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FISCAL IMPACT REPORT

SPONSOR Dixon/Kernan/Lopez/ Jaramillo **ORIGINAL DATE** 02/04/21 **LAST UPDATED** _____ **HB** 143
SHORT TITLE Crime Victim Interviews **SB** _____
ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY21 | FY22 | FY23 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|-------------------------|------|------|----------------------|------------------------------|------------------|
| Total | See Fiscal Implications | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB 36

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Offices of the Public Defender (LOPD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Office of the Attorney General (NMAG)
 Department of Public Safety (DPS)
 Crime Victims Reparation Commission (CVRC)

SUMMARY

Synopsis of Bill

House Bill 143 amends the Victims of Crime Act to expand the rights and protections of victims of violent crimes. The bill adds legislative findings regarding the need to address the secondary trauma experienced by victims of violent crime in the criminal justice system with additional protections, including guidelines for pretrial interviews and trial testimony. The bill adds new sections to the Act providing that:

- a child or incapacitated adult who has already provided a statement shall not be compelled to give an additional statement or interview conducted by the defense and that adult victims have the right to refuse a pretrial interview.

- if an adult victim declines to be interviewed, the defendant may petition the court for approval of written interrogatories. The defendant may contact the victim only through the prosecutor’s office, and if an adult victim consents to an interview, the bill specifies the conditions under which the interview will be conducted. The prosecutor’s office may not notify the defendant of the victim’s address or other personally identifiable information, unless it is ordered by a court.

- when a child or incapacitated adult testifies at a court proceeding and is subject to cross-examination, a previously recorded statement of material fact by the child or incapacitated adult may be admitted if it bears circumstantial guarantees of trustworthiness, and may be admitted as evidence if the court finds the statement to be nontestimonial.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

AOC states that 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 how often this new procedure is applied. 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.

LOPD states that the fiscal impact of this proposal is difficult to quantify, but would likely be substantial. As it applies to a wide range of crimes—ranging from aggravated assaults and batteries to negligent use of a firearm—and to all victims of those crimes—including family members in some cases—HB43 would likely result in more pretrial litigation in virtually every case involving one of these charges. This would increase the length of time cases are pending trial and significantly increase the complexity of pretrial investigations and litigation, decreasing the number of cases a given attorney or investigator could constitutionally handle. This would result in a corresponding need for more attorneys, investigators, and support staff for LOPD.

SIGNIFICANT ISSUES

AODA states that New Mexico, along with Missouri and Indiana, are the only states in the nation that subject child victims to pretrial interviews by a defendant without any showing of a need for the interview or providing some type of procedural protection for the child. HB143 would protect children from the trauma experienced during a pretrial interview while ensuring that the defendant has access to a child’s statement for purposes of trial preparation. With respect to adult victims, other states have recognized the right to refuse an interview as part of a comprehensive protection of victims’ rights similar to the Victims of Crime Act.

AODA also notes that the Rules of Evidence recognize the admissibility of hearsay deemed to be sufficiently trustworthy by the judiciary or the legislature. Many statements by child victims bear circumstantial guarantees of trustworthiness but do not fall within existing hearsay exceptions. For this reason, most states have enacted provisions, often called “tender years” laws, that establish an exception to the hearsay rule for previous statements by child victims that are found to have circumstantial guarantees of trustworthiness. To comply with the application of the constitutional confrontation clause to testimonial statements, the bill establishes two categories of previous statements. Section 3(A) applies to any recorded statement, which would primarily include

testimonial statements, and requires that the child testify and be subject to cross-examination. Section 3(B) applies only to nontestimonial statements for which there is no constitutional right of cross-examination.

AOC notes that Article II, Section 24 of the state constitution provides for the rights of crime victims, which also are stated in the Victims of Crime Act. By providing limitations on interviews of certain crime victims, HB143 expands on the rights afforded by our constitution. According to AOC, while HB143 grants victims of crime more rights in the criminal justice process it may have the unintended consequence of limiting the ability for a defendant to conduct a thorough investigation of the charges during the discovery phase of a criminal case. Nevertheless, AOC also notes by providing defendants with the ability to obtain additional information from a crime victim through the use of written interrogatories, the bill attempts to balance the need to protect victims with the defendant's right to obtain additional information during the discovery process and to adequately prepare a defense.

