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FISCAL IMPACT REPORT

ORIGINAL DATE

SPONSOR Rehm/Lord/Dow **LAST UPDATED** 2/3/2022 **HB** 27/ec

SHORT TITLE Pretrial Release of Certain Persons **SB** _____

ANALYST Carswell/Rabin/Tolman/
Courtney

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)¹

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Counties: increased detention costs	Up to \$4,599.1	Up to \$13,797.3	Up to \$13,797.3	Up to \$32,193.7	Recurring	County General Funds
Counties and municipalities: benefits from crime prevention	Up to (\$1,591.6)	Up to (\$4,774.9)	Up to (\$4,774.91)	Up to (\$11,141.5)	Recurring	County and Municipal General Funds
State: benefits from crime prevention	Up to (\$248.4)	Up to (\$745.3)	Up to (\$745.3)	Up to (\$1,739.0)	Recurring	General Fund
Public Defender Department	\$342.0	\$1,026.1	\$1,026.1	\$2,394.2	Recurring	General Fund
Total	Up to \$3,101.1 – see fiscal implications	Up to \$9,303.2 or more – see fiscal implications	Up to \$9,303.2 or more – see fiscal implications	Up to \$21,707.5 or more – see fiscal implications	Recurring	State, County, and Municipal General Funds

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Joint Resolution 4
Conflicts with House Bill 5, Senate Bill 156, Senate Bill 189

SOURCES OF INFORMATION

LFC Files
Institute for Social Research (ISR), University of New Mexico
Pew Results First

¹ Budget impact only includes criminal justice system costs and does not include potential costs due to criminogenic effects of pretrial detention or potential benefits of avoiding value of life lost. The value of a statistical life can range from \$4 million to \$10 million dollars. Should the enactment of HB5 or similar legislation result in avoided homicides (potentially estimated at 1.5 per year), the benefits could come closer to accounting for or exceeding overall costs.

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Attorney General’s Office (NMAG)
Sentencing Commission (NMSC)
Department of Public Safety (DPS)

No Response Received

New Mexico Counties
Crime Victims Reparation Commission (CVRC)

SUMMARY

Synopsis of Bill

House Bill 27 creates a rebuttable presumption against pretrial release for individuals charged with certain crimes, including first-degree murder, several enumerated “serious violent offenses,” capital or serious violent offenses in which a firearm was brandished or discharged, and felonies committed while a defendant was pending trial or sentencing for a separate felony. HB27 would also create a rebuttable presumption against pretrial release for defendants charged with capital or serious violent offenses while on probation, parole, or another form of post-conviction supervision, for defendants who have missed a court appearance for any prior felony charge, and for defendants who have a pattern of failure to follow conditions of release.

Under HB27, the rebuttable presumption would apply only in cases in which a prosecutor filed a pretrial detention motion. The bill states the defendant shall have the opportunity to rebut the presumption and that nothing in the bill shall be construed to allow detention solely based upon a defendant’s financial inability to post bail.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

To the extent the provisions of HB27 increase pretrial detention, the proposal is likely to result in costs due to additional detention, while potentially providing benefit in the form of crimes prevented due to offender incapacitation. The presumption would only apply to cases involving the charge types and defendants defined in the bill in which the prosecutor files a pretrial detention motion.

HB27 would allow judicial discretion as to whether to detain individuals in cases in which this rebuttable presumption applies based at least in part on the judge’s appraisal of the rebuttal offered by defense counsel. To avoid speculating on the future choices of judges, this analysis estimates a range of costs and benefits resulting from this policy. The analysis is based on data specific to the population that would be affected by provisions of Subsection A identifiable by charge in House Bill 5, a bill similar in nature to HB27. Though HB27 and HB5 would apply the rebuttable presumption to somewhat different populations, there is significant overlap between the impacted populations, and data specific to HB27 is not available at this time. The lower end

of the range calculated for HB5 and provided here assumes the bill does not impact judges' behavior at all, while the upper end assumes judges grant all pretrial detention motions in which the presumption applies. It is likely the number of cases in which the presumption impacts judicial behavior, and the resulting costs and benefits, will fall somewhere within this range. Because HB27 appears to make a larger population of defendants eligible for rebuttable presumptions than HB5, the upper end of the range provided in this analysis may not reflect a true high-end estimate of either HB27's costs or benefits.

