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## FISCAL IMPACT REPORT

SPONSOR	Hochman-Vigil	LAST UPDATED	3/1/2023
SHORT TITLE	Pretrial Detention Hearings	ORIGINAL DATE	
BILL NUMBER		House Bill 74	
ANALYST		Gray/Rabin/ Tolman	

### 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 \$1,846.8	Up to \$6,481.8	Up to \$6,481.8	\$14,810.4	Recurring	General Fund
NMSC: PSA evaluation	No fiscal impact	\$650	\$650	\$1,300	Recurring	General Fund
<b>Total</b>	<b>Up to \$1,846.8</b>	<b>Up to \$7,131.8</b>	<b>Up to \$7,131.8</b>	<b>Up to \$16,110.4</b>		

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent version of this legislation.

Relates to SB123, SB174, and HB509.

### Sources of Information

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of House Bill 74

**Overview.** House Bill 74 proposes statutory requirements for constitutionally required hearings contained in Article 2, Section 13 of the New Mexico Constitution. A summary of the changes are below:

- **Violent flag.** HB74 would require courts that use a public safety assessment in pretrial detention determinations to incorporate a violent flag for individuals charged with a violent crime. The phrase violent crime is defined with a non-exhaustive list of examples.
- **PSA evaluation.** HB74 would require criminal justice coordinating councils (CJCC) in each judicial district to independently evaluate and adjust the public safety assessment

used in their district. This nonvalidated evaluation would be conducted annually to account for public safety issues, which are not defined.

- **Provision for Motions.** HB74 would encode in statute existing court rules that allow prosecutors to file an expedited motion for detention and that the court shall hold an expedited hearing. The bill also proposes to add to statute existing court rules that allow the court to issue an arrest warrant if a prosecutor's motion for detention establishes probable cause of a new felony.
- **Requirement to Detain.** HB74 requires judges to detain an individual if a prosecutor establishes probable cause a new felony has been committed in the pretrial period and that there are no conditions of release that will protect the safety of the community. Much like other initiatives, HB74 effectively creates a presumption that there are no safe conditions of release for a person charged with a felony in the pretrial period without regard to the type of crime committed.
- **Expedited Appeal.** The final subsection of HB74 allows defendants an expedited appeal.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed.

## FISCAL IMPLICATIONS

**Overview.** In general, HB74 does little to change current law and practice because most of the language is already contained in court rules. Two elements of the bill will likely have fiscal impacts, and they are described below.

**Evaluation costs.** There will be minimal fiscal impact to members of criminal justice coordinating councils (CJCC) seeking to evaluate existing rearrest and recidivism prediction tools. These costs may be substantial if CJCCs choose to reevaluate the tools through a validated process, but they may be minimal if CJCCs choose to do so with the council's professional input alone.

It is assumed this provision will increase annual operating budget expenses by \$650 thousand. It is assumed this mandated annual reevaluation will be borne in by the New Mexico Sentencing Commission (NMSC), which currently contracts with the University of New Mexico for review of the public safety assessment. The cost for this review in Bernalillo County is \$50 thousand. This analysis assumes the same analysis and research will be done statewide in each judicial district.

**Detention costs.** Bills proposing to change pretrial detention policy have the greatest potential fiscal impact because they may increase detention, which is associated with significant costs. HB74 contemplates making a change already largely aligned with current rules. Section 2(C) requires that the court revoke conditions of release if a defendant is charged with a felony offense while on release in the pretrial period. Currently, all defendants on pretrial release are prohibited from violating federal, state, or local law, and a violation of any severity may result in detention.

However, HB74 differs from current statute because the bill would *require* judges to detain if a prosecutor provides probable cause that a felony was committed and establishes that it is more likely than not that there are no conditions of release that will protect the community. Current

statute provides judges the discretion to detain if there is probable cause any crime was committed.

This analysis seeks to estimate the fiscal impact of HB74. First, the analysis estimates how many people charged with a felony are currently detained under current rules. AOC did not provide an estimate for this population. The analysis then estimates the total additional detention costs caused by HB74.

**Cost of unnecessary detention.** 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 unnecessary detention have been under accounted. This analysis is unable to estimate the impacts given data constraints, but it acknowledges these are significant.

Research suggests there is a constellation of economic consequences associated with increasing the rate of detention which are fiscally salient albeit difficult to estimate. 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.

**Increased pretrial detention increases system costs.** Regarding costs borne by counties and the state, this analysis estimates HB74's impact by determining current judges' decisions and comparing them to what HB74 requires. LFC analysis of AOC data estimates HB74 could result in the detention of 571 additional pretrial detainees annually at an estimated marginal cost of \$6.8 million.

