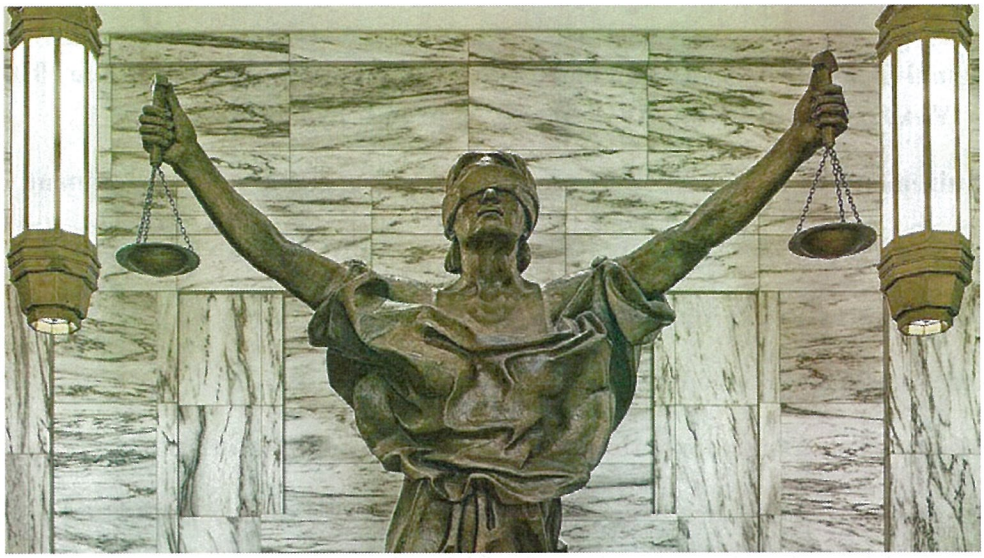
KEY FACTS AND LAW REGARDING PRETRIAL RELEASE AND DETENTION



INTRODUCTION

New Mexico, like the federal government and an increasing number of states in recent years, has been changing old dysfunctional practices to better protect public safety and improve the fairness of its pretrial justice system. Every jurisdiction that has seriously studied the problem has concluded that meaningful reforms in the way we distinguish between arrestees we hold in jail before trial and those we allow to remain free until their guilt can be determined can be accomplished only by moving from a money-based system to an evidence-of-risk-based system of release and detention.

In the past few years, New Mexico has taken two significant steps in that direction:

(1) passage in 2016 by the New Mexico Legislature (91% in favor) and New Mexico voters (87% in favor) of a constitutional amendment to give judges new authority to deny release to proven dangerous defendants -- no matter how much they can pay to buy a bail bond -- and ensuring that defendants who are neither a danger nor a flight risk may not be kept in jail before trial only because they cannot afford to buy a money bond; and

(2) issuance in July 2017 by the Supreme Court, on recommendation of a broad-based bail reform committee, of court rules to enforce the mandates of the new constitutional amendment, better protect public safety, and improve equal protection of the law.

This is a quick reference guide to key facts about those reforms.

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ORIGINAL COURT-PROPOSED CONSTITUTIONAL AMENDMENT

SECTION 1. It is proposed to amend Article 2, Section 13 of the constitution of New Mexico to read:

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied pending trial if, after a hearing, the court finds by clear and convincing evidence that no release conditions will reasonably ensure the appearance of the person as required or protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

No person eligible for pretrial release pursuant to this section shall be detained solely because of financial inability to post a money or property bond."

CONSTITUTIONAL AMENDMENT PASSED BY LEGISLATURE AND NM VOTERS

SECTION 1. It is proposed to amend Article 2, Section 13 of the constitution of New Mexico to read:

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner."

[*New language added to previous constitutional language is underlined*]

REQUIREMENTS OF THE 2016 CONSTITUTIONAL AMENDMENT

1. The NM Constitution now allows district judges to deny pretrial release to dangerous defendants, requiring that pretrial release and detention decisions be based on evidence of individual risk of danger or flight, not on how much an arrestee can pay to get out of jail.

2. For the first time in NM history, district judges may now better protect community safety by denying pretrial release to dangerous defendants, no matter how much they can pay for a bond. In the past, judges had no authority to deny release to dangerous defendants who could buy a bond or make an installment payment deal with a bail bondsman.