LFC analysis of data provided by the Institute of Social Research (ISR) at the University of New Mexico (UNM) estimates HB5 could result in up to 1,262 additional pretrial detainees annually, at an estimated total cost to county detention centers of \$13.8 million per year. Detention of these individuals could lower the statewide violent crime rate by 1.4 percent through incapacitation, preventing an estimated annual 190 crimes each year, including an estimated 1.5 homicides, resulting in estimated annual cost savings to public entities of \$5.5 million, which does not include the value of lost life. Total annual benefits are estimated at \$745.3 thousand to the state and \$4.8 million to counties and municipalities not including the value of a statistical life (VSL).

At this time, LFC does not have sufficient data to analyze the impact of all HB5's provisions or to project outcomes specific to populations impacted by HB27 that do not overlap with the provisions of HB5 for which relevant data is available. This analysis is therefore limited to the impact of provisions that apply the rebuttable presumption to the specific offenses identifiable by charge outlined in Subsection A of HB5. This analysis assumes the impact of HB27 would be similar to the impact of HB5.

While detention costs will be borne primarily by the counties, the benefits of crime prevention would be felt by a range of public entities at both the state and local levels, meaning counties could face net costs, while the state and municipalities will receive net benefits from crime prevention.

Because this bill includes an emergency clause, this analysis estimates costs and benefits for FY22 by prorating the total annual costs and benefits for an estimated four months. Without an emergency clause, the bill would take effect on May 18, and the estimated fiscal impact in FY22 would be smaller.

Number of Detainees. The estimated cost of this bill is dependent on the number of individuals for whom this rebuttable presumption would apply. LFC's estimate of 1,262 additional detainees per year, based on data from UNM's ISR, only accounts for the potential impact of provisions of Subsection A of HB5 identifiable by charge. At this time, LFC does not have sufficient data to estimate either the costs or benefits of provisions of HB5 or HB27 beyond those covered in Subsection A of HB5.

Assumptions. This analysis estimates prosecutors will file pretrial detention motions in 54 percent of cases involving these charge types based on historic data provided by UNM's ISR on the 2nd Judicial District, the largest in the state. The analysis assumes prosecutors will not change their behavior and will continue to file for pretrial detention at the same rate as in the past but that judges will grant all motions filed against defendants to whom a rebuttable presumption applies.

The cost analysis is based on the number of statewide additional defendants estimated to be detained by the establishment of rebuttable presumptions. The cost estimate was calculated by multiplying the estimate of additional detainees by the marginal cost for detention at the Metropolitan Detention Center and by an estimated length of detention.

To calculate the potential benefit of cost savings due to crime prevention resulting from increased detention, the cost to the system of each crime type was multiplied by the number of new arrests for those crimes expected by the pretrial population of defendants charged with offenses covered in Subsection A. The cost of each crime type is determined by the Pew Results First framework and includes costs to the police, courts, and jails.

The benefit of crimes prevented is based solely on the crimes not committed because the individual is detained and therefore unable to commit the crime. These calculations do not include a deterrent effect of increased pretrial detention because research shows this has no effect on future crime. Certainty of being caught is a significantly more effective deterrent to criminal behavior than the likelihood of being detained pretrial or the severity of punishment if convicted.

