

Prepared by the Institute for Social Research

In June 2020, a report by the New Mexico 2nd and 5th District Attorneys – Minority Report: Ad Hoc Committee to Review Pretrial Release and Detention Procedures – outlined concerns regarding preventive detention and pretrial release decision making. In general, the data used in the Minority Report to justify the declarations regarding the criminal justice system in New Mexico typically came from an SJDC report on cases with PTS rather than all cases in SJDC or all cases in Bernalillo County. The rates for cases with PTS are not equivalent to the rates for all cases, resulting in interpretations that overestimate FTAs and NCAs and, as a result, underestimate the effectiveness of the PSA and pre-trial release decision making in Bernalillo County courts. This document provides a preliminary response to the report.

The Minority Report is divided into a series of six sections:

- I. Who is being released?
- II. New Mexico's bail reform was a half measure that failed to incorporate two of the three bases for detention recognized in other jurisdictions.
- III. New Mexico is not yet safer with bail reform and is not as safe as other bail reform jurisdictions.
- IV. Defendants charged with violent crime pose a greater risk of violence.
- V. New Mexico releases more dangerous offenders than other jurisdictions.
- VI. Rebuttable presumptions are used across the country to help identify violent and otherwise risky offenders.

Section I: Who is being released?

The Minority Report is correct in the assertion that Second Judicial District Court (SJDC) have denied over 1,600 motions seeking preventive detention (PTD) from January 1, 2017 to February 29, 2020. The Minority Report states that 23% of those released due to denied PTD motions commit new crime, which is the rate only for those cases with an order for pretrial supervision (PTS) rather than the lower rate reported by the ISR of 18.0% for cases with a release and a PTD motion.

According to the Minority Report, SJDC judges have denied over 1,600 PTD) motions from January 1, 2017 to February 29, 2020 (p. 3). The Institute for Social Research (ISR) tracks PTD motions and shows a similar number of PTD motions denied (1,652). The report continues on to describe that 23% of those released committed a new crime during their pretrial period, citing an SJDC report. This figure appears to be from an SJDC report on Judicial Supervision and Diversion Program Measures from July 1, 2017 through June 30, 2019. This figure was not for all cases with a motion and a release, but for felony cases with an order to pretrial supervision (PTS) that had an assessment and a closure during this time period. This rate was the same for cases in this sample that had a motion filed for preventive detention (492 cases). This rate is higher than the 18.0% reported recently by the ISR that reviewed outcome measures for cases with a PTD motion (Ferguson et al, 2020b). Although this data for the ISR report was only available through March 2019, this rate includes all cases regardless of recommendations to PTS.

The Minority Report states that for the 1,501 released defendants there were 71 domestic violence charges. For BCMC domestic violence cases, nearly two-thirds (65.1%) were nolle pros during fiscal year

2019 (NM Judiciary Statistical Addendum, p. 50), so it is unclear what portion of the 71 cases resulted in a conviction. In addition, no rate is provided for all violent criminal activity. A list was provided in the minority report describing part of the current charges against this group, and listed 1,169 violent felonies, 286 aggravated assaults, 81 armed robberies, 46 rapes, and 24 murders (p. 3). It is unclear to what degree these descriptions are for multiple charges on the same case, so it is unclear how many people committed a new violent crime.

Section II: New Mexico's bail reform was a half measure that failed to incorporate two of the three bases for detention recognized in other jurisdictions.

New Mexico judges consider the defendant's risk of failing to appear in addition to the risk of committing new criminal activity and new violent criminal activity when making release decisions. In addition, the Minority Report compares the failure to appear rates for felonies in Bernalillo County to the rates of failures in other jurisdictions for both misdemeanor and felony cases.

According to the Minority Report, New Jersey takes three factors into account for detention: dangerousness, failure to appear, and obstruction of justice. However, New Mexico takes only dangerousness into account (p. 4). While it is unclear to what degree a history of failure to appear at court hearings increases the likelihood of a motion for preventive detention being granted, information is included on the petition for detention in at least some cases. Furthermore, failure to appear within the past two years increases both the FTA and NCA score on the Public Safety Assessment (PSA) and failure to appear prior to two years increases the FTA score. These increases would place the defendant in a stricter recommendation category on the PSA. In addition, at least some of the preventive detention motions include information regarding obstruction, including threatening potential witnesses. It is unclear how often this occurs, but it seems likely that information included as part of the preventive detention motion would be a factor considered during the detention hearing.

