

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:

Original	<input checked="" type="checkbox"/>	Amendment	<input type="checkbox"/>	Date	<u>2/2/2016</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>HJR20</u>

Sponsor:	<u>William R. Rehm</u>	Agency Code:	<u>305</u>
Short Title:	<u>Denial of bail for Certain Felonies</u>	Person Writing	<u>Steven Johnston</u>
		Phone:	<u>505-222-9197</u>
		Email	<u>Sjohnston@nmag.gov</u>

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: SJR1, HJR13
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

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.

This joint resolution proposes an amendment to Article 2, Section 13 of the New Mexico Constitution to permit courts to deny bail to defendants under circumstances where they previously were not permitted to deny bail. The present, effective version of Article 2, Section 13 only permits district courts to deny bail to defendants charged with capital offenses or to deny bail temporarily (for 60 days) for repeat felons or for defendants accused of committing crimes using a deadly weapon.

This bill, like all the bills introduced this session dealing with bail, appears to be responsive to *State v. Brown*, 2014-NMSC-038, which held that a court could not set a bail based only on the severity of the charged offense. *Brown* also held that courts were not permitted to set an arbitrarily high bail as a means of incarcerating a defendant before trial.

BILL SUMMARY

Synopsis:

This joint resolution proposes the following changes to Article 2, Section 13

Paragraph A: The constitutional guarantee against cruel and unusual punishment is moved to Paragraph A.

Paragraph B: Provides a presumption that all defendants, except those charged with a capital offense, are presumed to be eligible for release on reasonable bail. This was moved to Paragraph B without a substantial change in text.

Paragraph C: Provides the constitutional guarantee against excessive bail and excessive fines. This was moved to Paragraph C without a substantial change in text.

Paragraph D: Provides that bail may be denied to (1) individuals charged with a violent offense or sexual assault against another person provided that the proof is evident and presumption great, and that the court finds by clear and convincing evidence that there is a substantial likelihood that the defendant’s release would result in great bodily harm to others; or (2) for any offense where the proof is evident and the presumption great, and the court finds that the defendant has threatened great bodily harm against another person and there is substantial likelihood that the defendant would carry out the threat if released.

Paragraph E: Provides a constitutional basis for the court to consider the seriousness of the charged offense, previous criminal record, and probability of the defendant appearing at the trial or hearing in the case when setting bail.

Paragraph F: Provides that courts have the discretion to release a defendant on his or her own recognizance.

Paragraph G: Provides that an appeal from an order denying bail shall be given priority over all other matters. This section was moved to Paragraph G without substantial change in text.

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

The most significant issue with this resolution is that the proposed version of Article 2, Section 13, does not provide a mechanism for denying bail to individuals who are a flight risk. Post *Brown*, there are concerns that the New Mexico Constitution has been interpreted to provide defendants with a constitutional right to a bail which he or she is able to afford. Thus, unless the constitution specifically provides a mechanism for denying bail to individuals deemed to be a flight risk, the concern becomes that a defendant could repeatedly fail to appear for hearings on the same case and always be entitled to a bail that the defendant could afford. In order to adequately address the state of pretrial release law post *Brown*, courts need to be empowered to deny bail upon a finding that no pretrial release conditions are adequate to secure a defendant's appearance at a trial or hearing in the present case. It is recommended that Paragraph D contain a third exception to the right to bail in circumstances where the court makes an appropriate finding that there are no pretrial release conditions adequate to secure the defendant's appearance at a trial or hearing in the present case.

Paragraph D(1) & (2) provide exceptions to the general presumption that all defendants are entitled to reasonable bail. Unfortunately, neither reads very clearly.

Paragraph D(1) provides an exception to the right to bail for those charged violent offenses or sexual assault offenses. However, other areas of New Mexico law do not generally categorize crimes as sexual assaults, preferring the term sexual offenses or sexual crimes. *See e.g.* NMSA 1978, § 30-9-1 *et seq.* § 31-18-15(A)(5),(8), § 31-18-25, § 29-11A-3(I). It appears that there may be only one statutory reference for sexual assault which is located at NMSA 1978, § 30-1-15.

In both exceptions to the presumption that a defendant is bailable under Paragraph D, bail may only be denied if the "proof is evident or the presumption great." However, immediately after this language, the exceptions provide that the court must make additional findings by clear and convincing evidence standard. The "proof is evident or the presumption great" language is a term of art and distinct from the clear and convincing evidence standard. Confusingly, these exceptions recite two different standards of evidence without clearly stating how they interact.

Moreover, these provisions appear to require the State to make a showing that the "proof is evident or the presumption great" to the clear and convincing evidentiary standard. If the State is required to make that showing then the resolution appears to contemplate an adversarial hearing that is essentially a mini-trial of the case on the merits to a standard of proof just slightly less than that necessary to convict a defendant of the charged crime before bail is denied. Such a requirement would be uncommon among American jurisdictions. This would create a substantial

burden on prosecutors and courts, especially in jurisdictions that levy charges via a grand jury rather than via a preliminary hearing.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill conflicts with two other bills proposed this session, SJR1 and HJR13, which also proposed changes to Article 2, Section 13 of the New Mexico Constitution.

TECHNICAL ISSUES

The proposed changes to Article 2, Section 13 would make the Article 2, Section 13 slightly harder to read. It would be easier if the paragraphs were re-ordered:

Paragraph A should provide the guarantee against cruel and unusual punishment.

Paragraph B should provide the guarantee against excessive fines and bail

Paragraph C should provide the presumption that everyone is entitled to reasonable bail except those charged with capital offenses.

Paragraph D should then provide the exceptions to the presumption as it does.

Paragraph E should provide a constitutional basis for setting bail and the circumstances that courts must take into account when setting bail as it does.

Paragraph F should provide the court with discretion to release a defendant on his or her own recognizance as it does.

Paragraph G should provide for a preference for appeals from an order denying bond as it does.

Organizing the sections this way keeps the constitutional guarantees together, and places the presumption that defendants are entitled to reasonable bail directly in advance to the exceptions to that general presumption.

The version of Paragraph B proposed contains an exception for the right to bail for those charged with capital offenses and “in situations in which bail is specifically prohibited by this section.” This language does not make much sense when read with the rest of Article 2, Section 13. No provision of Article 2, Section 13 prohibits bail under any circumstances. The proposed version of Paragraph B should be edited. The phrase “in situations in which bail is specifically prohibited by this section” should be removed, and it should be replaced by “in situations in which bail is denied in accordance with this section.”

Finally, the proposed version of Paragraph D appears to provide any court with the power to deny a defendant bail. Previously, this power was restricted to the district courts.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The consequences of not enacting this joint resolution, or if the people of New Mexico do not

adopt it, will mean that the current status quo will remain in effect. Presently, there are few circumstances in which courts are empowered to deny bond to criminal defendants, and, post *Brown*, there are significant questions about the constitutionality of courts setting any bonds that defendants are unable to meet.

AMENDMENTS