3. As a result of an amendment in the legislative process, only a judge in a court of record (currently only district judges) has the authority to conduct a detention hearing or enter an order denying pretrial release, and may do so only after a prosecutor files a motion to detain a defendant without bail. Because of the legislative amendment, magistrate and metropolitan and municipal court judges have no authority to deny pretrial release to dangerous defendants.

4. In order to obtain an order to deny pretrial release, the prosecutor must file a detention request in district court and prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

5. Low-risk arrestees who or neither a danger nor a flight risk may not be jailed pending trial (at significant taxpayer expense) solely for lack of money to buy their way out. This enforces several fundamental bases of American justice: (1) that an accused citizen is innocent until proven guilty at a trial where constitutional protections are honored; (2) that the government has the burden of producing evidence to satisfy a jury or judge that guilt has been proved beyond a reasonable doubt; (3) that bail is not pretrial punishment but is a method of releasing an accused pending trial; and (4) that all accused citizens are entitled to equal protection of the laws, no matter how much money they may or may not have.

6. Constitutional provisions must be upheld by all government officials. Statutes enacted by the Legislature and procedural rules promulgated by the Supreme Court must comply with the Constitution and all judges must support and uphold constitutional mandates in their rulings.

7. The provisions of the 2016 constitutional amendment overwhelmingly approved by the Legislature and New Mexico voters were based on federal statutes that have been expressly upheld as constitutional over 30 years ago by the United States Supreme Court in *U.S. v. Salerno*, 481 U.S. 739 (1987), and on similar constitutional reforms approved in 2014 by New Jersey voters.

COURT RULE UPDATES REQUIRED BY CONSTITUTION CHANGES

1. On July 1, 2017 the NM Supreme Court, on recommendation of a broad-based state bail reform committee, updated its court rules to comply with the constitutional requirements.

2. The committee, chaired by a former UNM Law School Dean, included members from all branches of government; the AG's office; district attorneys; defense attorneys; county officials; commercial bondsmen; judges from various levels of courts; and a retired federal judge.

3. The amendments included evidence-based procedures for

(a) conducting detention-for-dangerousness hearings (Rule 409);

(b) determination of what monetary bond or other release conditions are necessary to address flight risk (Rule 401B-F);

(c) clarification that fixed money-bail schedules that do not take into account evidence of dangerousness or flight risk cannot be used (401E);

(d) clarification that released defendants who fail to appear or commit new crimes or otherwise violate their conditions of release may have their release conditions strengthened or their pretrial release completely revoked (Rule 403).

4. The requirement that arrestees be released on nonfinancial conditions unless the court makes a case finding that no combination of nonfinancial conditions will reasonably assure future court appearance has been part of federal law since 1966 and NM law since 1972. Those provisions were not created by the new rules.

5. In place of the various inconsistent fixed-money-bond schedules that had been used by many local jurisdictions despite their lack of consideration of individual risk and noncompliance with controlling law, the new rules (Rule 409) also provide tighter regulation of procedures for early release procedures by detention centers and court employees, allowing standardized release of low-risk arrestees prior to initial court appearances but ending the practice of releasing high-risk defendants on fixed money bond schedules before they appear before a judge for a detention or release hearing.

6. The rules updates do not prohibit the use of monetary bonds; they continue previous legal requirements that money bonds can be required only when needed to assure court appearance (Rule 401). Unlike a growing number of states and all nations except the U.S. and the Philippines, the new rules do not outlaw the selling of bail bonds or their requirement by a court where financial security is determined to be appropriate in a particular case.

WHY MONEY BONDS NEVER PROTECT PUBLIC SAFETY

1. Money bonds do nothing to protect public safety or deter a released defendant from committing new crimes while bonded out, whether against previous victims or new victims. Even worse, some defendants commit new crimes to get money to pay for money bonds.

2. A money bond's lawful purpose is not to protect public safety, but only to provide additional assurance that a released defendant will return to court. *State v. Eriksons*, 1987-NMSC-108.

3. Money bonds cannot lawfully be forfeited by a judge for commission of new crimes while out on bail because NM statutes do not "authorize[] forfeiture of bail for anything other than failure to appear." *State v. Romero*, 2007-NMSC-030. NMSA 31-3-2. No American jurisdiction allows judges to forfeit money bonds for commission of new crimes while on release.

