

<b>LFC Requester:</b>	<b>Austin Davidson</b>
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**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

**AgencyAnalysis.nmlegis.gov**

*{Analysis must be uploaded as a PDF}*

**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**     **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** Jan 17, 2024

**Bill No:** HB 44-280

**Sponsor:** Bill Rehm & Harlan Vincent  
**Short Title:** Pretrial Detention Presumption

**Agency Name and Code**    LOPD - 280  
**Number:** \_\_\_\_\_  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	589	1,767	1,767	4,123	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HJR 3**  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

HB 44 is an exact duplicate of 2023’s HB 509. The bill would create new material in Chapter 31 governing Criminal Procedure governing procedures for granting pretrial detention under Article II, Section 13 of the New Mexico constitution. As context for the synopsis, Article 2, Section 13 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).

HB 44, Section 1(A) would mandate that, in any hearing to determine pretrial detention, the presiding court in a criminal case must *first* make a formal probable cause determination and then proceed to consider pretrial detention.

Subsection B of HB 44 would require the prosecutor to “present all relevant evidence demonstrating that:

- (1) the defendant committed a **dangerous felony offense**;
- (2) the defendant is a danger to any other person or to the community if released; and
- (3) no release conditions will reasonably protect any other person or the community.”

Subsection F defines “dangerous felony offense” with an enumerated list of 14 statutory crimes that would be *per se* dangerous felonies; 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.

Subsection C then provides: “Introduction of the materials as provided in Subsection B of this section shall create a rebuttable presumption that the prosecuting authority has proven by clear and convincing evidence that the defendant is a danger to any other person or to the community if released and that no release conditions will reasonably protect any other person or the community.” Under Subsection D, if the prosecutor “successfully establishes th[at] presumption,” then the *defendant* bears the burden of proving they are *not* a danger and that conditions *can* protect the community. After presentation of both parties’ evidence, the court then determines whether the defendant rebutted the presumption.

HB 44 contains an emergency clause.

### SUMMARY OF AGENCY ANALYSIS:

The LOPD analysis of HB 44 provided herein is extensive and covers a variety of practical, fiscal, and constitutional concerns.

The “**Fiscal Implications**” section endeavors to estimate the actual fiscal impact on LOPD’s budget by also laying out the practical workload implications, particularly in light of LOPD’s existing workload challenges. In sum, the proposal in HB 44 would be incredibly expensive and burdensome for the LOPD, exacerbating our existing Sixth Amendment challenges in providing effective representation.

The “**Significant Issues**” section contains three primary discussions:

- (1) Constitutional Concerns discusses the ways in which HB 44 (and rebuttable presumptions in general) run afoul of New Mexico’s constitution as amended in 2016, as well as broader due process concerns regarding burdens of proof and burden shifting.
- (2) Charges not accurate predictors of dangerousness provides an evidence-based assessment of rebuttable presumptions, explaining why pretrial release is not the source of New Mexico’s crime rate and how casting a wide net based solely on unproven charges will overwhelm our county jails during a staffing and public health crisis, with no provable benefit to public safety.
- (3) Drafting concerns discusses internal inconsistencies within the bill’s structure that could lead to litigation, confusion, and potentially undermine the intent of the sponsor.

The “**Performance Implications**” section discusses other practical and constitutional issues that may arise if HB 44 is enacted.

“**Other Substantive Issues**” provides additional resources regarding data and current practices.

### FISCAL IMPLICATIONS

LOPD does not have the necessary data to estimate with specificity the financial impact that this bill would have on the department because we lack data on the number of cases that would be impacted statewide. We are continuing to evaluate the impact that shifting the burden will have on workload, workflow, and the budget. Nevertheless, the fiscal impact of altering a system in which the State must present evidence to *justify* detention to one in which the State enjoys a

rebuttable presumption of detention that the defense may *rebut* cannot be overstated.

The LOPD fiscal impact is based on two primary effects of the bill.

**First**, an increase in the number of pretrial detention *hearings* that require appearance and representation. HB 44 still requires prosecutors to file a motion seeking detention. However, an increase is anticipated because this bill will certainly incentivize prosecutors around the state to seek detention when such charges are at issue, knowing that their burden of proof is reduced. There would be no incentive to evaluate the *need* for detention in an individual case if the charges alone suffice to justify it, and very nearly every case falling within the terms of Section 1(A) of the bill would end up with a detention hearing.

