

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)

*and*

[DFA@STATE.NM.US](mailto: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 2-2-16  
**Original**     **Amendment**        **Bill No:** HJR20  
**Correction**     **Substitute**   

**Sponsor:** William "Bill" R. Rehm    **Agency Code:** 264  
**Short**    Denial of Bail for Certain    **Person Writing**    Gail MacQuesten  
**Title:**    Felonies, 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)**

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HJR13; SJR1  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

HJR20 proposes to amend Article 2, Section 13 of the New Mexico Constitution to:

1. Move the prohibition against cruel and unusual punishment to its own paragraph.
2. Allow bail to be denied for offenses involving acts of violence on another person, or sexual assault offenses on another person, when
  - the proof is evident or the presumption great and
  - the court finds, based on clear and convincing evidence, that there is a substantial likelihood the defendant’s release would result in great bodily harm to others.
3. Allow bail to be denied for offenses when the proof is evident or the presumption great and the court finds, based upon clear and convincing evidence, that
  - the defendant has threatened another with great bodily harm and
  - there is a substantial likelihood that the defendant would carry out the threat if released.
4. Require courts, when fixing the amount of bail, to take into account
  - the seriousness of the offense charged
  - the previous criminal record of the defendant and
  - the probability of the defendant appearing at the trial or hearing of the case.
5. Allow a defendant to be released on the defendant’s own recognizance in the court’s discretion.

The amendment proposed by HJR20 shall be submitted to the people at the next general election or at any special election prior to that date that may be called for that purpose.

**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.

HJR20 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 an increase in bail hearings. Bail hearings under HJR20 require detailed showings, which will mean increased costs to the courts, the public defenders and the district attorneys. It is not known whether the effect of the amendment would be to increase the number of persons held pending trial or decrease the number of persons held pending trial, so it is difficult to predict if there will be an increase or decrease in costs for incarceration.

## **SIGNIFICANT ISSUES**

HJR20, if adopted, would change the standard for denying bail, and would set out issues a court must consider in setting the amount of bail.

### The standard for 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.

HJR20 keeps the exception for capital offenses, but replaces the provisions regarding felonies with detailed provisions that turn on the likelihood the defendant committed the offense charged and the likelihood the defendant poses a danger if released. For offenses involving acts of violence or sexual assault offenses, bail may be denied if proof of the offense is great and the court finds based on clear and convincing evidence that release of the defendant would result in great bodily harm to others. For all offenses, bail may be denied if the proof is evident and the court finds, based upon clear and convincing evidence, that the defendant has threatened another with great bodily harm and that there is a substantial likelihood that the defendant would carry out the threat if released.

HJR20 therefore changes the standard for bail in the following ways:

- The current standard allows bail to be denied in capital cases and in felony cases if certain conditions are met; HJR20 allow bail to be denied in capital cases and for offenses (not necessarily felonies) if certain conditions are met.
- The conditions for denying bail under the current standard focus on prior felonies in state, and whether the current charge involves use of a deadly weapon; HJR20 focuses on proof of the current offense and some indication of dangerousness. For offenses involving acts of violence or sexual assault, there must be clear and convincing evidence that release of the defendant would result in great bodily harm to others. For other offenses, there must be clear and convincing evidence that the defendant has threatened another with great bodily harm and there is a substantial likelihood that the defendant would carry out the threat if released.

“Flight risk” is not a reason for denying bail under existing provisions or under HJR20.

### The amount of bail:

As currently written, the New Mexico Constitution provides that “excessive bail shall not be required.” HJR20 leaves that provision in place, and adds that in fixing the amount, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant and the probability of the defendant appearing at the trial or hearing.

In *State v. Brown*, 2014-NMSC-038, the New Mexico Supreme 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. HJR20 sets out limited circumstances in which a defendant may be denied bail outright. In all other circumstances, bail cannot be so high as to be unattainable. In considering the factors imposed by HJR20 (seriousness of offense, previous record, probability of defendant’s appearance) courts will also have to take into account *Brown*’s warning that if a defendant is entitled to bail, the amount cannot be prohibitive.

## **PERFORMANCE IMPLICATIONS**

By using the word “offenses” instead of “felonies,” HJR20 allows bail to be denied in misdemeanor cases (if the other criteria set out in HJR20 are met).

The standards for denying bail under HJR20 are detailed, requiring the prosecutor to show that “the proof is evident or the presumption great” that the defendant committed the crime charged, and clear and convincing evidence that there is a substantial likelihood the defendant’s release would result in great bodily harm (if the offense charged is a crime of violence or sexual assault) or that the defendant has threatened another with great bodily harm and that there is a substantial likelihood that the defendant would carry out that threat. 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.

If HJR20’s concern is protection of the public, it is unclear why bail can only be denied based on the likelihood that the defendant’s release would result in great bodily harm if the underlying offense is a crime of violence or sexual assault. HJR20 recognizes that bail may be denied if the defendant has threatened another with great bodily harm and there is a substantial likelihood that the defendant will carry out that threat, no matter what the underlying offense is.

HJR20 requires the court to take into consideration the probability of the defendant appearing at the trial when setting the amount of bail. But HJR20 does not recognize “flight risk” as a reason for denying bail. A known flight risk who did not meet HJR20’s criteria for denying bail would have to be given bail. And given the language in *Brown*, it appears that the court could not set bail so high that the flight-risk defendant could not meet that bail.

## **ADMINISTRATIVE IMPLICATIONS**

If the amendment proposed by HJR20 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 proposes a constitutional amendment that would allow courts to deny bail to a defendant charged with a felony if the state proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. SJR1 also provides that a person who is not a danger and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.

HJR13 proposes a constitutional amendment that would allow courts to deny bail to a defendant charged with a felony if the state proves by clear and convincing evidence that no release conditions will reasonably ensure the appearance of the defendant and protect the safety of any other person or the community.

## **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 in felony cases in limited circumstances.

## **AMENDMENTS**

None suggested.