LFC Requester:	

AGENCY BILL ANALYSIS - 2026 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO
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(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}

Date Prepared: *January 21, 2026* *Check all that apply:*
Bill Number: *HJR2* Original *X* Correction __
Amendment __ Substitute __

Sponsor: Eleanor Chávez and Andrea Reeb
Short Title: Denial of Bail, CA
Agency Name and Code Number: AOC 218
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY26	**FY27**		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY26	**FY27**	**FY28**		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY26	FY27	FY28	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HJR2 would submit for approval in the next general election or at any special election prior to that date that may be called for that purpose, an amendment to Article 2, Section 13 of the New Mexico Constitution. The amendment enumerates the current unified provisions into paragraphs A through E.

Paragraph A proposes to add "persons charged with" to the second paragraph of the current constitutional provision. It would clarify that the bail eligibility exception only applies to those charged with a capital crime.

Paragraph B proposes no changes to current language. It is important to recognize that when these provisions refer to "bail" they mean release from detention prior to trial and not the monetary bail bond often used colloquially as the means of obtaining pretrial release. The exception is when a money or property bond is addressed in Section D.

Paragraph C removes the requirement for the prosecutor to request a hearing but retains the requirement for the prosecutor to produce clear and convincing evidence that the defendant should be detained prior to trial. The language may allow the prosecutor to argue for detention prior to trial without a hearing, or require the judge to schedule a hearing without the prosecutor requesting one. The intent is not clear. In addition, the proposed language in HJR2 replaces the language that "no release conditions will reasonably protect the safety of any other person or the community" by striking "no" and adding "not" as follows; "[~~no~~] release conditions will *not* reasonably protect the safety of any other person or the community." It is unclear if this proposed change is intended to reduce the prosecutor's burden or simply as an intended clarification to what appears already to be clear language.

Paragraph C of HJR2 adds an explicit requirement that flight risk can be a sufficient basis to deny pretrial release. Language regarding flight risk exists in the current constitutional provision, found in what HJR2 has in Section D. HJR2 proposes to strike this existing language as [bracketed] and adding the underlined language; "[not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise] eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A [defendant] person who is [neither a danger nor a flight risk] eligible for bail and who has a financial inability to post a money or property to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond."

Paragraph C of HJR2 also provides that the court "may" presume pretrial detention is needed if the defendant is charged with "a felony offense designated by law as a dangerous or violent felony offense . . . unless the person charged rebuts the presumption by a preponderance of the evidence."

Paragraph D rewords the constitutional provision's language that establishes that a

defendant cannot be detained pretrial due to inability to post a money or property bond. While Paragraph D proposes to strike the reference to flight risk in the existing law. Unlike the provisions in Paragraph C that propose a significant change to release eligibility based on flight risk, the provisions in Paragraph D appear to seek to clarify the current language prohibiting detention based on lack of financial resources and not to significantly amend existing law on flight risk.

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SECTION 2: Submits the proposal for vote during the next general or special election.

FISCAL IMPLICATIONS

HJR2 allows but does not require a judge to presume the defendant should be detained before trial when the charge has been deemed by legislation to be a serious or violent offense, a category of crimes the proposal appears to expect to be adopted at some later time. If the law designates such crimes, the court may apply a presumption that pretrial detention is required unless the accused person rebuts the presumption by a preponderance of evidence.

SIGNIFICANT ISSUES

Section C may raise a number of constitutional issues. It removes the requirement for the prosecutor to request a hearing but retains the requirement for the prosecutor to produce clear and convincing evidence that the defendant should be detained prior to trial. The language may allow the prosecutor to argue for detention prior to trial without a hearing, or require the judge to schedule a hearing without the prosecutor requesting one. The intent is not clear. In addition, if the language revising the required finding ("release will *not* reasonably protect the safety of any other person or the community") is intended to reduce the prosecutor's burden, this language may deny a defendant's right to the presumption of innocence and to liberty. N.M Constitution, Article 2, Section 4.