The Minority Report's assertion that the high FTA rate in Bernalillo County, as compared to other jurisdictions, indicates the ineffectiveness of pretrial release conditions and pretrial supervision (p. 6) is not based upon comparable data. Similar to the NCA rate, the FTA rate of 32% appears to be from the SJDC report on Judicial Supervision and Diversion Program, which reports on a subset of all cases filed in the criminal justice system in Bernalillo County. A report by the ISR found that the FTA rate in Bernalillo County for all qualifying cases with a release and PTD was 17.8% (Ferguson et al, 2020b). Additionally, the FTA rate in Bernalillo County from both the SJDC report and the ISR report is for felonies only and does not include misdemeanor cases, which are included in PSA assessments in other jurisdictions and therefore are not comparable.

The Minority Report states that the PSA scores and recommendation would be the same "whether the defendant were charged with a single count of possessing a miniscule amount of drugs or charged instead with multiple counts of first degree murder" (p. 7). This statement is accurate to some degree, but is somewhat misleading. While two defendants may have the exact same risk factors in common other than their charges, the nature of the offense can contribute to the violent flag, which is an indicator of new violent criminal activity. This flag, in addition to a possible motion for preventive detention, and the decisions made by a judge provide opportunity for the charges to be considered during the release decision making process.

While the PSA is criticized in the Minority Report for an "inability" to address dangerousness (p. 8), the PSA functions as intended. The purpose of the PSA is to identify the risk of failure to appear, the risk of committing new criminal activity, and to identify cases where there is a higher likelihood of committing new violent criminal activity. The new criminal activity may not be considered "dangerous" as described

in the Minority Report, but it is measured as intended by the PSA. Therefore, any case where the defendant is likely to commit any new crime is identified rather than just those considered dangerous.

Section III. New Mexico is not yet safer with bail reform and is not as safe as other bail reform jurisdictions.

The Minority Report's assertion that New Mexico is not yet safer with bail reform and not as safe as other bail reform jurisdictions is not supported by comparable data. In addition to using rates reported for a subset of cases rather than all cases in Bernalillo County, the comparisons to a group of New Mexico Counties and jurisdictions are not comparable samples.

The safety rate of 77% listed in the Minority Report, like the NCA rate and FTA rate, is part of the SJDC report on cases ordered to pretrial supervision. A report by the ISR found that the NCA rate in Bernalillo County was 18.0% for cases with a PTD motion, so the safety rate was 82.0% (Ferguson et al, 2020b). The Minority Report compares the safety rate to the average of 74% for four other Counties prior to pretrial reform. While this is the rate reported for just under 1,000 cases across these four Counties, the rates by County vary drastically. According to the report containing this figure (Dole et al, 2019), the safety rate (calculated by subtracting the NCA rate from 1) ranged from as high as 88.4% for 78 cases in Chaves County to as low as 64.3% for 556 cases in Santa Fe County (p. 23). Furthermore, it is not entirely clear that these cases are comparable to the sample of cases used to report rates for cases post bail reform. The second comparison made in the minority report is to the safety rate of other jurisdictions (p. 8). While the safety rate for these other jurisdictions is higher than Bernalillo County, other jurisdictions using the PSA assess both felony and misdemeanor cases and the safety rate calculated for the County by the ISR is closer to the rate of these jurisdictions.

The minority report asserts that this data shows that New Mexico is not safer with bail reform and that it is not as effective as other jurisdictions at identifying those who will commit new crimes. The differences in samples used across several reports indicates that this is not the case, as the safety rate is about 10% higher in Bernalillo County and the rate is slightly lower than other jurisdictions that use different samples under the PSA.

Section IV. Defendants charged with violent crime pose a greater risk of violence.

The Minority Report misinterprets the most restrictive recommendation category of the PSA.

The Minority Report describes again the “inadequacy” of the PSA in evaluating dangerousness, including data from the ISR regarding the type of crime committed and the recommendation level. There are several important factors worth noting. The category for Detain/Max indicates to either detain if constitutional requirements are met OR to release with maximum conditions. It is not solely to recommend detention. The assertion that the PSA is evaluating dangerousness is not accurate, as the intent of the PSA is to identify the likelihood of FTA, NCA, and to flag those with increased risk of NVCA.

