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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/13/19

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HB 408

SHORT TITLE Pretrial Bond Hearing SB \_\_\_\_\_

ANALYST Torres

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate*			Indeterminate*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

\*See fiscal implications.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)

Human Services Department (HSD)

Administrative Office of the Courts (AOC)

New Mexico Attorney General (NMAG)

New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of Bill

House Bill 408 would create a new Section under Chapter 31, NMSA 1978, relating to pretrial detention, establishing rebuttable presumptions allowing the pretrial detention of certain felony defendants. The bill would require a district court to deny bail and detain a person, pending trial, if the prosecuting authority proves by clear and convincing evidence that the person is (1) charged with a first degree felony or serious violent offense pursuant to Section 33-2-34(L)(4) NMSA 1978; and (2) the person was previously convicted of a felony or had previously violated conditions of pretrial release in another case. A person could rebut the prosecution's evidence, by a preponderance of the evidence. The bill also provides that the rules of evidence would not apply to a pretrial detention hearing. The bill also provides that the district court could order a person detained to complete drug abuse treatment, and would allow for certain sanctions if the person fails to complete treatment as ordered.

## FISCAL IMPLICATIONS

The Public Defender Department reports that the bill would result in an increase in the overall workload of the justice system by causing additional petitions for pretrial detention to be filed and additional work for defense counsel, prosecution, and the courts in preparing for these hearings.

Any fiscal implication as a result of this bill would result from additional hearings, which is indeterminate at this time.

## SIGNIFICANT ISSUES

The Administrative Office of the Courts notes the following concerns:

First, the New Mexico constitution requires the prosecution to prove “by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.” N.M. Constitution, Article II, Section 13. This bill says that the court “may” presume that this requirement is met, and then says that the court “shall” deny bail when the prosecution has met its burden under the new Section. The “may” and “shall” are not compatible with the constitutional requirement, because the court must find that “no release conditions will reasonably protect the safety of any other person or the community,” before it can deny bail. Therefore, saying that the court “shall deny bail” means that the court must make this presumption, because to do otherwise would violate the constitutional rights of the defendant. In order to fix this discrepancy the “may” would have to be changed to “shall.” However, this provision already takes away a significant amount of discretion from the court, and could be found to be unconstitutional due to the fact that it does not allow the court to make an individualized determination of what conditions of release may reasonably protect the safety of any other person or the community. Changing the “may” to “shall” would further reduce the court’s discretion and increase the likelihood of a constitutional challenge.

Second, the Rules of Criminal Procedure for the District Court already provided that “[t]he New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the [pretrial detention] hearing.” Rule 5-409(F)(5) NMRA 2019. Attempting to provide the same in statute may violate the constitutional separation of powers. The New Mexico Supreme Court has held that, “[u]nder the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court.” *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975).

Third, the proposal under paragraph D is confusing and incompatible with the purpose of pretrial detention. This provision starts with the requirement that the district court make a finding that the person be detained prior to trial, but then says that the court may require the person to participate in programs which are not available to detained persons. Someone who is in custody cannot participate in an inpatient or residential treatment program, an outpatient treatment program, or a drug court program. The only treatment

program that a detained individual can participate in is an in-custody program. The other treatment programs would require the person to be out of custody, and would be more appropriately ordered as conditions of release, which would be incompatible with the constitutional requirement that the court find “that no release conditions will reasonably protect the safety of any other person or the community.” N.M. Constitution, Supra.

Finally, subparagraph (E)(1) and (2) are incompatible with paragraph D, in that paragraph D says “upon a finding by the district court that the person be detained prior to trial,” and E says “[w]hen the person fails to complete a program imposed pursuant to Subsection D... the district court may issue a warrant for the person's arrest; [and] the court shall determine if the person shall be detained pursuant to Article 2, Section 13 of the constitution of New Mexico.” It will cause significant confusion when 1) the court has already determined that the person be detained, but 2) they are released and the court has issued a warrant, and 3) the court has to make the determination if the person shall be detained again. If the person is released, the court would issue conditions of release, and Rule 5-403 NMRA 2019 already provides a mechanism for the court to revoke conditions of release.

The Public Defender Department claims that because “HB 408 does not require that the accused individual be shown to any actual danger to the community and also takes away the discretion of the judge who would otherwise be able to examine all the particular circumstances of the case in each case... the accused would be detained primarily on the basis of unproven charges, on which the accused would otherwise be presumed innocent.”

The New Mexico Attorney General notes:

- Article 2, Section 13 of the New Mexico Constitution provides, in part, “Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.” HB408 states that no release conditions will reasonably protect the safety of any other person or the community if the prosecuting agency proves by clear and convincing evidence that: (1) the person is charged with a certain level or type of felony, and (2) (a) the person has been convicted of any felony in the past, or (b) the person previously violated pretrial conditions of release in some other case. It would be easy to prove by clear and convincing evidence these factors: simply showing a criminal complaint with an enumerated felony charge, and showing a previous violation of a condition of release (even in a misdemeanor case). This does not appear to reach the New Mexico Constitution’s requirement to prove danger to the community by clear and convincing evidence.
- HB408 states that the defendant may “rebut evidence offered by a prosecuting authority by demonstrating that the authority did not meet its burden . . .” as required by the statute. The standard of proof for this rebuttal is a preponderance of the evidence. This language does not create a rebuttable presumption; rather, it essentially states that if the prosecuting agency has not met its burden, then the presumption is not established.

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

Conflicts/relates to HB 224, which would allow pretrial detention hearings to be conducted by

the Metropolitan and magistrate courts.

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