INSTITUTE FOR SOCIAL RESEARCH

July 12, 2019

From: Samuel Torres, M.A., Paul Guerin, Ph.D., Elise Ferguson, M.A.

To: Former Justice Charles Daniels

Re: Pre-Trial Detention

On May 23, 2019 you sent me (Paul Guerin) an email and asked:

"Do you know of any research supporting the theory that the DA's proposed presumption offenses are predictive of likely commission of dangerous crimes on pretrial release?"

We have read DA Torrez's letter to the Governor regarding a proposed constitutional amendment and pretrial detention bill that together form the basis of a new framework for pretrial detention in New Mexico. The following is our response. We focus on three areas.

1. A review of literature for research supporting the claim of a national standard for allowing defendants to be detained on the basis of flight risk and obstruction of criminal process in addition to detention on the grounds of dangerousness.
2. A review of literature on the use and public safety improvement potential of rebuttable presumptions.
3. A review of existing preventive detention motion filing data in the Second Judicial District Court reporting the result of the hearing, the FTA, and NCA rates.

As you know, judges in Bernalillo County currently gauge felony defendant's risk for committing a new crime or failing to appear in court with the aid of the Arnold Venture's Public Safety Assessment (PSA) risk assessment instrument. Given judges' access to the information provided by this tool, the purpose of this memo is to consider the extent to which DA Torrez's proposals regarding rebuttable presumptions of detention would improve public safety decision-making beyond the information provided by the PSA. The memo concludes that as written, portions of the amendment and bill concerning rebuttable presumptions will not improve public safety by detaining some defendants before trial.

National Standards for Pretrial Detention and Release

DA Torrez's suggestion that the framework will align New Mexico with "the national standard" is not supported by our review of the literature. As far as we have been able to determine, there is no set of national evidence-based or best practices for pretrial release/detention supportive of the full combination of changes proposed. Standard 2.8 of the NAPSA Standards on Pretrial Release (National Association of Pretrial Service Agencies [NAPSA], 2004) and Standard 10-5.8 of the ABA Standards for Criminal Justice: Pretrial Release (American Bar Association [ABA], 2007) recommend the judicial officer should take into account "any facts justifying a concern that a defendant will present a serious risk of flight or of obstruction" when considering whether there exist any conditions that would assure a defendant's appearance in court and protection of the community, so the DA's claim that permitting defendants to be detained on the basis of these factors will bring the state closer to some nationwide standard is defensible. However, each of these standards only recommend rebuttable presumptions of detention "in cases charging capital crimes or offenses punishable by life imprisonment without parole." In contrast, the DA's pretrial detention bill specifies presumptions for a wider range of conditions including: commission of violent felonies, firearm possession or availability, convictions for felony offenses within the past five years, commission of felony offenses while pending trial or sentencing, intimidation of witnesses or victims, and commission of felony offenses while under probation, parole or post-conviction supervision.

Use and Public Safety Improvement Potential of Rebuttable Presumptions

There is also considerable heterogeneity in how rebuttable presumptions are used across jurisdictions. Federal decisions are guided by the 1984 Federal Bail Reform Act, according to which defendants become eligible for pretrial detention only if the nature and circumstances of their charged offense falls within a set of specified conditions indicative of serious risk of danger, flight, or obstruction of justice. If any of these conditions are met, the federal judge holds a detention hearing during which the prosecution must prove that "there are no conditions of release that will reasonably assure the appearance of the defendant and the safety of the community" to secure pretrial detention (Reiter, Sullivan, & Frank 2013:344-345). A rebuttable presumption of detention, in which the burden of proof shifts to the defendant to show he or she is *not* a risk, is activated in only two situations: (1) the defendant committed a detention eligibility-triggering offense while on pretrial release in the past and less than five years have passed since release from prison for that offense, or (2) the defendant is charged with one or more of a set of very serious offenses enumerated in the statute, originally limited to a drug offense punishable by at least 10 years or an offense involving the use or possession of firearms (Marcella, 1988).

