LFC Requester:	

AGENCY BILL ANALYSIS
2024 REGULAR SESSION

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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 X **Amendment** ___
Correction ___ **Substitute** ___

Date Jan. 22, 2024
Bill No: SB 122-280

Sponsor: Craig W. Brandt & Mark Moores
Short Title: Rebuttable Presumption Against Release

Agency Name and Code Number: LOPD-280
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	**FY25**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

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

(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	589	1,767	1,767	4,123	Recurring	General

(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 is functionally identical to 2022's HB 5 (as introduced), and 2023's SB 123, as introduced.

As context for the synopsis, this analysis initially notes: Article 2, Section 13 of the New Mexico Constitution authorizes judges to detain a felony defendant without bail pending trial "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." N.M. Const. Art II, § 13. 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).

SB 122 would create a statutory scheme authorizing the denial of pretrial release (a.k.a. the *grant* of preventative detention requests) based on rebuttable presumptions that a defendant is dangerous and that no release conditions will reasonably protect the safety of any other person or the community based entirely on charging conditions. "Subject to rebuttal by the defendant," and where the prosecutor requests a hearing, SB 122 would create presumptions as follows:

> Section 1(A) relies on probable cause supporting current charges for enumerated offenses—(the same offenses enumerated in 2022's HB 5), including any felony in which a firearm was brandished or discharged, or any offense inflicting great bodily harm—to create a mandatory presumption ("shall be presumed") that the State has met its constitutional burden of proof for *both* requirements identified by *Mascareno-Haidle*.
>
> Section 1(A)(2) also incorporates what was a separate Subsection B in the 2022 bill, which relies on probable cause supporting "new felony" charges prompting detention if the charge arises while pending trial or sentencing on an offense enumerated in (A)(1), while on

probation or parole for an offense enumerated in (A)(1), or within five years of a conviction for an offense enumerated in (A)(1). Incorporating the language from A(1), if the court finds probable cause that the new felony charge was committed under such circumstances, "it shall be presumed" that the State has met its burden for detention.

Subsection B (Subsection C in the 2022 bill) provides, "If the court rules that the presumption in Subsection A of this section applies to a defendant, the court shall evaluate whether the prosecuting authority has satisfied its burden" of *both* prongs of the test established by the constitution, based on factors set by Supreme Court Rule. *See* Rule 5-409 NMRA.

Subsection (C) (Subsection D in 2022) states: "Nothing in this section shall be deemed to shift the burden of proof to the defendant…. The burden of proof rests with the prosecuting authority."

SUMMARY OF AGENCY ANALYSIS:

The LOPD analysis of SB 122 provided herein is extensive and covers a variety of practical, fiscal, and constitutional concerns.

The "**Fiscal Implications**" section endeavors to estimate the actual fiscal impact on LOPD's budget by also laying out the practical workload implications, particularly in light of LOPD's existing workload challenges. In sum, the proposal in SB 122 would be incredibly expensive and burdensome for the LOPD, exacerbating our existing Sixth Amendment challenges in providing effective representation.

The "**Significant Issues**" section contains three primary discussions:

(1) Constitutional Concerns discusses the ways in which SB 122 (and rebuttable presumptions in general) run afoul of New Mexico's constitution as amended in 2016, as well as broader due process concerns regarding burdens of proof and burden shifting.

(2) Charges not accurate predictors of dangerousness provides an evidence-based assessment of rebuttable presumptions, explaining why pretrial release is not the source of New Mexico's crime rate and how casting a wide net based solely on unproven charges will overwhelm our county jails during a staffing and public health crisis, with no provable benefit to public safety.

(3) Drafting concerns discusses internal inconsistencies within the bill's structure that could lead to litigation, confusion, and potentially undermine the intent of the sponsor.

The "**Performance Implications**" section discusses other practical and constitutional issues that may arise if SB 122 is enacted.

"**Other Substantive Issues**" provides additional resources regarding data and current practices.

