

LFC Requester:	Austin Davidson
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

Analysis.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 **Amendmen**
 t
Correction **Substitute**

Date 1/20/2024

Prepared: _____

Bill No: SB122

Sponsor Craig W. Brandt
 : Mark Moores

**Agency Name
and Code
Number:** NM AOC; 218

Short Rebuttable Presumption
Title: Against Release

Person Writing Gilbert Jaramillo and Kelly

Analysis: Bradford

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
NA	NA		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
NA	NA	NA		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown	Unknown	Unknown	Unknown		

(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: SB 122 would amend Chapter 31, Article 3 NMSA 1978 Criminal Procedure Act by introducing rebuttable presumptions regarding the pretrial release of certain defendants in certain circumstances. Under the bill, in a pretrial detention hearing, if the prosecuting authority shows either (1) that a defendant is accused of one of the enumerated felonies or (2) that a defendant committed a new felony during a specified (i.e., pending trial or sentencing; on probation, parole, or post-conviction supervision; or, within five years of conviction of the offenses) then a rebuttable presumption would be in place that defendant is not entitled to release under Art. II, Sec. 13 of the New Mexico Constitution. The bill then requires a judge to evaluate if the prosecuting authority has met its burden of proof.

SB 122 contains an emergency clause so that it would take effect immediately.

FISCAL IMPLICATIONS

Rebuttable Presumptions (RP) create an automatic hold in detention of defendants for several days pending the scheduling and completion of a detention hearing. Several recent studies and reports have been conducted based on the criteria presented in similar bills over the last 4 years. The changes proposed in these bills would initially detain large populations of individuals charged with certain charges, and would increase costs for multiple agencies. This will increase costs to multiple agencies: Courts, Detention Centers, District Attorney Offices, and the Law Office of the Public Defender.

Courts

Based on the data provided from the University of New Mexico Institute Of Social Research (UNM ISR) using Bernalillo County data and cost analysis as part of the New Mexico Supreme Court Ad Hoc Committee Report May 2020¹, (Appendixes F and G), there would be significant

¹ <https://www.nmcourts.gov/court-administration/pretrial-release-and-detention-reform/ad-hoc-pretrial-detention-committee/>

cost increases to the courts and local jails for additional resources and staff. In Bernalillo County, the studies have shown there would have been an additional 797 to 1969 individuals held using RPs resulting in 797 to 1969 additional court hearings. Each hearing is estimated to last at a minimum of 1 hour and additional 2.25 hours needed for judge and court staff prep time and completion of scheduling orders and docketing. Total time needed for each hearing is approximately 3.25 hours which projects at a cost of \$178.35 per hearing.

Estimated Court staff resources and time:

- Judge review pleadings/orders and conduct the hearing: 1.5 hours
- Bailiff time: 0.5 hours
- TCAA Scheduling/process pleadings: 0.5 hours
- Court Monitor: 0.5 hours
- Clerk: 0.25 hours
- Total 3.25 Hours with a cost per hearing of **\$178.35**

As an example, the Second Judicial District (2JD) would need an additional 100 to 246 court days to hold hearings 8 hours a day. Based on available court time per year of 230 days which includes subtracting holidays, weekends, vacation time and training days, additional court resources would be needed (judges, bailiffs, court monitors and TCAs). Using UNM ISR reports and data from 2JD, all courts across the state would require additional judges, court staff and court facilities to cover these hearings. Because the analysis was originally focused on HB80 and SB123 from the 2022 and 2023 Legislative Sessions and SB122 may be broader, the court resources needed would increase, possibly double, from these original estimates. A resource and cost analysis should be completed to fully understand the fiscal impact and needs of the courts.

Detention Centers

Jail costs would also be impacted because more people would be held in detention prior to trial. Based on data provided by UNM ISR, an additional 797 to 1969 defendants would have been detained under the HB80 proposal in 2022. **This would increase the number of bed days needed for defendants automatically held (minimum of 5 days) pending a hearing by 3985 bed days to 9845 bed days.** With the Bernalillo County Metropolitan Detention Center (MDC) cost per day per person of \$133.00, this could be an increase of **\$530,005 to \$1,309,385 per year** to hold defendants for 5 days pending a detention hearing. If 50% of the defendants automatically held have a time to case disposition of 180 days, jail costs would increase at an estimated range of **\$9.5 million to \$20.5 million** during the time frame of the data used, July 2017 to March 2020. Because HB44 may broaden the net of presumptive preventive detention, the costs could be more. MDC could see a daily population increase of 20% to 50%. The increased costs statewide to all detention centers would be expected and more resources would be needed.

District Attorney Offices and the Law Offices of the Public Defender would also experience an increase in detention hearings which may result in a need for more attorneys and support staff across the state. In areas of the state that do not have a Law Office of the Public Defenders and use contract attorney's, there would need to be an increase in the availability of local defense council, which currently has a shortage in the state.

