

Colorado Legislative Council Staff Fiscal Note

**STATE and LOCAL
REVISED FISCAL IMPACT**

(replaces fiscal note dated February 8, 2013)

Drafting Number: LLS 13-0646
Prime Sponsor(s): Rep. Waller; Fields

Date: March 13, 2013
Bill Status: House Appropriations
Fiscal Analyst: Hillary Smith (303-866-3277)

TITLE: CONCERNING PENALTIES FOR PERSONS WHO DRIVE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS.

| Fiscal Impact Summary | FY 2013-2014 | FY 2014-2015 |
|--|---------------------|---------------------|
| State Revenue Cash Funds - Various Cash Funds | Potential increase | |
| State Expenditures General Fund | \$12,000 | \$32,816 |
| FTE Position Change | | |
| Effective Date: Upon signature of the Governor, or upon becoming law without his signature. | | |
| Appropriation Summary for FY 2013-2014: Office of the State Public Defender: \$12,000 General Fund. | | |
| Local Government Impact: Minimal and unlikely to create a need for additional county jail space. | | |

Summary of Legislation

Current law specifies that in any prosecution for driving under the influence (DUI), driving while ability impaired (DWAI), vehicular homicide, or vehicular assault, if a driver's blood alcohol content (BAC) was 0.08 or greater at the time of the offense or within a reasonable time thereafter, this fact gives rise to a permissible inference that the defendant was under the influence of alcohol. This bill, **as amended by the House Judiciary Committee**, states that if a driver's blood contains five nanograms or more of delta 9-tetrahydrocannabinol (THC) per milliliter in whole blood (5 ng/mL) at the time of the offense or within a reasonable time thereafter, this fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs. THC is the primary psychoactive component of marijuana.

DUI, and DWAI are misdemeanors. Vehicular homicide is a class 3 felony if the driver was under the influence of alcohol, drugs, or both. Vehicular assault is a class 4 felony if the driver was under the influence of alcohol, drugs, or both.

The bill also clarifies state law to match current practice by stating that in cases of vehicular homicide or vehicular assault, if a driver's BAC was 0.08 or greater at the time of the offense or within a reasonable time thereafter, this fact gives rise to a permissible inference that the defendant was under the influence of alcohol, rather than stating that it is presumed that the defendant was

under the influence of alcohol. Finally, the bill repeals the law specifying that it is a misdemeanor for a habitual user of any controlled substance to drive a motor vehicle or low-power scooter. Other references to charges of "habitual user" are also repealed.

Permissible inference. A permissible inference allows a judge to instruct a jury that if it finds that a defendant's whole blood contained at least 5 ng/mL of THC while driving or shortly thereafter, then the jury *may* conclude that the defendant was driving under the influence. A permissible inference does not require a jury to conclude that a defendant was driving under the influence when a THC concentration level is met. In addition, the jury may consider all of the evidence in the case to evaluate whether the prosecution has proved the offense beyond a reasonable doubt.

State Revenue

Convictions of DUI, vehicular homicide while under the influence, and vehicular assault while under the influence are likely to increase in cases in which the driver's blood had 5 ng/mL or more of THC at the time of driving or shortly thereafter. Therefore, the bill will increase state revenue from fines by an indeterminate amount, beginning in FY 2013-14. Pursuant to Section 18-1.3-401 (III) (A), C.R.S., the fine penalty for a class 3 felony is \$3,000 to \$750,000, the fine penalty for a class 4 felony is \$2,000 to \$500,000, and the fine penalty for a class 5 felony is \$1,000 to \$100,000. Unless otherwise provided by law, the fines are to be deposited in the state Fines Collection Cash Fund for annual appropriations to cover associated administrative and personnel costs. All unexpended balances of the cash fund revert to the state General Fund at the end of each fiscal year. To the extent that more individuals are convicted of class 3 felony vehicular homicide while under the influence rather than class 4 felony vehicular homicide or are convicted of class 4 felony vehicular assault while under the influence rather than class 5 felony vehicular homicide, fine revenue has the potential to increase. However, the courts have the discretion of incarceration or imposing a fine. Therefore, the impact on state revenue cannot be determined.

An increase in DUI convictions will also increase revenue from various other fines and surcharges. Individuals convicted of DUI are subject to a number of fines and surcharges. The fines range from \$600 to \$1,500, depending on the offender's number of prior convictions and the discretion of the court. Surcharges are mandatory and range from \$1 to \$500. Fine and surcharge revenues are deposited into the following cash funds:

- Fines Collection Cash Fund;
- Crime Victim Compensation Fund;
- Persistent Drunk Driver Cash Fund;
- Rural Alcohol and Substance Abuse Fund; and
- Colorado Traumatic Brain Injury Trust Fund.

Courts have the discretion to suspend the fines for DUI offenses, so the impact to state revenue cannot be determined. It should be noted that the repeal of the habitual user statute has the potential to decrease state revenue. However, charges of habitual user are rare, so any impact is expected to be minimal.

State Expenditures

Creating a permissible inference for DUI offenses related to THC content will increase state expenditures by an estimated \$12,000 in FY 2013-14 and by \$32,816 in FY 2014-15. These costs are described in greater detail below.

Department of Corrections. This bill is anticipated to increase General Fund expenditures in the Department of Corrections by \$20,816 for FY 2014-15 and \$5,551 for FY 2015-16. The Department of Corrections (DOC) will experience an increase in costs because more offenders will be convicted of vehicular assault while under the influence of drugs rather than vehicular assault, and therefore will receive longer prison sentences. These costs are based on the following facts and assumptions:

- about 100 people are convicted of vehicular assault while under the influence per year, 40 percent of whom are sentenced to the DOC;
- last year, 42 people were charged with vehicular assault while under the influence, a class 4 felony, but were convicted of vehicular assault, a class 5 felony; and
- this fiscal note assumes that at least one person every five years will be convicted of vehicular assault while under the influence of drugs rather than vehicular assault due to the permissible inference created by the bill, and his or her length of stay will be increased by 15.2 months.