Using data from the ISR, the Minority Report described that a defendant charged with a violent crime are most likely to commit a violent crime than other types of crime (p. 10). While this is one way to interpret the data, the more accurate interpretation would be to say that the defendant is more likely to commit a non-violent crime (54.2%) than a violent crime (45.8%). If a defendant has current violent charges, they are more likely to get a violent activity flag on their PSA recommendation.

The claim that research and common-sense show that violent offenders tend to commit violent crimes when reoffending are not true. Research does not show that an individual who commits a violent crime is more likely to commit violent crimes when reoffending.

Section V. New Mexico releases more dangerous offenders than other jurisdictions.

The Minority Report asserts strict judicial adherence to PSA recommendations without supporting data and underreports the percentage of cases for which the DA seeks PTD.

The Minority Report states that, “Data shows that judges frequently follow the PSA recommendation even though it is almost completely divorced from the notion of dangerousness” (p. 11). While the PSA is a tool provided to judges for release decision making, it provides a recommendation and is not always followed if and when conditions of release are set. The ISR found that in approximately 1 in 4 cases (25.2%), the conditions of release set by the judge did not correspond with the PSA recommendation (Ferguson et al., 2020a). Furthermore, in instances where the judge either adhered to the conditions set or set less restrictive conditions, the FTA rate, NCA rate, and NVCA was lower or equivalent to the overall rates and lower than the rates for instances where the conditions of release were more restrictive than the PSA recommendation (p. 17).

According to the Minority Report, the SJDC DA’s office files a much smaller percent of motions for pretrial detention (12.6%) than New Jersey (49%) (p. 12). While this figure is likely calculated based on all BCMC and SJDC case files, nearly all motions are filed in BCMC, with very few being filed during the SJDC portion of the case. Of the 23,118 BCMC cases filed from January 2017 to June 2020, a motion was filed for approximately 3,863 cases, around 16.6% of the total and higher rates in later years (2017 had approximately 9.3% of cases with a PTD motion filed whereas in the first half of 2020, 23.3% of cases filed in BCMC had a PTD motion filed. Furthermore, data collected by the ISR shows that around 46% of these motions were denied compared to the 48% (p. 12) and 51.6% (p. 12) in the Minority Report.

Section VI. Rebuttable presumptions are used across the country to help identify violent and otherwise risky offenders.

Those with an RPO offense are less likely to have an FTA or an NCA than those without an RPO offense, although the rate of NVCA for the NCA was 1.5% higher.

The ISR’s review of rebuttable presumptions across the U.S. found there is considerable variation in the country regarding the use of rebuttable presumptions. This includes how "dangerousness" is defined. There is no national standard in the U.S. for the use of rebuttable presumptions (Torres et al., 2019).

Overall, those with an RPO are less likely to have an FTA or an NCA, but the NCAs are slightly more likely to be violent. While there may be specific individual charges with higher rates, the listed charges do not demonstrably indicate an increased rate of failure to appear or NCAs and a slightly higher percent of violent activity. Of those cases identified as having an RPO, a motion for preventive detention was filed for less than half of the cases (44.9%). Of the cases released, pre-trial outcome measures were calculated for cases with and without an RPO. The FTA rate was lower for cases with an RPO than those with no RPO (12.4% compared to 19.1%). Similarly, the NCA rate was lower for cases with an RPO (11.7%) and higher for those cases without an RPO (17.8%). The NVCA rate was higher for those with an RPO (5.3%) and lower for those without an RPO (3.8%).

While the Minority Report indicates that New Mexico should adopt rebuttal presumption offenses (RPO) similar to the state of California, research provided by the ISR has indicated a lower rate of FTA and NCA among those with an RPO and a slightly higher NVCA rate. The charges identified as an RPO included the following: murder (1st or 2nd degree), voluntary manslaughter, assault (2nd or 3rd degree), aggravated battery (3rd degree), habitual domestic abuse, kidnapping (1st or 2nd degree), child abuse resulting in death or great bodily harm, criminal sexual penetration (1st, 2nd, or 3rd degree), robbery (1st or

2nd degree), aggravated arson (2nd degree), and human trafficking or a child (1st or 2nd degree). These charges were included regardless of whether the charges involved assault or battery against a peace officer.

Conclusion

The statistics used in the Minority Report underestimate the effectiveness of the PSA and pre-trial release decision making in Bernalillo County.

References

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