SIGNIFICANT ISSUES

This proposal may create constitutional issues based on New Mexico's legal framework under the New Mexico Constitution and New Mexico Supreme Court opinion *State v. Brown*, 2014-NMSC-

038, as well as a potential conflict with federal case law such as *U.S. v. Salerno*, 481 U.S. 739 (1987), and *Stack v. Boyle*, 342 U.S. 1 (1951).

Current Law

Article II Section 13 of the New Mexico State Constitution provides that every defendant has the right to pretrial release. Currently in New Mexico, anyone charged with a felony level offense is eligible for preventive detention. Under that framework, the prosecution first files an expedited motion for detention, and all felony cases are eligible for this request. The prosecution has the burden of proof to establish by clear and convincing evidence that no conditions of release exist to ensure the safety of the community. The court then reviews multiple factors to determine if the prosecution has met its burden. The court then examines multiple factors, including the nature of the offense, the defendant's history, evidence of a likelihood to reoffend, and the danger posed to any person or the community, in order to determine if the prosecution has met its burden.

In FY23, a preventive detention motion was filed on approximately 8.6% of all felony cases filed in New Mexico. As a result of these motions 1,027 defendants were detained during the pretrial period of the case under the current system. From the beginning of FY18 to the end of FY23 a total 6,582 defendants have been preventively detained in New Mexico under the current pretrial justice system.

SB 122 Proposes Changes

The bill introduces a presumption against release that would then have a defendant present evidence or rebut the presumption. The prosecutor would submit evidence as outlined above, but the defendant would have the task of proving that they are not a danger to the community or that there are release conditions that would protect the public. While Section 1(C) of the bill states that it does not shift the prosecution's burden of proof, the effect of a rebuttable presumption does just that as it lowers the threshold of what must be proven by the prosecutor.

Under the current legal framework, prosecutors generally have the burden of presenting evidence of a defendant's guilt; defendants are presumed innocent until guilty. The language of SB 122 could be read to contradict the New Mexico Constitution requiring the "prosecuting authority" to "prove[] by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." Given this constitutional provision, litigation will likely result to resolve the constitutional question of the bill if passed.

Additionally, Section 1(A)(2) creates a rebuttable presumption of dangerousness where a defendant "committed a new felony offense" during a certain time period. This may be read as penalizing a defendant prior to a conviction or evidence that the offense was committed. Where the bill could infringe on the protections that a defendant is presumed innocent until proven guilty, it would invite legal challenge.

PERFORMANCE IMPLICATIONS

As discussed above in "Substantive Issues," the bill would significantly increase the amount of pretrial detention hearings in a such a way that courts would not be able to absorb the workload but would require hiring of additional staff. As stated above and by way of example, a UNM Institute of Social Research Study examining a similar but more limited rebuttable presumption bill found that the Second Judicial District would need an additional 100 to 246 court days to hold hearings 8 hours a day. Based on available court time per year of 230 days which includes subtracting holidays, weekends, vacation time and training days, additional FTEs would be needed

(judges, bailiffs, court monitors and TCAAs).

ADMINISTRATIVE IMPLICATIONS

See “Performance Implications” and “Substantive Issues” above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

The bill appears to be internally inconsistent as it establishes a rebuttable presumption when a prosecuting authority establishes that the defendant is accused of enumerated crime or that the accused committed an enumerated crime during a certain timeframe, but then holds that judicial review is required to see whether the prosecutor met the constitutional burden and that there is no “burden shifting” onto the defendant. A rebuttable presumption by its legal operation requires a defendant to present evidence under a new framework that is not required under the current law.

