

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)).

## FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/21

SPONSOR Rehm LAST UPDATED \_\_\_\_\_ HJR 4

SHORT TITLE Conditions For Release of Bail, CA SB \_\_\_\_\_

ANALYST Dick-Peddie

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Secretary of State	\$0	\$0	\$150.0- \$200.0	\$150.0- \$200.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

University of New Mexico Institute for Social Research (UNMISR)

Stanford Law Review (SLR)

### Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorneys (AODA)

Public Defender Department (PDD)

New Mexico Attorney General (NMAG)

### SUMMARY

#### Synopsis of Bill

House Joint Resolution 4 amends Article II, Section 13 of the New Mexico Constitution, which is the provision of the New Mexico Constitution relating to pretrial detention, commonly referred to as the bail bond amendment. HJR4 empowers the Legislature to define circumstances through statute that allow a court to detain a criminal defendant pending trial, removes the existing requirement that pretrial detention determinations be made by a court of record as well the requirement that a criminal defendant must be charged with a felony to be subject to pretrial detention. The amendment also allows a court to impose detention upon a finding that no release

conditions will reasonably ensure the appearance of the defendant. Finally, HJR4 removes court procedures for providing relief to defendants who are not a danger or a flight risk but who have an inability to post money or a property bond.

## **FISCAL IMPLICATIONS**

Though it is difficult to accurately project an increased cost to the criminal justice system if HJR4 were adopted by voters and enacted, research indicates that “frontloading” prosecution work, or promulgating court rules and or policies that require prosecutorial agencies to present more evidence early on in the criminal justice process, saves time and resources for all justice partners throughout the life of a case. HJR 4 introduces ambiguity into the requirement that the burden of proof rests with the prosecuting authority, shifting that burden to the defense, after significant time and resources have already been expended.

Under Section 1-16-4 NMSA 1978 and the New Mexico constitution, the SOS is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. The SOS is also required to publish them once a week for four weeks preceding the election in newspapers in every county in the state. The estimated cost per constitutional amendment is \$150 thousand-\$200 thousand depending upon the size and number of ballots and if additional ballot stations are needed.

## **SIGNIFICANT ISSUES**

In 2016, New Mexico voters overwhelmingly adopted a constitutional amendment reforming the cash bail process in New Mexico. The amendment, which prohibits imposing detention based solely on a person’s ability to afford bail, also gave judges new authority to hold defendants deemed dangerous in custody. Not only did this increase judicial discretion, it increased prosecutorial responsibility by mandating the state submit a motion for pretrial detention displaying “clear and convincing” evidence the accused cannot safely remain in the community pending trial. In the years since the constitutional amendment, prosecutors have struggled to file timely and sufficient pretrial detention motions, especially in rural areas where fewer attorneys are available to attend initial hearings. In response to criticism that the reformed pretrial timelines are too demanding, resulting in leniency for defendants likely to commit new crimes while awaiting trial, the Supreme Court formed the Ad Hoc Pretrial Release Committee in 2020 which included stakeholders from all judicial agencies to clarify and improve pretrial detention.

In the Ad Hoc committee, prosecutors proposed the same “rebuttable presumption” created in HJR4, and for a variety of reasons, including constitutional concerns, the committee rejected the proposal. The committee did, however, expand timelines for prosecutors, allowing judges to detain individuals for 24 hours in the absence of a motion for detention, providing district attorneys more time to compile evidence and submit compelling motions.

HJR4 also allows pretrial detention upon the court finding it is likely a defendant will fail to appear for a court hearing. Research from the University of New Mexico Institute for Social Research (UNMISR) indicates that though individuals failing to appear for their court dates is a problem facing the New Mexico criminal justice system, perhaps because the state lacks infrastructure such as reliable public transportation, it is not necessarily an indication that a defendant is likely to commit a new crime. UNMISR found instead that an arrestee who has failed to appear to a court

date in the last two years may fail to appear again, but was unlikely to commit a new violent or nonviolent crime.

Further, a 2017 study published in the *Stanford Law Review*, “The Downstream Consequences of Pretrial Detention,” found increased pretrial detention did not significantly reduce crime rates, but those detained were 43 percent more likely to be incarcerated than similarly situated released defendants. Research also indicates any amount of unnecessary detention comes with significant economic and behavioral health consequences, potentially worsening the rate of re-offense among already vulnerable individuals.

HJR4 also removed the requirement for pretrial detention hearings to take place in a court of record, allowing magistrate judges who may be less familiar with criminal procedure to detain defendants. In addition to the possibility of this leading to dramatically increased detention rates, the agency response submitted by NMAG questions the ability of the amendment to truly change court of record requirements, noting:

Even if passed, [the] Supreme Court would have to promulgate procedural rules in order to empower courts not of record to make pretrial detention determinations. Under the current constitutional scheme, the rules of procedure for the various courts require a district court to make pretrial detention determinations when a defendant is charged in lower courts not of record. The rules provide a mechanism for the court not of record to temporarily transfer jurisdiction to a district court when the prosecuting authority files a motion for pretrial detention. See Rules 6-409, 7-409 NMRA. Additionally, the Supreme Court has exclusive rulemaking authority thus, under the existing procedural rules, courts not of record could still be barred from deciding pretrial detention issues even if HJR4 is not enacted until the procedural rules are changed to reflect the adoption of HJR4.

In the agency response, AODA posed that HJR4 would allow for more consistent enforcement of pretrial detention throughout the state by removing the Supreme Court’s authority to promulgate rules around pretrial detention. However, AOC and NMAG hold that the Supreme Court of New Mexico (SCNM) holds the sole authority to promulgate such rules, and should HJR 4 be adopted by voters and enacted, SCNM would still need to create parameters for courts to execute the rule change.

## **PERFORMANCE IMPLICATIONS**

Currently, district attorneys, public defenders, and courts all measure timely justice, a key element of a functioning judicial system, in some way or another, whether that be time to disposition or age of active pending cases. Enacting HJR4 would likely increase time to disposition for justice partners.

ADP/sb