FISCAL IMPLICATIONS

LOPD does not have the necessary data to estimate with specificity the financial impact that this bill would have on the department because we lack data on the number of cases that would be

impacted statewide. We are continuing to evaluate the impact that shifting the burden will have on workload, workflow, and the budget. Nevertheless, the fiscal impact of altering a system in which the State must present evidence to *justify* detention to one in which the State enjoys a rebuttable presumption of detention that the defense may *rebut* cannot be overstated.

The LOPD fiscal impact is based on two primary effects of the bill.

First, an increase in the number of pretrial detention *hearings* that require appearance and representation. This increase is anticipated because the identification of charges and timing of charges which can trigger the presumption will certainly incentivize prosecutors around the state to seek detention, knowing that the charging circumstances alone satisfied their own burden of proof for detention. There would be no incentive to evaluate the *need* for detention in an individual case if the charges alone suffice to justify it, and very nearly every case falling within the terms of Section 1(A) of the bill would end up with a detention hearing.

In Albuquerque alone during 2023, the State filed 1,226 motions for preventative detention (within about 100 of both 2021 and 2022). Of those, 57.2% were granted. 242, or 19.7%, were filed on non-violent charges, including 11 motions to detain on a case of simple drug possession.

Over a larger swath of time, as of December 31, 2023, 6,883 detention cases were filed in Albuquerque from 2017 to 2022 and 3289 (47.8%) of those were granted. 409 of those, or 12.4%, were not indicted within the 10 days allowed by rule to continue detention. 6,636 detention cases have "resolved," meaning a final outcome is known. Of those resolved cases, 19.3% were not indicted within the year, and 45.8% ended without a state conviction. Only 16.5% of people on whom the State filed for detention were ultimately sentenced to prison for a conviction on that case.

In 2021, the AOC estimated that adopting a list of presumptively dangerous charges triggering a hearing would result in approximately 800 *additional* detention hearings each year in Albuquerque.

Because the list of presumptive charges was different in that study, that number may not be a perfect match, but with the addition of Subsection (A)(2) criteria, Analyst estimates that number would be even higher. At an average estimated 30-minute hearing per case, 800 hearings would require 400 additional court hours, or 50 additional 8-hour days of court appearance time (for the court, LOPD, and prosecutors). This time estimate does not include the time required to *prepare* for the hearing, which is separately addressed below.

Including staff attorney and contract attorney caseloads, LOPD represents approximately 85% of criminal defendants around the state. Analyst notes that in Judicial Districts without a brick and mortar LOPD office, the LOPD already struggles to get contract attorney coverage of existing hearings on short notice and the strain on contract counsel to cover additional hearings would be significant. The need for additional FTEs to cover the cases handled by staff attorneys is estimated below.

The second effect of the bill with dramatic fiscal impact on LOPD is the requirement of preparing and presenting rebuttal evidence. Currently, the State always has to establish probable cause of new charges for the charges to go forward. Before then (or concurrently if requested, *see* Rule 5-409), and separately required for preventative detention, the State bears the burden to prove – *not the fact of the charges* – but the fact of dangerousness **and** that conditions of release

are inadequate to address the risk. The State presents police reports, criminal history information, and details about the particular manner in which the charges were allegedly committed. Under SB 122, the State would present only evidence of probable cause for the new charges. Because probable cause is an extremely low evidentiary bar, much of the contextual evidence currently presented at pretrial detention hearings would not necessarily be presented.

This presents constitutional concerns, but relevant here, that places the entire evidentiary burden on the defense to address other circumstances ordinarily related to dangerousness and the adequacy of conditions. As discussed below in "Drafting concerns," the nature of the rebuttal is unclear in SB 122. But assuming a defendant is expected to rebut "dangerousness," the defendant would have to prove a negative without a positive to respond to.

If on the other hand, the defendant is required to prove the *absence* of probable cause of the charged crime, they are in no position to do so within days of their arrest. The detention hearing occurs at a time in a criminal case when the defense has not yet received "discovery" from the State (i.e., the fruits of the law enforcement investigation) and in most cases has not even seen a police report. Typically, the only document available at the time of a hearing is the arresting officer's criminal complaint. A criminal complaint is an inherently one-sided account and to rebut any dangerousness inference from the fact of the charges alone, the defense would essentially have to conduct a complete investigation into the criminal allegations themselves, a process that – in preparing for trial – can take months or years. It is impossible to prepare in 5 days.

