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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Rehm</u>	<b>LAST UPDATED</b> _____
	<b>ORIGINAL DATE</b> <u>3/1/2023</u>
	<b>BILL</b>
<b>SHORT TITLE</b> <u>Pretrial Detention Presumptions</u>	<b>NUMBER</b> <u>House Bill 509/ec</u>
	<u>Gray/Rabin/</u>
	<b>ANALYST</b> <u>Tolman</u>

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Counties: increased detention costs	Up to \$9,656.1	Up to \$33,892.9	Up to \$33,892.9	Up to \$77,442.0	Recurring	County General Funds
Counties and municipalities: benefits from crime prevention	Up to (\$3,233.1)	Up to (\$11,348.4)	Up to (\$11,348.4)	Up to (\$25,929.9)	Recurring	County and Municipal General Funds
State: benefits from crime prevention	Up to (\$495.8)	Up to (\$1,740.5)	Up to (\$1,740.5)	Up to (\$3,976.8)	Recurring	General Fund
Public Defender Department	\$448.7	\$1,574.7	\$1,574.7	\$3,598.1	Recurring	General Fund
<b>Total</b>	<b>Up to \$6,375.9</b>	<b>Up to \$22,378.7</b>	<b>Up to \$22,378.7</b>	<b>Up to \$51,133.3</b>	<b>Recurring</b>	<b>State, County, and Municipal General Funds</b>

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent version of this legislation.

Conflicts with Senate Bill 123, Senate Bill 174, and House Bill 74

### Sources of Information

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Public Defender Department (PDD)  
 Administrative Office of the District Attorney (AODA)  
 New Mexico Attorney General (NMAG)  
 Department of Public Safety (DPS)  
 New Mexico Corrections Department (NMCD)  
 New Mexico Sentencing Commission (NMSC)

## SUMMARY

### Synopsis of House Bill 509

House Bill 509 creates a rebuttable presumption and provides that a defendant carries a burden of guilt if the prosecutor presents evidence a person committed one of the enumerated “dangerous felony offenses.”

To establish a rebuttable presumption of guilt under HB509, the prosecutor must:

1. Make a probable cause determination; then
2. Present evidence demonstrating:
  - a. The defendant committed a dangerous felony offense;
  - b. The defendant is a danger to any other person or to the community if released; and
  - c. No release conditions will reasonably protect any other person or the community.

Notably, the evidence produced by a prosecutor does not have to be persuasive to a judge. The mere act of producing the evidence creates the presumption of guilt and shifts the burden away from the prosecutor and onto the defendant.

Subsection F defines “dangerous felony offense” with an enumerated list of 14 statutory crimes; a broad category of *any* felony “a felony that was committed while the defendant brandished or discharged a firearm;” and an additional list of 15 statutory offenses that the court may deem a dangerous felony at its discretion. HB509’s list is effectively coextensive with the list of crimes that indicate a violent flag by the public safety assessment (PSA) used in New Mexico.

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

## FISCAL IMPLICATIONS

To the extent the provisions of HB509 increase pretrial detention, the proposal is likely to result in additional system costs due to additional detention, while potentially providing benefit in the form of crimes prevented due to offender incapacitation.

***Cost of unnecessary detention borne outside criminal justice system.*** Pretrial detention policy seeks to balance the public’s interest by not unnecessarily detaining individuals who pose no risk to the community and preventing the release of individuals who will go on to commit a serious crime during the pretrial period. There is an asymmetry in how these two priorities are balanced. The defendants whose lives are upturned due to unnecessary pretrial detention remain invisible and are rarely reported. In contrast, when a defendant is released and commits a serious crime, their name and criminal history are widely reported. Historically, the fiscal impacts of an unnecessary detention have been under accounted, mirroring public perception. This analysis is unable to estimate the impacts given data constraints, but it acknowledges these are significant.

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. Detaining individuals who have low- and moderate-risk

of recidivism is associated with higher rates of new criminal activity and recidivism. When held for 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. Increasing the risk of recidivism has long-term fiscal implications for county-run detention facilities and for the economy as a whole, as a share of people commit subsequent offenses who may not have otherwise done so.

**Costs to counties and the state.** This analysis avoids speculating on the future choices of judges and instead estimates a range of costs and benefits resulting from this policy. The lower end of this range assumes the bill does not impact judges' behavior at all, while the upper end assumes judges grant all pretrial detention motions in which the requirement to detain pretrial 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.

LFC analysis of data provided by AOC estimates HB509 could result in up to 2,830 additional pretrial detainees annually at an estimated marginal cost of \$33.9 million per year. Based on analysis of reported crimes, detention of these individuals may prevent an estimated annual 426 crimes each year, including an estimated one homicide, resulting in estimated annual cost savings to public entities of \$13.1 million, which does not include the value of lost life. Total annual benefits are estimated at \$1.8 million to the state and \$11.3 million to counties and municipalities not including the (VSL).

However, it is unclear whether any crime will actually be prevented through incapacitation due to greater detention. Defendants in cases where prosecutors file a motion to detain are roughly as likely to commit a new offense in the pretrial period as defendants in cases where prosecutors do not file a motion to detain. In other words, prosecutors operating under the conditions of a rebuttable presumption would be effectively motioning to detain a random sample of defendants who are released under current standards. This analysis provides the highest possible benefits through incapacitation, but the true benefits may be far lower and could possibly be nonexistent.

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.

