Minority Report:

Ad Hoc Committee to Review Pretrial Release and Detention Procedures

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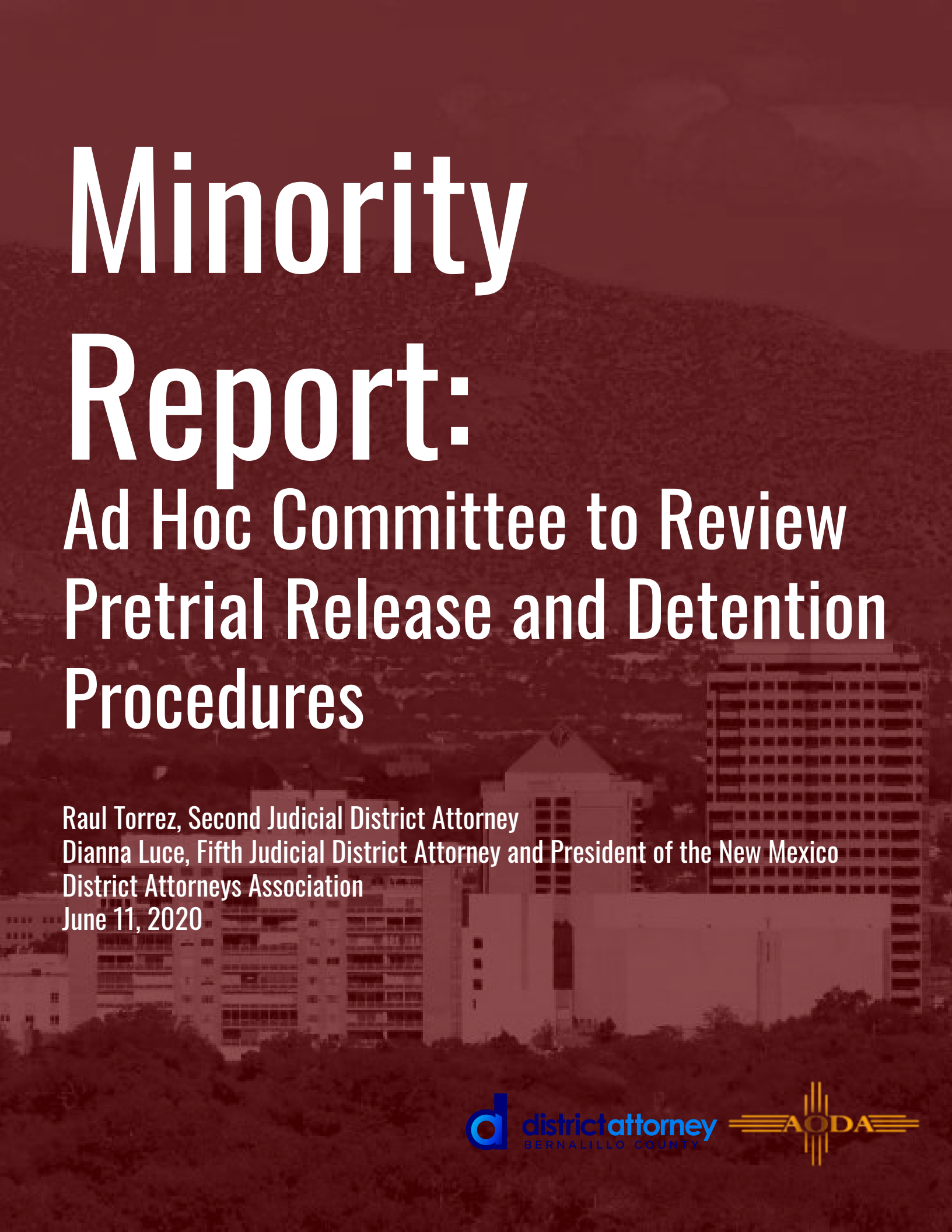
June 11, 2020



Summary

I. Who is being released?

- Releasing defendants that should be detained has tragic real-life consequences for the victims of violent crime. The 1,501 released defendants account for nearly 7,000 cases, including almost 4,000 violent felonies, in the Second Judicial District over the past ten years.

II. New Mexico's bail reform was a half measure that failed to incorporate two of the three bases for detention recognized in other jurisdictions

- New Mexico has an atypical hybrid system that combines pretrial detention and money bail and does not allow pretrial detention to assure appearance in court for defendants posing a serious flight risk. This hybrid system has created unacceptable failure to appear rates and indirectly distorted information about public safety.

III. New Mexico is not yet safer with bail reform and is not as safe as other bail reform jurisdictions.

- While other bail-reform jurisdictions report "safety rates" close to 90%, data in New Mexico indicates a safety rate of 77%.

IV. Defendants charged with violent crime pose a greater risk of violence.

- Research and common sense show that violent offenders tend to commit violent crimes when reoffending.

V. New Mexico releases more dangerous offenders than other jurisdictions.

- New Mexico judges have been instructed that a defendant's dangerousness to the community is not enough to detain, so they frequently release dangerous defendants who would have been detained in other jurisdictions.

VI. Rebuttable presumptions are used across the country to help identify violent and otherwise risky offenders.

- Consistent with other bail reform jurisdictions which either use rebuttable presumptions themselves or similar decision-making frameworks, our proposal would require judges to scrutinize defendants accused of certain dangerous crimes, such as first degree murder, in their evaluation of risk.

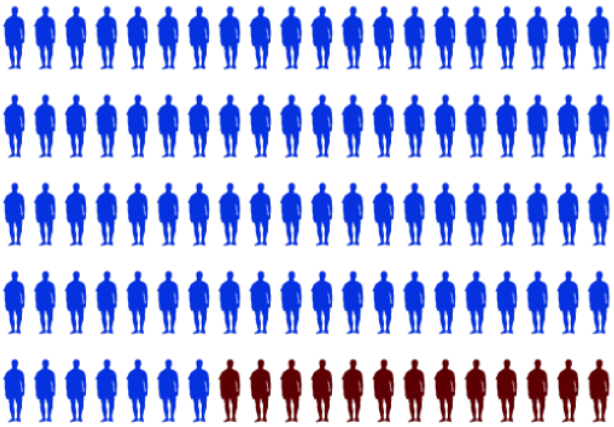
INTRO

In 2016, the people of New Mexico adopted the amendment to Article II, Section 13 that permits pretrial detention. The actual constitutional language did not appear on the ballot. The people instead overwhelmingly voted in favor of a summary of the provision that promised to "protect community safety by granting courts new authority to deny release on bail pending trial for dangerous defendants in felony cases." Three and a half years later, the promise of safer streets remains largely unfulfilled, and the mission of community safety has now been relegated to the minority view advanced in this report.

Justice Chávez's report for the Ad Hoc Committee said it perfectly: There is always room for improvement. As shown by all the different data sets considered by the Committee, defendants commit new crimes while pending trial in Bernalillo County far more often than in other bail-reform jurisdictions. That stark reality should be a wake-up call and a motivation for change. Yet adding rebuttable presumptions to the rule was the only suggested rule change advanced in the Committee with the capability of broadly improving community safety. The Committee's vote against our proposal leaves a deafening silence in answer to the question of how to improve pretrial detention and reduce the number of crimes committed by defendants on pretrial release. Rebuttable presumptions may not be a complete solution to the problem, but we are convinced — as are other bail-reform jurisdictions — that they will make our community safer. We urge this Court to adopt our proposal. The failure to do so will break the trust New Mexicans placed in the courts when they voted for public safety in 2016.