Practical challenges notwithstanding, any effort to present rebuttal evidence would require defense investigator, social worker, paralegal, and attorney time to prepare a more personalized assessment of the individual defendant, including their ties to the community and potential "mitigation" evidence about their life and circumstances. This is the type of preparation ordinarily reserved for sentencing proceedings and often involves hiring a "mitigation expert." Frankly, it is completely uncertain the lengths to which defendants will need to go to convince judges not to follow the presumption, particularly when the current allegations may be very serious, despite the continued presumption of innocence.

In light of the above evaluation, Analyst estimates ***extremely*** conservatively that SB 122 would result in 2000 pretrial detention hearings annually in Albuquerque alone, (approximately 1,200 similar to 2021 & 2022 numbers, plus a conservative estimate of 800 additional hearings). Because LOPD represents an average of 85% of defendants (the higher percentage skewing toward serious felony cases), Analyst conservatively estimates that LOPD will be responsible for presenting rebuttal evidence in **1700 Albuquerque hearings annually**. Where the defense currently does not need to present *any* evidence other than basic biographical facts about the client, primarily holding the State to *its* burden, the preparation time is almost entirely a new resource burden upon LOPD.

LOPD employed attorneys handle about 2/3 of the LOPD caseload statewide; LOPD contractors handled the remaining 1/3, on average.

LOPD estimates that preparations for each hearing would require an average of 6 hours of attorney time and 6 1/2 hours of support staff time. Again conservatively estimating that attorneys *currently* spend approximately 2 hours preparing for each hearing with 1.5 hours of support staff assistance, LOPD estimates this bill would *increase* LOPD workload by 4 attorney hours and 5 staff hours per hearing. Estimating 2/3 of the 1700 hearings per year handled in

house, that is 1,133 hearings, which represents an increase of 4,533 attorney hours each year and by 5,667 support staff hours—just in Albuquerque.

In-House Staffing Estimates

4,533 attorney hours at 2080 working hours per year (40 hours per week, 52 weeks a year) represents 2.18 full-time attorney equivalents. 5,667 support staff hours represents 2.72 full-time staff equivalents. However, 2080-hour years does not account for time spent on training, administrative or other tasks, or any leave taken. Realistically, **3 additional attorney FTEs** (a combination of mid-level and upper-level attorneys in light of the felony charges) and **3 additional staff FTEs** would be required to manage the increase in Albuquerque hearings alone.

Roughly half of LOPD in-house attorneys and core staff serve the Albuquerque courts. As a result, to account for the needs of the rest of the state, the estimated number of additional FTE needed should easily be doubled to **6 attorneys and 6 core staff**. These are conservative, preliminary estimates.

PD2 level attorneys do not handle felony cases. The agency cost of an LOPD "PD3" mid-level Associate Trial Attorney's mid-point salary including benefits is $136,321.97 in Albuquerque/Santa Fe and $144,811.26 in the outlying areas (due to salary differential required to maintain qualified employees). An LOPD "PD4" higher level (non-supervisor) Associate Trial Attorney's mid-point salary including benefits is $149,063.16 in Albuquerque/Santa Fe and $ $157,552.44 in the outlying areas. Recurring statewide operational costs per attorney would be $12,780 with start-up costs of $5,210. Additionally, average agency salary and benefits, plus recurring operational costs (but excluding start-up costs) for investigators is $95,718.51 and for social workers, $104,802.78.

Averaging these salary ranges and applying to double the Albuquerque estimated FTE for 6 additional attorney FTE (average $146,937.21) and 6 core staff FTE (average $100,260.65) *statewide*, Analyst conservatively estimates the passage of HB 44 would result in recurring costs of $881,623.25 for attorney FTE and $601,563.90 for core staff.