Paragraph C adds an explicit requirement that flight risk can be a sufficient basis to deny pretrial release. The current constitutional provisions permit pretrial detention only if a defendant is a significant threat to the safety of a person or the community. *See* Rule 5-409G, NMRA. Flight risk is only addressed in the provision that prohibits a bond the defendant is unable to post due to lack of financial resources to do so. Present court rules and practices require the AOC to provide the district court with a risk analysis known as the Public Safety Assessment (PSA) as well as a Background Investigation Report (BIR) for every defendant eligible for pretrial detention. The PSA scores a defendant's risk for re-arrest and failure to appear (FTA) during the pretrial period. Regarding FTA, prior FTAs are a factor in the PSA analysis. Considerations of flight risk and prior criminal history currently help shape the court's imposition of conditions of release that mitigate these risks.

Paragraph C of HJR2 also provides that the court "may" presume pretrial detention is needed if the defendant is charged with "a felony offense designated by law as a dangerous or violent felony offense . . . unless the person charged rebuts the presumption by a preponderance of the evidence." Courts will have to develop practices to guide evaluation of the presumptive offenses to see if the current charge merits pretrial detention. The practice would echo what happens now. If a prosecutor brings a charge that would be on a future list of presumptive crimes, does the court have sufficient information to find the way the particular crime before the

court occurred merits detention. **The presumption is permissive, so the court would have to do what it does now; analyze what is presented to determine if detention is needed to protect the community or a person.** It is difficult to see how the permissive presumption advances a criminal justice or public safety objective. The court still must determine if the defendant is a sufficient threat to the safety of a person or the community to require pretrial detention.

In analyzing the existing pretrial detention provision, the New Mexico Supreme Court has recognized that, "Bail is not pretrial punishment and is not to be set solely on the basis of an accusation of a serious crime. . . Empirical studies indicate that the severity of the charged offense does not predict whether a defendant will flee or reoffend if released pending trial. *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1, 14-16 (2008) (reviewing studies indicating that "evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending"); 4 Wayne LaFave et al., *Criminal Procedure*, § 12.1(b), at 12 (3d ed. 2007) (citing studies and stating that the "likelihood of a forfeiture does not appear to depend upon the seriousness of the crime")." *State v. Brown*, 2014-NMSC-038, para. 52. *See also State ex rel. Torrez v. Whitaker,* 2018-NMSC-005, para. 101 ("Detention decisions, like release conditions, should not be based categorically on the statutory classification and punishability of the charged offense. But the particular facts and circumstances in currently charged cases, as well as a defendant's prior conduct, charged or uncharged, can be helpful in making reasoned predictions of future dangerousness.").

The Supreme Court has found that current law does not overly burden prosecutors in their burden to demonstrate dangerousness sufficiently to detain a defendant pretrial.

> [O]ur case law and court rules afford the state considerable flexibility and ease in presenting its case for detention by (1) dispensing with the rules of evidence, Rule 5-409(F)(5), (2) declining to extend a defendant's constitutional confrontation rights to a detention hearing, *Torrez*, 2018-NMSC-005, ¶¶ 45, 89, 91, and (3) not imposing any categorical requirement for live-witness testimony, *id.* ¶¶ 80-95, 110; *Ferry*, 2018-NMSC-004, ¶ 3 (endorsing the use in detention hearings of live testimony or a "proffer [of] documentary evidence in a form that carries sufficient indicia of reliability"). The state, far from being bound by all the requirements of the Constitution and the rules of evidence, may rely on "all helpful and reliable information" at its disposal, *Torrez*, 2018-NMSC-005, ¶ 103, to establish to the court's satisfaction, under the clear and convincing standard, that no conditions of release will reasonably protect the public against a defendant's future dangerousness. This lenient evidentiary burden persists even though a defendant detained while awaiting trial—and innocent until proven guilty—will be subjected to conditions of confinement identical to those imposed on a defendant proven guilty beyond a reasonable doubt at trial.
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> The state's burden of proving the first element required to obtain pretrial detention has been considerably lessened. The state may rely solely on "the nature and circumstances of a defendant's conduct in the underlying charged offense(s)" as sufficient to prove by clear and convincing evidence that a defendant is dangerous—that is, "that the defendant poses a [future] threat to others or the community." *Ferry*, 2018-NMSC-004, ¶ 6. Thus the state, the prosecuting authority that

decides which offenses to charge the defendant with in the first place, may now rely on those same charges for proof of dangerousness. *Id.*

