F I S C A L I M P A C T R E P O R T

SPONSOR HJC **ORIGINAL DATE** 1/24/22 **LAST UPDATED** 2/11/22 **HB** 5/ec/HJCS

SHORT TITLE Pretrial Release Conditions **SB**

ANALYST Rabin/Carswell/ Tolman/Courtney

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI but Possible Impact in Future Years – See Fiscal Implications				Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Joint Resolution 4, House Bill 27, Senate Bill 156, and Senate Bill 189
Relates to Appropriations in the General Appropriation Act

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Public Defender Department (PDD)
Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bill 5 requires courts to (1) provide 24/7 monitoring of all defendants on pretrial release who are under electronic location monitoring, (2) maintain records of this monitoring for at least five years, (3) notify law enforcement immediately of such an individual's violation of pretrial release conditions, and (4) provide electronic monitoring data upon request to law enforcement agencies, district attorneys, public defenders, and the Attorney General's Office (NMAG).

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

FISCAL IMPLICATIONS

Currently, 24/7 electronic location monitoring is only conducted in the 2nd Judicial District and San Juan County; however, Sandoval County and the 6th Judicial District also have electronic location monitoring that is not 24/7 and would need to be expanded under the provisions of HB5.

According to the Administrative Office of the Courts (AOC), an average of 144 defendants are monitored each day in the 2nd Judicial District (with a capacity of up to 160), while 25 to 30 are monitored in San Juan County (capacity of up to 35), 15 are monitored in Sandoval County (capacity up to 20), and six to eight are monitored in the 6th Judicial District.

AOC is currently staffing after-hours electronic monitoring for the 2nd Judicial District at a cost of $467 thousand for 6 FTE per year (an average cost of $77.8 thousand per position), the cost of which is funded through vacancy savings. AOC notes that, because after hours monitoring is a new program, it is minimally staffed and requires expansion to accommodate employee leave and turnover without compromising the program's function. According to the agency, such expansion would be required to continue the program in Bernalillo County and to expand after hours monitoring to other jurisdictions if HB5 is enacted.

The analysis estimates the additional operating budget impact to AOC from HB5 includes the cost of two additional FTEs for the program in the 2nd Judicial District ($155.7 thousand) and the cost of two more employees to provide 24/7 monitoring of the estimated maximum of 28 individuals under electronic location monitoring in Sandoval County and the 6th Judicial District. It is unclear if the monitoring of up to 35 individuals on electronic monitoring in San Juan County is currently being supplemented or would require additional funding through AOC; this would require a further 2 FTE. Overall, this analysis estimates an additional staffing cost of up to an additional $467 thousand for AOC to expand monitoring services to provide 24/7 monitoring.

The cost of equipment for electronic monitoring is borne by counties or local pretrial programs. HB5 would not necessarily result in any additional equipment costs because it does not require a larger portion of the pretrial population be subjected to electronic monitoring. However, as AOC continues its statewide expansion of pretrial services, HB5 may result in additional costs not included in this analysis due to additional staffing required for 24/7 electronic monitoring. Equipment costs borne by counties and local pretrial programs that adopt electronic monitoring in the future should not be affected by HB5 because the bill does not require jurisdictions to employ electronic monitoring. Counties or local pretrial programs that adopt electronic monitoring will therefore incur these costs with or without HB5.

The House Appropriations and Finance Committee substitute for House Bill 2 includes a total of $1.6 million in recurring appropriations to the Administrative Office of the Courts (AOC) for pretrial services, including a $289.2 thousand increase to ensure 24/7 monitoring. The HB2 substitute also includes $4.5 million in nonrecurring general fund appropriations to AOC for pretrial services monitoring, which specifically states the funds can be used to provide 24/7 monitoring. Of these funds, $500 thousand is appropriated for FY22 and FY23 supplementing county funding for monitoring, while $4 million is appropriated for FY23 through FY25, which can be used for monitoring and other services.

Overall, the HB2 substitute includes $2.1 million in FY23, $1.6 million in FY24, and $1.6 million in FY25 that could cover the costs resulting from HB5. As a result, it is estimated that the costs related to this bill will not result in any additional fiscal impact to the agency. However, it is worth noting that AOC has planned expansions to pretrial services offerings in addition to electronic monitoring, and using a portion of these funds for expanded electronic location monitoring may restrict the agency's ability to expand other pretrial services. Additionally, in future fiscal years (after FY25), the agency may require additional funds to continue electronic location monitoring programs.

The requirement for electronic location monitoring records to be retained for at least five years is not expected to create additional costs to courts, as it is assumed most of these records are already being retained for some time. In instances where those records are not currently retained for at least five years, there may be some minimal cost incurred for additional retention.

The requirement for the entities to immediately notify law enforcement of a violation of a requirement of electronic location monitoring are sufficiently aligned with current practice in the 2nd Judicial District that it is not anticipated to create any additional costs for that district. It is not known if this aligns with practice in other districts.

The requirement to provide records upon request is not anticipated to result in additional costs, although the lack of a clear timeframe for the court or monitoring entity to fulfill that request (see Technical Issues, below) could result in additional costs if the bill is interpreted to require a very tight timeframe.

SIGNIFICANT ISSUES

Effectiveness of Electronic Location Monitoring. States currently use electronic monitoring in a wide variety of settings, such as a pretrial supervision alternative to jail, an alternative to imprisonment for some offenders, and a mandated supervision requirement for some felons released from prison. A U.S. Department of Justice study of over 5,000 medium- and high-risk offenders in Florida found electronic monitoring reduced offenders' risk of failure by 31 percent.[1] In a National Institute of Justice study of high-risk sex offenders in California, those placed on electronic monitoring had 38 percent lower recidivism rate.[2] However, monitoring systems can also make it more difficult for offenders to obtain and keep a job. In the Florida study, 22 percent of offenders said they had been fired or asked to leave a job because of electronic monitoring. Electronic monitoring was not found to deter offenders from finding housing.[3] Electronic monitoring will be most effective when it is used to support supervision that limits a person's access to chances to commit crime. Such supervision should help offenders lead productive lives by helping them redesign their routines so that any risky settings are avoided and are replaced with more positive influences.[4]

Data Sharing and Confidentiality. Subsection C does not place any restrictions on what law enforcement, district attorneys, public defenders, or NMAG may do with electronic monitoring data after they receive it. It may be desirable to specify the Legislature's intent as to how these records may be used. It is also unclear if these records would be subject to the Inspection of Public Records Act (IPRA). Whether these records are subject to IPRA when held by the court is the subject of active litigation; it is not clear if the records being held by another party might

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[1] U.S. Department of Justice, Office of Justice Programs, (September, 2011). *Electronic Monitoring Reduces Recidivism.* National Institute of Justice: Washington, D.C. Available: https://www.ojp.gov/pdffiles1/nij/234460.pdf.

[2] National Institute of Justice. (February, 2013). Sex Offenders Monitored by GPS Found to Commit Fewer Crimes. National Institute of Justice Journal. Available: https://nij.ojp.gov/topics/articles/sex-offenders-monitored-gps-found-commit-fewer-crimes.

[3] U.S. Department of Justice, Office of Justice Programs, (September, 2011). *Electronic Monitoring Reduces Recidivism.* National Institute of Justice: Washington, D.C. Available: https://www.ojp.gov/pdffiles1/nij/234460.pdf.

[4] Crime & Justice Institute. (2004). Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention. Available: https://s3.amazonaws.com/static.nicic.gov/Library/019342.pdf.

impact the act's applicability.
AOC provides the following analysis regarding these issues:

> In New Mexico, rules exist for probation program work product and confidentiality (see Section 31-21-6 NMSA 1978); however, similar do not rules do not exist for pretrial supervision program data. Other states have developed policies for information sharing that recognize the role of pretrial supervision programs while providing for public safety.
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> The National Association of Pretrial Services Agencies (NAPSA) Standard 4.7 addresses the issue of developing policy for pretrial agency information: "The pretrial services agency should have written policies regarding access to defendant information contained in the agency's files. These policies should mandate that information obtained during the pretrial investigation, monitoring, and supervision should remain confidential and not be subject to disclosure, except in limited circumstances."

Constitutional Concerns. The Public Defender Department (PDD) expresses significant concerns regarding the constitutionality of allowing access to location data to other entities under the U.S. and New Mexico constitutions:

> The HJC-Substitute for HB 5 would mandate that the entity overseeing pretrial supervision, shall turn over GPS location data for a defendant on pretrial release upon request by a law enforcement agency, district attorney, public defender, or office of the attorney general. The bill requires no factual basis justifying the request, creating the potential for abuse and implicating the privacy interests protected by the Fourth Amendment to the US Constitution and Article II, Section 10 of the New Mexico Constitution. It also provides no assurance that the data, once acquired by the requesting entity, would not become publicly available or subject to an IPRA request, leading to potential for serious intrusions into privacy and risk to defendants' safety.
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> Location data carries a significant privacy interest that otherwise requires probable cause and a warrant. The United States Supreme Court recently addressed the privacy interests in location data in *Carpenter v. United States*, 138 S. Ct. 2206, 2211-12, 2217 (2018).