In Albuquerque alone during 2023, the State filed 1,226 motions for preventative detention (within about 100 of both 2021 and 2022). Of those, 57.2% were granted. 242, or 19.7%, were filed on non-violent charges, including 11 motions to detain on a case of simple drug possession.

Over a larger swath of time, as of December 31, 2023, 6,883 detention cases were filed in Albuquerque from 2017 to 2022 and 3289 (47.8%) of those were granted. 409 of those, or 12.4%, were not indicted within the 10 days allowed by rule to continue detention. 6,636 detention cases have “resolved,” meaning a final outcome is known. Of those resolved cases, 19.3% were not indicted within the year, and 45.8% ended without a state conviction. Only 16.5% of people on whom the State filed for detention were ultimately sentenced to prison for a conviction on that case.

In 2021, the AOC estimated that adopting a list of presumptively dangerous charges triggering a hearing would result in approximately 800 *additional* detention hearings each year in Albuquerque. Because the list of presumptive charges was different in that study, that number may not be a perfect match, but with the addition of Subsection (A)(2) criteria, Analyst estimates that number would be even higher. At an average estimated 30-minute hearing per case, 800 hearings would require 400 additional court hours, or 50 additional 8-hour days of court appearance time (for the court, LOPD, and prosecutors). This time estimate does not include the time required to *prepare* for the hearing, which is separately addressed below.

Including staff attorney and contract attorney caseloads, LOPD represents approximately 85% of criminal defendants around the state. Analyst notes that in Judicial Districts without a brick and mortar LOPD office, the LOPD already struggles to get contract attorney coverage of existing hearings on short notice and the strain on contract counsel to cover additional hearings would be significant. The need for additional FTEs to cover the cases handled by staff attorneys is estimated below.

**The second effect** of the bill with dramatic fiscal impact on LOPD is the requirement of preparing and presenting rebuttal evidence. Under HB 44, a rebuttable presumption is triggered after the state (1) establishes probable cause of the charges, and (2) presents any evidence pertaining to dangerousness and that conditions of release are inadequate to address the risk. The bill then places a burden on the *defendant* to “the burden of proving that the defendant is not a danger to any other person or to the community and that release conditions exist that will reasonably protect any other person.”

This presents constitutional concerns, *see Significant Issues, infra*, but relevant here, that places an evidentiary burden on the defense to address circumstances ordinarily related to

dangerousness and the adequacy of conditions. 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. HB 44 would require defendants to prepare for such a showing in 5 days.

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 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.

In light of the above evaluation, Analyst estimates *extremely* conservatively that HB 44 would result in 2000 pretrial detention hearings annually in Albuquerque alone, (approximately 1,200 similar to 2021-2023 numbers, plus a conservative estimate of 800 additional hearings). Because LOPD represents an average of 85% of defendants (the higher percentage skewing toward serious felony cases), Analyst conservatively estimates that LOPD will be responsible for presenting rebuttal evidence in **1700 Albuquerque hearings annually**. Where the defense currently does not need to present *any* evidence other than basic biographical facts about the client, primarily holding the State to *its* burden, the preparation time is almost entirely a new resource burden upon LOPD.

LOPD employed attorneys handle about 2/3 of the LOPD caseload statewide; LOPD contractors handled the remaining 1/3, on average.

LOPD estimates that preparations for each hearing would require an average of 6 hours of attorney time and 6 1/2 hours of support staff time. Again conservatively estimating that attorneys *currently* spend approximately 2 hours preparing for each hearing with 1.5 hours of support staff assistance, LOPD estimates this bill would *increase* LOPD workload by 4 attorney hours and 5 staff hours per hearing. Estimating 2/3 of the 1700 hearings per year handled in house, that is 1,133 hearings, which represents an increase of 4,533 attorney hours each year and by 5,667 support staff hours—just in Albuquerque.

### **In-House Staffing Estimates**

4,533 attorney hours at 2080 working hours per year (40 hours per week, 52 weeks a year) represents 2.18 full-time attorney equivalents. 5,667 support staff hours represents 2.72 full-time staff equivalents. However, 2080-hour years does not account for time spent on training, administrative or other tasks, or any leave taken. Realistically, **3 additional attorney FTEs** (a combination of mid-level and upper-level attorneys in light of the felony charges) and **3 additional staff FTEs** would be required to manage the increase in Albuquerque hearings alone.

