

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:
Original **Amendment**
Correction **Substitute**

Date 1-14-15
Bill No: SJR1

Sponsor: Peter Wirth
Short Title: Denial of Bail for Certain Felonies, CA

Agency Code: 264
Person Writing Gail MacQuesten
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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:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SJR1 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 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; and
- prohibit courts from detaining a person who is not a danger and is otherwise eligible for bail solely because of financial inability to post a money or property bond.

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.

SJR1 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. 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. More defendants may be held without bail based on the new dangerousness standard, but fewer non-dangerous defendants may be held without bail because of the prohibition against holding someone otherwise eligible for bail solely because of financial inability to post bail.

SIGNIFICANT ISSUES

SJR1 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.

SJR1 keeps the exception for capital offenses, but replaces the other provisions with the following language, which looks to how dangerous the defendant is and not to the number of previous felonies or the nature of the charges:

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.

This language 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). (The federal Bail Reform Act of 1984 also contains language allowing courts to deny bail if the defendant poses a flight risk. Flight risk is not mentioned in New Mexico's existing constitutional provision or in SJR1's proposed amendment.)

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.

PERFORMANCE IMPLICATIONS

SJR1 applies a different standard for denying bail in noncapital felony cases, which focuses on the danger the defendant poses, and whether release conditions can be fashioned that will protect the public. Bail hearings will require clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

This is a very high burden of proof and may be so difficult for prosecutors and judges to obtain notice of the arrest, collect evidence, and present the evidence to the court prior to the hearing on bond conditions, which should occur within hours or days of the arrest. Additional personnel for

the prosecution and courts may be needed to reasonably prepare for bond hearings to ensure that individuals who should not be released are in fact not released.

Focusing on danger and public safety makes more sense than looking only to prior felonies. Although prior felonies may be an indication of dangerousness, SJR1 recognizes that a defendant without prior felonies may be dangerous and a threat to the community.

Unlike the federal Bail Reform Act, New Mexico does not take into account whether the defendant is a flight risk. A defendant who cannot be held under the provision regarding capital offenses and who is not a danger must be released without bail if he does not have the financial ability to post a money or property bond, even if he is a known flight risk.

ADMINISTRATIVE IMPLICATIONS

If the amendment proposed by SJR1 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

None noted.

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.

AMENDMENTS

None suggested.