4. Money bonds cannot lawfully be set in an amount designed to prevent exercise of the constitutional right to pretrial release nor as pretrial punishment for the charged offenses. "Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." *State v. Brown*, 2014-NMSC-038. The same is true under controlling law in the federal constitution, as observed by the United States Supreme Court: "[R]equiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. *Stack v. Boyle*, 342 U.S. 1 (1951); *Bandy v. U.S.*, 81 S. Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom.").

5. Money bonds are not required to be used as conditions of release by either the NM or the US constitutions. " 'Bail' as used in the constitutions is a broad category of nonmonetary and monetary pretrial release; money bonds are only one form of bail. Commercial money bonds did not exist until around 1900, over 100 years after the adoption of the U.S. constitution." *State v. Brown*, 2014-NMSC-038. The term "bail" includes the "process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance. . . " Black's Law Dictionary 167 (10th ed. 2014).

6. The United States Supreme Court has recognized that the federal constitution's only reference to bail, the 8th Amendment's right against excessive bail, "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." *Salerno v. United States*, 481 U.S. 739 (1987).

7. A bail bondsman does not enforce important pretrial release conditions such as drug or alcohol testing, curfews, preventing contact with victims or witnesses, travel restrictions, weapons restrictions, GPS monitoring, or the requirement not to commit new crimes.

FIXED MONEY BOND SCHEDULES ARE DANGEROUS AND UNJUST

1. Fixed money bond schedules neither protect public safety nor protect against flight risk, because they can never take individual risk or criminal history into account. They result in repetitious catch-and-release for high-risk defendants.

2. Fixed schedules deny equal protection of the law to arrestees who do not have money to buy them because they are jailed pretrial despite the fact they are neither dangerous nor flight risks, simply because they have less money than defendants who can afford to buy their way out of jail.

3. Fixed money bond schedules were never established by New Mexico laws and have been held in numerous cases to be inconsistent with state and federal law. See the precedents surveyed in *Odonnell v. Harris County*, https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf; http://www.houstonpress.com/news/judge-rips-harris-county-bail-system-in-historic-ruling-9399890

4. The various county-by-county fixed money bond schedules that had been used in recent years in parts of New Mexico created inconsistent provisions that meant arrestees on the very same state charges, felony or misdemeanor, were treated differently in the amount of money bond they were required to post, depending on what side of a county line they were arrested.

5. No federal or state court has ever held that fixed money bond schedules are required by any federal or state constitution, despite repeated unsuccessful lawsuits by the commercial money bail industry.

RISK ASSESSMENTS HELP IDENTIFY DANGER AND FLIGHT RISKS

1. "A pretrial risk assessment instrument or tool provides an objective analysis of whether an arrested person is likely to appear in court and not get rearrested if released before trial. Using a pretrial risk assessment tool reduces bias and subjectivity in court decisions about who should be detained before trial and which conditions, if any, should be required of those who are released." https://www.pretrial.org/solutions/risk-assessment

2. The thoroughly-validated Arnold Public Safety Assessment is the recognized leader for risk assessment instruments and has been used successfully in many states to improve public safety and avoid unnecessary taxpayer-funded detention of low-risk arrestees.

http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/

http://www.ncjp.org/pretrial/universal-risk-assessment

https://mobile.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html

http://www.ncjp.org/pretrial/universal-risk-assessment

https://www.wired.com/story/bail-reform-tech-justice/

https://ww2.kqed.org/news/2017/09/27/bail-or-jail-tool-used-by-san-francisco-courts-shows-promising-results/

3. The New Mexico July 2017 amendments provide in Rule 401 that judges should consider, although not be controlled in their release and detention decisions by, the results of a Supreme Court-approved risk-assessment-instrument. Although no instrument has yet been fully tested and approved for statewide use, a pilot project using the Arnold PSA has been authorized in Bernalillo County. In 2018, after analyzing the results of this project in improving judicial predictions of dangerousness and flight risk, the Supreme Court will determine whether to authorize use of the Arnold PSA in courts elsewhere in New Mexico.

4. Risk assessment algorithms, which consider statistically-validated predictive factors, such as prior criminal history and record of attendance at court proceedings, are an additional evidence-based tool, but do not replace consideration of all other relevant factors in an individual case.