87.2%

New Mexicans voted in favor of 2016 amendment to protect community safety



I. Who is being released?

Releasing defendants that should be detained has tragic real-life consequences for the victims of violent crime. Judges in the Second Judicial District have denied over 1,600 pretrial detention motions from January 1, 2017 through February 29, 2020.[1] Of the defendants released, approximately 23% committed new crimes while their cases were pending.[2] More important than any percentage is the actual crimes those defendants committed and the harm inflicted on victims.

It is too frequent that defendants released after the denial of motions for pretrial detention commit new violent crimes while their case is pending. Not surprisingly, these defendants often target a person close to them. In Bernalillo County alone, released defendants committed 71 domestic violence cases while on conditions of release. These figures represent reported cases, meaning the actual incidents in the community are higher.

There is simply no question that prosecutorial screening appropriately identifies dangerous defendants. In Bernalillo County, the 1,501 defendants released after the denial of a pretrial motion had lengthy criminal histories. In fact, those 1,501 defendants account for nearly 7,000 cases, including almost 4,000 violent felonies, in the Second Judicial District over the past ten years.

1501 DEFENDANTS RELEASED

10 YR CRIMINAL HISTORY	CURRENT CHARGE
6900 CRIMINAL CASES	1616 CRIMINAL CASES
2391 VIOLENT FELONIES	1169 VIOLENT FELONIES
532 AGGRAVATED ASSAULTS	286 AGGRAVATED ASSAULTS
135 ARMED ROBBERIES	81 ARMED ROBBERIES
101 RAPES	46 RAPES
49 MURDERS	24 MURDERS

II. New Mexico's bail reform was a half measure that failed to incorporate two of the three bases for detention recognized in other jurisdictions.

	New Mexico's Incomplete Detention Scheme *Article II Sec. 13*	New Jersey's Comprehensive Detention Scheme *NJSA § 2A:162-18*
Dangerousness	"... no release conditions will reasonably **protect the safety of any other person of the community**..."	"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure... **the protection of the safety of any other person or community**..."
Failure to Appear		"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible **defendant's appearance in court**..."
Obstruction		"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure... the eligible **defendant will not obstruct** or attempt to obstruct the criminal justice process…"

Figure 1: A comparison of the constitutional pre-trial detention frameworks of New Mexico and New Jersey. New Jersey allows for detention on the basis of dangerousness, flight risk, and obstruction of justice, while New Mexico's only allows for detention based on the first. Because the PSA was designed for broader application, it often recommends detention for defendants who are not subject to detention under New Mexico law.

This Court thoroughly traced the history of the bail system and the process of bail reform in other jurisdictions and New Mexico in *State ex rel. Torrez v. Whitaker*.[3] New Mexico's money-bail system had two fundamental flaws. First, it resulted in the de facto detention of low-risk defendants charged with low-level crimes based only on the defendants' financial inability to afford the bond. Second, it was not an adequate means of addressing dangerousness; bail could only be forfeited for a failure to appear, not the commission of a new crime, and bail could not be denied altogether no matter how dangerous a defendant might be, which meant that wealthy dangerous defendants could buy their way out of jail. The bail-reform measure in Article II, Section 13 was supposed to fix both problems.

New Mexico modeled its bail-reform provisions on the Federal Government and on a similar bail-reform movement in New Jersey. Those jurisdictions permit pretrial detention on three grounds: (1) protecting public safety; (2) assuring appearance in court; and (3) preventing obstruction of the criminal process.[4] The Federal Government uses rebuttable presumptions to identify the charges and offenders that pose the most risk of harming a member of the community, failing to appear for court, and obstructing the criminal process.[5] New Jersey makes similar use of a risk management tool that is based largely on the seriousness of the charged offense.[6]

This Court submitted a proposal to the Legislature that included the first two of the three grounds for detention used in other jurisdictions, that is, public safety and appearance in court, but the Legislature amended the proposal to permit pretrial detention only on the basis of a threat to public safety. As adopted by the people, Article II, Section 13 is an untested hybrid provision. It permits pretrial detention to prevent threats to public safety but retains money bail as a means of assuring appearance in court.[7] And it fails to explicitly address the problem of defendants obstructing the criminal justice process.

New Jersey	Arizona	Santa Cruz County	New Mexico
Step 1: Complete PSA	**Step 1:** Complete PSA	**Step 1:** Complete PSA	**Step 1:** Complete PSA
Step 2: Determine if current charge is subject to life imprisonment. If yes, release not recommended.	**Step 2:** Determine if def extradited, if violence flag found, or if current charge is on enumerated list/ any FTA for enumerated crime	**Step 2:** Determine if def extradited, if violence flag found, or if current charge is on enumerated list/ any FTA for enumerated crime	
Step 3: Determine PSA generated a score of 6 on either scale.	**Step 3:** If yes, release not recommended. If no, determine recommendation using matrix.	**Step 3:** If yes, release not recommended. If no, determine recommendation using matrix.	
Step 4: Determine if there is a violence flag and one of current charges is violent.	**Step 4:** Determine if current charge is, if there is any FTA for, or any attempt or conspiracy to commit any of a list of enumerated crimes. If so, increase recommendation type and conditions level.	**Step 4:** Determine if current charge is, if there is any FTA for, or any attempt or conspiracy to commit any of a list of enumerated crimes. If so, increase recommendation type and conditions level.	
Step 5: Determine if current charge is on a list of enumerated crimes.		**Step 5:** Determine Supervision Category and Standards using matrix or automatic increase.	
Step 6: Determine if defendant has been arrested on at least two occasions and if those charges were still pending at time of current offense.			
Step 7: If yes, release not recommended. If no, determine recommendation using matrix.			
Step 8: Determine if any current charge is No Release Act not previously listed.			
Step 9: Determine if any current charge is one of a list of weapons charges. If so, increase recommendation type and conditions level.			
Step 10: Determine if the highest current charge is an indictable offense or DV-related and eligible for pretrial detention.			

Figure 2: A comparison of the additional steps accompanying the use of the PSA in New Jersey, Arizona, and Santa Cruz County, CA. These extra steps take care to consider the violence and danger of the current offense, which can serve to modify the risk tool's numeric output. New Mexico does not implement any supplementary steps in its use of the Arnold tool for a detention recommendation.