Other Costs and Benefits. Costs due to HB5/HB27 were calculated based on direct detention costs; however, additional costs to individuals and the economy are not included and could be significant. Detaining low- and moderate-risk defendants is associated with higher rates of new criminal activity and recidivism. For example, when held two to three days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than defendants held for no more than 24 hours. This is likely because individuals who are detained for even short periods of time face the possibility of lost employment, loss of housing, and other negative social outcomes. A 2018 LFC Program Evaluation of the Bernalillo County criminal justice system noted links to loss of stability-providing structures as a result of incarceration, including employment, housing, family, and community relationships.

Similarly, the benefits of crime prevention only include reported crimes, and benefits only reflect potential saved costs to the criminal justice system (police, courts, and jails) due to reduced crime. However, tangible and intangible costs borne by victims of these crimes, and communities experiencing high crime rates, and the value of life lost are not included in these figures and could be significant. Should enactment of this legislation prevent homicides, the prospect of an overall better balance in the benefits and costs of the bill may be found because VSL is significant. For example, researchers at the Washington State Institute for Public Policy estimate VSL can range from \$4 million to \$10 million dollars per life. Within the four-year Bernalillo County pretrial release sample analyzed by UNM ISR and LFC, HB5 might have resulted in the detention of three of seven individuals later arrested for homicide.²

To the extent HB5/HB27 leads prosecutors to file additional pretrial detention motions, prosecution costs and costs to other justice system actors (such as the courts and public defenders) will likely increase, and detention costs would likely also increase if some of these additional motions were granted. Quantifying these costs would require speculation as to the

² It should be noted that LFC's January 17, 2022, memo "Status Update on Bernalillo County Crime, Law Enforcement, and Bail Reform" conducted a similar cost-benefit analysis using criteria from 2020 proposed House Bill 80 and identified zero homicides because the categories of known crimes in the population 2020 HB80 targeted were different from those among the population HB5 would affect. Thus, 2020 HB80 likely would not have resulted in the potential detention of those individuals later arrested for homicides, whereas HB5 might have resulted in the detention of three individuals later arrested for homicide.

future behavior of prosecutors.

Costs to the Public Defender Department. The Public Defender Department (PDD) anticipates it will experience increased costs based on HB5/HB27 due to (1) an increase in the number of pretrial detention hearings that require appearance and representation and (2) the requirement of preparing and presenting rebuttal evidence. PDD notes 85 percent of criminal defendants are represented by public defenders and the department does not currently have investigative capacity to prepare rebuttals for hundreds or more than a thousand detention hearings per year. PDD estimates an annual cost of \$541.6 thousand due to increased hearings and \$1 million due to preparing and presenting rebuttal evidence, with prorated FY22 costs of \$180.5 thousand and \$342 thousand, respectively. Overall, the agency estimates total recurring costs to the agency of \$1.6 million, with prorated FY22 costs of \$522.6 thousand.

Other stakeholders have contended that this bill will not increase the number of pretrial detention motions made and, therefore, not increase the total number of hearings. Because determining whether or not prosecutors will increase the number of pretrial detention motions they file is highly speculative, this analysis assumes elsewhere that prosecutors will file these motions at the same rate as they have historically, which also aligns with some district attorneys' statements. To be consistent with those assumptions, only the cost due to preparing and presenting rebuttal evidence is reflected as part of the estimated total cost under "additional operating budget impact." How much preparation public defenders need to put into these hearings is at PDD's discretion and, as a result, the agency's assumptions regarding its future actions are not considered overly speculative.

SIGNIFICANT ISSUES

Constitutional Concerns. PDD, the Sentencing Commission, and the Administrative Office of the Courts raise concerns the creation of a rebuttable presumption against pretrial release could violate Article II, Section 13 of the New Mexico State Constitution, which requires a prosecutor to prove "by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." On the other hand, the Department of Public Safety (DPS) contends that the "New Mexico Supreme Court has previously recognized that some crimes can by themselves demonstrate that a defendant poses a danger to the community." Stakeholders agree that litigation over these differing interpretations is inevitable if HB5, HB27, or similar legislation is enacted.