However, we also recognized in *Ferry* that even if this initial burden is satisfied, "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.'" *Ferry*, 2018-NMSC-004, ¶ 6.

State v. Mascerano-Haidle, 2022-NMSC-015, 514 P.3d 454.

If the presumption proposed in HJR2 is constitutional, a substantial body of experience and research provides reason to question the efficacy of the presumption. Several publications on pretrial detention presumptions in the federal system address this issue. The reports were published by the Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts. In a study authored by Amaryllis Austin, Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, *The Presumption for Detention Statute's Relationship to Release Rates,* Federal Probation Journal*, volume 81, number 2* (September 2017) found at: https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates, research found that;

> Furthermore, the effect of the presumption on actual release rates and on the recommendations of pretrial services officers was most significant for low-risk defendants (meaning there may be some level of unnecessary detention), while having a negligible effect on the highest risk defendants. Additionally, the presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, fail to appear, or be revoked for technical violations. In the limited instances where defendants charged with a presumption demonstrated worse outcomes than nonpresumption cases, the differences were not significant and were most likely caused by the system's failure to address these defendants appropriately under the risk principle.
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> These results lead to the conclusion that the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk. In the years since the passage of the Bail Reform Act of 1984, there have been huge advances in the creation of scientifically-based risk assessment methods and tools, such as the PTRA. This study finds that these tools are much more nuanced and effective at identifying high-risk defendants.

A similar conclusion was reached by another study of presumptions in the federal system; *The Rising Federal Pretrial Detention Rate, in Context,* Matthew G. Rowland, Federal Probation, volume 82, number 2 (September 2018) at page 17, found at: https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/federal-probation-journal/2018/09/rising-federal-pretrial-detention-rate-context;

> Where the government does seek detention, it has the burden of proof in many cases and must demonstrate the defendant is a risk of flight by a preponderance of the evidence and show danger to the community by an even greater standard, clear and convincing (Boss). There is an exception, however, that is growing larger than the rule in favor of release.

> The exception is found in 18 U.S.C. §3142(e) and flips the burden of proof for release onto the defendant when the defendant is charged with offenses said to involve violence, drugs, and sex offending. A presumption of detention also extends to some predicate felons. The "presumption was created with the best intentions: detaining the 'worst of the worst' defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases." (Austin 61). Unfortunately, research indicates that the enumerated offenses may not be the best predictors of risk of flight or danger to the community (Austin 60). Consequently, the Judiciary has suggested that Congress reexamine the presumption provisions (Judicial Conference of the United States).

The federal courts have found, a has research in New Mexico, that "people held in jail pretrial are more likely to be convicted, to be sentenced to longer incarceration terms, or to commit new crimes post-trial compared to their released counterparts. The relative cost of pretrial detention – about $92 per day – is also significantly higher than the cost of pretrial supervision – about $11 a day. Defendants released in the federal system have a high degree of success, with 86 percent committing no new violations or failing to appear in court as required." *Pretrial Release and Detention in the Federal Judiciary*, a publication of the United States Courts (February 15, 2023) found at: https://www.uscourts.gov/about-federal-courts/probation-and-pretrial-services/pretrial-services/pretrial-release-and-detention-federal-judiciary

The Commonwealth of Virginia had statutory presumptions for pretrial detention from 1996 until they were repealed in 2021. A 2023 study found that this 25-year presumptions experience showed harm to many and no benefit to public safety.