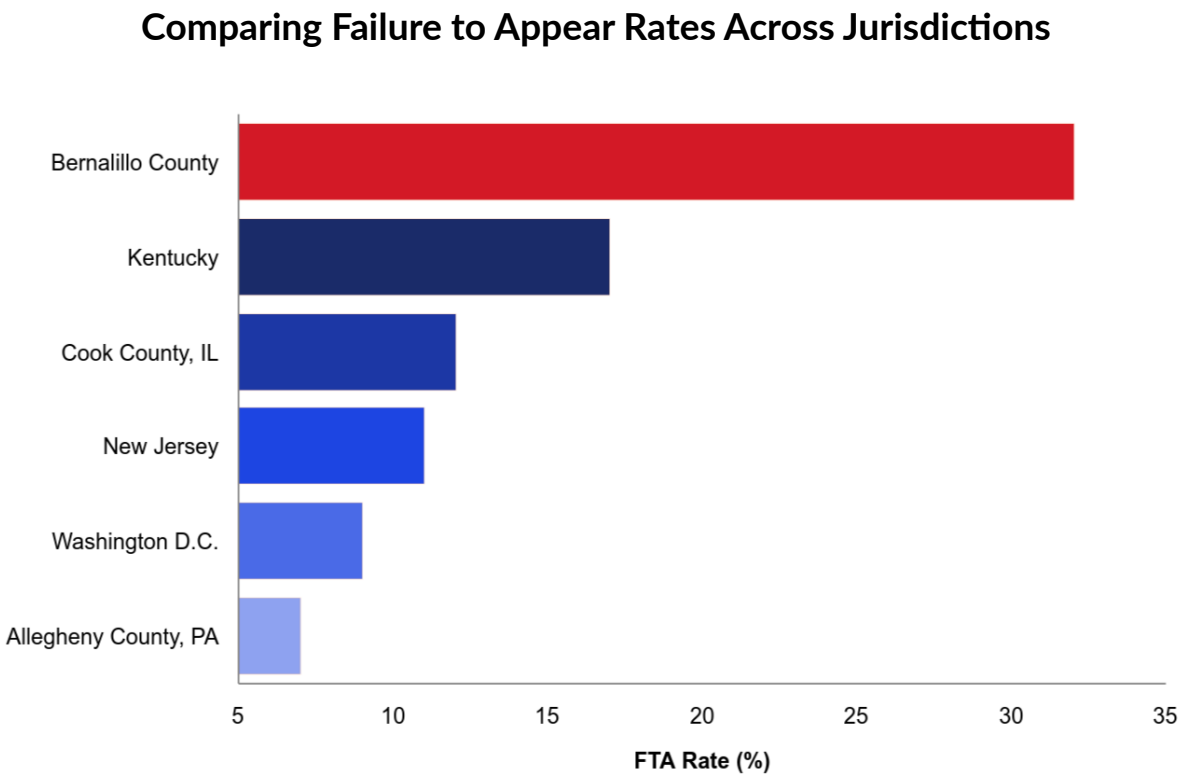


Figure 3: Bernalillo County has a high failure to appear rate compared to that in other jurisdictions, indicating that current pretrial conditions of release and pretrial supervision are not effective. In comparison, other bail reform jurisdictions have FTA rates of approximately 10%.[13,15]

> New Mexico is the only jurisdiction in the country that does not have a presumption to detain defendants charged with premeditated murder. ”

Article II, Section 13 incorporates the due process requirement that the prosecution prove the grounds for detention to a clear and convincing standard. The prosecution must separately show that the defendant poses a threat to the safety of others and that no release conditions will reasonably protect against that threat.[8] The provision is silent, however, on the factors for the court to consider in making a pretrial detention decision, including the issue of rebuttable presumptions. The text of Article II, Section 13 retains the presumption of detention for capital offenses that has existed in New Mexico since statehood.[9] This Court, though, has ruled that this language has no effect because first degree murder is no longer a capital offense.[10] New Mexico is the only jurisdiction in the country that does not have a presumption to detain defendants charged with premeditated murder.

The rule of procedure governing pretrial detention, Rule 5-409 NMRA, provides a non-exclusive list of factors that judges must consider. This list includes “the nature and circumstances of the offense charged, including whether the offense is a crime of violence.” However, the rule does not include rebuttable presumptions like those used by the Federal Government, California,[11] and the District of Columbia.[12] Nor does it provide for the use of a risk management tool like New Jersey. Thus, unlike all other bail-reform jurisdictions, New Mexico’s pretrial detention provisions do not identify the riskiest defendants.

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The Constitution’s omission of flight risk as a basis for pretrial detention has had serious consequences for the justice system and public safety. Bernalillo County has an extremely high failure to appear rate.

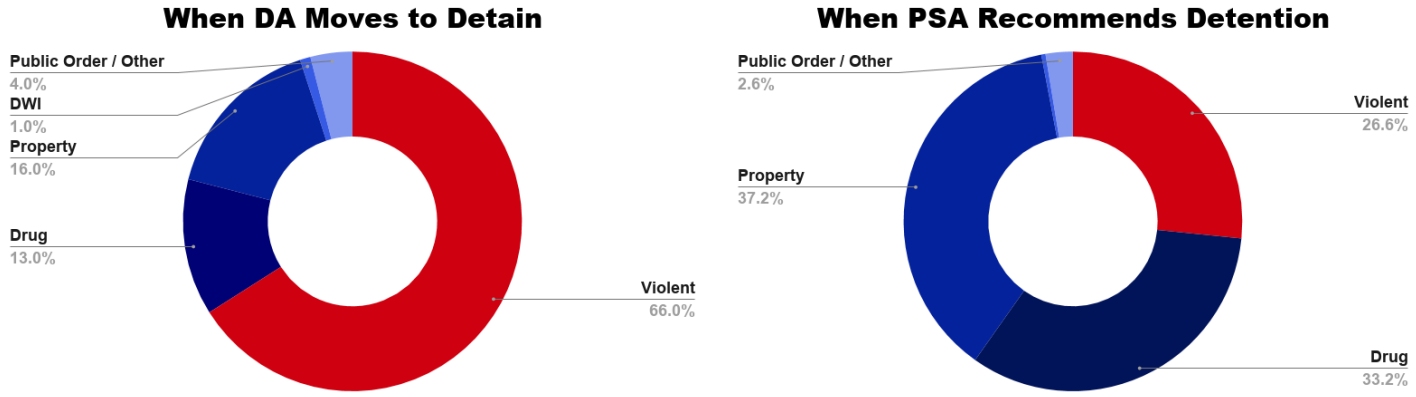


Figure 4: The Second Judicial DA's Office moves to detain violent defendants more than twice as often as the PSA recommends their detention. The PSA recommends detention for drug and property crimes nearly three times as often. The DA's Office has implemented internal screening policies and procedures to identify and file motions on dangerous and violent defendants.[16]

> The PSA scores are almost entirely divorced from the text of the New Mexico Constitution… The tool thus identifies offenders for detention that cannot legally be detained in New Mexico.

Further, many of the defendants who have failed to appear were on pretrial supervision, thereby calling into serious question the effectiveness of pretrial services. Before the constitutional amendment, four counties in New Mexico — Santa Fe, Dona Ana, Chaves, and Luna — had a failure to appear rate of 22.4%; after the constitutional amendment, Bernalillo County's failure to appear rate is 32% while other bail-reform jurisdictions have failure to appear rates of approximately 10%.[12]

The unreasonably high failure to appear rate in Bernalillo County disrupts the judicial process and frustrates the goal of obtaining justice in criminal cases. Equally important, it impacts public safety. Bernalillo County uses a risk assessment tool called the Public Safety Assessment (PSA). This tool relies on aggregate data to predict the risk an offender poses of failing to appear and committing new crimes while on release based on the offender's age, criminal history, and court appearance history. With these factors, the PSA generates a failure to appear score and a new criminal activity score, both measured on a scale of 1 (the lowest risk) to 6 (the highest risk). These scores are combined in a matrix to provide a recommendation of either release or detention and the level of supervision to impose if the defendant is released.

The PSA scores are almost entirely divorced from the text of the New Mexico Constitution. The failure to appear score reflects flight risk, and the new criminal activity score reflects the risk of committing any crime, including property and drug crimes, while on conditions of release. But Article II, Section 13 provides for pretrial detention based only on dangerousness, not a risk of failing to appear or even a risk of committing non-violent crimes. Indeed, the tool often recommends detention for defendants with a high level of flight risk even without any evidence of dangerousness. In those circumstances, prosecutors cannot file a motion to detain because there are no grounds to support such a motion under the limited basis for detention provided in Article II, Section 13. The tool thus identifies offenders for detention that cannot legally be detained in New Mexico. Unsurprisingly, the PSA was developed for jurisdictions that provide for detention based on flight risk in addition to dangerousness, not for a hybrid system like the one in New Mexico.

