LFC Requester:	

AGENCY BILL ANALYSIS
2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

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SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original X **Amendment** ____
Correction **Substitute** ____

Date 3/18/2025
Bill No: HJR 22-280

Sponsor: Nicole Chavez; Andrea Reeb; William Hall

Agency Name and Code Number: LOPD-280

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	**FY26**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	**FY26**	**FY27**		
n/a	**n/a**	**n/a**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	**630.7**	**1,892**	**1,892**	**4,415**	**Recurring**	**General**

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HB 165; HJR 9; HJR 14; SB 196**

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

HJR 22 is one of a number of proposed amendments to Article 2, Section 13 of the New Mexico Constitution. In the 2025 legislative session, HJR 22 appears intended to operate in conjunction with HB 165, a bill to require a presumption of preventative detention for enumerated charges, because HJR 22 would constitutionally authorize the approach taken by HB 165. In turn, HB 165 is similar to past legislation, including 2022's HB 5 (as introduced), 2023's SB 123, and 2024's SB 122.

As context for the synopsis, this analysis initially notes: Article 2, Section 13 of the New Mexico Constitution authorizes judges to detain a felony defendant without bail pending trial "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." N.M. Const. Art II, § 13. Interpreting that constitutional provision, the New Mexico Supreme Court has made it clear that detention has two requirements:

> In order to subject a presumed-innocent defendant to pretrial detention, the state is required to prove "by clear and convincing evidence that (1) the defendant poses a future threat to others or the community, and (2) no conditions of release will reasonably protect the safety of another person or the community."

State v. Mascareno-Haidle, 2022-NMSC-015, ¶ 27, 514 P.3d 454 (quoting *State v. Ferry*, 2018-NMSC-004, ¶ 3, 409 P.3d 918).

Synopsis:

HJR 22 would amend Article 2, Section 13 of the New Mexico Constitution to add subsection letters and some technical cleanup language. It would otherwise retain current constitutional language regarding the State's burden of proof for pretrial detention, but would add language in the newly lettered Subsection C, allowing a court to "presume" that burden is met if a person is "charged with a felony offense designated by law as a dangerous or violent felony offense," and allowing the defendant to then "rebut[] the presumption."

FISCAL IMPLICATIONS

The fiscal impact of this joint resolution alone, even without looking to the proposed legislation in this area, is impossible to determine. By expanding detention to misdemeanants

and questionable flight risks, however, would certainly increase the number of defendants against whom the State would *seek* pretrial detention. It would also certainly result in an increase in the number of detention hearings required by the courts and the number of defendants being held pretrial, which would impact resources in the courts and county jails around the state. It would also increase the number of defendants appealing their detention decisions, also placing a further burden on the appellate courts.

Furthermore, looking at current 2025 legislation such as HB 165 and SB 196, as an example of changes this joint resolution might enable, the potential for huge fiscal implications is palpable. LOPD estimates those bills would incur a **recurring increase of $1,892,217** to the LOPD budget. Analyst refers LFC to the fiscal implications analyses for those bills as well.

SIGNIFICANT ISSUES

HJR 22 would simultaneously relieve the State of its current constitutional burden of *proving* dangerousness in order to impose detention without bail. In other words, the State would no longer need to present evidence "that no release conditions will reasonably protect … the community," N.M. Const. art. 2, § 13, but could instead *presumably* rely on the mere fact that charges have been filed (regardless of the underlying factual allegations or even the nature of the charges). A massive increase in the number of defendants held pretrial is assured.

This creates an internal logic conflict within Article 2, Section 13 because the provision both establishes a burden of proof for the State and simultaneously *relieves the State of that very burden*. Currently, the State has to establish probable cause of new charges for the charges to go forward. For preventative detention, the State bears the burden to prove – *not just the fact of the charges* – but the fact of dangerousness **and** that conditions of release are inadequate to address the risk. The State presents police reports, criminal history information, and details about the particular manner in which the charges were allegedly committed. Under HJR 22 (and any ensuing statutory changes), the State would present only evidence of probable cause for the felony charges. Because probable cause is an extremely low evidentiary bar, much of the contextual evidence currently presented at pretrial detention hearings would not necessarily be presented.

This places the entire evidentiary burden *on the defense* to address other circumstances ordinarily related to dangerousness and the adequacy of conditions. As discussed below in "Drafting concerns," the nature of the rebuttal is unclear in HJR 22. But assuming a defendant is expected to rebut "dangerousness," the defendant would have to prove a negative without a positive to respond to.

If on the other hand, the defendant is required to prove the *absence* of probable cause of the charged crime, they are in no position to do so within days of their arrest. The detention hearing occurs at a time in a criminal case when the defense has not yet received "discovery" from the State (i.e., the fruits of the law enforcement investigation) and in most cases has not even seen a police report. Typically, the only document available at the time of a hearing is the arresting officer's criminal complaint. A criminal complaint is an inherently one-sided account and to rebut any dangerousness inference from the fact of the charges alone, the defense would essentially have to conduct a complete investigation into the criminal allegations themselves, a process that – in preparing for trial – can take months or years.