AOC suggests that HB143 may raise questions under Article II, Section 14 of the state constitution, which provides for the accused's right to confront witnesses "in all criminal proceedings." The Supreme Court has addressed whether the full constitutional right of confrontation in criminal prosecutions applies at a pretrial probable cause determination, see *State v. Lopez*, 2013-NMSC-047. The Supreme Court held that it does not, "because the right of confrontation in Article II, Section 14 of the New Mexico Constitution, as with the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution, applies only at a criminal trial where guilt or innocence is determined."

AOC notes that the additional protections for crime victims under HB143 would only apply to the twenty-one criminal offenses listed in Section 31-26-3 of the Victims of Crime Act.

According to AOC, criminal judges have expressed concerns regarding how written interrogatories would be handled. The bill would materially alter the current criminal discovery process; first, by injecting written interrogatories, which are not a part of the criminal trial process and are typically confined to civil litigation; second, by removing the ability of defendants through their counsel to verbally question the alleged victim; and third, by not allowing either party's [state's or defendant's] attorneys to be present when prior approved written interrogatories are asked of the victim by the law enforcement officer. Allowing for interrogatories may deny attorneys the opportunity to participate in discovery in a meaningful way and would inject the court and law enforcement officers into this process.

AOC also notes that the bill would require a court to "deny interrogatories that are not material to the defense's preparation" and to "modify interrogatories in a manner that protects the victim's health, safety, and privacy" while ensuring that any modification "does not substantially diminish the defendant's access to material information." These provisions require a judge to balance the victim's rights with the defendant's right to prepare a defense and will likely result in additional court hearings. In addition, the requirement in HB143 that the judges must review and approve the questions that would be asked of crime victims via interrogatories would require to spend an extensive time reviewing and revising the interrogatories, as well as hearing the disputes between the parties.

LOPD identifies that following issues:

As was recently found in Pennsylvania, there are significant due process and confrontation issues in permitting victims the right to refuse interviews and in limiting defense access to critical discovery and impeachment material. *See e.g.*, Mike Stinelli, “Pa. Commonwealth Court declares Marsy’s Law unconstitutional, referendum votes invalid,” *Pittsburgh Post-Gazette* (Jan. 7, 2021). *Cf. State v. Layne*, 2008-NMCA-103, ¶ 13 (recognizing limitation of discovery undermined defendant’s rights because “[i]mpeachment is crucial to effective cross-examination because it gives a party the opportunity to discredit a witness, so the jury properly has a way to determine whether a witness is untruthful or inaccurate”).

As *Layne* describes, the ability to test an accusing victim’s memory and reliability, and other aspects of their credibility, requires getting a full version of their account before trial and comparing it to their trial testimony. Without access to a pretrial interview, an attorney is ineffective and the defendant is deprived effective confrontation of their accuser, and deprived due process in the discovery process and in the ability to present their defense at trial.

Additionally, assuming certain persons are victims at the outset of the case—before any determination of guilt has been made—and insulating such persons from the discovery process is inconsistent with the presumption of innocence and the state’s burden of proof. The presumption of innocence and burden of proof afford defendants who are facing incarceration, convictions carrying life-long consequences, and the entire resources and force of the state (including the police, SLD, OMI, CYFD, the District Attorneys’ Office, the Attorney General’s Office, etc.), certain protections and rights consistent with these presumptions. The provisions of HB 43 would presume that a particular individual is a victim, another individual is guilty, and would specifically limit the defendant’s access to evidence and information based on such presumptions.