> A defendant would receive the same PSA scores, and the same recommendation for release or detention, whether the defendant were charged with a single count of possessing a minuscule amount of drugs or charged instead with multiple counts of first degree murder.

> The PSA's inability to capture a defendant's risk of dangerousness is evident in the fact that it recommends detention for property and drug crimes nearly 30% of the time but recommends detention for only 17% of violent crimes.

The PSA targets a type of risk that is not a valid basis for detention in New Mexico; it also fails to target the risk for which defendants can actually be detained. The failure to appear and new criminal activity scores have almost nothing to do with dangerousness. These scores in no way account for the nature of the current charge and do not distinguish between violent and non-violent charges. A defendant would receive the same scores, and the same recommendation for release or detention, whether the defendant were charged with a single count of possessing a minuscule amount of drugs or charged instead with multiple counts of first degree murder. The new criminal activity score considers whether a defendant has a past conviction for a violent crime, but it does not distinguish between a past violent assault resulting in no injury and a past violent murder resulting in a person's death. Moreover, this aspect of a defendant's criminal history is only one of seven factors used to create the new criminal activity score and therefore has only a minor impact on the overall score.

The PSA's inability to capture a defendant's risk of dangerousness is evident in the fact that it recommends detention for property and drug crimes nearly 30% of the time but recommends detention for only 17% of violent crimes. In fact, the most frequent recommendation for violent crimes is release on the defendant's own recognizance, the lowest level of supervision possible, even though recognizance is not the most frequent recommendation for any of the other five categories of charges.

In short, the PSA is incompatible with Article II, Section 13. By attempting to squeeze this tool into a system where it does not belong, judges receive distorted recommendations for release or detention. And although judges are not bound by the PSA, the judges in Bernalillo County nevertheless often follow it.

III. New Mexico is not yet safer with bail reform and is not as safe as other bail reform jurisdictions.

No one can ask judges to be perfect in making pretrial detention decisions. The Constitution assigns judges the very difficult task of predicting a person's future behavior. But the public and crime victims do reasonably ask that judges be as careful and, ultimately, as accurate as possible given that their decisions affect not only a defendant's liberty but the lives of potential crime victims. Data shows that, in this regard, New Mexico can and must improve.

> A "safety rate" is based on the number of defendants that were not arrested for another crime while out of custody pending trial.

With the assistance of the Administrative Office of the Courts, the Committee heard from national experts on the subject of pretrial detention. Their presentation included data for the "safety rate" in other bail-reform jurisdictions. A "safety rate" is based on the number of defendants that were not arrested for another crime while out of custody pending trial. Kentucky and Washington, D.C., have a safety rate of 88%, while New Jersey has a safety rate of 86%.[13]

The available data suggests that four counties in New Mexico — Santa Fe, Dona Ana, Chaves, and Luna — had, an average safety rate of 74% under the former bail system.[14] The Second Judicial District Court reports that, in the three calendar years since the adoption of the bail-reform amendment, Bernalillo County had a safety rate of 77%, which is far below other jurisdictions and near the safety rate that existed before bail reform.[15]

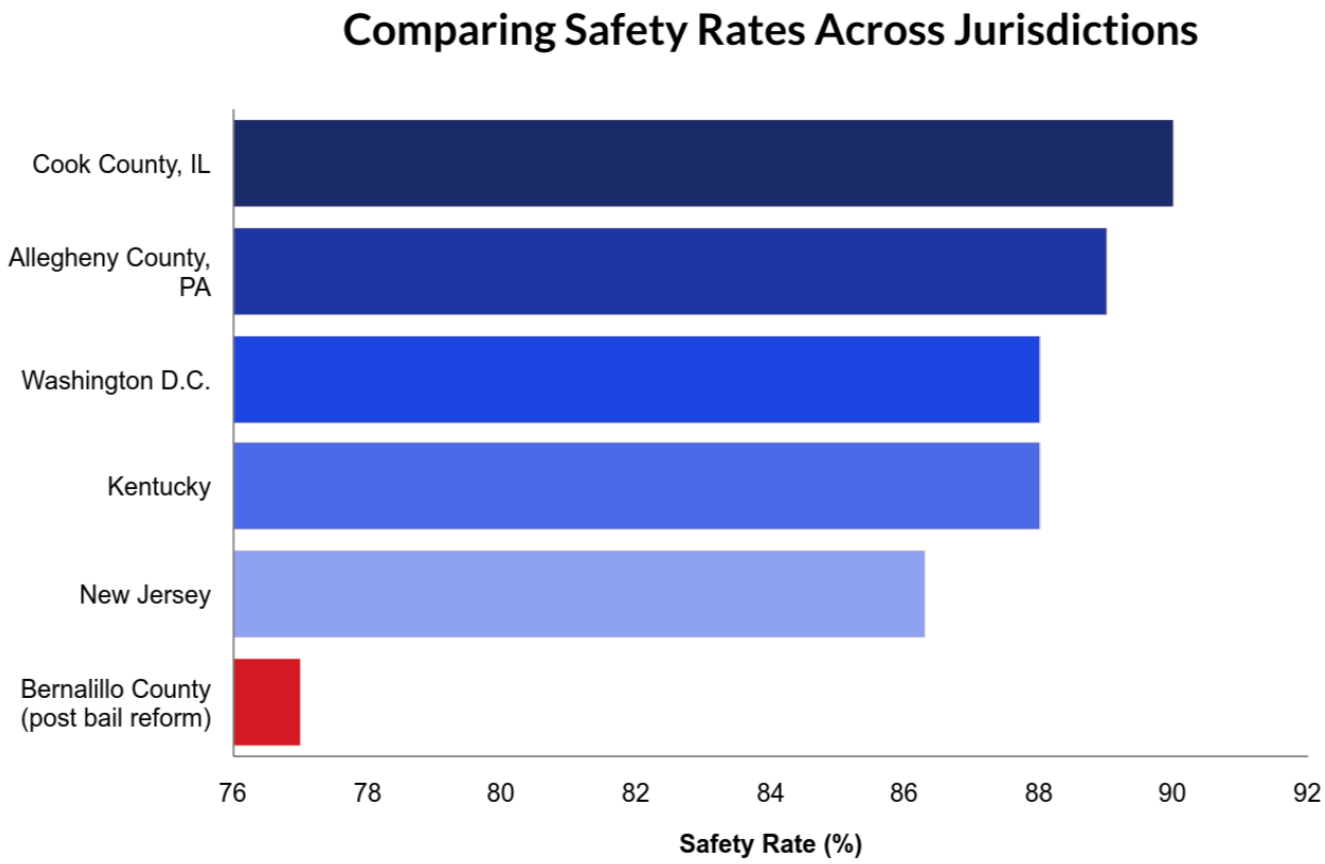


Figure 5: Bernalillo County's "safety rate" — a measurement of defendants' new arrests while out of custody pending trial — is measurably lower than that of other jurisdictions. This indicates that Bernalillo County experiences a higher level of pre-trial recidivism. [12,13,16]

> Current pretrial detention rules have failed to make New Mexico safer with bail reform than it was under the former bail system. New Mexico is worse at identifying the defendants most likely to commit new crimes than other bail-reform jurisdictions.