5. One advantage of the Arnold PSA, in addition to its proven success in better predicting dangerousness and flight, is that it does not require personnel and funding to conduct individual interviews of arrestees to obtain the necessary information for its use. The background data is quickly available from computerized databases.

NEW COURT RULES HAVE NOT CAUSED HIGHER CRIME RATES

1. The 2016 constitutional amendment and the July 2017 Rules that enforce the constitution's requirements were written to better deal with the real crime problems in New Mexico that have existed for years; they did not cause them.

2. Crime rates in the Albuquerque area, for example, had risen significantly from 2010 to 2016, during the time that dangerous defendants were able to rotate in and out of jails and courts on catch-and-release money bonds. None of that crime rate can be attributed to the later adoption of a case management order, the November 2016 constitutional amendment, or the July 2017 procedural rules.

3. Because of the new constitutional authority and court rules, prosecutors now have new authority in Rule 409 to request and district judges have new authority to prevent release of dangerous defendants, no matter how much they can pay for a money bond.

4. New provisions in Rule 403 as of July 2017 now provide all judges the explicit authority to amend conditions or to revoke pretrial release entirely for defendants who commit new crimes while released, to address the past problems of catch-and-release bail bonds.

5. New provisions in Rule 12-204 provide new authority for both prosecutors and defense counsel to appeal pretrial release and detention decisions and obtain prompt rulings.

6. An objective assessment of the effect of the new laws on New Mexico crime rates will take at least 12 months; during that time prosecutors and judges and others can develop experience in applying their new authority, and reliable statistical data can be developed and reviewed.

7. The New Mexico constitution and rules changes were modeled after provisions of law in other states, the federal courts, and the District of Columbia, that have been found to better protect public safety while ensuring that taxpayer-supported jail space is not used for jailing low-risk defendants who do not pose a danger or a flight risk. There is no reason to believe we cannot achieve similar successes in New Mexico.

EARLY RELEASE MUST BE BASED ON LOW RISK AND NOT MONEY

1. NM Courts have had the authority since 1972 to appoint designees (under a single sentence in old Rule 401) to administer early releases, which had been done either through ROR programs assessing individual risk or, in applications of unclear legality in parts of the state, early release from detention centers on fixed-money-bond schedules that disregarded the individual risk determinations required since 1972 in Rule 401.

2. The fixed-money-bond schedules that some local detention centers were allowed by local courts to administer in the past not only were created in the absence of any explicit state law and in contravention of the individual assessments required by the bail rules since 1972, they varied from county to county, creating inconsistent treatment of arrestees for the same offenses that depended on which side of the county line a person was charged.

3. On recommendation of the bail committee, the Supreme Court issued new Rule 408 to provide guidelines and ensure consistent application of delegated early release authority.

4. Rule 408(B) allows courts to delegate early release authority to county detention facilities, but only for low-risk arrestees in identified misdemeanor cases, and only if they are not already on pretrial release, probation, or parole.

5. The Administrative Office of the Courts has issued a model delegation order that standardizes and clarifies the scope of delegations of early release authority to release those low-risk misdemeanor arrestees. Its standardized guidelines neither allow nor require any exercise of discretion or judicial decision-making by detention center employees.

6. Rules 408 (C) and (D) will allow future use of court-approved validated risk assessment instruments and court-supervised ROR programs for early release of other low-risk defendants, which will not burden detention center personnel with making discretionary judicial decisions. Decisions in those cases will be made by court officials working under court-approved guidelines, based on specific risk-relevant facts relating to each arrestee.

7. No arrestee may be released under these provisions while a prosecutor's detention motion is awaiting a ruling or after a court's detention order has been entered.

8. All these early release provisions are designed to release only low-risk defendants before court appearance, unlike the old fixed money bond schedules that allowed high-risk defendants to buy their way out of jail before even seeing a judge and kept low-risk defendants in jail at taxpayer expense simply for lack of money to buy a money bond.

NM BAIL REFORMS ARE PART OF NATIONAL REFORM EFFORTS

1. The federal government began modern bail reform with the Bail Reform Act of 1966, requiring release on nonmonetary conditions unless financial security is required to assure court appearance in individual cases. Many states, including NM in 1972, modeled their bail rules on the federal reforms. Compare federal 18 U.S. Code § 3142 with New Mexico Rules 401 and 409.

