

LFC Requester:	
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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: Date 1-22-16
Original **Amendment** **Bill No:** HJR13
Correction **Substitute**

Sponsor: David Adkins & Patricio Ruiloba **Agency Code:** 264
Short Denial of Bail to Certain **Person Writing** Gail MacQuesten
Title: Defendants, CA **Phone:** 466-0532 **Emai** gailmacquesten@q.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	0	(unknown)	(unknown)	(unknown)	recurring	general

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: SJR1
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HJR13 proposes to amend Article 2, Section 13 of the New Mexico Constitution to allow courts to deny bail to a defendant charged with a felony if the prosecutor proves by clear and convincing evidence at a hearing that no release conditions will reasonably:

- Ensure the appearance of the defendant; and
- Protect the safety of any other person or the community.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

HJR13 proposes a constitutional amendment, and the secretary of state's office will incur expenses in adding the proposed amendment to the ballot at the next general election, or in conducting any special election for the purpose of considering the amendment.

If the amendment is adopted, there may be more complex bail hearings, which will mean increased costs to the courts, the public defenders and the district attorneys. If more defendants are held without bail there will be an increase in costs for incarceration.

SIGNIFICANT ISSUES

HJR13 proposes to amend New Mexico's constitutional provision governing bail in two ways.

First, it changes the standard for denying bail. As currently written, the New Mexico Constitution provides that all persons shall be eligible for bail, with the following exceptions:

- defendants charged with capital offenses when the proof is evident or the presumption great;
- defendants charged with a felony who have two or more prior felony convictions within the state; and
- defendants charged with a felony who have one prior felony within the state if the current charge involves the use of a deadly weapon.

HJR13 keeps the exception for capital offenses. But HJR13 replaces the provisions that focus on prior offenses with language that focuses directly on the two classic reasons for denying bail: the need to ensure the appearance of the defendant and to protect the safety of any other person or the community. Bail may only be denied, however, if the prosecuting authority proves by clear and convincing evidence that no release conditions will reasonably ensure the appearance of the defendant and protect public safety.

New Mexico's existing constitutional provision on bail says nothing about ensuring the appearance of the defendant, although that is the traditional reason for denying pre-trial release. HJR13 adds language recognizing that if no release conditions will reasonably ensure the appearance of a felony defendant, the defendant may be held without bail.

New Mexico's existing constitutional provision looks to prior in-state felonies as a reason to deny bail. This may have been an indirect way of predicting whether the defendant posed a danger. HJR13 looks directly at whether release conditions would reasonably protect the safety of any other person or the community. The language on dangerousness is similar to the language used in the federal Bail Reform Act of 1984, 18 USC Section 3142. The United States Supreme Court upheld the language in the Bail Reform Act against the claim that detention based on the defendant's dangerousness violates due process. See *United States v. Salerno*, 481 U.S. 739 (1987).

PERFORMANCE IMPLICATIONS

HJR13 applies a different standard for denying bail in noncapital felony cases, focusing on the defendant's flight risk and the danger the defendant poses. Bail hearings will require clear and convincing evidence that no release conditions will reasonably ensure the defendant's appearance and protect the safety of any other person or the community. This is a more detailed showing than simply showing prior convictions and examining the pending charges to see if they involve use of a deadly weapon.

Focusing on flight risk and danger makes more sense than looking only to prior felonies. Although prior felonies may be an indication of dangerousness, HJR13 recognizes that a defendant without prior felonies may be dangerous and a threat to the community, and a defendant's flight risk can't be determined by how many prior felonies the defendant has.

ADMINISTRATIVE IMPLICATIONS

If the amendment proposed by HJR13 is adopted, the courts will need to review their criminal rules on bail to make them consistent with the new provisions.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SJR1 also proposes a constitutional amendment on bail. There are two significant differences in the proposals.

First, SJR1 (unlike HJR13) contains no provision regarding a defendant's flight risk. The only basis for denying bail to non-capital felony defendants under SJR1 is dangerousness.

Second, SJR1 provides that a person who is not a danger shall not be detained solely because of

financial inability to post bail. The New Mexico Constitution already provides, as does the federal constitution, that “excessive bail shall not be required.” SJR1’s provision requiring release of non-dangerous defendants if they are not financially able to post bail is likely a response to the New Mexico Supreme Court’s decision in *State v. Brown*, 2014-NMSC-038. In that case the court wrote:

Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant shall not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.

Brown, 2014-NMSA-038, ¶ 53. It appears that the New Mexico Supreme Court has already determined that setting bail so high that a person otherwise eligible for bail cannot meet it would be “excessive” under existing constitutional provisions. Therefore, it would be redundant to amend the constitution to provide that a person “otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.”

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Release on bail will be governed by existing constitutional provisions, which allow bail to be denied only in limited circumstances that do not explicitly include dangerousness or flight risk.

AMENDMENTS

None suggested.