that medicine will not impair that person's driving abilities and other cognitive abilities. For instance, Vicodin must be taken once every four hours. Vicodin side effects include confusion and feeling faint or lightheaded. For a driver to get behind the wheel after taking Vicodin is a dangerous situation.

Drivers may avoid prosecution if they take the prescription drugs in a manner and amount directed by a health care practitioner. Even taking the drugs in a manner and amount prescribed by a doctor does not absolve any person of responsibility when that drug can impair an individual. Most drugs do have a FDA warning on them, however some anti-depressants do not. Regardless of the FDA warning, drivers must be responsible. This bill proposes to take the responsibility of being a safe driver out of individual hands into the hands of the FDA. It also proposes to allow more lawsuits against doctors who will be held liable for any injuries or crashes caused by patients prescribed certain medications.

This bill will cause the prosecution of drug impaired driving cases with prescription drugs to be nearly impossible. How would the State subpoena medical records to prove that the drugs were taken in the manner prescribed? Will privacy issues prohibit the State from obtaining those records even with a subpoena? The State will have significant problems proving its case as the toxicologists from the SLD can only testify to levels of drugs and cannot testify with specificity how the drug actually impaired the person. The SLD analysts can only testify in general terms even if the proper foundation is laid. There will be no witness who will be able to testify whether the driver was taking the prescription pursuant to a therapeutic dose or an abusive dose.

Removal of presumptive language in 66-8-110 is not justified. Prosecutors will now be required to have necessary experts at trial. Experts who work for the State are lacking as a whole. Experts from SLD or other crime labs cannot be at trial all the time. Those experts have other responsibilities. Taking the presumptive language out of the 66-8-110 puts an undue burden on the State to ensure that an expert is at every drug impaired driving hearing, trial and court procedure.

Studies have shown that baby boomers aged 50 and older are simultaneously using several different legally prescribed drugs in conjunction with each other. Senior citizens typically use at least five, and many more use more than a dozen, different legally prescribed drugs at the same time and many of these drugs have negative interactions with each other. Prescription drugs are now the drug abuse of choice for baby boomers.