This data shows two things. First, current pretrial detention rules have failed to make New Mexico safer with bail reform than it was under the former bail system. Second, New Mexico is worse at identifying the defendants most likely to commit new crimes than other bail-reform jurisdictions. A safety rate is useful for comparison purposes, but it is important to understand that it is not a true reflection of the number of crimes committed by released defendants.

A safety rate is useful for comparison purposes, but it is important to understand that it is not a true reflection of the number of crimes committed by released defendants. A safety rate is based on arrests.[16] It is common knowledge that arrests represent only a small fraction of the overall number of crimes. In fact, a substantial number of crimes, including violent crimes, go unsolved and result in no arrest. The safety rates reported by the District Court and the Institute of Social Research further undercount new criminal activity because they only include closed cases in which the case is closed,[17] which excludes open cases in which defendants are on warrant status due to the commission of new crimes. The true impact of new criminal activity on community safety is better measured by new victimization from violent crime.

IV. Defendants charged with violent crime pose a greater risk of violence.

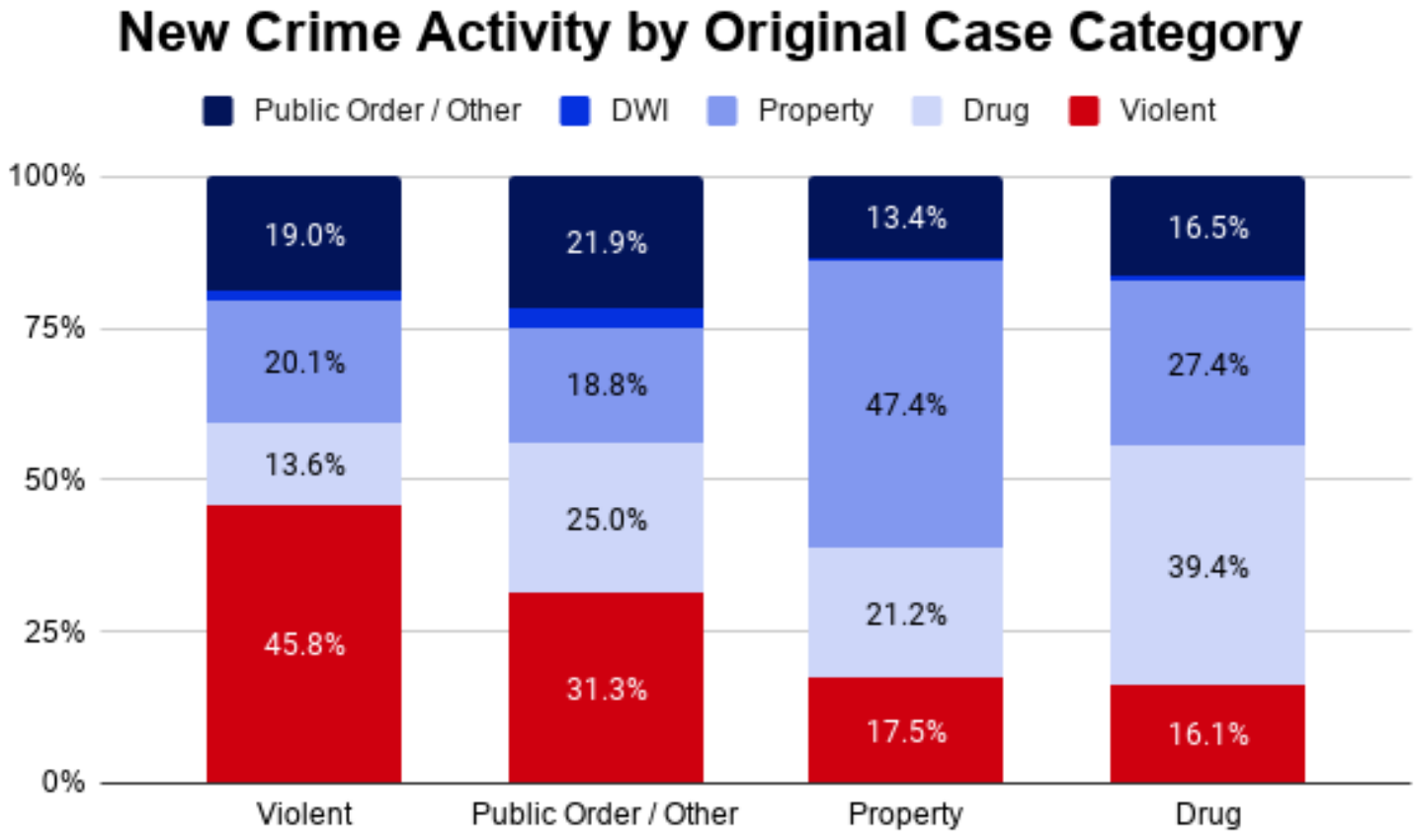


Figure 6: Defendants who are released and reoffend are more likely to reoffend in the same case category as their original charges. Thus, those charged with violent crimes are more likely to commit new violent offenses if they reoffend.[16]

The Institute for Social Research has found that new criminal activity committed by released defendants is "more likely to be the same kind of crime as the original assessed case than any other individual category."[18] This means that defendants charged with violent crimes that are released and reoffend are more likely to commit crimes of violence than other crimes.

This research is consistent with Timothy Schnacke's presentation to the Committee. Mr. Schnacke took note of New Mexico's "wide net" of all felony charges that are subject to pretrial detention and explained that his own net would be crimes of violence because common sense and several studies show that violent offenders tend to commit violent crimes when reoffending.

> Defendants charged with violent crimes that are released and reoffend are more likely to commit crimes of violence than other crimes.