Contractor Cost Estimates

In addition to the recurring FTE costs, LOPD will additionally incur an increase in the recurring costs to LOPD's contract attorney rates. Of the 1700 estimated LOPD hearings in Albuquerque, if 1/3 are handled by contractors, that is 567 *additional* hearings in Albuquerque, potentially double that statewide, or 1134. As a *conservative preliminary estimate,* LOPD estimates the additional preparation and hearing time for detention hearings involving rebuttal will require an additional $250 per flat fee currently paid for such hearings. The increase to recurring statewide contract expenses from enacting HB 44 are therefore estimated at $283,500.

The total recurring increase is therefore $1,766,687.15. If passed with the emergency clause, increased costs for the remainder of FY 22 from February through June would be at least 1/3 of that figure, or $588,895.

Additional considerations

It is important to note that the additional work required by SB 122 is not included in the calculations in the workload study released in January of 2022. This study by an independent

organization and the American Bar Association concluded that New Mexico faces a critical shortage of public defense attorneys. The study concluded, "A very conservative analysis shows that based on average annual caseload, the state needs an additional 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment." https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf

Approximately 85% of criminal defendants are represented by public defenders. The LOPD simply does not have the investigative capacity to prepare a case to rebut presumptions in hundreds if not thousands of detention hearings each year. Meanwhile, by definition, the State has law enforcement at their disposal who have already done an investigation before arresting/charging, so they are in an ideal position to meet their burden under current law.

The practical reality is that defendants will certainly be held under the presumption solely because of our inability to develop an adequate rebuttal under resource constraints. This includes cases handled by LOPD Contract Counsel who represent a great number of LOPD clients, most of whom do not have access to "in house" investigative resources. If privately retained counsel is in a better position to present rebuttal evidence, SB 122 would effectively mean a return to the money bail system before the 2016 amendment in which those with means were released while the indigent languished in jail on unaffordable bonds or detention holds not actually tied to public safety.

Finally, in addition to the direct impact on LOPD resources, there is a concomitant effect on the judiciary and prosecutors in merely holding and attending the hearings.

Additionally, the dramatic effect on county jails is potentially catastrophic. The State can detain a defendant based on the mere filing of a motion until the hearing is held. It is impossible to estimate what percentage of defendants the courts would thereafter detain versus release under the proposed mechanism. Nevertheless, the UNM Institute for Social Research recently estimated that rebuttable presumptions would have incarcerated an additional 797 to 1,969 additional people between 2017 and 2020 just in Albuquerque. *See* UNM Center for Applied Research and Analysis, Institute for Social Research, and Santa Fe Institute report: *Who would rebuttable presumptions detain?* (Dec. 2021) (Elise Ferguson, Cristopher Moore; Helen De La Cerda, and Paul Guerin).

Because New Mexico has no mandate that trial be held within a set period of time upon detention, the potential for lengthy jail stays is significant. This bill comes at a time when New Mexico's jails are in crisis. Staffing shortages and pandemic conditions have made it not only dangerous to reside in jail, but also, despite some improvements over the last year, extraordinarily difficult to access one's attorney in order to prepare a defense to their criminal charges. *See* Joshua Bowling, *Off guard: A crisis looms at New Mexico's largest jail, plagued by understaffing—and unsafe conditions*, Searchlight New Mexico (August 11, 2022), *available at* https://searchlightnm.org/off-guard/; Elise Kaplan, *MDC understaffing leads to state of emergency*, Albuquerque Journal (June 12, 2022), *available at* https://www.abqjournal.com/2507966/mdc-understaffing-leads-to-state-of-emergency.html; Jessica Onsurez, *Officials point to over-incarceration, not just staffing as reason for 'crisis' in county jail*, Alamogordo Daily News (Aug. 17, 2022), *available at* https://www.alamogordonews.com/story/news/2022/08/17/officials-point-to-over-incarceration-not-staffing-as-leading-reason-for-crisis-in-county-jail/65406354007/; Elise Kaplan, *Witnesses said jail*

staff accused her of faking seizure. She died hours later. Albuquerque Journal (Jan. 10, 2023), *available at https://www.abqjournal.com/2563527/ex-woman-was-18th-person-in-mdc-custody-to-die-since-the-start-of-20.html*.