Sweeping detention proposals without individualized public safety assessments are over-inclusive in their effort to capture individuals likely to be a danger to the community. An accused could be detained primarily on the basis of unproven charges (for which the accused would otherwise be presumed innocent), and without considering the factual nature of those charges in a particular case. Consequently, people who are actually innocent of the target charges, with no criminal history, could be held in detention without any opportunity for release while awaiting trial. Pretrial delay could easily result in this person being held for periods well over a year at the county's not insignificant expense. Even if ultimately found guilty, this resolution could result in a lengthy period of incarceration even in cases where the judge might not have imposed an incarceration sentence after conviction.

While the State may already rely on the pending charges to establish *dangerousness*, "the State must still prove by clear and convincing evidence, under Article II, Section 13, that 'no release conditions will reasonably protect the safety of any other person or the community,'" and must provide additional, distinct evidence in order to meet that burden. 2022-NMSC-015, ¶ 31. This bill would remove that second requirement.

Additionally, even if the nature of charges were a reasonable litmus test for dangerousness (which this Analyst disputes below), relying on "probable cause" as a substitute for "clear and convincing evidence" similarly contravenes the express language of Article II, Section 13. This is particularly true based on the timing of detention hearings, which are typically held before a *formal* probable cause determination by preliminary hearing or grand jury indictment. Instead, the "statement of probable cause" relied upon in detention hearings is usually the police officer's "criminal complaint narrative," which is based on limited investigation, designed to justify arrest and initial prosecution, and not a determination by a neutral fact-finder. To consider the State's burden satisfied by "probable cause" in such circumstances *reduces* the State's constitutional burden, even if it does not relieve it. *Cf. Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021) (holding that state constitutional bail provision requiring that "proof is evident or presumption great" standard to justify bail denial imposed a higher burden than mere probable cause or a "prima facie" showing because it clearly contemplated more than a "potential risk" to the community to deny bail).

Meanwhile, the federal system which employs a narrow set of presumptively dangerous crimes to determine bail (without a corresponding constitutional provision like New Mexico's) operates with The Federal Speedy Trial Act in mind, which requires that trial be held within 70 days of formal charging to ensure that defendants held without bail do not languish in jail while still presumed innocent.

Charges not accurate predictors of dangerousness

Current dangerousness evaluations are based on many circumstances, beyond just the current charges for which a person is presumed innocent, investigation is ongoing, and evidence is scarce. These assessments have proven quite effective at detaining the right people. An August 2021 study by UNM's Center for Applied Research and Analysis, Institute for Social Research[1] shows that the vast majority of people who should be held are, and that people who are not detained largely do not commit new crimes (only 14%), much less violent crimes (only 5%). In fact, most violations are of technical conditions of release, which can and often do result in detention thereafter. Proponents of HB 5 during the 2022 session asserted that the 14% and 5%

[1] ISR, *Bail Reform: Motions for Pretrial Detention and their Outcomes* (Aug. 2021).

numbers are underinclusive because they only account for people who are "caught" committing crimes on pretrial release, but the existence of any other "new crimes" by people on release is *unknown* and cannot be the basis for policy-making. Nonetheless, it is likely to be consistent with the overall trend of being only a fraction of the overall crimes committed and not a significant percentage or driver of the crime rate.

HJR 22 would create a rebuttable presumption that the prosecution has proven that a person is dangerous and that there are no conditions that will reasonably protect the safety of any person or the community based on a broad list of charges, without any evidence that any of these charges are by themselves reliable predictors of a defendant's future dangerousness. The presumption would thus apply to a wide variety of defendants, including many who are not violent.

Under HJR 22, an enormous number of *presumptively innocent* defendants would be detained despite the fact that they are not *actually* dangerous, merely because of the nature of unproven allegations against them. Relying on the presumption will lead to a huge number of "false positives"; i.e., non-dangerous defendants being held pending trial unnecessarily.

Tellingly, pretrial detention is *already* over-inclusive. LOPD's internal data indicates that 22% of defendants **detained** in Albuquerque between 2017 and the end of 2023 were not ultimately convicted of anything (849 of 3882), excluding those referred to federal court or where guilt was otherwise never adjudicated. An additional 162, or 4.2%, pled down to a misdemeanor offense, possibly just to get out of jail. These numbers do not include defendants who were released or those who were convicted of some lesser felony, including felonies that would not be considered "dangerous" by any measure. Of those convicted, over 28% receive probated sentences because once all the circumstances are known, incarceration is no longer deemed appropriate.

