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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Brandt/Moores **ORIGINAL DATE** 1/24/24

BILL

SHORT TITLE Rebuttable Presumption Against Release **NUMBER** Senate Bill 122/ec

ANALYST Davidson

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 \$6,421.9	Up to \$22,538.5	Up to \$22,538.5	Up to \$51,498.5	Recurring	County General Funds
Public Defender Department	\$589.0	\$1,767.0	\$1,767.0	\$4,123.0	Recurring	General Fund
Total	Up to \$7,011.0	Up to \$24,306.0	Up to \$24,306.0	Up to \$55,622.0	Recurring	State, County, and Municipal General Fund

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

Relates to House Bill 44

Sources of Information

LFC Files

Agency Analysis Received From
 Administrative Office of the Courts (AOC)
 Attorney General (NMAG)
 Public Defender Department (PDD)
 Corrections Department (NMCD)
 Department of Public Safety (DPS)

SUMMARY

Senate Bill 122 (SB122) creates a rebuttable presumption against pretrial release for individuals charged with certain crimes, including several enumerated “serious violent offenses,” felonies in which a firearm was brandished or discharged, and felonies resulting in great bodily harm or death. A full list of the enumerated serious violent offenses in the bill can be found in Attachment 1. The bill would also apply this presumption to individuals charged with any felony who are on pretrial supervision, probation, parole, or are within five years of a conviction for one of these identified offenses.

Under SB122, this rebuttable presumption would apply only in cases in which a prosecutor filed a pretrial detention motion and could show probable cause the defendant committed the charged offense. The bill states in cases in which this presumption applies, the prosecutor must establish by clear and convincing evidence that a defendant is too dangerous to release, and the court shall evaluate this based on New Mexico Supreme Court rules. SB122 further clarifies the burden of proof to establish a defendant is too dangerous to release rests with the prosecutor. The provisions of this bill would apply to charges first filed on or after its effective date.

SB122 is functionally identical to the introduced version of 2023 Senate Bill 123 and 2022 House Bill 5.

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

FISCAL IMPLICATIONS

To the extent the provisions of SB122 increase pretrial detention, the proposal is likely to result in additional system costs due to additional detention, while potentially providing benefit in the form of crimes prevented due to offender incapacitation. The presumption would only apply to cases involving the relevant charge types in which the prosecutor files a pretrial detention motion.

Cost of unnecessary detention borne outside criminal justice system. 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 an unnecessary detention have been under accounted, mirroring public perception. This analysis is unable to estimate the impacts given data constraints, but it acknowledges these are significant.

There is evidence that pretrial detention also has a criminogenic effect, increasing new crime after case disposition. A 2018 LFC program evaluation found that likelihood of a new felony arrest rose with length of initial jail stay. 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 because of incarceration, including employment, housing, family, and community relationships. Increasing the risk of recidivism has long-term fiscal implications for county-run detention facilities and for the economy as a whole, as a share of people commit subsequent offenses who may not have otherwise done so.

Costs to counties and the state. This analysis avoids speculating on the future choices of judges and instead estimates a range of costs and benefits resulting from this policy. The lower end of this range assumes the bill does not impact judges' behavior at all, while the upper end assumes

judges grant all pretrial detention motions in which the requirement to detain pretrial applies. It is likely the number of cases in which the presumption impacts judicial behavior, and the resulting costs and benefits, will fall somewhere within this range.

LFC analysis of data provided by the Administrative Office of the Courts (AOC) estimates SB122 could result in up to 1,969 additional pretrial detainees annually. Analysis estimates this could increase detention costs by up to \$22.4 million per year.

Additionally, it is unclear whether any crime will actually be prevented through incapacitation due to greater detention. Defendants in cases where prosecutors file a motion to detain are roughly as likely to commit a new offense in the pretrial period as defendants in cases where prosecutors do not file a motion to detain. In other words, prosecutors operating under the conditions of a rebuttable presumption would be effectively motioning to detain a random sample of defendants who are released under current standards. This analysis provides the highest possible benefits through incapacitation. However, the true benefits will be far lower and could possibly be nonexistent.