2. The federal government enacted the Bail Reform Act of 1984 to better protect public safety by authorizing federal judges to deny pretrial release for defendants on a showing of clear and convincing evidence of dangerousness. *Salerno v. United States*, 481 U.S. 739 (1987). It was not until the Legislature and voters passed the 2016 constitutional amendment that the NM Supreme Court could issue rules allowing judges to deny release based on dangerousness..

3. States throughout the country are engaged in bail reform efforts like those in New Mexico:

https://newsroom.courts.ca.gov/news/chief-justice-workgroup-money-bail-is-unsafe-and-unfair

http://www.ncsc.org/~/media/microsites/files/trends%202017/trends-2017-final-small.ashx

http://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system

http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/01/locked-up-is-cash-bail-on-the-way-out

http://www.azcentral.com/story/news/local/arizona/2017/06/21/arizona-courts-back-away-cash-bail-system-bond-companies-worried/400209001/

http://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html

4. Justice system participants throughout the country support bail reform:

http://www.theiacp.org/portals/0/pdfs/Pretrial_Booklet_Web.pdf (Intl. Assn Chiefs of Police)

http://www.sheriffs.org/sites/default/files/uploads/documents/2012resolutions/2012-6%20Pretrial%20Services.pdf (National Sheriffs Association)

http://ccj.ncsc.org/~/media/microsites/files/ccj/resolutions/20170809-supporting-federal-efforts-promote-pretrial-risk-assessment.ashx (National Conference of Chief Justices)

https://1newsnet.com/aba-house-supports-bail-reform-other-criminal-justice-measures/ (ABA)

http://lawenforcementleaders.org/wp-content/uploads/2017/09/Press-Release-for-Pretrial-Integrity-and-Safety-Act.pdf (Law Enforcement Leaders)

FEDERAL & STATE COURTS UNIFORMLY UPHOLD BAIL REFORM

1. The Federal Bail Reform Act of 1984, on which N.M. bail reforms are modeled, was upheld by the U.S. Supreme Court in *U.S. v. Salerno*, 481 U.S. 739, 754-55 (1987), holding that when a government's "interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more" and that when reforms require "detention on the basis of a compelling interest other than prevention of flight [such as protecting the community] the Eighth Amendment does not require release on bail."

2. Kentucky explicitly outlawed commercial bail bond companies from doing business in the state in 1976. Commercial bail bond companies brought a series of constitutional challenges to the statutory prohibition, all of which were rejected by federal and state courts. *See, e.g., Johnson Bonding Co.*, 420 F. Supp. 331, 337 (E.D. Ky. 1976); *Stephens v. Bonding Asso. of Kentucky*, 538 S.W.2d 580, 584 (Ky. 1976) (rejecting constitutional challenge to legislation that "[i]nstead of letting commercial sureties 'die on the vine,'" determined to force "commercial bonding companies as surety for profit to go quickly and 'gently into that good night.'"); *Benboe v. Carroll*, 494 F. Supp. 462, 466 (W.D. Ky. 1977) (awarding attorneys' fees to defendants as a result of plaintiff bail bond companies repeated, unsuccessful, and meritless constitutional challenges to Kentucky's prohibition of commercial bail bond companies).

3. In *Schilb v. Kuebel*, 404 U.S. 357, 359-360 (1971), a unanimous US Supreme Court upheld Illinois bail reforms that eliminated use of commercial bail bonds: "Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. The Court rejected challenges to the reforms, stating "[w]e refrain from nullifying this Illinois statute that . . . has brought reform and needed relief to the State's bail system." Id. At 372.

4. In 1979 Wisconsin outlawed the selling of commercial bail bonds entirely. In *Kahn v. McCormack*, 299 N.W.2d 279, 281 (Wis. Ct. App. 1980) the Wisconsin Court of Appeals rejected a challenge to the constitutionality of the reforms, holding that the state "could in the exercise of its police power, reasonably conclude that outlawing the bail bonding business is in furtherance of the public welfare."

5. The Oregon Court of Appeals in 1974 rejected a bond industry lawsuit and upheld 1973 Oregon bail reforms modeled on the Illinois reforms addressed *in Schilb, supra.* "Nowhere does [the constitutional right to bail] say that lawful release of a defendant may be accomplished only through the medium of sureties. Were this contention sound, release of a defendant on his own recognizance or by any other means would be constitutionally prohibited – an obvious absurdity." *Burton v. Tomlinson*, 527 P.2d 123, 126 (Or. Ct. App. 1974).

