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FISCAL IMPACT REPORT

SPONSOR <u>SJC</u>	LAST UPDATED _____
Hold without bond for pretrial release	ORIGINAL DATE <u>2/14/24</u>
SHORT TITLE <u>violation</u>	BILL <u>CS/Senate Bill</u>
	NUMBER <u>271/SJCS</u>
	ANALYST <u>Davidson</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

Agency/Program	FY24	FY25	FY26	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	\$650.0	\$650.0	\$1,300.0	Recurring	General Fund
Total	Up to \$1,846.8	Up to \$7,131.8	Up to \$7,131.8	Up to 16,110.4	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Relates to House Joint Resolution 3

Sources of Information

LFC Files

Agency Analysis Received From
 Administrative Office of the Courts (AOC)
 Law Offices of the Public Defender (LOPD)
 New Mexico Attorney General (NMAG)
 Department of Corrections (NMCD)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of SJC Committee Substitute for Senate Bill 271

The Senate Judiciary Committee substitute for Senate Bill 271 makes multiple language changes, removing the declaration of an emergency and word bond from the bill.

The committee substitute removes from section 1, part A. the word “No-Bond” and removes “the chief clerk of,” these changes place the responsibility of issuing an order of hold to the court, not to the chief clerk. The committee substitute also removes the language stating that a person will remain “without bond” from the section as well.

The committee substitute also makes changes to part B. of section 1, removing “to any previous felony cases holds a hearing to” and replacing it with “for that purpose.”

The bill proposes to amend statute surrounding pretrial detention and would require the court to issue orders for the person to remain in custody until a hearing is held regarding the conditions of release.

FISCAL IMPLICATIONS

This analysis seeks to estimate the fiscal impact of SB271. First, the analysis estimates how many people charged with a felony are currently detained under current rules. AOC, due to the short timeframe between introduction of the bill and its first hearing, could not provide an estimate for this population. The analysis then estimates the total additional detention costs caused by SB271.

Bills proposing to change pretrial detention policy have the greatest potential fiscal impact because they may increase detention, which is associated with significant costs. SB271 contemplates making a change already largely aligned with current rules. SB271 proposes that the court modify or 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, SB271 differs from current statute because the bill would enable the chief clerk of the court to issue an order for the person who committed a subsequent felony on pretrial release to remain in custody without bond.

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 S271’s impact by determining current pretrial detention decisions

and comparing them to what SB271 requires. LFC analysis of previous AOC data for a similar bill estimates SB271 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, SB271’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, for a similar bill, 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 statewide costs.

Number of Detainees. The estimated cost of this bill is dependent on the number of individuals impacted. This analysis assumes the proposed legislation applies to all defendants released on pretrial for any felony.

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 SB271 were calculated based on direct detention costs; Agency analysis for previous bills that are over all similar noted that because SB271 is so similar to the current law and practice, it likely does not include costs among criminal justice partners outside detention centers.

SIGNIFICANT ISSUES

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) for bills similar to SB271 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.

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 SB271 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 conflicts with the Supreme Court’s decision in *Mascareno-Haidle*.

PDD analysis for similar legislation 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.

If the proposed legislation were enacted, due to its application to all felony charges and to it instituting pretrial detention without bail regardless of whether the defendant has been proven innocent or guilty, it could create a litany of constitutional questions and litigation against the state for potential violations of constitutional rights given to defendants. The proposed legislation could also potentially greatly increase detention costs due to the increase of defendants awaiting new pretrial hearings.

Additionally, analysis from the Law Offices of the Public Defender (PDD) noted that due to the bill including the felony of simple drug possession, the proposed legislation passed would conflict with the current practice of the judge having discretion to find whether that simple possession has an impact on community safety. According to the agency’s analysis, the bill would remove that judicial discretion.

Analysis from PDD also noted that:

Under current law, judges may already order an arrest warrant for a new felony allegation, or the person may be arrested on an independent arrest warrant for the new felony, if formally charged.

Analysis from the Administrative Office of the Courts (AOC) also referenced existing practices regarding pretrial detention. Agency analysis pointed to NM Court rule 403 that, “allows for modification or revocation of release.” The analysis also outlined the rule:

5-403. Revocation or modification of release orders.

A. Scope. In accordance with this rule, the court may consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release

(1) if the defendant is alleged to have violated a condition of release; or

(2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for revocation or modification of conditions of release.

(1) the court may consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor or on the court’s own motion. The judge has discretion to issue a bench warrant or issue a summons and schedule a hearing to revoke or modify conditions of release.

The agency’s analysis also noted that the proposed legislation would also modify current rules and procedures that the courts follow. In particular, analysis from the AOC notes that language in Section 1. B would limit the courts “authority and ability to efficiently administer justice.” The agency goes further, noting that the proposed legislation would counteract the courts “rules and procedures” that “drive the fair and effective administration of justice.”

Agency analysis consistently raised the concern that SB 271 could be duplicative of the current laws and practices that already exist.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 271 is similar to House Joint Resolution 3. Both proposed legislations amend statute surrounding and affecting pretrial detention.

Senate Bill 271 is similar to House Bill 74 from the 2023 legislative session.

TECHNICAL ISSUES

The proposed legislation’s bill header reads “Requiring the court to hold a person for a violation of conditions of release to consider modification or revocation of those conditions of release.” The proposed legislations intent to require the court to hold people for concurrent felony charges until, a hearing considering the modification or revocation of conditions of release are two separate actions of the court. Due to how the current bill header is structured, those separate actions appear to be synonymous. Grammatical changes to the header could clear up the distinction between the two actions.

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