At the state level, as of 2012, 48 states and D.C. had laws permitting courts to detain or conditionally release defendants based on "dangerousness," 46 allowed pretrial detention of dangerous defendants, and 44 permitted judges to consider the defendant's present charge in determining dangerousness. Baradaran and Mcintyre (2012) noted that in determining dangerousness all states relied on some combination of the circumstances surrounding the present offense, the defendant's past conduct, and judicial discretion regarding defendant's circumstances and character, but exact methods varied by state. Of those states that allowed pretrial detention of defendants according to dangerousness, 29 had statutory rebuttable presumptions of detention for defendants charged with specific crimes and 5 had rebuttable presumptions of detention for defendants who had previously been convicted of specific crimes.

Variation in the content and application of rebuttable presumptions across jurisdictions notwithstanding, the proposition that a defendant's current charge alone is predictive of his or her subsequent involvement in dangerous crimes is not supported in extant research. In their follow-up of nearly 72,000 felony defendants released pretrial between 1990 and 2006, Baradaran and McIntyre (2012) found that although defendants initially charged with a violent offense were more likely to be rearrested for a violent felony than the average defendant, recidivism rates were low in absolute terms regardless of original offense. For example, for teenage defendants previously convicted of a violent felony with at least four prior arrests and an active criminal justice status—the group of persons most likely to be rearrested in the sample—an initial felony charge of murder was associated with a 19.4% rearrest likelihood, followed by 15% for a robbery charge, 13% for a rape charge, and 11% for an assault charge. Regarding the probability of rearrest for violent offenders overall, they concluded that "those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial… [and after breaking] out rearrests for violent crime... no group was composed mostly of people who will be rearrested" (Baradaran & McIntyre, 2012:528, emphasis original). In their meta-analysis evaluating predictors of pretrial failure across 13 studies, Bechtel, Lowenkamp, & Holsinger (2011) found that a defendant's current felony offense significantly predicted rearrest but was unrelated to failure to appear to court or the commission of a new crime.

Furthermore, some of the offenses or statuses the DA lists in his pretrial detention bill framework are arguably questionable indicators of dangerousness. For instance, a defendant "armed with a firearm or had a firearm readily available during the commission of the charged felony…" does not require any explicit act of violence to have been committed to activate a presumption of detention against a defendant. But even if each of the listed conditions were reliable predictors of dangerousness, presumptions of detention would still not be warranted to increase public safety because they preclude consideration of other factors known to influence recidivism likelihood. Many of these factors, including current age, prior violent offending, and prior incarceration, are already included in the Arnold Venture's Public Safety Assessment (PSA) in use by the Bernalillo County courts. Rebuttable presumptions of detention thus have the potential to overestimate the danger posed by defendants charged with the enumerated crimes and underestimate the risk of defendants whose current charge happens to fall outside the specified offenses.

As a consequence, rather than enhancing public safety, overbroad use of presumptions of detention may jeopardize community protection in at least two ways. First, to the extent that presumptions err in selecting defendants for detention who are of low or moderate danger to the public, they expend limited detention resources on persons who could otherwise be released on their own recognizance or be supervised within the community while awaiting trial. Second, a collection of studies conducted by the Arnold Ventures have found that if low- to moderate-risk defendants are unnecessarily detained pretrial, their recidivism likelihood may increase rather than lessen (LAJF, 2013). Such defendants' heightened probability of reoffending adds to the public safety risk already posed by those individuals with a moderate or high level of dangerousness who remain free in the community because their risk level was underestimated, or detention resources were not available to incapacitate them.

Nevertheless, rebuttable presumptions and/or the use of criteria in determining release eligibility that are not predictive of failure to appear or new criminal activity can still serve the purpose of liability protection. That is, they protect actors in the local criminal justice system from liability in high-profile incidents. If rebuttable presumption use is limited to cases in which defendants are charged with offenses punishable by life imprisonment, and other pretrial detention decisions are left to judges' discretion and informed by risk assessment tools like the PSA, they can ensure reputation protection and align with national standards without undermining public safety.

