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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 2/10/2018  
**LAST UPDATED** \_\_\_\_\_ **HJR** 5 \_\_\_\_\_  
**SPONSOR** Rehm  
**SHORT TITLE** Additional Grounds For Denial Of Bail, CA **SB** \_\_\_\_\_  
**ANALYST** Torres

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate but substantial	Indeterminate but substantial	Indeterminate but substantial			

Relates to/ Conflicts with HJR 7, HB 74, SB 13, SB 44, and SJM13.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Public Defender Department (PDD)  
 New Mexico Attorney General (NMAG)  
 New Mexico Sentencing Commission (NMSC)  
 New Mexico Corrections Department (NMCD)

#### Responses Not Received From

Bernalillo County Metropolitan Court (BCMC)  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

HJR 5 proposes an amendment to Article 2, Section 13 of the New Mexico Constitution, to provide additional grounds on which a court may deny a person’s release pending trial. The additional grounds for denying bail involve (1) persons who have failed to appear for a scheduled court appearance on any pending criminal charge; (2) persons charged with violent offenses; (3) persons charged with felony offenses with two or more prior convictions; and (4) persons charged with felony offenses while serving a period of probation or parole or while on release for a separate felony charge. HJR 5 would also (5) remove the requirement that the bail hearings be held by a court of record, (6) lower the standard for denying bail from clear and

convincing evidence to probable cause, and (7) would allow such a denial if the defendant presents a flight risk, as an alternative to the community safety consideration which currently exists.

## **FISCAL IMPLICATIONS**

The AOC provided the following analysis of the fiscal implications:

The amendment proposed by HJR 5 would have a significant fiscal impact on the courts. Denying bail to people who have failed to appear for a pending criminal charge would mean that thousands of defendants who have failed to appear for anything from a traffic misdemeanor to a felony offense would remain in-custody pending trial. The Administrative Office of the Courts cannot quantify the number of defendants who have a prior failure to appear, but can assure that it applies to a very significant portion of individuals who come before the courts. These range from defendants who miss a court date due to illness or car trouble to those who actively attempt to evade the court's jurisdiction. Along with the denial of bail for violent offenses (without a clear definition of those offenses) and the two new classes of felony offenders, the option to deny release for failure to appear would greatly increase the number of defendants who are held in-custody pending trial. Even if only a subset of those eligible are actually detained, the number of detention hearings is likely to rise significantly.

Courts have much shorter timeframes in which to deal with cases where the defendant is held in-custody pending trial. First, preliminary examinations of people charged with felony offenses must be held within 10 days for defendants in custody, as opposed to 60 days for defendants out of custody. Increasing the number of those defendants would increase the number of preliminary hearings which have to be held within a shorter amount of time without providing for the additional resources courts would need to handle that increase. Defendants who remain in-custody are also given expedited trial settings under Rules of Criminal Procedure and Speedy Trial requirements of the US and New Mexico Constitutions. Therefore, this amendment would also decrease the trial timeframe in a significant number of cases, without providing courts with the additional resources necessary to accommodate these shorter timeframes.

In-custody defendants also require additional security measures at courts, such as adequate holding cells and security personnel. Significantly increasing the number of defendants who appear before the courts in-custody may strain courts' resources to adequately secure facilities beyond current capacities, without providing additional resources necessary for the increased security needs.

Furthermore, in-custody defendants create many logistical problems for the courts, such as having to provide a place to consult with counsel to aid in the defense or discuss plea offers, or even allowing for shackling and unshackling time involved in moving inmates to and from holding cells. These factors mean that hearings involving in-custody defendants take more time than those involving out of custody defendants. By increasing the number of in-custody defendants, this amendment would also increase the time needed for courts to conduct hearings and get through criminal dockets, without providing additional resources necessary for courts to adapt to the increases.

## House Joint Resolution 5 – Page 3

As AOC noted, HJR 5 will expand the number of defendants who are detained and require an increase in the number of pretrial detention hearings. Both the PDD and district attorneys are struggling to absorb the costs associated with these new trials since the implementation of the original amendment in July, 2017. The increase in hearings is likely to impact the district attorneys, PDD, and courts proportionally.

The additional hearings could be handled by entry-level PDD attorneys, which the PDD estimates to cost \$83.7 thousand at a mid-point salary including benefits. Recurring statewide operational costs per attorney would be \$2,300.00 with start-up costs of \$3,128.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$77,113.01.

The AODA did not provide cost estimates at the time of this publication.

Assessment of the costs of the new amendment to courts, PDD, and district attorneys cannot be done at this time because the increase in hearings is indeterminate.

### SIGNIFICANT ISSUES

The NMAG points to the potential legal challenges to the amendment, if adopted, that would be faced in respect to the Constitution of the United States and due process. The NMAG also notes that “the [New Mexico] Supreme Court recently issued rules regarding bail reform and the constitutional amendment that allows for pretrial detention. If this amendment is eventually passed by the voters, new procedural rules for its implementation will need to be drafted.”