In late September 2022, the Association of Counties presented to CCJ regarding statewide staffing issues, asserting a shortage of 953 staff to reach full staffing of 2,325 positions. Meanwhile, it cited a detention population of 5,436 compared to 3,853 in May 2020. As of May 2022, the report indicated staffing shortages over 40% in two counties, over 30% in seven counties, and near or above 20% in another seven. NM Association of Counties, Detention Facility Report (Sep. 28, 2022), *available at* https://www.nmlegis.gov/handouts/CCJ%20092822%20Item%201%20County%20Detention%20Facility%20Report.pdf. *See* Assoc. Press, *5 New Mexico Jails Less Than Half Staffed; 1 Moving Inmates*, U.S. News & World Rep. (Aug. 20, 2022), *available at* https://www.usnews.com/news/best-states/new-mexico/articles/2022-08-20/5-new-mexico-jails-less-than-half-staffed-1-moving-inmates. The Corrections Department was not faring much better. *See* Curtis Segarra, *New Mexico prisons facing low staff, increased inmate drug use*, KRQE (Sep. 28, 2022), *available at* https://www.krqe.com/news/new-mexico-prisons-facing-low-staff-increased-inmate-drug-use/.

SIGNIFICANT ISSUES

Constitutional Concerns

As the New Mexico Constitution was amended in 2016, "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." N.M. Const. art. II, § 13. Thus, under the New Mexico Constitution, the State bears the burden of persuading a court that a particular defendant is in fact dangerous *and* that no conditions of release would protect the community from the risk they present. *See Mascareno-Haidle*, *supra*.

In the time since 2022's HB 5 was under consideration, the New Mexico Supreme Court announced a constitutional holding that confirms the unconstitutionality of SB 122. *Mascareno-Haidle*, which was decided on June 30, 2022, held that **the nature of current charges** (which carry a presumption of innocence) **cannot satisfy the State's burden of proof for *both* prongs of the detention requirements**. While the State may rely on the pending charges to establish *dangerousness*, "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,'" and must provide additional, distinct evidence in order to meet that burden. 2022-NMSC-015, ¶ 31.

Because the constitution explicitly imposes a burden upon the State, relieving the State of that burden and relying instead merely on the charges themselves, especially with respect to both prongs of the burden, would directly violate Article II, Section 13.

Meanwhile, the federal system which employs a narrow set of presumptively dangerous crimes to determine bail (without a corresponding constitutional provision like New Mexico's) operates with The Federal Speedy Trial Act in mind, which requires that trial be held within 70 days of formal charging to ensure that defendants held without bail do not languish in jail while still presumed innocent.

Additionally, even if the nature of charges were a reasonable litmus test for dangerousness (which this Analyst disputes below), relying on "probable cause" as a substitute for "clear and convincing evidence" similarly contravenes the express language of Article II, Section 13. This is particularly true based on the timing of detention hearings, which are typically held before a *formal* probable cause determination by preliminary hearing or grand jury indictment. Instead, the "statement of probable cause" relied upon in detention hearings is usually the police officer's "criminal complaint narrative," which is based on limited investigation, designed to justify arrest and initial prosecution, and not a determination by a neutral fact-finder. To consider the State's burden satisfied by "probable cause" in such circumstances *reduces* the State's constitutional burden, even if it does not relieve it. *Cf. Commonwealth v. Talley*, __ A.3d__, S. Ct. No. 14 MAP 2021, 2021 WL 6062913 (Pa. 2021) (holding that state constitutional bail provision requiring that "proof is evident or presumption great" standard to justify bail denial imposed a higher burden than mere probable cause or a "prima facie" showing because it clearly contemplated more than a "potential risk" to the community to deny bail).

Finally, although Subsection C attests not to, the bill has the unmistakable effect of shifting the State's constitutional burden to the defendant, to prove the negative. Burden shifting at this stage in a proceeding violates the due process guarantee to a presumption of innocence.

