

**FINAL
FISCAL NOTE**

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

Date: June 4, 2013
Bill Status: Postponed Indefinitely
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TITLE: CONCERNING PENALTIES FOR PERSONS WHO DRIVE WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Fiscal Impact Summary	FY 2013-2014	FY 2014-2015
State Revenue Cash Funds - Various Cash Funds	Potential increase	
State Expenditures General Fund	\$12,000	\$12,000
FTE Position Change		
Effective Date: The bill was postponed indefinitely by the Senate Judiciary Committee on April 22, 2013.		
Appropriation Summary for FY 2013-2014: Office of the State Public Defender: \$12,000 General Fund.		
Local Government Impact: Minimal and unlikely to have created 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, which was postponed indefinitely by the Senate Judiciary Committee, stated 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.

In a trial for DUI or DWAI, a defendant's valid medical marijuana registry identification card could not have been used as part of the prosecution's case in chief. In addition, in a traffic stop, the driver's possession of a valid medical marijuana registry identification card must not have, in the absence of other contributing factors, constituted probable cause for a peace officer to require the analysis of the driver's blood.

The bill also clarified 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 would have repealed 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" were 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 were likely to have increased 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 would have increased 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 were convicted of class 3 felony vehicular homicide while under the influence rather than class 4 felony vehicular homicide or were convicted of class 4 felony vehicular assault while under the influence rather than class 5 felony vehicular homicide, fine revenue had the potential to increase. However, the courts have the discretion of incarceration or imposing a fine. Therefore, the impact on state revenue could not be determined.

An increase in DUI convictions would 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 could not be determined. It should be noted that the repeal of the habitual user statute had the potential to decrease state revenue. However, charges of habitual user are rare, so any impact was expected to be minimal.

State Expenditures

Creating a permissible inference for DUI offenses related to THC content would have increased state expenditures for the Office of the State Public Defender by an estimated \$12,000 in FY 2013-14 and for at least one year thereafter. In addition, costs for the Department of Corrections would have increased by \$20,816 in FY 2015-16 and by \$5,551 in FY 2016-17. These costs are described in greater detail below.

Department of Corrections. This bill was anticipated to increase General Fund expenditures in the Department of Corrections by \$20,816 for FY 2015-16 and \$5,551 for FY 2016-17. The Department of Corrections (DOC) was expected to experience an increase in costs because more offenders would have been convicted of vehicular assault while under the influence of drugs rather than vehicular assault, and therefore would have received 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 have increased under the bill, the number of individuals charged with that offense is very low (31 people in 2012). This fiscal note assumed 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 would have been minimal and would have been 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 assumed that the impact of this bill would have been accommodated through the use of private contract prisons, and that no new capital construction funds were 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 five 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	0.0	\$0	\$0	\$0
FY 2015-16	1.0	\$0	\$20,816	\$20,816
FY 2016-17	0.3	\$0	\$5,551	\$5,551
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) was \$12,000 General Fund in FY 2013-14 and for at least one year thereafter. The new permissible inference would have increased attorney workload for the OSPD and increased the office's need for retesting and expert testimony to litigate the science behind the 5 ng/mL threshold. This fiscal note assumed that the OSPD could have absorbed the estimated 72 additional attorney work hours created by the bill. However, retesting and expert testimony costs were estimated at \$12,000 per year in the first few years following the bill's passage, as it was likely that litigation concerning the 5 ng/mL threshold would have been spread out over the next two or three years. Beyond FY 2013-14, any costs associated with the bill would have been addressed during the annual budget process.

This fiscal note assumed 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 was 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 have been impacted, because prosecutors would now have been able to rely on a permissible inference that does 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 was not expected to have a significant impact on the trial courts. The number of case filings was 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 have declined in cases where defendants' blood tests at or above 5 ng/mL, but this decline was expected to be minimal. The Probation Department may have seen an increase in cases due to an increase in convictions, but any impact to the Judicial Branch was 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 could not 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 was assumed that the impact of the new permissible inference for DUI offenses would have been minimal and would not have created the need for additional county jail space.

State Appropriations

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

Departments Contacted

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