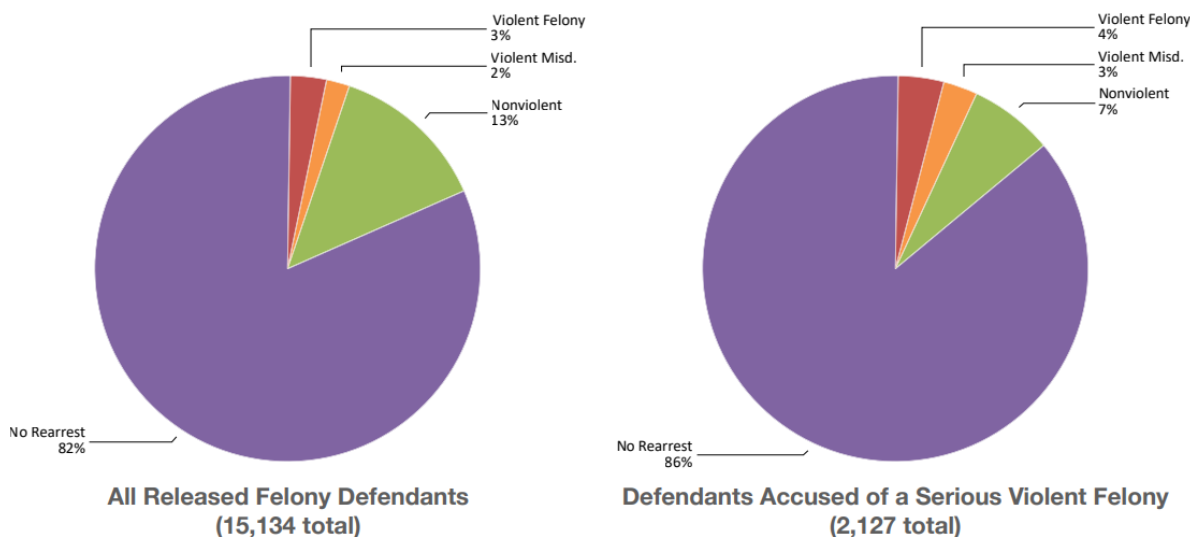
OTHER SUBSTANTIVE ISSUES

The Data on Pretrial Detention

Multiple studies have demonstrated that the desired goal of increasing public safety will not be achieved by introducing “rebuttable presumptions” into the pretrial release process. Analyses from the Santa Fe Institute and the University of New Mexico Institute for Social Research of similar legislation show how often individuals who are identified by these bills are rearrested during the pretrial phase. In Bernalillo County, there were a total of 15,134 felony defendants who were released and their case closed during a four-year period from July 2017 through June 2021. The charge criteria in a prior proposal, HB509, which overlaps with those in SB122 and the current statutory definition of “Serious Violent Offense”, would apply to between 2,127 and 5,092 of these 15,134 defendants. Based on these studies, it is likely that many more defendants may be detained during the pretrial phase of their case which could last months and/or years until those cases are adjudicated.

The SFI/UNM study also measured how often defendants charged with a Serious Violent Offense, the same and/or similar to the “dangerous felony offenses listed in the proposal, are rearrested for various types and severities of crime. As the chart on the right shows, 4% of these defendants are rearrested for a violent felony; 3% are arrested for a violent misdemeanor or petty misdemeanor; 7% are rearrested for a nonviolent offense; and 86% are not rearrested for any new charge during their pretrial period. These numbers are close to those for felony defendants in general, as shown in the chart below. Thus, measured by rearrest, these defendants are not significantly more dangerous to the public, as a group, than other felony defendants.

How Dangerous Are Released Defendants?



Source: Moore, Ferguson, and Guerin, How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? *J. Empirical Legal Studies*, to appear, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143886. Data from AOC based on 15,134 felony defendants released pretrial during 7/1/2017–6/30/2021 whose cases originated in Bernalillo County Metro Court and which were closed during that period.

Further discussion of how bail reform measures have impacted crime trends may be found in Section IV in the LFC Status update on Bernalillo County Crime, Law Enforcement, and Bail Reform. If HB 44 is intended to require detention prior to a detention hearing, the recent UNM analysis may be helpful.

UNM ISR Preliminary Review of Charges, The Public Safety Assessment, Preventative Detention and Rebuttable Presumptions in Bernalillo County, Reporting Brief, December 2021. <http://isr.unm.edu/reports/2021/the-public-safety-assessment-preventive-detention,-and-rebuttable-presumptions-in-bernalillo-county-report-in-brief>

1. 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>

Also from the study:

- 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.
 - 2472 cases had the appearance of the Violence Flag, of those, 2251 or 91% did not have a new violent charge during the pretrial stage of their case.
2. Additional research was conducted by UNM ISR in 2022 during Legislative Session for HB80 which is similar to SB122

- Among the defendants in our database from July 2017–March 2020, HB80 would have detained **between 797 and 1,969 additional people**.*
- Using a conservative figure of 20 days[†] of additional detention at \$133/day, HB80 would have cost taxpayers **between \$2.1 and \$5.2 million** during this period.
- **Four-fifths** of these defendants, **between 656 and 1596** of them, **would not have been rearrested or charged with any new crime** while awaiting trial. Detaining them is expensive, unnecessary, and disrupts lives and families.
- **8%** of these defendants were rearrested and charged with a violent crime while awaiting trial, accounting for **between 61 and 162 arrests** during this period.
- For comparison, in 2020 alone the APD reported **15,262 crimes against persons** [Analysis of NIBRS Group A Crimes from 2018-2020]. Thus HB80 would have **prevented a small fraction** of violent crime during this 33-month period.

3. In a new study (2022) By Cris Moore with the Santa Fe Institute: *How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? A Natural Experiment from New Mexico* findings showed: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4143886

- **Defendants whose current charge is an SVO (section F). Over the four-year period looked at, this would have detained 2127 out of our 15,134 felony defendants, or 14%. Of these 2127 defendants:**
 - **1835 or 86% received no new charge**
 - **80 or 4% received a nonviolent misdemeanor**
 - **70 or 3% received a nonviolent felony**
 - **61 or 3% received a violent misdemeanor**
 - **81 or 4% received a violent felony.**
- **Firearm-related charges are also identified in the study. Based on the charges, there are 408 of these defendants. Of these,**
 - **315 or 77% received no new charge**
 - **18 or 4% received a nonviolent misdemeanor**
 - **50 or 12% received a nonviolent felony**
 - **9 or 2% received a violent misdemeanor**
 - **16 or 4% received a violent felony.**

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS