

Duplicates/Conflicts with/Companion to/Relates to: HJR2, Denial of Bail, CA; HB163 Denial of Bail for Certain Offenses

Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SJR6, Section 2, 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. SJM6, Section 1, enumerates the current unified provisions into paragraphs A through D with changes as follows.

Paragraph A proposes to replace the entitlement of all persons to bail except as “is specifically prohibited” by Article II, Section 13 of the NM Constitution with “may be denied as provided” in the NM Constitution.

Paragraph B proposes no changes to current language. It is important to recognize that when these provisions refer to “bail” they mean release from detention prior to trial and not the monetary bail bond often used colloquially as the means of obtaining pretrial release. The exception is when a money or property bond is addressed in the existing constitutional language restated in SJR6, Section D.

Paragraph C eliminates the language authorizing denial of bail and allowing pretrial detention if the prosecutor proves “by clear and convincing evidence that no release conditions will reasonably protect” the safety of any other person or the community and replaces it with language that authorizes denial of bail if the prosecutor proves “that the person poses an unreasonable risk to” the safety of any other person or the community.

In addition, Paragraph C authorizes denial of bail and pretrial detention upon proof “that the person is an unreasonable flight risk.” Language regarding flight risk exists in the current constitutional provision, found in what SJR6 has in Section D, which limits release due to “flight risk in the absence of bond.”

Paragraph D strikes current language “detainable on grounds of dangerousness” with “an unreasonable safety risk” and applies the same language to risk of flight.

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

SJR6, Section A, broadens the language to recognize the proposed changes in Section C regarding denial of bail and authorizing pretrial detention.

SJR6, Section C, alters the standard for pretrial detention. It does so by replacing the

requirement that the prosecutor prove “by clear and convincing evidence that no release conditions will reasonably protect” public safety with the requirement that the prosecutor “proves that the person poses an unreasonable risk” to public safety. Paragraph C also authorizes pretrial detention if the prosecutor “proves” that the person is “an unreasonable flight risk.” These changes may raise a number of constitutional issues.

SJR6 removes the “clear and convincing evidence” standard but does state what standard the prosecutor must meet when the prosecutor “proves” there is an “unreasonable risk” of danger to the public or flight before trial. Litigants can be expected to argue for a range of options, but the most common alternative to the clear and convincing evidence standard in this context is the preponderance of evidence standard. Clear and convincing evidence “is something stronger than a mere ‘preponderance’ and yet something less than ‘beyond a reasonable doubt.’ For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true.” *In re Valdez*, 1975-NMSC-050, para. 20 (citations omitted). The preponderance of evidence standard imposes a lesser burden of proof, requiring only proof that the asserted proposition or fact is more likely than not true.

The New Mexico Supreme Court’s analysis of the existing clear and convincing standard for pretrial detention is found in *State v. Mascareno-Haidle*, 2022-NMSC-015, paras. 27-32. Most states as well as the District of Columbia and the federal criminal justice system that have a defined standard for pretrial detention “authorize pretrial detention only upon a judicial finding by clear and convincing evidence that no less restrictive alternative is adequate to meet a compelling state interest.” Sandra G. Mayson, *Detention By Any Other Name*, 69 Duke Law Journal 1643, 1677 (2020) (citations omitted), found at [Detention by Any Other Name](#). The clear and convincing standard for pretrial detention is recommended by the American Bar Association (Pretrial Release Standard 10-5.1(f) found at [Pretrial Release](#)); the National Institutes of Correction (*A Framework for Pretrial Justice - Essential Elements of an Effective Pretrial System and Agency*, February 2017, p.16, found at [A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency](#)); and the National Association of Pretrial Services Agencies (*Pretrial Standards: Revised 2024*, standard 3.4(h) found at [Pretrial Standards: Revised 2024](#)). See also Marty Berger, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, Stanford Law Review, volume 75, p.469 (February 2023) found at [The Constitutional Case for Clear and Convincing Evidence in Bail Hearings](#), contending that “the government is *constitutionally* obligated to prove the basis for pretrial detention by clear and convincing evidence, including for non-appearance risk.”

The United States Supreme Court relied upon the clear and convincing standard in upholding the 1984 Bail Reform Act, finding that with such proof the defendant’s “strong interest in liberty” may be “subordinated to the greater needs of society”

“We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ *Snyder v. Massachusetts*, 291 U.S. 97, 291 U.S. 105 (1934).”

United States v. Salerno, 481 U.S. 741, 751 (1987).

In addition to the change to the proof required for pretrial detention due to dangerousness, Paragraph also C adds an option for pretrial detention if the prosecutor “proves” there is an unreasonable flight risk. Present court rules and practices require the AOC to provide the district court with a risk analysis known as the Public Safety Assessment (PSA) as well as a Background Investigation Report (BIR) for every defendant eligible for pretrial detention. The PSA scores a defendant’s risk for re-arrest and failure to appear (FTA) during the pretrial period. Considerations of flight risk and prior criminal history currently help shape the court’s imposition of conditions of release that mitigate these risks. Pretrial detention for flight risk with a preponderance burden of proof instead of clear and convincing evidence may also result in challenges based on federal constitutional provisions. *See* Jaden M. Lessnick, *Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight-Risk Standard*, University of Chicago Law Review, volume 89, issue 5, p.1245 (2022), found at [Microsoft Word - 03_Lessnick_CMT_FINAL.docx](#).

PERFORMANCE IMPLICATIONS

Courts, prosecutors and defense attorneys will have to adjust practices to manage the significant changes with removal of the clear and convincing standard of proof. New court rules and practices will have to be adopted. Assuming a reduced preponderance standard, detention centers may experience a greater volume of pretrial detainees. Litigation can be anticipated addressing challenges to the new constitutional language under federal precedents interpreting the United States Constitution.

ADMINISTRATIVE IMPLICATIONS

Courts would have to adjust existing rules to incorporate a process for consideration of the new standard of proof for pretrial detention.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

There is some overlap with and relationship to HJR2, Denial of Bail, CA and HB163 Denial of Bail for Certain Offenses

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Courts will continue to evaluate motions by prosecutors for pretrial detention under the existing rules and cases developed since voters passed the constitutional amendment in 2016.

AMENDMENTS

None noted.