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FISCAL IMPACT REPORT

ORIGINAL DATE 1/27/16
LAST UPDATED 2/16/16 **HB** _____

SPONSOR Wirth/Maestas

SHORT TITLE Denial of Bail for Certain Felonies, CA **SB** SJR1/aHRPAC

ANALYST Downs

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	(\$17,900.0)	(\$18,000.0)	(\$18,000.0)	(\$53,900.0)	Recurring	General Fund and County Detention Fund*

(Parenthesis () Indicate Expenditure Decreases)

*An indeterminate amount of savings is allocated to the counties associated with county-funded detention centers.

Relates to House Joint Resolutions 13 and 20

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Judicial Standards Commission (JSC)
- Administrative Office of the District Attorneys (AODA)
- Public Defender Department (PDD)
- Attorney General’s Office (AGO)
- Department of Public Safety (DPS)
- Secretary of State (SOS)
- Commercial Bail Bond Industry

Responses not received from

- Association of Counties
- Municipal League

SUMMARY

Synopsis of HRPAC Amendment

The House Regulatory and Public Affairs Committee amendment to Senate Joint Resolution 1 adds more detail to who cannot be detained on unaffordable bail by adding ‘[defendants] who do not pose a flight risk’ to the end of the title, line 15 on page 1. On page 2, the amendment makes changes to the paragraph starting on line 20 to expand what formerly just stated no one can be

held if he or she is not ‘a danger,’ to no one who is not ‘detainable on grounds of dangerousness nor a flight risk in the absence of bond.’ At the end of that paragraph, the amendment says that someone who is not a danger or a flight risk and who has financial inability to post a bond has to file a motion requesting relief from payment on which the court shall ‘rule in an expedited manner.’

Synopsis of Original Bill

Senate Joint Resolution 1 purposes an amendment to Article 2, Section 13 of the Constitution of New Mexico to allow courts of record to deny bail to a defendant charged with a felony when a prosecutor requests a hearing to deny bail and provides clear and convincing evidence that the defendant will not come back to court, and is a danger to the community.

In addition to the provision to deny bail to dangerous defendants, the amendment would also allow courts to release defendants without bail if there is no evidence that the defendant is dangerous or a flight risk, preventing detention that hinges on income. The amendment would be put on the ballot in the next general election for approval by the voters.

FISCAL IMPLICATIONS

There are three areas of fiscal impact: fewer nondangerous defendants in custody, more dangerous defendants in custody, and costs associated with publications for the election. Savings from fewer nondangerous defendants in custody amount to \$19 million per year. Costs associated with detaining dangerous defendants are estimated to be \$967 thousand. By subtracting \$967 thousand from \$19 million it can be estimated the constitutional amendment will save \$18 million annually. The costs associated with publishing the constitutional amendment for balloting purposes are estimated by the secretary of state to be \$104 thousand, reducing the savings to \$17.9 million for FY17.

Each area of fiscal impact is detailed below:

1. Fewer nondangerous defendants in custody

According to the New Mexico Sentencing Commission, the average cost per day to house an inmate in a detention center is \$72.03. The commission also reported that the average time in jail pretrial for a misdemeanor is 55 days and that the average time in jail pretrial for a felony is 147 days. It can be estimated by multiplying the average days in jail by the average cost per day that every defendant released pending trial would save \$3,962 for a misdemeanor and \$10,588 for a felony.

AOC estimated that the constitutional amendment would reduce the population of those detained pretrial by 10 percent, based on population reduction in other states that have enacted similar legislation. Statewide there is an average daily population of 7,305. By multiplying 10 percent of the daily population, 730, by the average cost per day, it can be estimated that releasing 10% of the pretrial jail population will save \$53 thousand per day and \$19 million per year.

2. More dangerous defendants in custody

AOC reported that between FY12 and FY14 there was an average of 85 defendants per year who were threats to the community but we able to pay a bond of \$10 thousand or more and be released. Additionally, AOC reported in those three years, 19 dangerous defendants were able to pay bonds of \$100 thousand or more and secure release.

This amendment to the constitution would presumably allow those defendants to be detained without any bail. By multiplying the New Mexico Sentencing Commission's average cost of detention per felon (\$10.6 thousand) by 274 (AOC's estimated 85 defendants per year with a \$10 thousand bond plus the 19 defendants with a \$100 thousand bonds), it can be estimated that the cost of implementing HJR13 will be at least \$2.9 million in detention expenses for the counties over the course of three years, or \$967 thousand per year.

3. Cost of ballots

The Secretary of State estimates the cost of placing a constitutional amendment on the ballot to be \$104 thousand based on 2010 actual expenditures. This includes all necessary printing and advertizing. The next general election is in FY17.

SIGNIFICANT ISSUES

The Public Defender Department stated that appeals on rulings to deny bail will probably increase, resulting in possible need to hire attorneys who are experienced in the appeals process. According to PDD, the midpoint salary for an associate attorney is \$93.1 thousand, and for a trial attorney is \$103.9 thousand. The Attorney General's Office and the Administrative Office of the District Attorney indicated similar potential need for additional attorneys, stating that the discretion to deny bail rests entirely on the prosecution, since it must request a dangerousness hearing. AOC reported that any additional hearings would fit within the existing structure and would not place an additional burden on the courts or criminal justice system.