The AOC contends that HJR5 would face challenges under the United States Constitution. Specifically, the AOC notes that “While the US Constitutional right to bail is fundamental, it is not absolute. States may deny bail as long as the denial is not unreasonable or arbitrary. *See, e.g. Corbett v. Patterson*, 272 F.Supp. 602 (D.C. Colo. 1967); *U.S. ex rel. Fink v. Heyd*, 287 F.Supp. 716 (E.D. La. 1968). Since this amendment is so broad in the number of possible defendants whom it would affect, the likelihood of a constitutional challenge at the federal level is very high.”

Since “denying bail to people who have failed to appear for a scheduled court appearance on any pending criminal charge, or for felony defendants who otherwise present a flight risk” the AOC concludes that the amendment “would leave no other defendants who would be eligible for money bail.” Fundamentally, the purpose of bail is to secure the defendant's attendance and is not tied to any other condition aside from the defendant's appearance in court.

Finally, the AOC suggests that “under the proposed amendment, anyone with a history of failure to appear would not have the right to bail. The court would also be able to deny bail to anyone charged with a felony who is deemed to be a flight risk. Therefore, the amendment would deny bail to defendants who would otherwise need it to assure their appearance before the court. The court would not be able to justify bail as a condition of release for the defendants who do not meet the criteria of this amendment because those defendants would not be flight risks. Accordingly, there would be virtually no more market for money bail in New Mexico.”

The PDD provided a thorough response of potential significant issues, which included concerns for the potential of HJR 5 to reduce the rights of persons accused of crimes in New Mexico, and

the constitutionality of its implementation. PDD refers to the case *United States v. Salerno*, 481 U.S. 739 (1987), which “held that the Bail Reform Act’s authorization of pretrial detention on the basis of future dangerousness constituted permissible regulation that did not violate these rights and did not amount to impermissible pre-trial punishment. The Court agreed that ‘a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants,’ the Court rejected ‘the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.’” Although, “*Salerno* does not allow for mere *probable cause* to hold an arrestee: ‘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.’” The PDD concludes that Section C of the proposed constitutional amendment would likely be stricken as a violation of the federal constitution because of *Salerno* which states that the government proves the threat by clear and convincing evidence.

The PDD provided the following additional issues of significance:

It is important to remember that the subject is the release of persons *accused* (but not convicted) of crimes. Persons who have a right to be **presumed innocent** at trial. New Mexicans with families who need their support and presence. And New Mexico is a poor state, with many families just barely getting by with approximately 40% of the population under 200 percent of the federal poverty guidelines level.

While the protection of the populace is a necessary function of government, bond is not how we remove people from society: conviction after trial or plea is. Trials of those accused of dangerous crimes should certainly be expedited in order to perform this function. But what about those wrongly accused? What about their families? What about their jobs as they languish in jail awaiting trial?

Wealthy individuals accused of a crime are able to bond out. Looking around the court houses of the state, however, it is evident the majority of criminal defendants are not wealthy. While HJR 5 seems to be in response to the recent *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, opinion and the constitutional amendment and rule changes that followed, the proposed amendment does nothing to address *Brown*’s concern that, in practice, bail lets wealthy defendants be released from jail while low-income defendants either remain in jail, or are subject to the bail bond industry to post bail on their behalf.

Enactment of the constitutional amendment would probably require amendment of the rules of the lower courts. Since the amendment would take away the “of record” requirements, appeals would presumably be de novo, which would require that all evidence be presented twice - hardly an efficient use of New Mexico’s already-stretched-to-the-limit justice resources (DAs, [PDD], courts would all be affected).

Finally, with regard to Section (A)(1) of the proposed amendment, a single prior failure to appear [hereinafter *FTA*] at any time in the past, would remove an arrestee from eligibility for bail. [PDD] trial personnel inform [the] analyst that a number of warrants have been issued due to a lack of notice to the defendant, and are only cancelled rather than quashed. Such individuals, through no fault of their own, would be deemed a flight

risk and ineligible for bond under the proposed amendment. A senior Public Defender attorney informed [the] analyst that a significant number of LOPD clients have an FTA (failure to appear) in their past, and noted that of 29 defendants set for felony first appearances in Bernalillo County on January 25, 2018, 16 had a prior FTA . . . even though about half of those had not had one in the past two years. This same attorney noted that of the 13 defendants that day who did *not* have a past FTA, 7 would be detainable under other provisions of the proposed amendment. Thus, 23 of the 29 defendants at felony first appearances would have been detainable without the prospect of bail: the cost to the counties is going to be tremendous.

### **PERFORMANCE IMPLICATIONS**

HJR 5 would impact the justice system’s performance measures by increasing the workload and the amount of hearings.

### **ADMINISTRATIVE IMPLICATIONS**

There may be administrative implications in the amount of time necessary to complete hearings and the increased amount of cases on shorter time frames.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 74 and SB 13 seek to make magistrate and metropolitan courts into courts of record for the purpose of hearing motions under the current constitutional amendment allowing for pretrial detention.

SJM 13 seeks to ask the Supreme Court to rescind some of its new rules regarding bail and pretrial detention.

SB 44 seeks to create a presumption of a flight risk – for purposes of bail issues – for any person charged with leaving the scene of an accident.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

IT/al/jle