V. New Mexico releases more dangerous offenders than other jurisdictions.

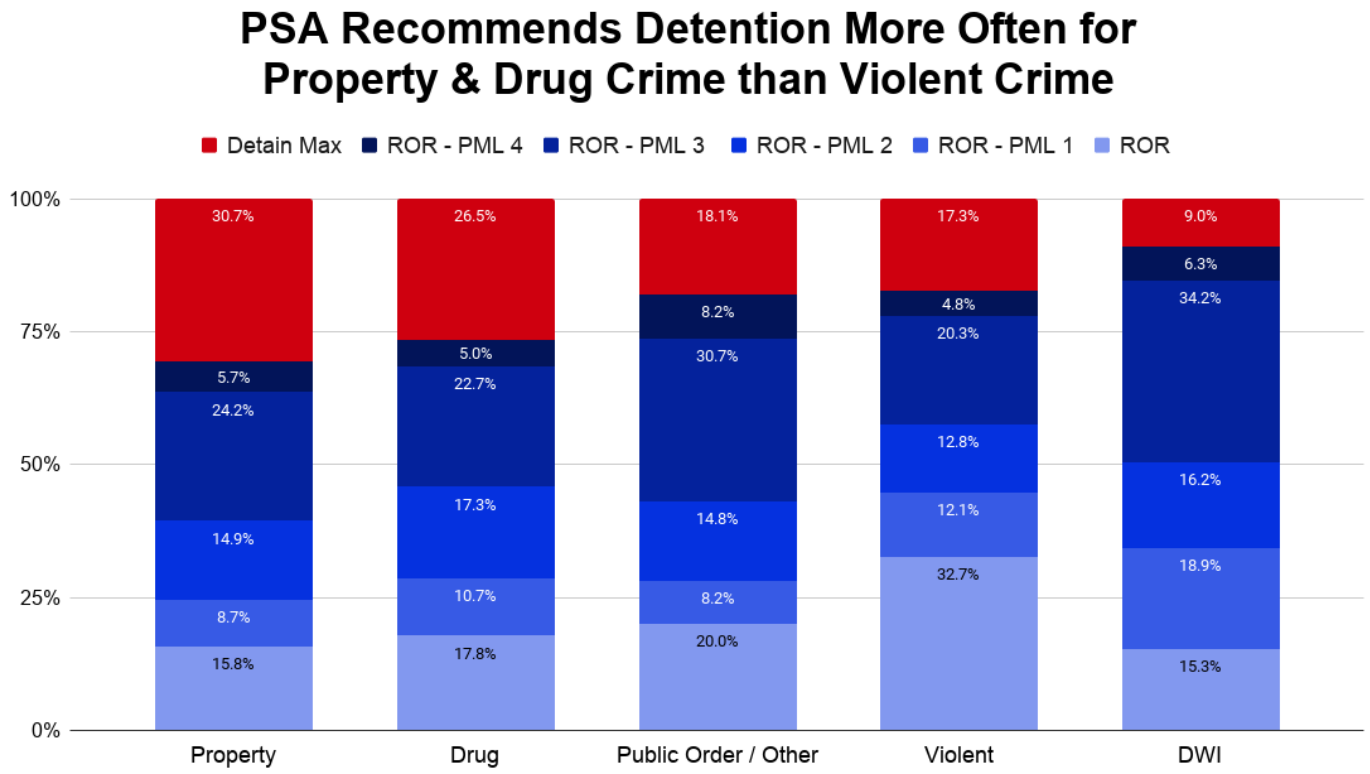


Figure 7: The above chart illustrates the inadequacy of the PSA in its evaluation of the dangerousness of the current criminal charge. It recommends release nearly a third of the time for defendants accused of violent crime, while recommending detention for property and drug crimes. Further, Bernalillo County judges' decision-making is overwhelmingly influenced by the PSA, with detention decisions tracking release recommendations for every crime category. [16]

> Data shows that judges frequently follow the PSA recommendation even though it is almost completely divorced from the notion of dangerousness.

As observed above, Rule 5-409(F)(6) requires judges to consider "whether the offense is a crime of violence." The rule, however, does not distinguish among violent crimes and provides no guidance on how this factor should be considered or the weight it should be given.

Bernalillo County has a violence flag in the PSA, which can be an effective way to highlight potential dangerousness. New Jersey found that defendants with a violence flag were three times more likely than other defendants to be charged with a violent crime following release.[19] In New Mexico, however, the violence flag is overshadowed by the PSA scores and the associated recommendation of release or detention. New criminal activity scores and failure to appear scores are not based on violence indicators and are not designed to reveal dangerousness. Indeed, the PSA recommends releasing defendants charged with violent crimes on their own recognizance at a higher rate than defendants charged with property and drug crimes. The tool therefore sends mixed messages to judges and diminishes the weight given to violent charges. Data shows, in fact, that judges frequently follow the PSA recommendation even though it is almost completely divorced from the notion of dangerousness.

Compared to other bail-reform jurisdictions, judges in New Mexico receive too little guidance about the circumstances warranting pretrial detention (see Fig. 2 for a comparison on PSA implementation across jurisdictions). As a result, pretrial detention rates vary considerably among different judges and among different judicial districts.

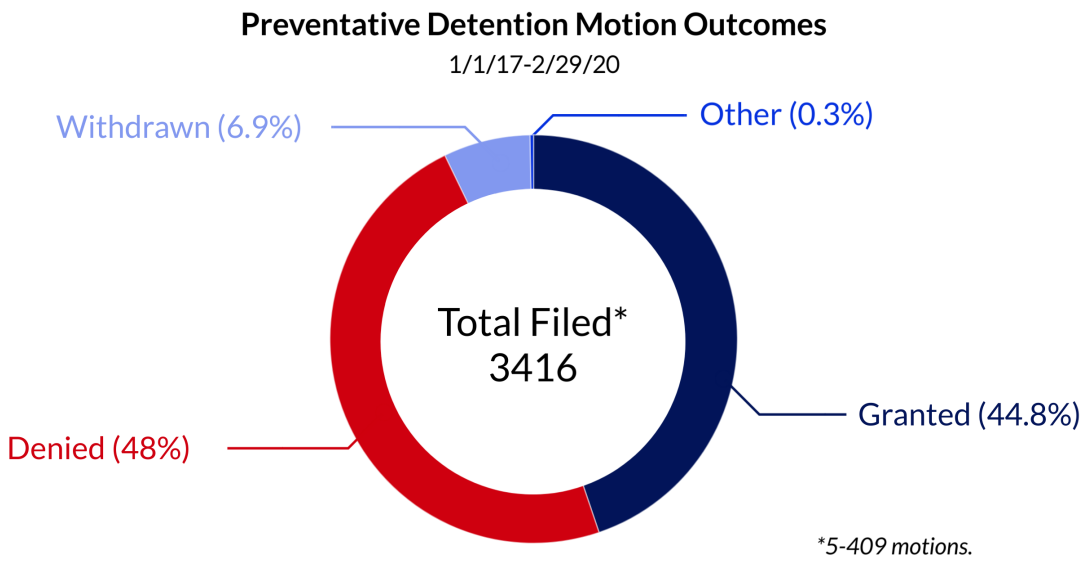


Figure 8: Pre-trial detention outcomes for motions filed in the Second Judicial District. Data based in internal tracking by the Second Judicial District Attorney and the court records system, Odyssey.

> A dangerous defendant charged with murder is no less of a risk to the public simply because the defendant has not previously violated conditions of release.

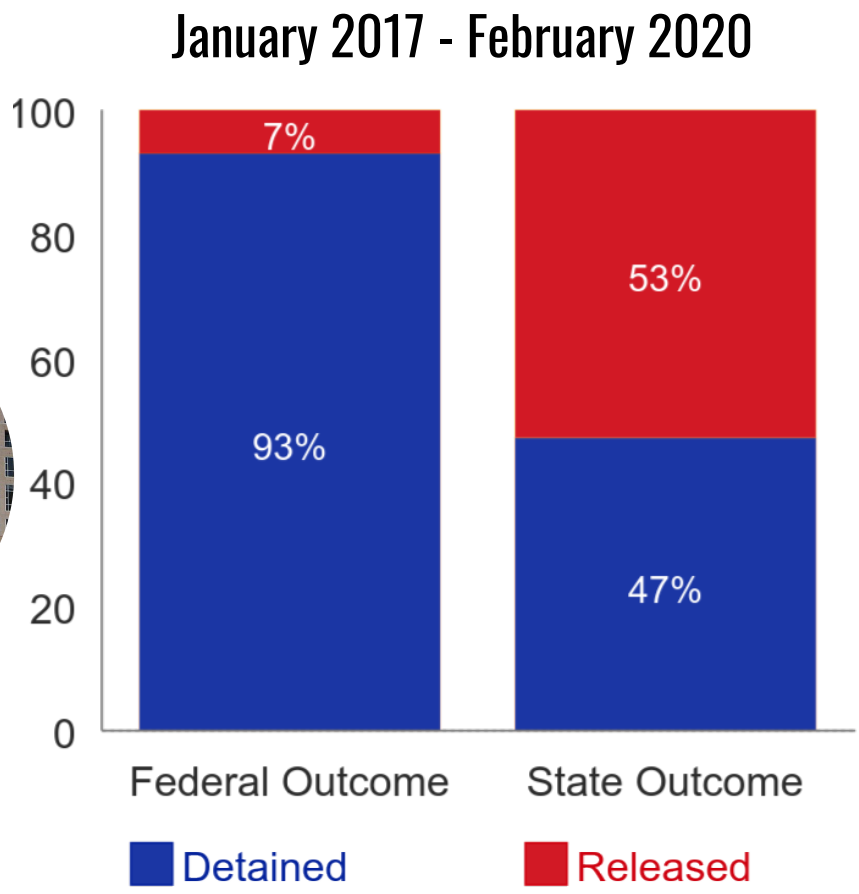
Moreover, because New Mexico judges have been instructed that a defendant's dangerousness to the community is not a sufficient ground in itself to detain, they frequently release dangerous defendants that should not be released. Time and again, judges in the Second Judicial District have released defendants charged with serious violent felonies, even though the judges found the defendants to be dangerous to the community, because the State was unable to point to past violations of conditions of release or probation.[20] This is a form of the "Son of Sam" problem identified by Mr. Schnacke.[21] A dangerous defendant charged with murder is no less of a risk to the public simply because the defendant has not previously violated conditions of release.