Formal studies also show that charges are not a good predictor of behavior while released, but risk assessments and judges *are* good predictors.[2] The December 2021 report estimated a 79% "false positive" rate from presumptions relying on charges alone (based on the criteria used in 2020's HB 80) and 73% false positive rate based on presumptions for "firearms" charges. It also found that only about 3.5% of first-degree felony crimes are committed by people on pretrial release (13 out of 383 between July 2017 and March 2020), and only a small percentage of those 13 would have fallen within rebuttable presumption criteria from 2020's HB 80.

Enumerating crimes that carry presumptive detention status will incentivize prosecutors to charge those offenses in order to *get* detention, leading to an increase in overcharging practices. Rebuttable presumptions based on *charges alone* will exacerbate this issue.

PERFORMANCE IMPLICATIONS

HJR 22 would have a dramatic impact on LOPD by requiring defense attorneys to prepare and present rebuttal evidence. Practical challenges notwithstanding, any effort to present rebuttal evidence would require defense investigator, social worker, paralegal, and attorney time to prepare a more personalized assessment of the individual defendant, including their ties to the community and potential "mitigation" evidence about their life and circumstances. This is the

[2] *See* Institute for Social Research & Santa Fe Institute report: *Who would rebuttable presumptions detain*? (Dec. 2021).

type of preparation ordinarily reserved for sentencing proceedings and often involves hiring a "mitigation expert." Frankly, it is completely uncertain the lengths to which defendants will need to go to convince judges not to follow the presumption, particularly when the current allegations may be very serious, despite the continued presumption of innocence.

The unfortunate consequence of a rebuttable presumption approach is that people with the means to immediately hire private counsel and pay for investigator time are more likely to be able to rebut the presumption effectively, returning New Mexico back to where we were under a money bail system and directly undermining the purpose of the 2016 constitutional amendment.

Analyst notes that in New Jersey, often held out as an example of success in the area of rebuttable presumptions, 68% of arrestees are released on either a summons or bail, and the presumption is not at issue. Of the detention motions that are filed, 23% are withdrawn by the prosecutor or dismissed outright by the court and for the remaining 77%, roughly half are granted, and half are denied (comparable to Albuquerque). Overall, only 5.7% of arrestees end up in pretrial detention while facing criminal charges. New Jersey's only charges involving presumptive dangerousness are murder and crimes carrying life sentences, for all other charges, *release* is presumed. *See* Clenn A. Crant, J.A.D., *Report to the Governor and Legislature*, (N.J. 2019), *available at* https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=oIY.

Analyst notes that lengthy detention in jail while awaiting trial can be persuasive in establishing Speedy Trial violations under the Sixth Amendment as well. Analyst recommends that any rebuttable presumption measure be accompanied by statutory speedy trial guarantees, as it is in the federal system (70 days) and in other states that have adopted presumptions, such as New Jersey, which prohibits detention for more than 180 days.

Finally, increasing the rate of pretrial detention impacts the amount of total time that defendants spend incarcerated upon conviction because people are not entitled to "good time" during their jail stay the way they are when serving a post-conviction sentence in the Department of Corrections. As a result, the amount of "credit" they get for time served prior to trial is less than it would be for the same amount of time served in Corrections.

ADMINISTRATIVE IMPLICATIONS

None noted

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HJR 9; HJR 16; HB 165; SB 196

TECHNICAL ISSUES

Noted above.

OTHER SUBSTANTIVE ISSUES

Keeping in mind that a person charged with a crime is presumed innocent, it is also important to compare pretrial detention numbers with the ultimate outcome of the criminal case. As noted

above, according to LOPD internal data for Albuquerque, as of December 31, 2024, 8,110 detention cases were filed in Albuquerque from 2017 to 2023 and 3,992 (49.2%) of those were granted. 458 of those, or 11.5%, were not indicted within the 10 days allowed by rule to continue detention. 7,780 detention cases have "resolved," meaning a final outcome is known. Of those resolved cases, 18.1% were not indicted within the year, and 44.0% ended without a state conviction. Only 17.4% of people on whom the State filed for detention were ultimately sentenced to prison for a conviction on that case.

ALTERNATIVES

Continued refinement of the current system, incorporating data as it becomes available. *See* SF New Mexican, Editorial, *Improve, don't toss out, New Mexico's bail reform* (Jan. 20, 2023), available at https://www.santafenewmexican.com/opinion/editorials/improve-dont-toss-out-new-mexicos-bail-reform/article_2bbd80b2-98fc-11ed-a98a-e7b4ce0534d3.html

Judicial training to ensure best practices in applying current constitutional and Court Rule requirements.

Funding and training, expansion of effective pretrial supervision programs to ensure compliance with conditions of release.

Prioritizing the successful prosecution of suspects to reinforce the integrity of the criminal legal system and increase deterrence.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. The State will be held to its constitutional burden.

AMENDMENTS

None.