While convictions for vehicular homicide while under the influence of drugs may also increase under the bill, the number of individuals charged with that offense is very low (31 people in 2012). This fiscal note assumes that any change in the number of individuals convicted of vehicular homicide while under the influence of drugs rather than vehicular homicide as a result of the bill will be minimal and will be addressed during the annual budget process.

Current law prohibits the General Assembly from passing any bill to increase periods of imprisonment in state correctional facilities without appropriating an amount sufficient to cover the increased capital construction and operating costs of the bill in each of the first five fiscal years. However, current law also allows the DOC to place offenders classified as medium custody and below in private contract prisons, for which no state capital construction costs are incurred.

Offenders sentenced under this bill to DOC may be placed in either a state-run or a private contract prison, depending on several factors. Any offenders that *must* be housed in a state-run prison will likely require a shift of other inmates in that facility to private contract prisons. Therefore, this fiscal note assumes that the impact of this bill will be accommodated through the use of private contract prisons, and that no new capital construction funds are necessary.

Offenders placed in a private contract prison cost the state about \$57.03 per offender per day, including the current daily rate of \$52.69 and an estimated \$4.34 per offender per day for medical care provided by the DOC. Table 1 shows the estimated cost of the bill over the next six fiscal years (in order to show the full impact).

| Table 1 Five-Year Fiscal Impact On Correctional Facilities | | | | |
|---|--------------------------|--------------------------|-----------------------|-------------------|
| Fiscal Year | Inmate Bed Impact | Construction Cost | Operating Cost | Total Cost |
| FY 2013-14 | 0.0 | \$0 | \$0 | \$0 |
| FY 2014-15 | 1.0 | \$0 | \$20,816 | \$20,816 |
| FY 2015-16 | 0.3 | \$0 | \$5,551 | \$5,551 |
| FY 2016-17 | 0.0 | \$0 | \$0 | \$0 |
| FY 2017-18 | 0.0 | \$0 | \$0 | \$0 |
| Total | | \$0 | \$26,367 | \$26,367 |

Office of the State Public Defender. The fiscal impact of the bill on the Office of the State Public Defender (OSPD) is \$12,000 General Fund in FY 2013-14 and for at least one year thereafter. The new permissible inference increases attorney workload for the OSPD and increases the office's need for retesting and expert testimony to litigate the science behind the 5 ng/mL threshold. This fiscal note assumes that the OSPD can absorb the estimated 72 additional attorney work hours created by the bill. However, retesting and expert testimony costs are estimated at \$12,000 per year in the first few years following the bill's passage, as it is likely that litigation concerning the 5 ng/mL threshold will be spread out over the next two or three years. Beyond FY 2013-14, any costs associated with the bill will be addressed during the annual budget process.

This fiscal note assumes that of the 6,100 DUI cases the OSPD handles per year, 10 percent, or 610 cases, involve impairment by THC. This estimate is based on data from CDPHE and ChemaTox (a private toxicological testing lab) indicating that between 5 and 17 percent of samples submitted for DUI investigations test positive for THC. The bill is mainly expected to affect cases in which THC, but no alcohol, is present. However, cases in which the driver's BAC is below 0.08 but the sample contains five nanograms or more of THC may also be impacted, because prosecutors will now be able to rely on a permissible inference that would not exist under current law. The fiscal note is based on the following assumptions:

- 20 percent, or 122 cases will test positive for 5 ng/mL or more of THC and will not indicate a BAC of 0.08 or higher;
- 10 percent of those 122 cases, or 12 cases will be close enough to the 5 ng/mL level that the OSPD will use some combination of retesting and expert testimony in an attempt to challenge the science behind the 5 ng/mL threshold;
- those 12 cases will require 6 extra attorney hours per case, for a total of 72 hours, or 0.03 attorney FTE, which the OSPD can absorb without additional appropriations.
- the 12 cases will require a combination of retesting and expert testimony estimated at \$1,000 per case, for a total of \$12,000.

Judicial Branch. The bill is not expected to have a significant impact on the trial courts. The number of case filings is not expected to increase substantially, because law enforcement is already making contact with and arresting individuals who are driving while under the influence of THC. Eventually, the number of cases that go to trial may decline in cases where defendants' blood

tests at or above 5 ng/mL, but this decline is expected to be minimal. The Probation Department may see an increase in cases due to an increase in convictions, but any impact to the Judicial Branch is expected to be minimal and absorbable within existing appropriations.

Local Government Impact

The penalty for DUI is 5 days to 1 year imprisonment in a county jail and a fine of \$600 to \$1,500, plus surcharges, community service, and probation. Because the courts have the discretion to determine the period of incarceration and the fine amount, the impact at the local level cannot be determined. The cost to house an offender in county jails varies from \$45 to \$55 per day in smaller rural jails to \$62 to \$72 per day for larger Denver-metro area jails. It is assumed that the impact of the new permissible inference for DUI offenses will be minimal and will not create the need for additional county jail space.

State Appropriations

For FY 2013-14, the Office of the State Public Defender requires a General Fund appropriation of \$12,000.

Departments Contacted

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|----------------------------------|-------------------------------|
| Counties | Corrections |
| District Attorneys | Human Services |
| Judicial | Law |
| Local Affairs | Municipalities |
| Office of Information Technology | Public Health and Environment |
| Public Safety | Revenue |
| Sheriffs | |