> "The combination of higher detention rates and longer detention periods for those subject to presumptions meant that as many as approximately 7% (and as much as 25%) of all inmate days in Virginia's jails were due only to the presence of presumptions. The operating costs associated with the days for defendants known to have been subject to presumptions exceeded $65M annually. . . If presumptions led to avoided violence or harm to the public, it could be suggested that these costs might be balanced by the societal benefits. Our study uses the sample of individuals subject to presumptions who were released to estimate this risk. We find defendants subject to presumptions were no more likely to be rearrested for a subsequent criminal offense during the pretrial period than those who did not. Fewer than 5% of defendants who faced presumptions but were released were charged with a new violent offense in the pretrial period, nearly identical to the share among defendants who did not face presumptions. This is true even when we account for other differences between presumption and non-presumption cases. Therefore, the cost of presumptions does not result in any benefit. Taken together, our findings suggest that the 2021 repeal of presumptions saved tens of millions of dollars in jail costs and prevented harms to tens of thousands of Virginians and their families. Ariel BenYishay, *Impacts of Presumptions Against Bail On Pretrial Release and Public Safety in Virginia*, January 24, 2023 William & Mary, p.13, found at: https://www.justice4all.org/wp-content/uploads/2023/06/Impacts-of-Presumptions-Against-Bail-on-Pretrial-Release-and-Public-Safety-in-Virginia-Jan-24-2023.pdf.

In New Mexico, LFC researchers relied on reports by the Institute for Social Research at UNM which analyzed the impact of several legislative proposals to establish presumptions of

detention based on the charge in more than 15,000 cases with pretrial releases in Bernalillo County over four years, reaching the conclusion that pretrial presumptions would not improve public safety;

> ISR's December 2021 study included data on the public safety implications of HB80. It found that violent charge-based rebuttable presumptions could have led to the detention of defendants in nearly 3,000 additional cases over a four-year period. Over 80 percent of the defendants in this group committed no new crimes during the pretrial period. Thus, charge-based rebuttable presumptions could have led to the unnecessary detention of roughly 2,400 defendants while preventing 253 violent arrests and 300 non-violent arrests over four years... Notably, most of the violent crimes that would have been prevented were fourth-degree felonies for aggravated assault, and none of the homicides committed by defendants on pretrial release during the four-year period would have been prevented by the reforms because none were committed by the population the bill targeted. In fact, all seven murders were committed by defendants previously arrested for offenses not involving serious violent charges. While counterintuitive, these findings are consistent with national research on pretrial detention, which has found little empirical support for charge-based detention policies. In other words, using a defendant's current criminal charge as the primary determinant for detention is a values-based approach, not an evidence-based one. LFC Report, December 2021, pages 13-14.

In addition, the LFC report at page 11 finds, "Little Evidence Exists to Suggest that Bail Reform is Driving Violent Crime Trends in Albuquerque." The LFC points to other possible factors impacting crime. See page 6, "Arrests and convictions for violent offenses have remained relatively flat through at least seven years of rising violent crime." See page 8, "Justice is not certain for those who are arrested due to low prosecution and conviction rates" and "Declining case clearance rates and low conviction rates suggest law enforcement agencies in Albuquerque are not creating effective deterrence." Also see Chart 18 on page 14, "40 Percent of Defendants Prosecutors Sought to Detain Pending Trial Were Not Ultimately Convicted."

The ISR report found that, "detaining additional defendants based on rebuttable presumptions would decrease the rate of serious crime only slightly" while "a wide variety of criteria for rebuttable presumptions have poor accuracy and a high false positive rate. Despite the presumed intentions of policymakers, these proposals do not accurately target the small fraction of defendants who will be charged with new serious crimes if released pretrial. Instead, they cast a wide net, recommending detention for a large number of defendants who would not receive any new charges during the pretrial period" (ISR Report, pages 13, 19). The ISR Report concludes that rebuttable presumptions, "reduce judicial discretion by requiring judges to regard large classes of defendants as dangerous by default, rather than demanding that prosecutors prove this individually. Their proponents argue that they prevent a large amount of crime with a minimal impact on civil liberties. We have shown that this is not the case, both because a small fraction of crime is committed by pretrial defendants, and because presumptions detain many defendants for each crime they prevent" (ISR Report, page 21)