Potential litigation over the constitutionality of SB 122 is guaranteed.

Charges not accurate predictors of dangerousness

Current dangerousness evaluations are based on many circumstances, beyond just the current charges for which a person is presumed innocent, investigation is ongoing, and evidence is scarce. These assessments have proven quite effective at detaining the right people. An August 2021 study by UNM's Center for Applied Research and Analysis, Institute for Social Research[1] shows that the vast majority of people who should be held are, and that people who are not detained largely do not commit new crimes (only 14%), much less violent crimes (only 5%). In fact, most violations are of technical conditions of release, which can and often do result in detention thereafter. Proponents of HB 5 during the 2022 session asserted that the 14% and 5% numbers are underinclusive because they only account for people who are "caught" committing crimes on pretrial release, but the existence of any other "new crimes" by people on release is *unknown* and cannot be the basis for policy-making. Nonetheless, it is likely to be consistent with the overall trend of being only a fraction of the overall crimes committed and not a significant percentage or driver of the crime rate.

SB 122 would create a rebuttable presumption that the prosecution has proven that a person is dangerous and that there are no conditions that will reasonably protect the safety of any person or the community based on a broad list of charges, without any evidence that any of these charges are by themselves reliable predictors of a defendant's dangerousness. The presumption would thus apply to a wide variety of defendants, including many who are not violent.

Furthermore, the presumptively dangerous circumstances enumerated in Subsection A are quite broad, and recent studies of New Mexico's pretrial detention practices indicate that they will not be effective at reducing the overall crime rate. Understanding that some defendants commit new crimes while on pretrial release, it is a small percentage of the overall crimes being committed.

[1] ISR, *Bail Reform: Motions for Pretrial Detention and their Outcomes* (Aug. 2021).

Even if New Mexico decided to detain absolutely *everyone* pretrial, the vast majority of criminal activity would continue. Meanwhile, under SB 122, an enormous number of *presumptively innocent* defendants would be detained despite the fact that they are not *actually* dangerous, merely because of the nature of unproven allegations against them. Relying on the presumption triggers in Subsection A will lead to a huge number of "false positives"; i.e., non-dangerous defendants being held pending trial unnecessarily.

Tellingly, pretrial detention is *already* over-inclusive. LOPD's internal data indicates that 22% of defendants **detained** in Albuquerque between 2017 and the end of 2022 were not ultimately convicted of anything (722 of 3289), excluding those referred to federal court or where guilt was otherwise never adjudicated. An additional 137, or 4.2%, pled down to a misdemeanor offense, possibly just to get out of jail. These numbers do not include defendants who were released or those who were convicted of some lesser felony, including felonies that would not be considered "dangerous" by any measure. Of those convicted, over 30% receive probated sentences because once all the circumstances are known, incarceration is no longer deemed appropriate.

Enumerating crimes that carry presumptive detention status will incentivize prosecutors to charge those offenses in order to *get* detention, leading to an increase in overcharging practices. . Rebuttable presumptions based on *charges alone* will exacerbate this issue.

This is particularly concerning at a time when New Mexico's jails are unsafe and understaffed. In county jails around the state, staffing issues are pervasive and extreme. *See supra*, **Fiscal Implications** at 7-8.

Meanwhile, the strain on medical services during the Covid pandemic worsened an already unstable health care infrastructure. *See* Marisa Demarco, *TURMOIL AT THE STATE'S BIGGEST JAIL: Staff members flee as crises unfold*, Source NM (Jan. 20, 2022), *available at* https://sourcenm.com/2022/01/20/turmoil-at-the-states-biggest-jail-staff-members-flee-as-crises-unfold/. "Last fall, the Tennessee-based company Corizon Health promised more health care staff at MDC, and as county officials signed a $64.8 million contract with the company, they said they hoped it would ease strain on guards." However, that has not been the case, as Source NM reports, "attorneys say there hasn't been a medical director or an on-site physician, and more and more nurses are resigning, leaving a skeleton crew, especially at night." *Id.* Source NM reports:

> A court-appointed medical expert who helped evaluate MDC reported in September on poor medical care at the jail under the previous medical provider Centurion Health. Dr. Robert Greifinger identified systemic gaps in medical care inside the jail, with several patients receiving "substantially deficient" care. The doctor wrote that "these problems were apparent in several deaths" in his evaluation, cited in a Dec. 29 court filing.