Roughly half of LOPD in-house attorneys and core staff serve the Albuquerque courts. As a result, to account for the needs of the rest of the state, the estimated number of additional FTE needed should easily be doubled to **6 attorneys and 6 core staff**. These are conservative, preliminary estimates.

PD2 level attorneys do not handle felony cases. The agency cost of an LOPD “PD3” mid-level Associate Trial Attorney’s mid-point salary including benefits is \$136,321.97 in Albuquerque/Santa Fe and \$144,811.26 in the outlying areas (due to salary differential required to maintain qualified employees). An LOPD “PD4” higher level (non-supervisor) Associate Trial Attorney’s mid-point salary including benefits is \$149,063.16 in Albuquerque/Santa Fe and \$157,552.44 in the outlying areas. Recurring statewide operational costs per attorney would be \$12,780 with start-up costs of \$5,210. Additionally, average agency salary and benefits, plus recurring operational costs (but excluding start-up costs) for investigators is \$95,718.51 and for social workers, \$104,802.78.

Averaging these salary ranges and applying to double the Albuquerque estimated FTE for 6 additional attorney FTE (average \$146,937.21) and 6 core staff FTE (average \$100,260.65) *statewide*, Analyst conservatively estimates the passage of HB 44 would result in recurring costs of \$881,623.25 for attorney FTE and \$601,563.90 for core staff.

### **Contractor Cost Estimates**

In addition to the recurring FTE costs, LOPD will additionally incur an increase in the recurring costs to LOPD’s contract attorney rates. Of the 1700 estimated LOPD hearings in Albuquerque, if 1/3 are handled by contractors, that is 567 *additional* hearings in Albuquerque, potentially double that statewide, or 1134. As a *conservative preliminary estimate*, LOPD estimates the additional preparation and hearing time for detention hearings involving rebuttal will require an additional \$250 per flat fee currently paid for such hearings. The increase to recurring statewide contract expenses from enacting HB 44 are therefore estimated at \$283,500.

**The total recurring increase is therefore \$1,766,687.15. If passed with the emergency clause, increased costs for the remainder of FY 22 from February through June would be at least 1/3 of that figure, or \$588,895.**

### **Additional considerations**

It is important to note that the additional work required by HB 44 is not included in the calculations in the workload study released in January of 2022. This study by an independent organization and the American Bar Association concluded that New Mexico faces a critical shortage of public defense attorneys. The study concluded, “A very conservative analysis shows that based on average annual caseload, the state needs an additional 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment.” [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-moss-adams-nm-proj.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf)

Approximately 85% of criminal defendants are represented by public defenders. The LOPD simply does not have the investigative capacity to prepare a case to rebut presumptions in hundreds if not thousands of detention hearings each year. Meanwhile, by definition, the State has law enforcement at their disposal who have already done an investigation before arresting/charging, so they are in an ideal position to meet their burden under current law.

The practical reality is that defendants will certainly be held under the presumption solely because of our inability to develop an adequate rebuttal under resource constraints. This includes cases handled by LOPD Contract Counsel who represent a great number of LOPD clients, most

of whom do not have access to “in house” investigative resources. If privately retained counsel is in a better position to present rebuttal evidence, HB 44 would effectively mean a return to the money bail system before the 2016 amendment in which those with means were released while the indigent languished in jail on unaffordable bonds or detention holds not actually tied to public safety.

**Finally**, in addition to the direct impact on LOPD resources, there is a concomitant effect on the judiciary and prosecutors in merely holding and attending the hearings.

Additionally, the dramatic effect on county jails is potentially catastrophic. The State can detain a defendant based on the mere filing of a motion until the hearing is held. It is impossible to estimate what percentage of defendants the courts would thereafter detain versus release under the proposed mechanism. Nevertheless, the UNM Institute for Social Research recently estimated that rebuttable presumptions would have incarcerated an additional 797 to 1,969 additional people between 2017 and 2020 just in Albuquerque. *See* UNM Center for Applied Research and Analysis, Institute for Social Research, and Santa Fe Institute report: *Who would rebuttable presumptions detain?* (Dec. 2021) (Elise Ferguson, Cristopher Moore; Helen De La Cerda, and Paul Guerin).