**Method.** This analysis contemplates a range of conceivable costs. The lowest end of this range assumes that all individuals charged with a felony offense already have their conditions of release revoked and are detained. Under this assumption, HB74's proposed changes would not impact judges' behavior at all and would have no fiscal impact.

Similarly, the highest conceivable end of this range would assume that all defendants who commit a felony crime in the pretrial period are *not* detained. This is an unreasonable assumption. The commission of a crime in the pretrial period is highly persuasive evidence of dangerousness and that a defendant's current release conditions are unacceptable. Accordingly, a judge is already quite likely to revoke the defendant's release.

Instead of making an unreasonable assumption, this analysis makes two assumptions to estimate the highest reasonable end of the range:

- Judges already detain all defendants charged with a violent felony in the pretrial period, as this directly bears on dangerousness; and
- Judges detain no defendants charged with a *nonviolent* felony. As mentioned above, the commission of *any* crime in the pretrial period is persuasive evidence and it is likely that judges decide to detain a significant share of defendants charged with a nonviolent felony in the pretrial period. This analysis makes this assumption to provide readers a reasonable “at most” cost estimate.

**Data.** Data provided by AOC included a sample of 10 counties who have fully implemented national best practices for collecting and cleaning data related to the pretrial justice system. Data was collected from January 1, 2022 to December 31, 2022. This analysis used this sample to estimate for statewide costs.

This analysis estimates costs and benefits for FY23 by prorating the total annual costs and benefits for an estimated 14 days because this legislation does not have an effective date and would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed.

**Number of Detainees.** The estimated cost of this bill is dependent on the number of individuals impacted. This analysis assumes the presumption in Section 2 (C) would apply to individuals who are facing felony charges listed in Section 1 (A), though this is not stated and the Section 1 (A) list does not include all felonies.

**Benefits.** Unlike past analyses of pretrial detention bills, this analysis does not estimate benefits of reduced crime due to incapacitation. The assumptions made in the cost analysis are tenuous and made to provide the highest reasonable cost estimate. It would be imprudent to extend the tenuous assumptions into a benefit analysis.

**Other Costs and Benefits.** Costs due to HB74 were calculated based on direct detention costs; Agency analysis noted that because HB74 is so similar to the current law and practice, it likely does not include costs among criminal justice partners outside detention centers.

## **SIGNIFICANT ISSUES**

Most language in HB74 will not have any impact on current law or practice because the provisions are already included in court rules. However, those sections that will have an impact contain significant modifications and have raised concern in agency analyses.

**Creation of a Violent Flag.** Currently, public safety assessments employ a violent flag when the validated instrument indicates the person has an elevated risk of new criminal activity being violent. The tools rely on prediction and draw on large data sets about people who have previously come into contact with the justice system. HB74 would mandate that public safety assessments incorporate unproven allegations of an offense. Charges of offense are not a validated indicator of future violence. Further, judges are already presented with the details of new charges in and have the authority to consider the nature of the allegations under 5-409 NMRA.

**Evaluation of public safety assessments.** HB74 requires CJCCs to evaluate public safety assessments (PSAs) annually. Public safety assessments are a research-based tool that provides

objective information to a judge to assess the likelihood of court appearance and of rearrest. The tool produces a recommendation of release conditions, but judges have discretion in all decisions. Further, judges are required to consider judicial rules and to consider evidence.

**Background of PSAs.** Background of PSAs is important to understand the significance of HB74's contemplated changes. According to the Bureau of Justice Assistance, there are two main approaches to gauging risk.

First, criminal justice decision-makers with specialized knowledge and experience can make individual determinations. This is the professional judgement approach.

Second, risk can be measured through tools that synthesize factors related to future crime through statistical analysis. This is the actuarial risk assessment approach.

A well-balanced criminal justice system balances these approaches. On one hand, the actuarial risk assessment approach is a means to describe risk at the global-level, applied equally and objectively to everyone who will come in contact with the justice-system. This is not unlike how insurance companies seeks to understand risk. For example, an insurance company cannot know which people will be in car accidents, but it can know which combination of attributes make the odds of such an accident higher. On the other hand, the professional judgement approach utilizes a decision-makers' specialized knowledge and experience to make determinations at the individual-level. At the individual-level, a decision-maker can weigh the factors that make a case unique that could not be analyzed through an actuarial risk assessment.

In isolation, neither the actuarial approach nor the professional judgement approach fully advance the interests of justice. A person should not solely be judged based on how they compare to other people with similar crimes or circumstances. In the same way, a person should not solely be judged based on one person's opinion, which may be biased.

Instead of utilizing one or the other, the current system seeks to balance the actuarial and the judgement approach, allowing decision-makers to rely on objective information while also weighing the unique factors of a case. In New Mexico, the judicial branch embraces the actuarial approach through a public safety assessment (PSA).

**HB74's impact on PSAs.** HB74 would change the current balance of risk assessment approaches, moving the scale in the favor of professional decision-makers. The actuarial tool is weakened in two ways.

First, HB74 does not define the term “evaluate” or “adjust.” Interpretations of those terms may differ, and CJCCs may be empowered to directly modify the PSA. Each interpretation of those terms may have drastically different implications for performance of the tool.

Second, it appears that HB74 requires each judicial district to evaluate the public safety assessment in that district. If true, such annual reevaluation would be based on small numbers of individuals in a small geographic areas, both factors which would decrease the validity of the tool.

Taken together, the provisions of HB74 make it likely that the approach to judging risk will be unbalanced, and that judgements of risk will more closely resemble the professional judgement of CJCC members. It is unclear whether this was the intent of HB74, and it is unclear whether

this is in the best interest of the equal application of justice.

**Constitutional concerns.** Analysis from AOC, the Public Defender Department (PDD), the Office of the Attorney General (NMAG), and the Administrative Office of the District Attorneys (AODA) note possible constitutional concerns.

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.”

N.M. Const. art. II, § 13. (Emphasis added.)

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).

Analysis from the Public Defender Department (PDD) notes that HB74 appears to “rely on the allegations of a new felony to establish a violation of conditions of release, dangerousness (although it is not mentioned in the bill), and the inability of conditions to protect the community.”

If true, this is in conflict with the Supreme Court’s decision in *Mascareno-Haidle*. PDD notes that *Mascareno-Haidle* held that the nature of current charges cannot satisfy the state’s burden of proof for both prongs of the detention requirements.

HB74 is also in direct tension with the New Mexico Constitution because it conflicts with the discretionary language provided by the constitution. The bill would require judges to detain—“shall detain”—while the constitution provides discretion—“may detain.”

PDD analysis writes:

The current mechanism employed when a defendant is accused of committing a new felony while on release is to file a motion to revoke the conditions of release in the *first* pre-existing felony case and rely on the fact of new charges to meet the State’s constitutional burden of proof. This system is highly effective as the commission of a new crime is highly persuasive evidence of both dangerousness and the failure of then-existing conditions of release to adequately protect the community.

PDD continues and notes possible issues with the secondary provision under Section 2(C) which requires the court to impose new conditions of release if a person is not detained:

Under Subsection C, if the court does not revoke the conditions of release, HB74 also would require the court to *instead* impose “new or additional conditions of release” and require written findings for how those conditions will adequately protect the community. This provision appears unnecessary if the court denied the motion based on the requirements of Subsection B.

Denial of a motion filed under HB74 could indicate two possible outcomes from the motion hearing. First, it could indicate that the court did not find probable cause that the defendant committed a new felony (and thus there is no basis for revoking conditions that have not been violated). Second, assuming the court found probable cause of a new felony (which may well include simple drug possession or other non-dangerous offense) the court could have found insufficient evidence of (1) dangerousness and/or (2) that conditions of release would not protect the community. Thus, the court’s ruling denying detention inherently indicates findings that previous conditions are adequate to protect the community. Requiring imposition of additional conditions and reasons why those conditions are adequate flies in the face of the court’s underlying decision.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB74 relates to Senate Bill 123, which establishes a rebuttable presumption.

HB74 relates to Senate Bill 174, which also establishes a rebuttable presumption but under different conditions than SB123.

HB74 relates to House Bill 509, which establishes a rebuttable presumption.

## **TECHNICAL ISSUES**

HB74 proposes language that mirrors language in existing rules and is redundant to 5-403 NMRA.

- Section 2(A) creates a process for detention. Current, 5-403 NMRA allows for requests for revocation of release conditions can be filed by a motion of the prosecutor or the court.
- Section 2(B) mirrors existing language in 5-403 NMRA C.

Much of Section 2 of HB74 reads like it was copied from court rules of procedure – there is even a reference in Paragraph A of Section 2 (p. 3, l. 14) to “this rule”, with no antecedent to the “this.” The meaning of the sentence with that reference is unclear: “The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing of this rule.” (p. 3, ll. 11-14).