Id. "One psychiatric nurse, in her resignation letter, called the worsening situation a 'recipe for disaster.'" Austin Fisher, *Bernalillo County employees filling in for jail workers during staffing crisis*, Source NM (Jan. 21, 2022), *available at* https://sourcenm.com/2022/01/21/bernalillo-county-employees-filling-in-for-jail-workers-during-staffing-crisis/.

In conjunction with unprecedented staffing shortages in other areas, now is the worst possible moment to pass legislation that would *drastically* increase inmate populations. *See also* Elise Kaplan, *Pretrial detention changes would worsen MDC conditions critics say*, Abq Journal (Nov. 28, 2021), *available at* https://www.abqjournal.com/2449983/pretrial-detention-changes-

would-worsen-mdc-conditions-critics-say.html.

Aside from health and safety, incarceration has legal implications for a defendant facing court proceedings. Inmates have much more difficulty getting access to their attorneys and can't adequately participate in preparing a defense. These circumstances inevitably lead to defendants' susceptibility to plead guilty just to get out of disastrous jail conditions, exacerbating the already imbalanced power prosecutors wield in the plea process. While access to clients for defense counsel has seen some improvement since the depths of the Covid crisis, health concerns and staffing issues still are major impediments to access to counsel.

Finally, formal studies show that charges are not a good predictor of behavior while released, but risk assessments and judges *are* good predictors.[2] The December 2021 report estimated a 79% "false positive" rate from presumptions relying on charges alone (based on the criteria used in 2020's HB 80) and 73% false positive rate based on presumptions for "firearms" charges. It also found that only about 3.5% of first-degree felony crimes are committed by people on pretrial release (13 out of 383 between July 2017 and March 2020), and only a small percentage of those 13 would have fallen within rebuttable presumption criteria from 2020's HB 80.

The current system has functioned well and is being continually refined over time through court rules and practices. *See* Rule 5-409. Rebuttable presumptions would neither make current detention practices more accurate or effective, nor reduce the overall crime rate, which is not being driven by pretrial release in the first place.

Drafting Concerns

Analyst reads the bill as stating that if the conditions of (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. However, Subsection B inexplicably 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." (Emphasis added.) This language is wholly inconsistent with the "shall be presumed" statement in (A). By the time that Subsection B would apply, the presumption *is in place*.

The bill nevertheless refers to factors that are currently provided by court rule for the same purpose. *See* Rule 5-409. 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. This problem demonstrates the larger drafting inconsistencies.

Critically, Subsection A begins with the phrase "subject to rebuttal by the defendant," but nothing else in the bill provides for the timing or mechanism for rebuttal. If the bill contemplates the rebuttal evidence being the *basis* for the court's Subsection B evaluation, there are looming questions about the nature of that rebuttal. First, if the State's entire "case" is the fact of probable cause for current charges, then rebuttal would ordinarily be limited in scope to the State's evidence, i.e., the fact of probable cause. As discussed above, defendants are in no position to address the underlying allegations mere days after being accused, *see supra*, **Fiscal**

[2] *See* Institute for Social Research & Santa Fe Institute report: *Who would rebuttable presumptions detain*? (Dec. 2021).

Implications. Moreover, responding to the facts *of the charges* would be insufficient to address the actual dangerousness and adequate conditions determinations that are also at issue. If a defendant is expected to prove they are not dangerous or can be adequately supervised if released, this would expand the shifted burden beyond a direct response to the State's probable cause evidence, which arguably is not "rebuttal evidence" at all. In other words, because "dangerousness" is presumed based solely on probable cause evidence and not actual "dangerousness" evidence, there is no way to directly rebut such a presumption.

Read with Subsection C, which attests the defendant is *not* expected to rebut actual dangerousness, and perhaps is supposed to be rebutting probable cause itself, Analyst concludes that Subsection B is indeed a nullity and would have no legal effect.