Analysis of Preventive Detention Motion Data

The following reports preventive detention motion data we have collected as part of our work with the County dealing with criminal justice system efficiencies in Bernalillo County. The data reviewed includes all PSA study cases for which a preventive detention motion was filed and the motion was denied at the evidentiary hearing between July 2017 and August 2018. During this time frame approximately 7,844 cases were filed and 19.5% (1,533) had a preventive detention motion filed.

Approximately 46% of the 1,533 preventive detention motions were granted and 54% were denied at the evidentiary hearing. We reviewed preventive detention motions that were denied and where the case had closed and measured their failure to appear rate (FTA) and new criminal activity (NCA) rate compared to those cases where a preventive detention motion was not filed and where the case had closed.

The review of these cases provides an opportunity to test the idea that preventive detention motions filed in Bernalillo County improve public safety. Support for this idea will be shown if denied preventive detention motion cases have substantively worse outcomes compared to cases where no preventive detention motion was filed. Outcomes of interest are FTA to court and NCA. Because the DA requests preventive detention motions on cases with defendants who the DA presumes are a greater threat to public safety than on cases with defendants in which there is less of a threat to public safety the FTA and NCA outcomes differences should be large. This expectation is tempered because in these cases, while the DA believed they were a risk to public safety the evidentiary hearing judge did not support this review and so denied the preventive detention motion.

Table 1 reports the Failure to Appear (FTA) rate by score and total for cases where no preventive detention motion was filed and cases where a preventive detention motion was filed and denied. Overall FTA rates were higher for cases where a prevention detention motion was filed and denied compared to cases where no motion was filed. In total 2.9% more of the preventive motion denied cases failed to appear at a court hearing during their pre-trial period compared to cases where a preventive detention motion was not filed. The difference varied by FTA score. Individuals with a denied preventive detention with an FTA score of 1 or 6 failed at a lower rate while individuals with an FTA score between 2 and 5 failed to appear at a higher rate.

Table 1 Denied Preventive Detention Motion Failure to Appear Rate		
	No Motion Filed	Motion Denied
FTA Score	FTA Rate	FTA Rate
1	4.4%	1.9%
2	8.6%	10.8%
3	11.8%	21.1%
4	15.9%	21.2%
5	17.7%	21.9%
6	23.8%	23.1%
Total	12.3%	15.2%

Table 2 reports the New Criminal Activity (NCA) rate by score and total for cases where no preventive detention motion was filed and cases where a preventive detention motion was filed and denied. Overall NCA rates were higher for cases where a prevention detention motion was filed and denied compared to cases where no motion was filed. In total cases with a denied preventive detention motion new criminal activity rate was 17.0% compared to 15.0% for cases where a preventive detention motion was not filed and varied by NCA score.

Table 2 Denied Preventive Detention Motion New Criminal Activity Rate		
	No Motion Filed	Motion Denied
NCA Score	NCA Rate	NCA Rate
1	7.6%	5.1%
2	11.1%	5.4%
3	12.1%	28.6%
4	17.2%	22.4%
5	25.9%	18.2%
6	25.4%	20.0%
Total	15.0%	17.0%

The total FTA and NCA rate were slightly higher for denied preventive motion cases compared to other cases and varied by FTA and NCA score, but not substantively large enough to provide sufficient support for the assertion that preventive detention improves public safety as measured by the FTA rate or NCA rate.

While allowing defendants to be detained on the basis of flight risk and obstruction of criminal process in addition to detention on the grounds of dangerousness is consistent with national standards, our review suggests adding these criteria as suggested by the DA will be of limited benefit for reducing rates of new criminal activity or failure to appear in court in Bernalillo County. Further, our review did not find support for the use of rebuttable presumptions for public safety improvements and a review of existing preventive detention motion filing data in the Second Judicial District Court did not find that preventive detention motions substantively improved public safety as measured by FTA and NCA rates.

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