

Duplicates/Conflicts with/Companion to/Relates to: 2023 HJR 9; 2024 SJR 11, and 2025 HJR9, HB165, SB196, SB309

SECTION III: NARRATIVE

BILL SUMMARY

HJR14 would submit for approval in the next general election or at any special election prior to that date that may be called for that purpose, an amendment to Article 2, Section 13 of the New Mexico Constitution. The amendment segregates the current unified provisions into paragraphs A through D.

Paragraph A expands the bases for pretrial detention beyond those stated in the Constitution to any basis “otherwise by law.”

Paragraph B proposes no change to current language.

Paragraph C removes the requirements for bail to be denied only by a court of record, the requirement for the prosecutor to request a hearing seeking pretrial detention, the limitation that pretrial detention may only be ordered for a felony charge, and the requirement that the prosecutor prove the basis for denying pretrial release. It also adds that, in addition to pretrial detention for community safety, the court may order denial of pretrial release to “ensure the appearance of the person as required...”

Paragraph D rewords the provision that a person eligible for bail shall not be detained solely for inability to post “a money or property bond” with the language inability to post “sufficient sureties” and permits a person unable to post sufficient sureties to seek relief from the court.

It is important to recognize that when these provisions refer to “bail” they mean release from detention prior to trial and not only the monetary “bail bond” or, as used in HJR14, “sufficient sureties” often used colloquially as the means of obtaining pretrial release.

FISCAL IMPLICATIONS

The fiscal impact of the proposal in Section A of HJR14, which authorize changes to bail eligibility by statute, is dependent on legislative action that would increase the bases for denial of pretrial release, expanding the number of court detention hearings with corresponding increases in resource needs by prosecutors, defense attorneys, police agencies, and the courts.

HJR14 removes the limitation that only people charged with felony offenses may be denied pretrial release. This could create a significant increase in the volume of release hearings because misdemeanor defendants will be subject to pretrial detention. In 2024 approximately 101,502 criminal cases were filed in New Mexico Courts, excluding traffic cases. About 85%, of these cases were for misdemeanors. It is very likely that not all of these cases would result in a detention hearing, although some increase would occur. Misdemeanor cases are filed in non-record courts, including all magistrate courts and most criminal cases filed in the Bernalillo County Metropolitan Court. Holding detention hearings in these courts would require additional resources and training in order to hold the hearings and make findings, although there is no provision for these non-record court proceedings to be recorded for review by the next level court. Appeal of non-record detention

hearings would be to district court which would hold a *de novo* detention hearing or, if the lower court is authorized to hold record proceedings, the district court would review those findings on the record of proceedings. Neither process occurs now as detention hearings on felonies all occur in of-record district courts with review on the record by the Court of Appeals.

HJR14 provides no funding for the Secretary of State of prepare the proposal for the general election ballot nor to any of the entities, including courts, prosecutors, and defense attorneys, which will realize increased costs if the amendment is adopted.

SIGNIFICANT ISSUES

Reducing the Burden of Proof for Pretrial Detention

HJR14 strikes language in the current constitutional provision that requires the prosecutor to request a hearing and “prove” the defendant should be denied pretrial release because no release conditions will ensure public safety. HJR14 retains the standard that a defendant “may” be held pretrial after a hearing at which the judge “finds” there is clear and convincing evidence to support denial of pretrial release. It is unclear what the intended consequence is for removing the requirement that the prosecutor request a detention hearing and removing the prosecutor’s burden of proof while leaving in place the clear and convincing standard of proof for facts that justify pretrial detention.

By eliminating the responsibilities of the prosecutor, HJR14 may anticipate that the court will file a motion after the court investigates whether the defendant is a candidate for pretrial detention and that the court will provide to the parties what evidence the court has found to support detention. Such a process may violate New Mexico Supreme Court Rule 21-209C - Ex parte communications, “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” Giving the judge responsibility to initiate a detention proceeding would be a significant expansion of the judge’s role in the pretrial process that is currently the responsibility of the prosecutor. The requirements for a judge to be impartial and to appear to be impartial prohibit a judge from acting both as the charging authority (a “one-man grand jury”) and presiding at a defendant’s trial. *In re Murchison*, 349 U.S. 133, 137 (1955). The removal of the requirement for the prosecutor to request a hearing and prove the basis for pretrial detention in HJR14 threatens to confuse the process and invite challenges. This issue should be clarified.