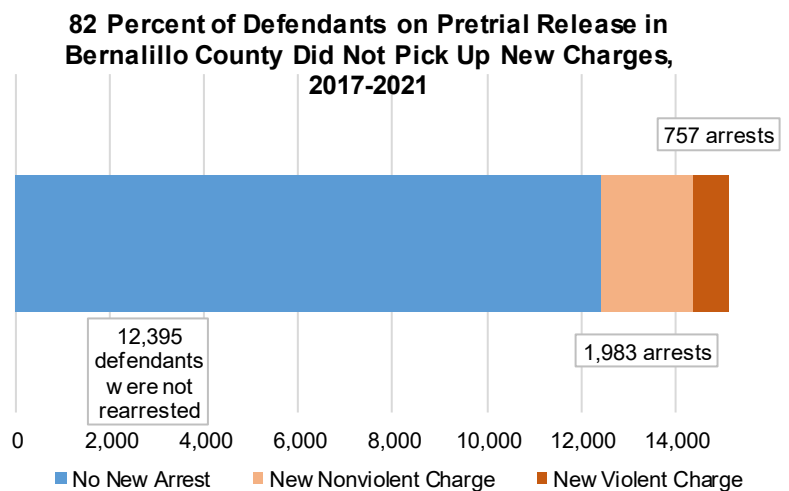
Both DPS and the Attorney General's Office (NMAG) note that rebuttable presumptions do not violate the U.S. Constitution, citing the federal Bail Reform Act's affirmed constitutionality. PDD notes the federal system does not have a constitutional provision that corresponds to New Mexico's under Article II, Section 13, and adds that the federal system is also governed by the Speedy Trial Act, which requires trial be held within 70 days of formal charging.

Public Safety Outcomes of Pretrial Release. Currently, pretrial defendants are relatively small contributors to Albuquerque's overall violent crime rate based on reported crime. According to data provided by UNM's ISR to LFC on 15,134 closed felony cases in Bernalillo County over a four-year period, defendants on pretrial release accounted for 5 percent of all violent felony arrests, suggesting the pretrial release population is a relatively small driver of overall violent crime. Defendants whose original charge was for a violent felony and who picked up a new violent felony charge accounted for 2.5 percent of all violent felony arrests. Assuming the district

attorney filed motions for detention against these defendants at its current rate and that all those motions were granted, the legislation could therefore be expected to reduce violent crime through incapacitation by approximately 1.4 percent. Over the last four years, defendants in the ISR sample who would be eligible for a rebuttable presumption under Subsection A of HB5 were arrested for three homicides while on pretrial release.

In December 2021, ISR released the results of the largest analysis to date on the overall outcomes of pretrial release reforms in Bernalillo County, which found that 95 percent of defendants did not pick up new violent charges while on pretrial release. Judges released 69.6 percent of defendants pending trial and detained 30.4 percent. In absolute numbers, defendants in 15,134 closed cases had at least some exposure in the community while awaiting trial over a four-year period. Of that group, 81.9 percent were not charged with additional crimes while on pretrial release, 13.1 percent (1,983) were arrested on a new non-violent charge, and 5 percent (757) were arrested on a new violent charge. Nearly 80 percent of defendants appeared for all court dates. These outcomes are comparable to other jurisdictions using empirical risk assessments to inform pretrial release and supervision. While low clearance rates could mean more crimes than arrests are occurring, the outcomes among pretrial defendants in Bernalillo County have remained consistent across several UNM ISR studies.

The most common new charges defendants picked up were property crimes (38 percent), followed by drug crimes (24 percent), and assault and battery (22 percent). Serious violent charges, such as robbery, sex offenses, or homicide each represented 1 percent or less of the new criminal activity in the pretrial release population. The defendants in the ISR sample were charged with seven homicides that occurred during pretrial release over the four-year period.



