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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/7/2022

SPONSOR SHPAC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Standard for Pretrial Release SB 156/SHPACS

ANALYST Carswell

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

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	NFI	Indeterminate but possibly significant – see fiscal implications			Recurring	County General Funds
Public Defender Department (PDD)	NFI	\$1,121.0	\$1,121.0	\$2,242.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 5, House Bill 27, House Joint Resolution 4, Senate Bill 189

### SOURCES OF INFORMATION

LFC Files

Institute for Social Research (ISR), University of New Mexico

#### Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of District Attorneys (AODA)

Attorney General’s Office (NMAG)

Sentencing Commission (NMSC)

Department of Public Safety (DPS)

Public Defender Department (PDD)

### SUMMARY

#### Synopsis of Bill

The Senate Health and Public Affairs Committee Substitute for Senate Bill 156 (SB156) would change pretrial release practices by limiting the release of defendants on their own recognizance in certain circumstances and by requiring certain defendants to post bail in order to secure release from jail. SB156 prohibits courts from excusing defendants from posting bail except when the

defense moves for a hearing and can prove the defendant lacks the financial means to post bond. SB156 specifies that courts shall use the indigency standard in state statute (Section 34-6-46 NMSA 1978) in determining whether defendants can or cannot afford to post bail.

SB156 would also create a rebuttable presumption against releasing defendants on their own recognizance when those same defendants have been released on their own recognizance for a prior offense, unless the defendants post bail.

Additionally, SB156 would create a rebuttable presumption against release on one's own recognizance when a defendant on conditions of release in another pending matter is arrested for a new serious violent offense. Under SB156, serious violent offense would include first degree murder, first or second degree felony human trafficking of a child, first degree felony abuse of a child, sexual exploitation of a child in the second degree or higher, a serious violent offense as provided in Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978, brandishing or discharging a firearm during commission of a felony, and any felony offense resulting in great bodily harm or death.

The final section of SB156 directs courts to exercise discretion in determining defendants' eligibility for pretrial release and in imposing monetary bail and prohibits courts from relying on risk assessment tools created by third parties that are not state entities or political subdivisions.

The effective date of this bill is July 1, 2022.

## **FISCAL IMPLICATIONS**

The fiscal implications of SB156 are indeterminate but possibly significant because it is unclear what effect the bill would have on pretrial detention relative to current system. SB156 is unlikely to result in the same levels of pretrial detention that existed prior to voter approval of a 2016 constitutional amendment largely eliminating cash bail in New Mexico because SB156 allows judges to excuse defendants from posting bail if they cannot afford it. Prior to bail reform, many defendants were detained while awaiting trial not because a court had deemed them dangerous, but rather because they could not post a bond to secure their release. However, being excused from posting bail under SB156 would require defendants to move for a hearing and, to the extent defense counsel failed to do so for indigent defendants or the volume of such hearings backed up the courts, some increase in detention due to financial hardship might still occur. Additionally, other provisions of SB156 appear to require judges to impose higher levels of supervision on pretrial defendants but not necessarily to detain them.

The estimated operating budget impact to the Public Defender Department (PDD) is based on agency analysis of additional attorney time required to move for, prepare, and argue hearings for bail exception for indigent defendants. PDD notes all its clients are indigent and SB156 would therefore require agency attorneys to file motions, hold a hearing, and present evidence in every case the department handles since the bill requires hearings to excuse defendants from posting bail for any offense, including both felonies and misdemeanors.

At this time, LFC does not have data to estimate with any precision the impact of provisions of SB156 that would impose rebuttable presumptions against release for certain defendants. The impact SB156 would have on detention is difficult to estimate because Subsection B would allow defendants to whom the presumption applies to secure release by posting a secured bond and

Subsection C would only apply the presumption to defendants who are arrested on serious violent charges while on conditions of release for a previous charge. Many such defendants may already be remanded to custody in such circumstances because a new violent arrest is likely to constitute a violation of conditions of release. Agency analysis from the Administrative Office of the Courts (AOC) notes the bill does not outline the process by which hearings would be set and detention decisions made in circumstances under which the rebuttable presumption would apply.

However, LFC estimates the cost to county governments of detaining one defendant for the entire pretrial period at \$8,165 in Bernalillo County and \$12 thousand in the rest of the state. The cost estimate is lower for Bernalillo County due to a shorter average time to case disposition, a result of the Case Management Order governing court deadlines that applies only in Bernalillo County.

## **SIGNIFICANT ISSUES**

***Constitutional Concerns.*** Agency analysis submitted by the Department of Public Safety (DPS), the Attorney General’s Office (NMAG), AOC, and the Sentencing Commission (NMSC) indicate the original and substitute versions of SB156 present potential conflicts with the state constitution and New Mexico Supreme Court rules. Article II, Section 13 of the New Mexico Constitution states, “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.” The rebuttable presumptions in SB156 may alleviate the prosecution of the high burden of proof for pretrial detention currently required by the state constitution, according to AOC. Agencies note the bill’s requirements for defendants to post monetary bail may also run afoul of the constitution by limiting judicial discretion to determine appropriate release conditions, including imposition of bail, and by requiring defendants to affirmatively invoke the applicability of constitutional provisions concerning bail. DPS states its constitutional concerns with SB156 do not apply to House Bill 5, another pretrial detention bill introduced this session, and that the agency believes HB5 is a preferable approach to issues regarding pretrial release.

***Public Safety Outcomes of Pretrial Release.*** Currently, pretrial defendants are relatively small contributors to reported crime in Bernalillo County, where data is available on pretrial outcomes over the last four years. According to data provided by the University of New Mexico’s Institute for Social Research (ISR) to LFC on all closed felony cases in Bernalillo County over a four-year period, defendants on pretrial release accounted for 5 percent of all violent felony arrests.

Additionally, in a December 2021 study, ISR found that 95 percent of defendants released pending trial in Bernalillo County did not pick up new violent charges while on pretrial release. Judges released 69.6 percent of defendants 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. While more crimes than arrests could be occurring, the outcomes among pretrial defendants in Bernalillo County have remained consistent across several 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 ISR’s 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.

***Risk Assessment Tools.*** It is unclear exactly how SB156 intends to limit the use of risk assessment tools in pretrial decision making. Currently, one such tool is used in some jurisdictions in New Mexico to inform judicial decisions about pretrial release and the level of pretrial supervision the court applies to defendants. The tool is not a substitute for judicial discretion and judges do not always follow the recommendations of the tool. Analysis submitted by the Administrative Office of District Attorneys indicates a preference for risk assessment tools developed by government agencies based on a belief that tools developed by third parties are designed to support release over detention. The tool currently in use in New Mexico generates risk assessments for failure to appear in court, new criminal activity, and new violent criminal activity. The recommendations are specifically designed to apply to conditions of release, and the tool does not generate a specific recommendation for or against detention<sup>1</sup>.

## **CONFLICT, RELATIONSHIP**

SB 156 conflicts with House Bill 5, House Bill 27, and Senate Bill 189, which would also introduce rebuttable presumptions for certain defendants in pretrial detention hearings, but in different ways than SB156.

SB 156 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 SB156. However, it would depend on the specific nature of the constitutional amendment and voter approval of any such amendment.

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<sup>1</sup> The recommendation for “max” conditions of release does include the word “detain,” but the word “detain” was added by stakeholders in New Mexico prior to implementation of the tool and does not reflect an intention to recommend detention by the tool’s creators.