Eliminating The Requirement For A Detention Hearing To Occur In A Court Of Record

As noted with regard to Fiscal Implications above, with the elimination of the requirement to hold a pretrial detention hearing in a court of record, it is also unclear how district courts are to review challenges to a detention order. The existing process for reviewing rulings of a non-record court is for the district court to begin the process from the start without reference to what happened in the non-record court. This process is called *de novo* review which would add days to the detention period while the district court schedules and hears whatever evidence is presented at the district court hearing. Lengthening the time to resolve pretrial detention issues may decrease public safety without discernable improvement in the process of determining pretrial detention issues. Time in pretrial detention has well-documented, serious consequences.

The consequences of pretrial detention are difficult to reconcile given that many of those detained pretrial are charged with offenses that, were they to be found guilty, would be

unlikely to result in incarcerative sentences. Research suggests that pretrial detention is linked to substantially higher recidivism rates post sentencing—suggesting that even if pretrial detention reduces some criminal activity during the pretrial period this is more than offset by much higher recidivism rates after individuals serve their sentences. Further, pretrial detention removes individuals presumed innocent from their families and communities—often resulting in the loss of employment and housing, interrupted treatment, and, in some cases, the loss of child custody. Court imposed fines and fees are passed without making income-based adjustments and failure to pay such fines and fees can result in revocation of one’s driver’s license and further incarceration.

Housing America’s prisoners is expensive—more than \$88 billion in local, state, and federal taxpayer monies were spent on corrections in 2016. Most of those in jail are awaiting trial—so the costs of jail are not to pay for punishment. Instead, pretrial detention is meant to ensure attendance at trial and to protect the public from harm by individuals who have not been convicted of a crime. But, in fact, failure to appear at trial is rare and often due to mundane reasons (e.g., forgetting the trial or hearing date). Similarly, new arrests of those released pretrial are also infrequent with arrests for violent crimes rare.

Pamela K. Lattimore, Cassia Spohn, and Matthew DeMichele, *A Better Path Forward for Criminal Justice; Reimagining Pretrial and Sentencing*, The Brookings Institution (April 2021), footnotes omitted, found at: <https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-reimagining-pretrial-and-sentencing/>

The fiscal and time delay costs resulting from lack of clarity regarding the burden of proof and expansion of detention hearings to non-record courts should be determined and considered relative to any hoped-for increase in court appearance rates or improved public safety.

Adding Risk Of Failure To Appear As A Basis For Pretrial Detention

HJR14 expands the bases for pretrial detention by providing in Section C that the court may order pretrial detention if the court finds the defendant’s risk of not appearing in court as required cannot be sufficiently mitigated by conditions of release. As discussed above, HJR14 does not require the prosecutor to request a pretrial detention hearing and removes the requirement that the prosecutor prove the basis for pretrial detention while expanding the charges for which a defendant may be denied pretrial release to misdemeanors following a determination by a non-record court that detention is required. The concerns discussed above arising from these changes apply with equal force to a determination that the risk of failure to appear justifies a denial of pretrial release.

PERFORMANCE IMPLICATIONS

HJR14 would substantially alter existing pretrial practices, requiring significant changes to Supreme Court Rules particularly for non-record magistrate courts. An expedited process for challenging a pretrial detention order entered in a non-record court would have to be created. Current statutes for non-record courts could be amended to require a record for detention hearings, which would make the appellate process less difficult but would require equipment and training to make a record of these proceedings. In addition, without a record of proceedings, appeals from non-record courts go to district courts to re-start the process. Along with the other issues discussed above, this adds delay to the pretrial detention process.

ADMINISTRATIVE IMPLICATIONS

As noted above, new rules and training for non-record courts would be required to add pretrial detention hearings to the dockets of these courts.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HJR9, HB165, and SB196 all address statutory or constitutional changes to pretrial detention.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

New Mexico courts will continue to administer the existing pretrial rules which comply with constitutional requirements and provide for pretrial detention of defendants who have demonstrated a likelihood of committing a new crime, particularly a violent crime, if released on pretrial conditions.

AMENDMENTS