Multiple studies have demonstrated that the desired goal of increasing public safety will not be achieved by introducing "inference and presumption" into the pretrial release process. Analyses from the Santa Fe Institute (SFI) and the University of New Mexico Institute for Social Research (UNM) of similar legislation show how often individuals who are identified by these bills are rearrested during the pretrial phase. The SFI/UNM study measured how often

defendants charged with a Serious Violent Offense are rearrested for various types and severities of crime. Only 4% of defendants were rearrested for a violent felony; 3% were arrested for a violent misdemeanor or petty misdemeanor; 7% were rearrested for a nonviolent offense; and 86% were not rearrested for any new charge during their pretrial period. Measured by rearrests, defendants charged with "dangerous violent felonies" are not significantly more dangerous to the public, as a group, than other felony defendants. Defendants charged with "violent felony offenses" are frequently released on pretrial conditions and do not violate those conditions, including arrest for another offense, during the pretrial period.

According to the UNM ISR PSA Validation Study for Bernalillo County published in June, 2021, the vast majority of defendants determined to have the highest risk for picking up a new charge do not pick up new charges which includes a new violent charge. https://isr.unm.edu/reports/2021/bernalillo-county-public-safety-assessment-validation-study.pdf

- 71% of defendants who scored as high risk, do not pick up new charges.
- Of the 29% that do have new charges, 17% have a new non-violent charge and 12% have a new violent charge.
- Of all pretrial defendants released in Bernalillo County, 4% of defendants had a new violent charge.
- 2,472 cases had the appearance of the PSA Violence Flag, of those, 2,251 or 91% did not have a new violent charge during the pretrial stage of their case.

A study (2022) By Cris Moore with the Santa Fe Institute: *How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? A Natural Experiment from New Mexico,* found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143886, found that in various previous iterations of proposed preventive detention statutes, for defendants charged with a serious violent offense to whom the proposed presumption would have applied, the proposed statute would have detained 2,127 out of the total of 15,134 felony defendants charged over a four-year period, or 14%. Of these 2,127 defendants: 1,835 or 86% received no new charge; 80 or 4% received a nonviolent misdemeanor charge; 70 or 3% received a nonviolent felony charge; 61 or 3% received a violent misdemeanor charge; and 81 or 4% received a violent felony charge. In addition, of the 408 defendants with a firearms related charge, 315 or 77% received no new charge; 18 or 4% received a nonviolent misdemeanor charge; 50 or 12% received a nonviolent felony charge; 9 or 2% received a violent misdemeanor charge; and 16 or 4% received a violent felony charge. These rates of new charges parallel defendants to whom the presumption of detention would not have applied.

PERFORMANCE IMPLICATIONS

Courts, prosecutors and defense attorneys will have to adjust practices to manage the significant changes with presumptive detentions for listed crimes. The Legislature and Governor will have to consider what, if any, charge should constitute a "dangerous or violent felony offense" that overcomes the presumption of innocence and the right to be freed from incarceration before conviction. Additional litigation can be anticipated addressing the nature of the presumption, such as an argument that rejection of the opportunity to apply the presumption can be appealed and under what standard of review. Litigation addressing the propriety of a specific crime being included in legislation as "dangerous or violent felony offense" would also have to be addressed. It can be anticipated that litigation will arise to challenge what qualifies as a "dangerous" felony.

ADMINISTRATIVE IMPLICATIONS

Courts would have to adjust existing rules to incorporate a process for consideration of the permissive presumption of pretrial detention for certain crimes.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None as of January 20, 2026.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Courts will continue to evaluate motions by prosecutors for pretrial detention under the existing rules and cases developed since voters passed the constitutional amendment in 2016.

AMENDMENTS

None noted.