Pretrial services are funded by a mixture of state and county funds in courts statewide. AOC contended that the savings from releasing defendants pretrial will compensate for any increases in pretrial services funding.

Although no risk assessment is indicated in the language of the amendment, according to AOC, the Second Judicial District Court and the Bernalillo County Metropolitan Court are currently doing a pilot run of a risk assessment instrument to determine pretrial release conditions. The assessment includes flight risk, community ties, employment, criminal history, etc. If the pilot is a success AOC will look into the use of an advanced risk assessment developed by the Laura and John Arnold Foundation. The instrument is inexpensive to use, but could require additional staff and supplies in the future.

According to AOC, state and county savings are not the most significant benefits that can be gained from the release of nondangerous defendants. Studies show that the less time a person spends in jail, the less likely he or she is to reoffend. Releasing nondangerous defendants without bail will result is lower crime recidivism rates, which not only means fewer costs, but more safety for the community.

The Attorney General’s Office (AGO) stated that the amendment removes the ability for courts to grant release without bail to defendants who do not pose a danger or flight risk because the language stating that an individual shall not be detained solely on financial inability is in a portion of the resolution discussing what is the appropriate bail, suggesting that courts can set unaffordable bails. The AGO also expressed concern that the motion made by the defendant can only be made if the defendant has already been deemed nondangerous and not a flight risk.

Conversely, representatives from the commercial bail bond industry added that there is potential for additional costs associated with SJR 1, as cited in a 2013 study called *Pretrial Release Mechanisms in Dallas County, Texas* by Robert Morris, UT Dallas. The study found that defendants who secured release via a commercial bond agent were more likely to appear for trial than by any other mechanism. The report also stated, “Overall, analyses based on the data explored here suggests that commercial bonds were the most successful in terms of defendant appearance rates, followed by attorney bonds, cash bonds, and pretrial services releases.”

The same study cited a cost of \$1.8 thousand per failure to appear, which comes from a 1997 study of failures to appear in Los Angeles. Using this cost, the study deduced that commercial bonds saved \$7.6 million (\$350 thousand for every 1000 defendants) for felonies, and \$3.5 million (\$160 thousand for every 1000 defendants) for misdemeanors, as compared to other types of bonds and pretrial release, in Dallas County.

According to the bail bond industry, New Jersey adopted similar bail reform in 2014. The New Jersey Association of Counties estimates that it will cost one county \$5 million to implement a new pretrial services program, which includes renovations and construction to the court house for the new pretrial services unit, and a new video conferencing area, as well as 15 more prosecutors and detectives. The counties are in favor of the reform, but are reaching out to the state’s legislature for funding assistance. Similarly, the commercial bonding industry reported that the bail reform adopted in Washington DC costs \$60 million annually.

PERFORMANCE IMPLICATIONS

The Administrative Office of the District Attorneys stipulated that bail hearings would increase the workload for prosecutors due to the requirement of clear and convincing evidence indicating higher burden of proof and need to gather and present notices of arrest and collected evidence within days or even hours of the arrest. Though the additional hearings may affect performance, AODA stated that a focus on danger and public safety is more practical than only considering prior felonies.

RELATIONSHIP, CONFLICT

Senate Joint Resolution 1 relates to House Joint Resolution 13, which also purposes an amendment to Article 2, Section 13 of the Constitution of New Mexico to allow courts of record to deny bail to a defendant charged with a felony when a prosecutor requests a hearing to deny bail and provides clear and convincing evidence that the defendant will not come back to court, and is a danger to the community. However, HJR13 does not include any provisions for those defendants who may not be able to afford bail.

SJR 1 also relates to HJR 20, which would to allow judges to deny bail when a defendant is charged with an act of violence or sexual assault in addition to the current provision that bail may be denied when a defendant is charged with a capital offense or a violent felony, and allows judges to consider the seriousness of the offense, the previous criminal record, and the probability of the defendant reappearing when fixing the amount of bail and also allows judges to release defendants on recognizance without setting a bail. There is no explicit provision in HJR 20 to allow courts to release a defendant in the case of financial inability to post a bond.

According to the AGO, the current language of the amendment states that without a dangerousness hearing, the court will be required to release the defendant, conflicting with Rules of Criminal Procedure for District Court, 5-401 NMRA which outlines considerations for determining bail. The amendment allows courts to release those who are too poor to pay their bond seemingly without regard to existing guideline, according to the AGO. Additionally, in reference to the HRPAC amendments, the AGO stated that if a defendant can only make a motion and be released without bond due to inability to pay once he or she has been determined nondangerous and not a flight risk, there is conflict with Rules of Criminal Procedure for District Court 5-401(G) NMRA which entitles those who are held for more than 24 hours on unaffordable bail to a hearing to reset the bail amount.

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