Prosecutors in New Mexico heavily screen felony cases to identify dangerous offenders. The Second Judicial District Attorney's Office files a motion for pretrial detention in only 12.6% of felony cases.[22] By contrast, New Jersey prosecutors file for detention in 49% of cases eligible for detention.[23] Yet judges in Bernalillo County still denied a higher percentage of pretrial detention motions (51.6%)[24] than judges in New Jersey (48.8%).[25] More starkly, for 108 defendants, the State initially charged the crime in state court and referred the case for federal prosecution after a state detention hearing. The federal prosecutor, based on the same offense and the same defendant, then sought pretrial detention in federal court. Of those 108 pretrial detention motions, the state court granted only 56 while the federal court granted 100. The federal court thus identified and held 44 dangerous defendants that the state court would have released into the community.

> The Second Judicial District Attorney's Office files a motion for pretrial detention in only 12.6% of felony cases. New Jersey prosecutors file for detention in 49% of cases eligible for detention. Judges in Bernalillo County still denied a higher percentage of pretrial detention motions (51.6%) than judges in New Jersey (48.8%).

The reality in New Mexico is that judges release more dangerous defendants than other bail-reform jurisdictions.[26] Because New Mexico's current rules result in the release of dangerous defendants, they conflict with the ballot's promise to the voters that judges would detain dangerous defendants.

FEDERAL COURT VS STATE COURT



108 cases:

- same defendant
- same incident
- same criminal history
- same level of proof

State prosecution includes the most serious firearm-involved cases, some of which are referred for federal prosecution after a state detention hearing. Between January 2017 and February 2020, there have been 108 cases in Bernalillo County with both State and Federal pre-trial detention outcomes. The bar graph above demonstrates that federal judges grant nearly double the percentage of preventative detention motions than state judges do for the same cases.

VI. Rebuttable presumptions are used across the country to help identify violent and otherwise risky offenders.

Other bail-reform jurisdictions recognize that certain charges and certain classes of offenders pose a special risk to community safety. To address this special risk, those jurisdictions rely on statutes or rules with rebuttable presumptions. These provisions mean that a defendant will be presumptively detained when there is probable cause to believe the defendant committed one of several enumerated dangerous offenses, committed an offense in a particularly risky manner, or has a particularly risky history, subject to the presumption being rebutted. These provisions do not shift the burden of persuasion to the defendant. Instead, the defendant bears a burden of production, meaning the defendant must introduce some proof of why the defendant should not be detained. As a result, these provisions serve to inform judges about general risks associated with certain charges or classes of defendants without limiting judicial discretion or imposing an undue burden on defendants.

CA - Senate Bill 10

signed by Gov. J. Brown (D) 2018

- Being charged with a violent felony
- Being personally armed with or using a deadly weapon or firearm in the commission of a felony
- Inflicting great bodily injury in the commission of a felony
- Being assessed as "high risk" and having a recent conviction of a serious or violent felony, committing the offense charged while pending sentencing for a violent felony or while on supervised probation or parole, or intimidating or threatening a witness or victim

NM Proposal for Rule 5-409

- Being charged with a serious violent felony
- Being armed with a firearm or having a firearm readily available in the commission of a felony
- Inflicting death or great bodily harm in the commission of a felony
- Having a recent conviction of or being on conditions of release or probation for one of the aforementioned dangerous felonies, or obstructing the criminal justice system

Rebuttable presumptions have withstood constitutional challenges in other jurisdictions, and they similarly do not offend the New Mexico Constitution. The Due Process Clause of the Federal Constitution requires the prosecution to bear the burden of establishing clear and convincing proof to justify pretrial detention.[27] Article II, Section 13 adopts this same burden of proof and standard of proof, and New Mexico voters thus did no more than expressly incorporate the due process standard in our Constitution.[28] Other bail-reform jurisdictions have repeatedly held that rebuttable presumptions do not violate the Due Process Clause because they do not shift the burden of proof, and the reasoning of these decision applies with equal force in New Mexico.[29]

California, the District of Columbia, and the Federal Government use rebuttable presumptions to identify offenders that are dangerous and from whom conditions of release cannot protect the community.[30] These provisions therefore not only make judges aware of important legislative policy evaluations but also minimize the "Son of Sam" problem.

We propose to add rebuttable presumptions to Rule 5-409. This proposal would create a presumption of detention for the following charges and classes of offenders:

- Being charged with One of Eleven serious violent felony
- Being armed with a firearm or having a firearm readily available in the commission of a felony
- Inflicting death or great bodily harm in the commission of a felony
- Having a recent conviction of or being on conditions of release or probation for one of the aforementioned dangerous felonies, or obstructing the criminal justice system

The experience of California and the District of Columbia shows that rebuttable presumptions can help judges identify potentially dangerous offenders. Rebuttable presumptions provide judges with information about the risks society is willing to tolerate, and when the community's safety is at stake, judges should have access to more, not less, information. As this Court has said, "to the extent that we permit judges to take into account all helpful and reliable information in [predicting the risk of a defendant committing a new crime while on release], we will reduce the margins for error."[29]

Conclusion

The people of New Mexico voted for safety. With the current release decisions, our communities are not as safe as other bail-reform communities. The public has the right to a change in rules of procedure or for the issue to be considered again by the Legislature. We believe rebuttable presumptions will make us safer. We respectfully ask the Court to adopt our proposal for Rule 5-409(F)(7).

APPENDIX

1. Second Judicial District Attorney's Office, *Response to Ad Hoc Committee Data Request* at 10 (Feb. 21, 2020).

2. Second Judicial District Court, Outcome Measures July 1, 2017 – June 30, 2019 at 4 (Feb. 2020).

3. 2018-NMSC-005, 410 P.3d 201.

4. 18 U.S.C. § 3142(f); N.J. Const. art. I, ¶ 11.

5. 18 U.S.C. § 3142(d)(2)-(3).

6. *State v. Mercedes*, 183 A.3d 914, 921 (N.J. 2018).

