

# Department of Planning and Budget

## 2007 Fiscal Impact Statement

**1. Bill Number**      **HB 440**

**House of Origin**    ☐ Introduced      ☐ Substitute      ☐ Engrossed  
**Second House**    ☐ In Committee    ☒ Substitute      ☐ Enrolled

**2. Patron**          Rust

**3. Committee**    Senate Courts of Justice

**4. Title**            **Presumptive denial of bail for undocumented immigrants**

**5. Summary/Purpose:**

Under current law, for persons charged with specified crimes, a judicial officer, usually a magistrate, shall presume that they are unlikely to appear for trial or they pose a threat to public safety and, thus, deny bail to such persons. This presumption is rebuttable before a judge.

The proposed legislation would add many offenses to the list for which the presumption would be applicable if the arrested person were identified by the U.S. Immigration and Customs Enforcement as being illegally present in the United States. The largest classes of offenses added to the list would be felony drug offenses, driving while intoxicated offenses, and weapons offenses. Some of the offenses in the latter two classes are misdemeanors.

However, the proposed legislation provides that the presumption would not exist for any misdemeanor offense or any felony drug offense unless the U.S. Immigration and Customs Enforcement has guaranteed that it will issue a detainer for the initiation of removal proceedings for persons charged with those offenses and has agreed to reimburse for the cost of the incarceration of those offenders from the time of the issuance of the detainer.

**6. Fiscal Impact:** Indeterminate. See Item 8.

**7. Budget amendment necessary:** No.

**8. Fiscal implications:**

The state reimburses localities \$8.00 per day for each person held in local and regional jails awaiting trial. Therefore, by making it harder for persons accused of committing certain offenses, and who are not legally present in the United States, to be released on bail, thereby increasing the number of people in jail awaiting trial, the proposed legislation could have a fiscal impact on the state. However, the provisions of the legislation create several unknown factors which make it difficult to project a cost.

The first such factor is the requirement that the accused be identified by the U.S. Immigration and Customs Enforcement as being illegally present in the United States.

Currently, magistrates, who are the officials who usually make the initial decision on bail, do not determine if an accused person is not legally present in the country and law enforcement officers do not usually make that determination when arresting a person. Law enforcement officers do conduct criminal history checks on persons who have been arrested and provide the results of those checks to the magistrate for his use in determining whether to release the accused on bond. It is unclear whether local law enforcement officers would be able to make a similar inquiry of the U.S. Immigration and Customs Enforcement (ICE) regarding legal presence before taking the accused before a magistrate. Similarly, if the law enforcement officer were able to make such an inquiry, it is unclear to what extent ICE could respond in a timely manner. Thus, if the accused, upon being brought before a magistrate, had not been identified as being illegally present in the United States, either because the law enforcement officer had not been able to make the inquiry of ICE or because ICE had not responded, the presumption against bail set out in this proposed legislation would not apply.

The other factor making it difficult to project the impact of this legislation is the provision that it is not applicable in the case of misdemeanors or drug felony offenses unless ICE has guaranteed that it will issue a detainer in all such cases and that it will reimburse for the costs of incarceration from the time of the issuance of the detainer. At present, there is no such guarantee or agreement from ICE. It is not known when there will be any such guarantee. Furthermore, if it were to enter into such agreements, ICE could limit its agreement or guarantee to certain specified offenses, rather than all those set out in the proposed legislation. In summary, it is not known which misdemeanor or felony drug offenses, if any, for which ICE would guarantee that it would issue a detainer and reimburse for the costs of incarceration, nor when any such guarantee would be granted.

The proposed legislation does include some other new offenses to which the presumptive denial of bail for persons not legally present in the United States would be applicable and which would be not affected by the requirement of an ICE guarantee. The Virginia Criminal Sentencing Commission has been able to project the additional number of persons charged with these offenses that would be held longer in jail awaiting trial or pending release on bond as a result of the legislation and for which the state would have to reimburse the localities \$8.00 per day.

Because time spent in jail awaiting trial is applied toward an offender's final sentence, this extra time in jail would result in less time spent in state correctional facilities for persons convicted of a felony. The Sentencing Commission has, therefore, projected the number of prison beds that would be freed up by this legislation because of offenders spending more time in jail. Because the Department of Corrections could use those freed-up beds to bring in more "out of compliance" state-responsible inmates from local jails, for which the state reimburses localities \$14.00 per day, this aspect of the legislation would result in a savings to the Commonwealth. Based on the Sentencing Commission's bed projections for jails and prisons, the costs for more persons awaiting trial would be largely offset by the savings from having fewer out of compliance state responsible inmates.

It needs to be noted that the Sentencing Commission has also projected the potential full impact of the proposed legislation, assuming that ICE would provide the requisite guarantees for all offenses covered by the legislation. Under those circumstances, the additional per diem costs for persons being held in jail awaiting or release on bond would far outweigh the

savings released by freeing up additional prison beds for out of compliance state responsible inmates. Because of the uncertainty regarding to what extent and when any of those guarantees would be provided, those potential impacts are not included in this analysis.

**9. Specific agency or political subdivisions affected:**

Compensation Board

Local and regional jails

Department of Corrections

**10. Technical amendment necessary:** None.

**11. Other comments:** None.

**Date:** {2/26/2008} rwh

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