6. No court challenge to any of the kinds of reforms in New Mexico's 2016 constitutional amendment or 2017 court rules has ever been upheld in any court in any jurisdiction.

INDUSTRY LAWSUITS IN NM AND NJ DECLARED GROUNDLESS

1. The most recent anti-reform lawsuits were filed by the industry and their allies in federal courts in New Jersey (*Holland v. Rosen*, Case 1:17-cv-04317, D.N.J, filed June 14, 2017) and in New Mexico (*Collins v. Daniel* [sic], Case No. 1:17-cv-00776, D.N.M, filed July 28, 2017). In both suits, the commercial bail industry and a few allies sought to block recent pretrial release and detention reforms that now permit pretrial detention of clearly dangerous defendants, no matter how much they could pay for a bail bond, and that prohibit requirement of a monetary bond for accused individuals who are neither a danger nor a flight risk. As the New York Times noted in an August 2017 article after those suits were filed, the states found themselves "facing a challenge familiar to others that have overhauled their bail systems: an energetic legal attack from the bail industry."

2. In the New Jersey case, the federal court in September 2017 entered its first substantive order, an extensive opinion denying the bond industry's requests for a court injunction against New Jersey's bail reforms. In that opinion, the court exhaustively traced the law and facts and determined that the bail industry had not shown their substantive claims had any legal substance and that they were likely to lose on all relevant merits once the case was concluded. A motion to dismiss the lawsuit completely has now been submitted and is awaiting final ruling.

3. In a strikingly similar analysis of the applicable established law, in September 2017, the federal court in the New Mexico case, with an out-of-state senior judge assigned, entered its first substantive order, also an extensive opinion denying the bond industry's requests for a court injunction against New Mexico's bail reforms. As in the New Jersey ruling, the court exhaustively traced the law and facts and determined that the bail industry had not shown their substantive claims had any legal substance and that they were likely to lose on all relevant merits once the case was concluded. As in the New Jersey case, a motion to dismiss the lawsuit completely has now been submitted and is awaiting final ruling. After the Attorney General's office representing the defendants, including the members of the New Mexico Supreme Court, all of whom were sued both for injunctive relief and monetary damages, requested that the federal court consider whether imposition of sanctions should be assessed under federal civil of procedure Rule 11 for pursuing clearly meritless litigation, the bondsmen filed a motion to further amend their complaint to add damages claims against the judicial defendants on a theory of denial of their rights to free speech and access to the courts. The federal court has set a November 27, 2017, hearing to address motions to dismiss the lawsuit completely and to determine whether to assess sanctions against the plaintiffs under Federal Rule 11 for misusing the court process to assert patently meritless claims.

Editorial: Pretrial detention rules need time to show results

By Albuquerque Journal Editorial Board, *Tuesday, September 19th, 2017*

A federal judge's recent decision keeps in place – for now – the state Supreme Court's new pretrial detention rules, crafted to help judges determine whether defendants should be detained until their trial, released on their own recognizance or released with specific conditions. And that's a good thing.

Because under the old system, judges by law were supposed to require "reasonable bail" for all but a very few crimes. That meant repeat drug traffickers could go free as long as their money man anted up some cash to a bondsman, while petty criminals would remain in jail because they couldn't afford to pay a bond. In contrast, the new rules allow judges to keep dangerous defendants in jail without bond pending trial. They allow judges to release other defendants with conditions, including ankle bracelets and other monitoring. And they allow judges to release defendants accused of low-level, non-violent crimes, instead of keeping them behind bars because they can't scrape up a mere $50 or so for bail.

While bail bondsmen are understandably unhappy that many defendants will no longer require their services, the new rules are far preferable and vastly fairer – when implemented correctly – than the old system of having judges often base pretrial release decisions on how much money a defendant has, or whether his family or friends will sign over enough collateral to have a bondsman post the bond. Because shouldn't public safety and flight risk, not financial assets, drive who's in jail and who isn't?

A handful of state senators, representatives of the bond industry and a defendant who was incarcerated for several days under the new rules recently sought a preliminary injunction as part of a lawsuit to suspend the rules. The defendants in the lawsuit, which include judges and court officials, have filed a motion to dismiss it. This month, Senior U.S. District Judge Robert Junnell denied the preliminary injunction. It was the right move.