7. Separately from the issue of rebuttable presumptions, there may need to be a constitutional amendment to address flight risk. The Second Judicial District Court reports a horrendous failure to appear rate of 32% since the constitutional amendment compared to a baseline of 22.4% under the money-bail system. Many of the defendants who failed to appear were on pretrial supervision, which calls into question the effectiveness of pretrial services. Other bail-reform jurisdictions have failure to appear rates of approximately 10%. Failing to provide for pretrial detention based on flight risk was a major oversight.

8. *See State v. Ferry*, 2018-NMSC-004, ¶ 6, 409 P.3d 918.

9. *See Tijerina v. Baker*, 1968-NMSC-009, ¶ 13, 78 N.M. 770 ("[T]he charge of a capital offense raises a rebuttable presumption that the proof is evident and the presumption great that the defendant so charged committed the capital offense, and one so accused is not entitled to bail until that presumption is overcome.").

10. *State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390.

11. Cal. Penal Code § 1320.20.

12. D.C. Code § 23-1322(c).

13. Data Provided by Timothy Schnacke in a Presentation to the Ad Hoc Committee on February 27, 2020.

14. Jenna Dole et al., *Bail Reform Baseline Measures* at 21 (N.M. Statistical Analysis Ctr. Oct. 2019).

15. Second Judicial District Court, Outcome Measures July 1, 2017 – June 30, 2019 at 3 (Feb. 2020).

16. *See Elise Ferguson* et al., *Failure to Appear and New Criminal Activity: Outcome Measures for Preventive Detention and Public Safety Assessments* at 2 (Inst. of Soc. Research Jan. 2020).

17. See id. at 8; *Outcome Measures*, supra, at 1.

18. Ferguson et al., *supra*, at 12.

19. N.J. Admin. Office of the Courts, *2018 Report to the Governor and the Legislature* at 12 (April 2019).

20. *See, e.g., State v. Darian Bashir*, No. D-202-LR-201900175, Order Denying Pretrial Detention Filed on Feb. 25, 2019, at 9-10 (finding clear and convincing evidence the defendant "poses a risk of danger to the community or any other person" but "the risk Defendant poses can be reasonably addressed with appropriate conditions of release").

21. "Son of Sam" refers to the serial killer, David Berkowitz, whose crimes terrorized New York City during the summer of 1976 and who was mentally unstable but had no criminal history when he was finally arrested in 1977. The "Son of Sam" problem is that the PSA scores largely based on criminal history, and a serial killer like the Son of Sam would likely receive scores of 1 out of 6 for flight risk and 1 out of 6 for risk of new criminal history, with a recommendation of release, despite the obvious and urgent danger to the public.

22. Admin. Office of the Dist. Attorneys, *Response to Ad Hoc Committee Data Request* at 1 (Feb. 21, 2020) (reporting 25,064 felony cases filed in the Second Judicial District from 2017 through 2019); Second DA's Response, *supra*, at 2 (reporting 3,149 pretrial detention motions filed from 2017 through 2019).

23. *2018 Report, supra*, at 5 n.1, 8.

24. Second DA's Response, *supra*, at 6.

25. *2018 Report, supra*, at 8.

26. Of the defendants eligible for pretrial detention in New Jersey, the state had a release rate of 80.2%, and New Jersey judges ordered pretrial detention for 19.5% of eligible defendants. *2018 Report, supra*, at In Bernalillo County, there was a release rate between 92.2% and 94.5%, and judges only detained between 5.5% and 7.8% of defendants eligible for pretrial detention. *Compare Outcome Measures, supra*, at 7 (reporting 15,862 completed PSAs and 1234 detention motions granted), *with* AODA Response, *supra*, at 1 (reporting 25,064 felony cases filed), and Second DA's Response, *supra*, at 2 (reporting 1391 detention motions granted). Judges in New Jersey detained defendants at more than twice the rate of judges in Bernalillo County.

27. For many of these reasons, rebuttable presumptions have survived constitutional challenges in other jurisdictions and would likely survive a constitutional challenge in New Mexico under both the Federal and State Constitutions. Article II, Section 13 assigns the burden of proof for pretrial detention to the prosecuting authority and imposes a clear and convincing standard of proof, but this language does not foreclose rebuttable presumptions. Instead, this language merely adopts in the text of the provision the constitutional standard otherwise applicable as a matter of due process. Long before the voters amended Article II, Section 13 to allow judges to detain dangerous defendants, the United States Supreme Court addressed the constitutionality of the federal Bail Reform Act of 1984 in *United States v. Salerno*, 481 U.S. 739 (1987). The Court ultimately held that, "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, . . . consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." Id. at 751. "In deciding in Salerno that [heightened scrutiny requiring

a sufficiently compelling governmental need for detention] did not categorically bar pretrial detention of criminal defendants without bail under the Bail Reform Act of 1984, it was crucial that the statute provided that, 'in a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.'" *Demore v. Hyung Joon Kim,* 538 U.S. 510, 549 (2003) (Souter, J., dissenting) (quoting Salerno, 481 U.S. at 750).

It is firmly established that rebuttable presumptions — such as those used in the Bail Reform Act, in the District of Columbia, and in California — do not conflict with the requirements of the Due Process Clause, and they therefore do not conflict with the identical standard expressed in Article II, Section 13. Justice Breyer, before joining the Supreme Court, explained in detail why rebuttable presumptions are consistent with the government's burden to prove dangerousness by clear and convincing evidence. In the pretrial detention context, a rebuttable presumption — whether based on the offense charged or an offender's history — does not shift the burden of proof: "[T]he presumption shifts the burden of production not persuasion and . . . once the defendant produces evidence, the [judge] will keep in mind [the legislative body's] general factual view about special . . . risks, using it where appropriate along with other factors . . . ." *United States v. Jessup*, 757 F.2d 378, 389 (1st Cir. 1985) (Breyer, J.). In other words, a legislative or rulemaking body makes a determination about general risks posed by particular classes of offenses or offenders, and the presumption serves as a signal to judges, "who typically focus only upon the particular cases before them, to take account of the more general facts that [the legislative or rulemaking body] found." *Id.* at 384.

This does not impose an insurmountable or inordinate burden on a defendant, who can rely on a proffer just like the State and who "can always provide the [judge] with some reason to believe him a good risk." *Id.* at 382-83. Nor does it unduly restrict judicial discretion. "[S]ince [the legislative or rulemaking body] seeks only consideration of the general . . . problem [posed by particular offenders or offenses], the . . . judge may still conclude that what is true in general is not true in the particular case before him. He is free to do so, and to release the defendant, as long as the defendant has presented some evidence and the . . . judge has evaluated all of the evidence with [the legislative or rulemaking body's] view of the general problem in mind." Id. at 384.

In other words, rebuttable presumptions serve only to highlight particularly risky offenses or offenders. They aid judges in their review of all of the evidence by focusing attention on particularly important facts, and they therefore promote more accurate decision making. Id. at 386. The voters' goal in adopting the amendments to Article II, Section 13 was to identify and detain dangerous offenders. A procedural mechanism that fosters this goal in a manner that does not offend the provision's text should not be deemed unconstitutional.

28. *See, e.g.,* 18 U.S.C. § 3142(e)(2) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judicial officer finds . . . .").

29. *Torrez*, 2018-NMSC-005, ¶ 103.

30. *See, e.g.*, 18 U.S.C. § 3142(e)(2) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judicial officer finds . . . .").

31. *Torrez*, 2018-NMSC-005, ¶ 103.