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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/11

SPONSOR Kintigh LAST UPDATED _____ HJR 20

SHORT TITLE Eliminate Right to Bail, CA SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 Public Defender Department (PDD)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Joint Resolution 20 is a proposed constitutional amendment which, if approved by the voters, would eliminate the constitutional right to bail, and instead would provide that bail may be granted or denied by a court based on the flight risk of the defendant, the nature and seriousness of the offense, the danger that would be posed to any person or the community by the defendant's release, and other factors as provided by law. It would also eliminate the presumption of no bail in capital cases and eliminate the prohibitions against excessive bail, excessive fines, and cruel and unusual punishment. The requirement that courts give preference to an appeal from an order denying bail over all other matters would also be eliminated.

FISCAL IMPLICATIONS

No agency reports any fiscal implications. The PDD notes that while it is more costly for the Department to have to visit clients in jail, because its clients are indigent it is unlikely that the amendment would increase the number of PDD clients in jail. Additionally, since NMCD does not incarcerate or supervise offenders accused of crime who would normally be subject to or

seek bail (only those who have been convicted), there would be no fiscal impact on its operating budget. NMCD points out that denial of pre-trial bail, which results in more pre-trial detention, likely would increase county costs.

SIGNIFICANT ISSUES

The AODA provides this summary of the law regarding bail as addressed in the Eighth Amendment to the U.S. Constitution:

Although an accused has a substantive due process right to pre-trial bail, the United States Supreme Court has recognized that that right is not absolute. In *U.S. v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987) the Supreme Court held that the Bail Reform Act's authorization of pretrial detention on the basis of future dangerousness constituted permissible regulation that did not violate substantive due process, and was not impermissible punishment before trial; legislative history of the Act indicated Congress formulated detention provisions as a potential solution to present societal problem of crimes committed by persons on release, and incidents of pretrial detention were not excessive in relation to the regulatory goal Congress sought to achieve, given careful limitation on circumstances under which detention could be sought...Consequently, the court held that the due process clause did not preclude pretrial detention imposed as a regulatory measure on ground of community danger pursuant to Bail Reform Act, when the Government proved by clear and convincing evidence that arrestee presented an identifiable and articulable threat to individual or community.

The AGO advises that the proposed amendment which indicates the factors used to determine bail may be contrary to or inconsistent with the Eighth Amendment, which expressly prohibits excessive bail, excessive fines, and cruel and unusual punishment (which are all eliminated under the proposed amendment).

The AGO also notes that currently, in most non-capital cases, the amount of bail is already within the discretion of the courts under the existing New Mexico constitutional provision regarding bail and district, magistrate, metropolitan and municipal court rules. Those rules list factors to be considered that include, among others, the specific factors listed in the proposed amendment.

The PDD suggests that the intent of the amendment may be to encourage judges to withhold bail altogether, but clarifies that:

While the proposed amendment would remove New Mexico's prohibitions on cruel and unusual punishment and unreasonable imprisonment without a conviction, it should of course be borne in mind that the federal constitution will continue to protect the rights of New Mexico citizens in these regards.

PERFORMANCE IMPLICATIONS

The AGO and the PDD (as to its clients) suggest that the actual impact of the proposed amendment may be the same as under present court standards and practices.

MD/bym