Because defendants would be required to litigate any request for identification information as well as proposed interrogatories, the amount of litigation required for such cases would increase significantly. This, in turn, would create substantial delay in cases involving such charges and thereby endanger the right to a speedy trial guaranteed by the Sixth Amendment of the Federal Constitution and Article II, Section 14 of the New Mexico Constitution. *See e.g.*, *State v. Serros*, 2016-NMSC-008, ¶¶ 71-73, 366 P.3d 1121 (discussing “the havoc” the State’s policy of restricting interviews of the victim and victim’s family in cases involving allegations of sexual abuse “can wreak on an accused’s right to a speedy trial” and attributing delay caused by “restricting interviews of the victim and the victim’s family” to the State for “effectively prevent[ing] Defendant’s attorneys from fully developing a defense”).

Finally, with respect to the admission of prior statements, existing rules of evidence regulating the admission of prior statements ensure the admission of the statements is consistent with a defendant’s confrontation or other constitutional rights and ensure that it is of sufficient reliability. It is unclear how HB143 would interact with those rules, making it unnecessary at best or confusing and an additional source of litigation at worst.

CVRC states that privacy is very important to many crime victims. They think it is so important that many do not access needed services such as medical and counseling services without verifying treatment professionals will protect their personal information from being disclosed. This bill creates a framework for regulations that would help protect the information victims share with law enforcement and medical and mental health professionals from further dissemination. Our current law and practice allow disclosure of crime victim confidential information to defense attorney's and ultimately the offenders. This proposed change to the law is long overdue.

ADMINISTRATIVE IMPLICATIONS

DPS notes that HB143 allows the defendant to petition the court for approval of written interrogatories, which shall be asked of the victim by a law enforcement officer. While DPS cannot forecast an approximate amount of additional investigative time it would take to conduct these written interrogatories, DPS anticipates some increase as the interrogatories will take the place of the traditional deposing of victims by defense prior to formal court proceedings.

AOC states that there may be an administrative impact on the courts as the result of an increase in caseload and/or in the amount of time necessary to dispose of cases. The bill, if enacted, may result in litigation challenging the constitutionality of this bill. In addition, the bill will also likely result in additional hearings dealing with whether interrogatories can be issued and the substance of the interrogatories.

LOPD states that there would be significant administrative issues at all stages of litigation should HB143 be passed. At the initial case assignment stage, limiting access to the identification information of victims prevents the LOPD from running accurate and necessary conflict checks to ensure that no conflict in representation occurs. At the pretrial stage, access to basic information permits the defense to investigate the case and to identify impeachment material. Requiring litigation up-front for such basic information significantly increases the length and complexity of the pretrial investigation phase. The discovery process would then be further impaired by requiring defendants to litigate the need to question the victim or to go through the approval process for having interrogatories approved and asked. Should the prosecution lose a pretrial motion, it could then file an interlocutory appeal, potentially resulting in years of delay.

In addition, LOPD states that the bill may result in constant claims of "unfair surprise" at trial, when new information come to light for the first time, resulting in increased motions for a mistrial or new trial based on discovery or *Brady* violations or on newly discovered evidence. *See Brady v. Maryland*, 373 U.S. 83, 86-87 (1963) (recognizing a defendant's due process rights are violated when the prosecution suppresses favorable evidence); Rule 5-614 NMRA (motion for new trial).

Finally, LOPD states that any litigation disputes and constitutional objections raised by the defense that were denied below would then need to be litigated on appeal. Given the severity of the limitations sought to be imposed by HB143, including access to basic identification material, such matters would likely need to be litigated on appeal in a significant number of cases where the rights and procedures provided for in HB143 were followed.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB143 conflicts with SB36, which also amends the Crime Victims Act to protect crime victims who testify in court proceedings.

TECHNICAL ISSUES

AOC suggests that the term nontestimonial in Section 3(B) be defined and asks, how would a statement ever be non-testimonial in nature?

AOC also suggests that the term “incompetent” in the Section 4(I)’s definition of “victim” be changed to “adjudicated incapacitated adult.”

OTHER SUBSTANTIVE ISSUES

AOC notes that judges always review various factors and exercise judicial discretion when they are setting the conditions of release for a defendant prior to trial. The bill would remove all judicial discretion and mandates the defendant shall have no contact with the victim except through the prosecutor's office. This bill does not allow the victim the ability to request to have contact with the defendant and does not give the judge with the ability to allow such contact.

BG/sb