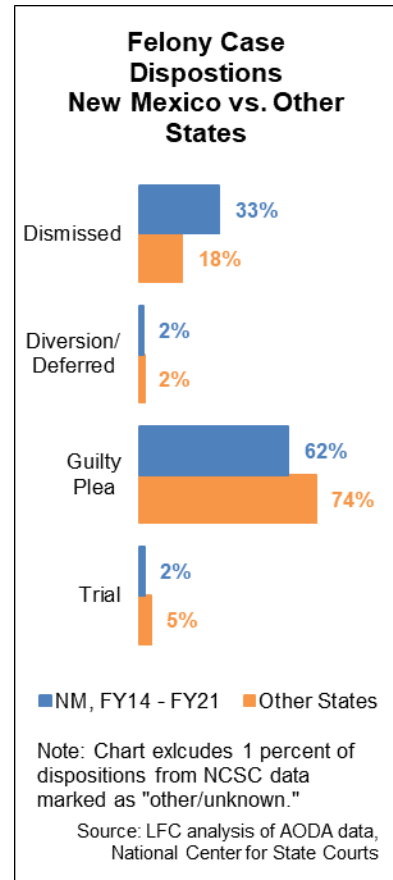
Although pretrial detention prevents new criminal activity prior to case disposition through a short-run incapacitation effect, there is evidence that pretrial detention also has a criminogenic effect, increasing new crime after case disposition. A 2018 LFC program evaluation found that likelihood of a new felony arrest rose with length of initial jail stay.

Public Safety Implications of Increased Pretrial Detention. LFC and UNM ISR analysis found rebuttable presumptions under Subsection A of HB5 could lead to the detention of up to 5,046 individuals over a four-year period, or an average of 1,262 per year, preventing 79 violent arrests and 112 nonviolent arrests over the period while detaining 1,071 individuals who would not have been arrested for new crimes.

National research on pretrial detention has found charges on their own are generally not predictive of the risk a defendant poses to public safety while on pretrial release. The Public Safety Assessment used in Bernalillo County and several other jurisdictions in New Mexico considers current violent charges among several other factors in its assessment of defendants' risk for new violent arrests.

Additionally, rebuttable presumptions may lead to prolonged detention of defendants who are never convicted of the crimes they are accused of. Dismissal rates for criminal cases in New Mexico are increasing, and in FY21, almost half of violent felony cases were dismissed. Felony case dismissals increased from 23 percent in FY14 to 47 percent in FY21; 48 percent of violent felony cases were dismissed in FY21. Felony cases are significantly more likely to be dismissed in New Mexico than in other states. A recent analysis from the National Center for State Courts of felony case dispositions in 21 states found 18 percent of felony cases are dismissed compared with an average of 33 percent of cases in New Mexico from FY14 to FY21. In 2018, LFC's evaluation team found evidence collection and victim or witness cooperation were the leading causes of felony case dismissals in the 2nd Judicial District, and this seems to hold in other districts as well.

In some cases, pretrial detention could improve crime reporting and victim cooperation with prosecutors. If a victim is concerned that they may face retribution from a defendant for reporting a crime or cooperating with authorities, increasing the likelihood that an individual would be detained pending trial might make a victim more willing to report or cooperate.



CONFLICT, DUPLICATION, RELATIONSHIP

HB27 conflicts with HB5 and Senate Bill 189 (duplicate bills), which also create a rebuttable presumption against pretrial release. HB27's presumption would apply to many of the same cases as HB5/SB189, but is generally broader. For example, HB27 would apply the presumption to individuals who have shown a pattern of failing to appear or to follow the conditions of release; HB5/SB189 would not apply its presumption to cases based on those factors.

HB27 relates to and may conflict with SB156, which would require judges to impose monetary bail on many defendants and would require pretrial detention under some circumstances.