Because New Mexico has no mandate that trial be held within a set period of time upon detention, the potential for lengthy jail stays is significant. This bill comes at a time when New Mexico’s jails are in crisis. Staffing shortages and pandemic conditions have made it not only dangerous to reside in jail, but also, despite some improvements over the last year, extraordinarily difficult to access one’s attorney in order to prepare a defense to their criminal charges. *See* Joshua Bowling, *Off guard: A crisis looms at New Mexico’s largest jail, plagued by understaffing—and unsafe conditions*, Searchlight New Mexico (August 11, 2022), available at <https://searchlightnm.org/off-guard/>; Elise Kaplan, *MDC understaffing leads to state of emergency*, Albuquerque Journal (June 12, 2022), available at <https://www.abqjournal.com/2507966/mdc-understaffing-leads-to-state-of-emergency.html>; Jessica Onsurez, *Officials point to over-incarceration, not just staffing as reason for 'crisis' in county jail*, Alamogordo Daily News (Aug. 17, 2022), available at <https://www.alamogordonevents.com/story/news/2022/08/17/officials-point-to-over-incarceration-not-staffing-as-leading-reason-for-crisis-in-county-jail/65406354007/>; Elise Kaplan, *Witnesses said jail staff accused her of faking seizure. She died hours later*. Albuquerque Journal (Jan. 10, 2023), available at <https://www.abqjournal.com/2563527/ex-woman-was-18th-person-in-mdc-custody-to-die-since-the-start-of-20.html>.

In late September 2022, the Association of Counties presented to CCJ regarding statewide staffing issues, asserting a shortage of 953 staff to reach full staffing of 2,325 positions. Meanwhile, it cited a detention population of 5,436 compared to 3,853 in May 2020. As of May 2022, the report indicated staffing shortages over 40% in two counties, over 30% in seven counties, and near or above 20% in another seven. NM Association of Counties, Detention Facility Report (Sep. 28, 2022), available at <https://www.nmlegis.gov/handouts/CCJ%20092822%20Item%201%20County%20Detention%20Facility%20Report.pdf>. *See* Assoc. Press, *5 New Mexico Jails Less Than Half Staffed; 1 Moving Inmates*, U.S. News & World Rep. (Aug. 20, 2022), available at <https://www.usnews.com/news/best-states/new-mexico/articles/2022-08-20/5-new-mexico-jails-less-than-half-staffed-1-moving-inmates>. The Corrections Department was not faring much better. *See* Curtis Segarra, *New Mexico prisons facing low staff, increased inmate drug use*,

KRQE (Sep. 28, 2022), available at <https://www.krqe.com/news/new-mexico-prisons-facing-low-staff-increased-inmate-drug-use/>.

## SIGNIFICANT ISSUES

### Constitutional Concerns

As the New Mexico Constitution was amended in 2016, “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. Thus, 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. See *Mascareno-Haidle*, *supra*.

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. While the State may 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.

Unlike 2022’s HB 5 and 2023’s SB 123 (a 2024 version following their approach has not yet been filed), HB 44 does not rely *exclusively* on the nature of the charges. However, it does apply a *presumption* without actually holding the State to its burden of proof. Because the constitution explicitly imposes a burden upon the State, relieving the State of that burden in any way would violate Article II, Section 13. Unlike other bills, HB 44 requires the State to *present* additional evidence relevant to dangerousness and the adequacy of conditions of release. However, 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.

Finally, the bill has the unmistakable effect of, not only reducing the State’s constitutional burden, but then *shifting* that burden to the defendant, to prove the negative. Burden shifting at this stage in a proceeding violates the due process guarantee to a presumption of innocence.

Potential litigation over the constitutionality of HB 44 is guaranteed.

### Current Procedures Are Effective

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<sup>1</sup>

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<sup>1</sup> ISR, *Bail Reform: Motions for Pretrial Detention and their Outcomes* (Aug. 2021).



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 prior pre-trial presumption legislation have asserted that the 14% and 5% 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.

HB 44 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 without requiring the State to actually *persuade* a court that these statements are true. The presumption would thus apply to a wide variety of defendants, including many who are not violent or dangerous at all. 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 2022 were not ultimately convicted of anything (722 of 3289), excluding those referred to federal court or where guilt was otherwise never adjudicated. An additional 137, 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 30% receive probated sentences because once all the circumstances are known, incarceration is no longer deemed appropriate.