Furthermore, Analyst reads SB 122 to say that the fact of probable cause for the charges presumptively proves *both* (1) dangerousness and (2) the fact that no conditions of release would protect the community. As noted above, *Mascareno-Haidle* has conclusively held that this approach is unconstitutional, and the data outlined above indicates that charges are not good indicators of dangerousness at all, but are even worse indicators of the second constitutionally required prong; that no conditions of release would protect the community. Only an individualized, context-driven risk assessment of a particular defendant's circumstances can answer the second question. Despite the suggestion that Subsection B contemplates such review, any such intent of the bill is frustrated by the language in Subsection A, for the reasons noted above.

PERFORMANCE IMPLICATIONS

The unfortunate consequence of a rebuttable presumption approach is that people with the means to immediately hire private counsel and pay for investigator time are more likely to be able to rebut the presumption effectively, returning New Mexico back to where we were under a money bail system and directly undermining the purpose of the 2016 constitutional amendment.

Analyst notes that in New Jersey, often held out as an example of success in the area of rebuttable presumptions, 68% of arrestees are released on either a summons or bail, and the presumption is not at issue. Of the detention motions that are filed, 23% are withdrawn by the prosecutor or dismissed outright by the court and for the remaining 77%, roughly half are granted, and half are denied (comparable to Albuquerque). Overall, only 5.7% of arrestees end up in pretrial detention while facing criminal charges. New Jersey's only charges involving presumptive dangerousness are murder and crimes carrying life sentences, for all other charges, *release* is presumed. *See* Clenn A. Crant, J.A.D., *Report to the Governor and Legislature*, (N.J. 2019), *available at* https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=oIY.

Analyst notes that lengthy detention in jail while awaiting trial can be persuasive in establishing Speedy Trial violations under the Sixth Amendment as well. Analyst recommends that any rebuttable presumption measure be accompanied by statutory speedy trial guarantees, as it is in the federal system (70 days) and in other states that have adopted presumptions, such as New Jersey, which prohibits detention for more than 180 days.

Finally, increasing the rate of pretrial detention impacts the amount of total time that defendants spend incarcerated upon conviction because people are not entitled to "good time" during their jail stay the way they are when serving a post-conviction sentence in the Department of

Corrections. As a result, the amount of "credit" they get for time served prior to trial is less than it would be for the same amount of time served in Corrections.

ADMINISTRATIVE IMPLICATIONS

None noted

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

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TECHNICAL ISSUES

Noted above.

OTHER SUBSTANTIVE ISSUES

Keeping in mind that a person charged with a crime is presumed innocent, it is also important to compare pretrial detention numbers with the ultimate outcome of the criminal case. According to LOPD internal data for Albuquerque, as of December 31, 2023, 1226 motions to detain were filed and heard last year, of which 57.2% were granted. 242, or 19.7%, were filed on non-violent charges, including 11 motions to detain on a case of simple drug possession. Furthermore, as of December 31, 2023, 6636 detention cases filed from 2017 – 2022 were considered to have resolved. 19.3% were not indicted within the year, and 45.8% ended without a state conviction. Only 16.5% of people on whom the State filed for detention were ultimately sentenced to prison for a conviction on that case.

ALTERNATIVES

Continued refinement of the current system, incorporating data as it becomes available. *See* SF New Mexican, Editorial, *Improve, don't toss out, New Mexico's bail reform* (Jan. 20, 2023), available at https://www.santafenewmexican.com/opinion/editorials/improve-dont-toss-out-new-mexicos-bail-reform/article_2bbd80b2-98fc-11ed-a98a-e7b4ce0534d3.html

Judicial training to ensure best practices in applying current constitutional and Court Rule requirements.

Funding and training, expansion of effective pretrial supervision programs to ensure compliance with conditions of release.

Prioritizing the successful prosecution of suspects to reinforce the integrity of the criminal legal system and increase deterrence.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. The State will be held to its constitutional burden.

AMENDMENTS

None.