HB27 relates to House Joint Resolution 4, which proposes to amend Article II, Section 13 of the New Mexico Constitution to allow the Legislature to set the conditions under which defendants may be detained without bail pending trial. Amending the constitutional terms for pretrial detention before attempting to redefine the circumstances under which detention can occur through statute might address the constitutional concerns raised by legislation such as HB27. However, it would depend on the specific nature of the constitutional amendment and voter approval of any such amendment.

TECHNICAL ISSUES

NMAG notes the following technical issues with HB27: “Presumption (2) for brandishing or discharging a firearm only applies if they brandishing or discharging occurs during the commission of one of the 31 crimes in Section D, and if the defendant is charged with one of those crimes Presumption (1) already applies. The Legislature may wish to increase the scope of Presumption (2) by making it apply whenever a felony is charged and defendant brandished or discharged a firearm during its commission.” Such a change would make HB27 more similar to HB5. Similarly, “Presumption (4) covers those who commit one of the 31 Section D crimes while on post-conviction supervision, but if the new crime charged is listed in Subsection D, then Presumption (1) ... already applies.” Finally, NMAG point out “HB27 copies the definition of ‘serious violent offense’ from Section 32-3-34, NMSA 1978. That means that HB27 does not include second degree homicide by vehicle ... as an option serious violent offense while including third degree homicide by vehicle. A drunk driver who hurts someone could be subject to Presumption (1) but a drunk driver who killed someone could not be.”

OTHER SUBSTANTIVE ISSUES

In analysis submitted for HB5, the Crime Victims Reparation Commission noted, “Victim notification of pretrial release decisions in the criminal justice system is currently inadequate in New Mexico. Streamlined determinations of release eligibility is (sic) likely to exacerbate this problem in our state. Without victim notification of release decisions about defendants, victim safety and ongoing victim participation in the criminal justice system cannot be safeguarded.”

Administrative Office of the District Attorneys’ analysis of HB27 stated codifying factors that support pretrial detention in statute could improve consistency of judicial decision-making in granting or denying pretrial detention motions.

Background Information on Pretrial Release and Detention. In 2016, New Mexico joined a growing national movement to reform cash bail and reduce detention pending trial when voters approved a constitutional amendment changing the conditions under which defendants could be detained without bond. Defendants are now eligible for detention pending trial if they are accused of a felony and if a prosecutor files a motion that they be held. For a judge to grant the motion, the prosecutor must prove by “clear and convincing evidence” the defendant is dangerous and no conditions of release can ensure the safety of the community or any individual. “Clear and convincing evidence” is a high legal standard. Courts apply the same standard to terminate parental rights.

The system aims to base pretrial detention on individual defendants’ risk rather than their ability to afford monetary bail. Detention decisions are made by a judge and follow criteria outlined in state statute. Judges consider the nature of the current offense; the strength of evidence against the defendant; the defendant’s criminal history and ability to comply with conditions of release; and the likelihood pretrial supervision can mitigate any public safety risk a defendant poses. In 2017, the 2nd Judicial District became the first district in the state to adopt the Public Safety Assessment (PSA), an empirical risk assessment tool that helps identify defendants at high risk for committing new crimes and missing court dates. Judges use the tool to inform decisions about conditions of release. AOC is now helping other districts incorporate the PSA into pretrial decision making.

The 2020 report to the New Mexico Supreme Court of the ad hoc committee to review pretrial release and detention procedures stated proposals to establish rebuttable presumptions are “based on legislative judgments about the seriousness of offenses and dangers posed by certain classes of defendants.” To the extent those judgments broadly reflect public opinion, presumptions may help foster public acceptance of pretrial practices. According to one pretrial expert interviewed by LFC staff, detention eligibility policies are used to that effect in other jurisdictions but should be narrowly defined. The ad hoc committee, a 16-member group including legislators, judges, prosecutors and defense attorneys, and legislators, ultimately rejected adding rebuttable presumptions to the state’s pretrial detention rules.

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