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. This is particularly concerning at a time when New Mexico’s jails are unsafe and understaffed. In county jails around the state, staffing issues are pervasive and extreme. *See supra*, **Fiscal Implications** at 7-8.

Meanwhile, the strain on medical services during the Covid pandemic worsened an already unstable health care infrastructure. *See* Marisa Demarco, *TURMOIL AT THE STATE’S BIGGEST JAIL: Staff members flee as crises unfold*, Source NM (Jan. 20, 2022), available at <https://sourcencm.com/2022/01/20/turmoil-at-the-states-biggest-jail-staff-members-flee-as-crises-unfold/>. “Last fall, the Tennessee-based company Corizon Health promised more health care staff at MDC, and as county officials signed a \$64.8 million contract with the company, they said they hoped it would ease strain on guards.” However, that has not been the case, as Source NM reports, “attorneys say there hasn’t been a medical director or an on-site physician, and more and more nurses are resigning, leaving a skeleton crew, especially at night.” *Id.* Source NM reports:

A court-appointed medical expert who helped evaluate MDC reported in September on poor medical care at the jail under the previous medical provider Centurion Health. Dr. Robert Greifinger identified systemic gaps in medical care inside the jail, with several patients receiving “substantially deficient” care. The doctor wrote that “these problems were apparent in several deaths” in his evaluation, cited in a Dec. 29 court filing.

*Id.* “One psychiatric nurse, in her resignation letter, called the worsening situation a ‘recipe for

disaster.” Austin Fisher, *Bernalillo County employees filling in for jail workers during staffing crisis*, Source NM (Jan. 21, 2022), available at <https://sourcenm.com/2022/01/21/bernalillo-county-employees-filling-in-for-jail-workers-during-staffing-crisis/>.

In conjunction with unprecedented staffing shortages in other areas, now is the worst possible moment to pass legislation that would *drastically* increase inmate populations. *See also* Elise Kaplan, *Pretrial detention changes would worsen MDC conditions critics say*, Abq Journal (Nov. 28, 2021), available at <https://www.abqjournal.com/2449983/pretrial-detention-changes-would-worsen-mdc-conditions-critics-say.html>.

Aside from health and safety, incarceration has legal implications for a defendant facing court proceedings. Inmates have much more difficulty getting access to their attorneys and can't adequately participate in preparing a defense. These circumstances inevitably lead to defendants' susceptibility to plead guilty just to get out of disastrous jail conditions, exacerbating the already imbalanced power prosecutors wield in the plea process. While access to clients for defense counsel has seen some improvement since the depths of the Covid crisis, health concerns and staffing issues still are major impediments to access to counsel.

Finally, formal studies show that charges are not a good predictor of behavior while released, but risk assessments and judges *are* good predictors.<sup>2</sup> 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.

The current system has functioned well and is being continually refined over time through court rules and practices. *See* Rule 5-409. Rebuttable presumptions would neither make current detention practices more accurate or effective, nor reduce the overall crime rate, which is not being driven by pretrial release in the first place.

## **PERFORMANCE IMPLICATIONS**

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* Glenn A. Crant, J.A.D., *Report to the Governor and Legislature*, (N.J. 2019), available at

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<sup>2</sup> *See* Institute for Social Research & Santa Fe Institute report: *Who would rebuttable presumptions detain?* (Dec. 2021).

<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. Tellingly, 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. 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.

## **ADMINISTRATIVE IMPLICATIONS**

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.

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

HB 74, HJR 9, SB 123, SB 174, SB 477

## **TECHNICAL ISSUES**

Reviewer is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill, analyst is unaware if it has been drawn pursuant to a special message of the Governor, and it was not vetoed following the previous regular session.

## **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. According to LOPD internal data for Albuquerque, as of December 31, 2023, 1226 motions to detain were filed and heard last year, of which 57.2% were granted. 242, or 19.7%, were filed on non-violent charges, including 11 motions to detain on a case of simple drug possession. Furthermore, as of December 31, 2023, 6636 detention cases filed from 2017 – 2022 were considered to have resolved. 19.3% were not indicted within the year, and 45.8% ended without a state conviction. Only 16.5% 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](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.