This analysis estimates costs and benefits for FY23 by prorating the total annual costs and benefits for an estimated 104 days, assuming the governor signs this bill into law on the final day of the legislative session, which would go into immediate effect due to its emergency clause.

**Number of Detainees.** The estimated cost of this bill is dependent on the number of individuals for whom this rebuttable presumption would apply. The presumption would apply both to individuals who are facing certain charges as outlined in Subsection F.

Subsection F defines "dangerous felony offense" with an enumerated list of 14 statutory crimes; a broad category of *any* felony "a felony that was committed while the defendant brandished or

discharged a firearm;” and an additional list of 15 statutory offenses that the court may deem a dangerous felony at its discretion. HB509’s list is practically coextensive with the list of crimes that indicate a violent flag by the public safety assessment (PSA) used in New Mexico, except for those cases where the default for those crimes is violent in the PSA but not in statute.

Accordingly, this analysis assumes the share of felony cases that had a violent flag in calendar year 2022 will be equivalent to the share of cases that would have a rebuttable presumption under HB509. It is assumed that one-third of cases that would be deemed violent by the PSA would not be reflected in HB509 subsection F.

**Costs and benefits.** The cost analysis is based on the number of statewide additional defendants estimated to be detained by HB509’s lowering of the evidentiary standard required to detain. 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 F. 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.

The analysis does not estimate the economic impact of subsequent criminal behavior, though research indicates people who are detained pretrial have higher rates of new criminal activity and recidivism.

**Other Costs and Benefits.** Costs due to HB509 were calculated based on direct detention costs; however, additional costs to police, courts, district attorney offices, and public defender offices are anticipated. Under HB509, police and prosecutors would face new incentives to charge people with the crimes enumerated in the bill. This could result in detention at a rate greater than that described above.

The analysis also does not include costs borne by individuals who do not pose a risk to the community but would still be detained under HB509.

The benefits of crime prevention only include reported crimes and benefits only reflect potential saved costs to the criminal justice system 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 also 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.

**Outcomes of Felony Defendants Following Bail Reform and Under 2022 Legislative Proposals**

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**Costs to the Public Defender Department.** The Public Defender Department (PDD) anticipates it will experience increased costs based on HB509 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 estimates an annual cost of \$760,742.34 for in-house attorney FTE and \$530,424.96 for in-house core staff FTE. The cost to increase contracted defense is estimated by the agency at \$283,500. The total cost to the agency is estimated at \$1.6 million, with a prorated cost of \$448.7 thousand in FY23 because of the emergency clause.

## **SIGNIFICANT ISSUES**

**Constitutional concerns.** Analysis from the Office of the Attorney General (NMAG), AOC, PDD, and the Sentencing Commission (NMSC) raise concerns the creation of a rebuttable presumption against pretrial release could violate Article 2, 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.” Under the New Mexico Constitution, the state bears the burden of persuading a court that a particular defendant is in fact dangerous and that no conditions of release would protect the community from the risk they present.

Should HB509 be enacted, litigation is effectively guaranteed.

Public Defender Department analysis notes:

In June 2022, the New Mexico Supreme Court announced a constitutional holding regarding pretrial detention in *Mascareno-Haidle*, which held that the nature of current charges (which carry a presumption of innocence) cannot satisfy the State’s burden of proof for *both* prongs of the detention requirements.

Unlike past bills creating rebuttable presumptions, HB509 does not rely exclusively on the nature of the charges, but it does apply the presumption without actually holding the state to its burden of proof. Relieving a prosecutor of its burden in any way violates Article II, Section 12 because the constitution explicitly imposes that burden on the prosecutor.

Similarly, unlike previous rebuttable presumptions, HB509 requires a prosecutor to present evidence relevant to dangerousness and the adequacy of conditions of release. However, PDD points out that the bill “does not require that evidence to actually be persuasive to the court or to constitute clear and convincing evidence; the mere production of the evidence results in a presumption that the State’s burden is satisfied. This is contrary to the constitutional burden of proof.”

Lastly and unmistakably, HB509 shifts the burden to the defendant to prove they are not dangerous. PDD writes: “Burden shifting at this stage in a proceeding violates the due process guarantee to a presumption of innocence.”

Outcome	All released felony defendants (actual)	HB5 2022* (est.)
No New Charge	12,388 (82%)	2,038 (85%)
Nonviolent Mis-demeanor	744 (5%)	93 (4%)
Nonviolent Felony	1,252 (8%)	114 (5%)
Violent Mis-demeanor	295 (2%)	66 (3%)
Violent Felony	455 (3%)	92 (4%)
<b>Total</b>	<b>15,134</b>	<b>2,403</b>

\*The effect of HB509 is very similar to 2022's HB5. This comparison is made to provide readers additional context.

Source: modified from Moore, Ferguson, and Guerin (2022)

**Public Safety Outcomes of Pretrial Release.** Pretrial defendants are small contributors to New Mexico’s overall violent crime rate based on reported crime. Research has concluded most proposals to create rebuttable presumptions are “roughly equivalent to detaining a random sample of defendants who are currently released.”

In December 2021, ISR released the results of the largest analysis to date on the 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.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB509 conflicts with Senate Bill 123, which establishes a rebuttable presumption.

HB509 conflicts with Senate Bill 174, which also establishes a rebuttable presumption but under different conditions than SB123.

HB509 conflicts with House Bill 74, which changes pretrial detention hearings.

BG/rl/ne