Number of Detainees. The estimated cost of this bill is dependent on the number of individuals for whom this rebuttable presumption would apply. The presumption would apply both to individuals who are facing certain charges (Subsection A(1)) and to individuals facing felony charges whose criminal history includes one of those offenses (Subsection A(2)). Charges under which the presumption would apply due to Subsection A include a list of enumerated serious violent offenses (see Attachment 1), felonies during which a firearm was brandished or discharged, and felonies resulting in great bodily harm or death. LFC's estimate of 1,882 additional detainees per year, based on data from AOC, only accounts for the potential impact of provisions of Subsection A(1) identifiable by charge.

Cases covered by Subsection A(2) would include individuals charged for any felony who are on pretrial supervision or post-conviction supervision (probation or parole) for one of the offenses listed in Subsection A(1), or who are within five years of a conviction for one of those offenses. Individuals who are on pretrial supervision, probation, or parole are almost always detained if they are charged with a new felony offense, so these provisions are unlikely to have significant fiscal implications compared with the status quo. However, the provision applying the presumption to individuals who have been convicted of one of the offenses from Subsection A(1) within five years may have more significant costs. LFC does not currently have sufficient data to estimate the number of additional detainees or potential costs that would be covered by Subsection A(2).

Other Costs and Benefits. Costs due to SB122 were calculated based on direct detention costs; however, additional costs to police, courts, district attorney offices, and public defender offices are anticipated. Further, costs borne by individuals who do not pose a risk to the community but are detained are not included.

The benefits of crime prevention only include reported crimes and benefits only reflect potential saved costs to the criminal justice system due to reduced crime; however, tangible and intangible costs borne by victims of these crimes, and communities experiencing high crime rates, and the value of life lost are not included in these figures and could also be significant.

Costs to the Public Defender Department. The Public Defender Department (PDD) anticipates

it will experience increased costs based on SB122 due to (1) an increase in the number of pretrial detention hearings that require appearance and representation and (2) the requirement of preparing and presenting rebuttal evidence. PDD estimates an annual cost of \$881,623.25 for inhouse attorney FTE and \$601,563.90 for in-house core staff FTE. The cost to increase contracted defense is estimated by the agency at \$588,895. The total cost to the agency is estimated at \$1.8 million, with a prorated cost of \$589 thousand in FY23 because of the emergency clause.

SIGNIFICANT ISSUES

Constitutional Concerns. Analysis from the Attorney General’s office, AOC, and PDD raise concerns the creation of a rebuttable presumption against pretrial release could violate Article 2, Section 13 of the New Mexico State Constitution, which requires a prosecutor to prove “by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.” If SB122 is enacted as proposed, litigation regarding its constitutionality should be expected.

Analysis by PDD also discusses the rulings by the New Mexico Supreme Court in *State v. Mascareno-Haidle*, 2022-NMSC-015. Analysis points specifically to the courts ruling 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.”

Agency analysis expressed concern that, if SB122 should be enacted, it would infringe on a person’s constitutional rights, place the constitutional burden on the defendant to prove the negative, and result in extensive litigation over SB122 affects on pretrial detention.

Public Safety Outcomes of Pretrial Release. Pretrial defendants are small contributors to New Mexico’s overall violent crime rate based on reported crime. Research has concluded most proposals to create rebuttable presumptions are “roughly equivalent to detaining a random sample of defendants who are currently released.”

In December 2021, the University of New Mexico’s Institute for Social Research (ISR) released the results of the largest analysis to date on the outcomes of pretrial release reforms in Bernalillo County, which found that 95 percent of defendants did not pick up new violent charges while on pretrial release. Judges released 69.6 percent of defendants pending trial and detained 30.4 percent. In absolute numbers, defendants in 15,134 closed cases had at least some exposure in the community while awaiting trial over a four-year period. Of that group, 81.9 percent were not charged with additional crimes while on pretrial release, 13.1 percent (1,983) were arrested on a new non-violent charge, and 5 percent (757) were arrested on a new violent charge. Nearly 80 percent of defendants appeared for all court dates. These outcomes are comparable to other jurisdictions using empirical risk assessments to inform pretrial release and supervision. While low clearance rates could mean more crimes than arrests are occurring, the outcomes among pretrial defendants in Bernalillo County have remained consistent across several UNM ISR studies.