PDD emphasizes: "...the bill permits law enforcement access the data without *any* factual basis whatsoever. This is likely to run afoul of Article II, Section 10, if not the Fourth Amendment as well."

The Sentencing Commission notes:

> Some scholars have noted that electronic monitoring implicates the Fourth Amendment. A statute such as the one proposed here, which seems to allow the electronic monitoring data to be turned over to law enforcement or prosecutors without a warrant, might be in significant tension with the Fourth Amendment. *See* Weisburd, "Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring", *North Carolina Law Review* (2020) (available here:

https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6783&context=nclr). Additionally, there are concerns when the use of electronic monitoring drives defendants into debt. *See* Kofman, "Digital Jail: How Electronic Monitoring Drives Defendants Into Debt", Pro Publica (2019) (available here: https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt). For more general concerns over the expanded use and efficacy of electronic monitoring, *see* "Electronic Monitoring", Electronic Freedom Foundation (2019) (available here: https://www.eff.org/pages/electronic-monitoring).

PERFORMANCE IMPLICATIONS

AOC notes HB5 does not mention data collection over time to study the impact on public safety when electronic location monitoring is used for pretrial defendants. The agency suggests such a study would provide additional information and data to determine if the use of electronic location monitoring impacts overall public safety.

RELATIONSHIP

HB5 relates to House Joint Resolution 4, House Bill 27, Senate Bill 156, and Senate Bill 189, all of which make changes to the current pretrial release practices.

TECHNICAL ISSUES

Subsection B provides that an entity conducting monitoring shall "immediately" notify law enforcement of a "violation" of electronic location monitoring requirements. This phrasing poses two potential issues. First, "immediately" is not defined, which could lead to differing interpretations. It may be desirable to specify a timeframe for this reporting. Second, as discussed under Other Substantive Issues, below, a "violation" cannot be determined to have occurred until that determination is made by a judge at a hearing. It may be desirable to specify law enforcement be notified of an "alleged violation" instead, or that law enforcement be notified upon issuance of a bench warrant (which aligns with current practice).

Subsection C does not specify a timeline for the court or monitoring entity to provide the requested data. It may be desirable to add this.

Subsection C does not provide for access to electronic location monitoring data for private defense counsel, but does provide for access to PDD.

OTHER SUBSTANTIVE ISSUES

Pretrial Monitoring and Notification of Violations. In the 2nd Judicial District, law enforcement is currently notified when pretrial services determines a defendant subject to electronic monitoring has likely violated conditions of release and a judge has issued a bench warrant for the defendant. Final determination that a violation has occurred is made by a judge when the defendant is arrested and appears for a hearing. Notification to law enforcement regarding issuance of the bench warrant and the defendant's last known location is routed through dispatch, and either uniform officers promptly pursue the defendant or the warrant is referred to investigations. In the 2nd Judicial District, defendants subject to electronic monitoring are

monitored 24 hours a day, seven days a week and bench warrants and law enforcement notifications can also be issued around the clock. Thus, Subsections A and B are likely to formalize but not substantively change current practices in Bernalillo County, assuming funding continues to be available for the 24/7 electronic monitoring program. However, HB5 would require AOC to stand up such a program in the two other judicial districts that currently use electronic monitoring for pretrial supervision but do not have 24/7 monitoring, as well as any judicial districts that adopt electronic monitoring in the future.

Specific rules governing confidentiality of pretrial services records and circumstances under which data on individual defendants collected during pretrial supervision may be shared with law enforcement, district attorneys, defense counsel, or the public do not exist in either state statute or Supreme Court rules. The 2nd Judicial District Court shares such records with law enforcement and the district attorney through warrants issued by a judge, under subpoenas, through stipulated protection orders, pursuant to judicial order, or as part of hearings in which the state alleges violations of conditions of release. Electronic monitoring data is rarely released by the court in its entirety. Rather, the court releases data for specific time periods related to specific allegations against defendants, and law enforcement or the district attorney are required to present some evidence to support those allegations, unless the parties, including defense counsel, agree to a stipulated protected order. To obtain a warrant, they must meet the standard of probable cause while lower standards usually apply to data released through subpoena or hearings on conditions of release. The court also reviews the information to limit the release of data protected by the Health Insurance Portability and Accountability Act (HIPAA). Through HB5, law enforcement and the district attorney would have broader access to electronic monitoring than is currently available, including all historical data on some defendants.

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