

LFC Requester:	Julia Downs
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**AGENCY BILL ANALYSIS
2016 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:** HJR 13
Correction _____ **Substitute** _____

Sponsor: D. Akins & P. Ruiloba **Agency Code:** 305
Short Denial of Bail to Certain **Person Writing** Steven Johnston
Title: Defendants **Phone:** 505-222-9197 **Email** Sjohnston@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(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						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Conflicts with SJR 1
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

Synopsis:

This joint resolution proposes an amendment to Art. 2, Section 13 of the New Mexico Constitution permitting courts of record to deny bail to defendants if they are charged with a felony and the prosecuting authority proves by clear and convincing evidence that the defendant is either dangerous or a flight risk. The current version of Art. 2, Section 13 only permits bail to be denied to defendants charged with capital offenses, and, for limited periods of time, to certain categories of repeat offenders.

This resolution appears to be a response to *State v. Brown*, 2014-NMSC-038, wherein the Court held that a court may not “base a pretrial release decision solely on the severity of the charged offense”, nor “set an unattainable bond simply for the purpose of preventing a defendant’s pretrial release.”

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

If adopted, this amendment would make it the duty of the prosecutor to request an evidentiary hearing and an order denying bail to defendants who are dangerous or a flight risk. The amendment would not permit a court to set a hearing on its own motion. This exclusion of the judiciary from this process would serve to remove an essential filter designed to ensure that conditions of release are imposed justly.

This bill also requires a hearing before a court would be permitted to deny a defendant bail. This may result in a significant burden on both prosecution offices and courts. However, hearings of this type are required in order to conform to the United States Constitution. *See e.g. United States v. Salerno*, 481 U.S. 739, 741 (permitting an arrestee to be detained pending trial “if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions will assure the safety of any other person or the community”) (internal quotation marks omitted). While not strictly necessary, the proposed joint resolution recites that at these hearings the prosecutor must present evidence establishing by “clear and convincing evidence” that a defendant was either dangerous or a flight risk. “Clear and convincing” would most likely be the required evidentiary standard at hearings of this type. *See id.*

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill conflicts with SJR 1. SJR 1 is also a proposed amendment to Art 2, Section 13 which provides courts of record with the ability to deny bail to new categories of defendants. However, SJR 1 did not address a court's ability to deny bail in the event that a defendant was a flight risk, and contained language indicating that all bailable defendants were entitled to a bail that they could afford.

TECHNICAL ISSUES

Section 1, Paragraph A of this resolution would read more clearly if the words "specifically prohibited by this section" were deleted and the words "denied in accordance with this section" were substituted in their place. This section does not actually describe any situations in which a court is prohibited from setting a bail. Instead, this section describes situations in which courts are permitted to deny bail.

OTHER SUBSTANTIVE ISSUES

The drafters may wish to consider a slight change in language in order ensure that the objectives of the joint resolution are met to: "All persons shall, before conviction, be bailable by sufficient sureties, except upon a showing that a person poses a danger to any other person or the community, poses a flight risk, or where a person has previously violated conditions of release. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Where the district court denies bail, it must make a finding that the person poses a danger to the community, either due to the seriousness of the present offense or the person's criminal history, or that the person poses a flight risk. A previous violation of conditions of release may be evidence to be considered in a judicial determination of pre-trial release."

Language such as this would act in concert with NMRA 5-401, and allow the courts to use judicial discretion while protecting a defendant's right to due process.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo. Post *Brown*, the courts are charged with setting the "least restrictive" of the bail options that will reasonably assure appearance and safety of the community. *Brown* also points out that the current state of the Constitution does not permit a judge to base a pretrial release decision based solely on the severity of the crime. *Brown* also requires the court to make a written finding demonstrating "that nonfinancial release options will not reasonably assure the appearance of the person as required or will endanger the safety of another person or the community." *Brown* is currently the guiding law governing the courts considerations on pre-trial release.

AMENDMENTS