These findings by ISR in relation to the percentage of new violent charges committed by

defendants have not changed in FY23. Data collected by AOC shows that the percentage of released defendants who did not commit a new violent crime was still 95 percent.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB122 duplicates aspects of House Bill 44, which also proposes establishing a rebuttable presumption in Chapter 21, Article 3 of NMSA. However, House Bill 44's additional section to Ch. 21, Article 3 is more extensive than SB122, and could create additional constitutional concerns.

TECHNICAL ISSUES

Subsection B of SB122 provides that, in cases in which the rebuttable presumption applies, “The court shall evaluate whether the prosecuting authority has satisfied its burden ... by evaluating any factors established by rules approved by the New Mexico Supreme Court for pretrial detention.” PDD raises concerns that Subsection B conflicts with Subsection A. According to the department, if Subsection B controls, then Subsection A “does not create presumptions at all and this bill codifies current practices. If Subsection A controls, then Subsection B is a nullity and does not ensure the court will conduct any individualized assessment of the State’s burden at all.” PDD analysis points out that this problem demonstrates larger drafting inconsistencies.

For example, if the conditions of Subsection (A) or (B) are met, a presumption is automatically in place. Logic suggests that rebuttal would occur at that point; i.e., after the presumption is triggered. PDD points out that Subsection B provides: “If the court rules that the presumption in Subsection A of this section applies to a defendant,” the court would then “evaluate whether the prosecuting authority has satisfied its burden.”

This language is inconsistent with the “shall be presumed” statement in (A) because, by the time that Subsection B would apply, the presumption is already in place.

OTHER SUBSTANTIVE ISSUES

Background Information on Pretrial Release and Detention. In 2016, New Mexico joined a growing national movement to reform cash bail and reduce detention pending trial when voters approved a constitutional amendment changing the conditions under which defendants could be detained without bond. Defendants are now eligible for detention pending trial if they are accused of a felony and if a prosecutor files a motion that they be held. For a judge to grant the motion, the prosecutor must prove by “clear and convincing evidence” the defendant is dangerous and no conditions of release can ensure the safety of the community or any individual. “Clear and convincing evidence” is a high legal standard. Courts apply the same standard to terminate parental rights. The system aims to base pretrial detention on individual defendants’ risk rather than their ability to afford monetary bail. Detention decisions are made by a judge and follow criteria outlined in state statute. Judges consider the nature of the current offense; the strength of evidence against the defendant; the defendant’s criminal history and ability to comply with conditions of release; and the likelihood pretrial supervision can mitigate any public safety risk a defendant poses. In 2017, the 2nd Judicial District became the first district in the state to adopt the Public Safety Assessment (PSA), an empirical risk assessment tool that helps identify defendants at high risk

for committing new crimes and missing court dates. Judges use the tool to inform decisions about conditions of release. The Administrative Office of the Courts is now helping other districts incorporate the PSA into pretrial decision making.

Attachment

1. Serious Violent Offenses Under SB122

AD/rl/ne

Attachment 1 - Serious Violent Offenses under SB 122

Offenses considered “serious violent offenses” under SB123 are as follows:

- murder in the first degree;
- first or second degree human trafficking of a child;
- first or second degree child abuse;
- first or second degree sexual exploitation of a child;
- second degree murder, as provided in Section 30-2-1 NMSA 1978;
- voluntary manslaughter, as provided in Section 30-2-3 NMSA 1978;
- third degree aggravated battery, as provided in Section 30-3-5 NMSA 1978;
- third degree aggravated battery against a household member, as provided in Section 30-3-16 NMSA 1978;
- first degree kidnapping, as provided in Section 30-4-1 NMSA 1978;
- first and second degree criminal sexual penetration, as provided in Section 30-9- 11 NMSA 1978;
- second and third degree criminal sexual contact of a minor, as provided in Section 30-9- 13 NMSA 1978;
- first and second degree robbery, as provided in Section 30-16-2 NMSA 1978;
- second degree aggravated arson, as provided in Section 30-17-6 NMSA 1978;
- shooting at a dwelling or occupied building, as provided in Section 30-3-8 NMSA 1978;
- shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;
- aggravated battery upon a peace officer, as provided in Section 30-22-25 NMSA 1978;
- assault with intent to commit a violent felony upon a peace officer, as provided in Section 30-22-23 NMSA 1978; and,
- aggravated assault upon a peace officer, as provided in Section 30-22-22 NMSA 1978.