Remember, the new rules were developed after voters overwhelmingly approved an amendment to the state Constitution. The Bernalillo County Metropolitan Court and 2nd Judicial District Court began using the rules implementing the amendment June 12. Since then, the amendment and the new rules have been blamed for the release of some repeat offenders who many believe are a clear danger to the public. If anything, the amendment gives the judges more leeway to keep serious offenders behind bars.

But as with any new system, some education, communication and adjustments are in order as judges try to interpret the rules. A key would be tracking which suspects released under the new rules ever show up in court or re-offend while awaiting trial; that's something the courts need to do and report back to the public.

The amendment passed at least in part because New Mexicans, and especially police officers, were undeniably sick of the "revolving door" that let criminals of most any ilk post bond and get back on the streets the next day, only to continue their burglaries, car thefts, assaults, drug trafficking, etc. And New Mexicans should be sick of a locked door that kept first-time offenders and petty criminals away from the families, jobs and support systems that can get them on a better path.

Last year, New Mexico voters said "enough is enough" and approved enabling legislation for a new pretrial release system aimed at keeping the right people in jail. Now it's up to the judges – keeping in mind the public's safety – to make sure the right people stay in jail.

KEY PROVISIONS OF THE 2017 RELEASE AND DETENTION RULES

Rule 5-401 (Procedures for Judicial Release and Detention Decisions):

A. **Hearing.**

(1) ***Time.*** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) first appearance or arraignment, if the defendant is not in custody.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. **Right to pretrial release; recognizance or unsecured appearance bond.**

Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose nonmonetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any nonmonetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the

appearance of the defendant.
(a) *Percentage bond.* The court may require a secured appearance bond executed by the efendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.
(b) *Property bond.* The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 6-401.1 NMRA.
(c) *Cash or surety bond.* The court may give the defendant the option of either
(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or
(ii) a surety bond executed by licensed sureties in accordance with Rule 6-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.
F. **Order setting conditions of release; findings regarding secured bond.**
(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall
(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and
(b) advise the defendant of
(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and
(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.
(2) ***Written findings regarding secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.
G. Pretrial detention. If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.
H. Case pending in district court; motion for review of conditions of release.
(1) Motion for review. If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release. . . .

Rule 5-403 (Procedures for Modification or Revocation of Release Orders):

A. Scope. In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release
(1) if the defendant is alleged to have violated a condition of release; or
(2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for revocation or modification of conditions of release.
(1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.
(2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of summons or bench warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial hearing.
(1) The court shall hold an initial hearing as soon as practicable, but no later than three (3) days after the defendant is detained.
(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.
(3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary hearing.
(1) Time. The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial earing.
(2) Defendant's rights. The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at completion of evidentiary hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may
(1) continue the existing conditions of release;
(2) set new or additional conditions of release in accordance with Rule 6-401 NMRA; or
(3) revoke the defendant's release, if the court finds by clear and convincing evidence that
(a) the defendant has willfully violated a condition of release and that no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or (b) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.
An order revoking release shall include written findings of the individualized facts justifying revocation.

Rule 5-408 (Procedures for Early Pre-Judicial Release by Authorized Designees):

A. Scope. This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person's first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. Minor offenses; release on recognizance.

(1) Persons eligible. A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) Exceptions. A person arrested for any of the following offenses is not eligible for release under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5 NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;

(h) stalking under Section 30-3A-3 NMSA 1978;

(i) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(k) enticement of a child under Section 30-9-1 NMSA 1978;

(l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;

(m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;

(n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;

(o) violating an order of protection under Section 40-13-6 NMSA 1978; or

(p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

C. Pretrial release based on risk assessment. A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. Pretrial release under release on recognizance program. A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court. . . .

Rule 5-409 (Procedures for Pretrial Detention fo Dangerous Defendants):

A. Scope. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled "Expedited Motion for Pretrial Detention" and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. Motion for pretrial detention. The prosecutor may file a written expedited motion for pretrial detention at any time in both the court where the case is pending and in the district court. The motion shall include the specific facts that warrant pretrial detention.

(1) The prosecutor shall immediately deliver a copy of the motion to

(a) the detention center holding the defendant, if any;

(b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

C. Case pending in magistrate or metropolitan court. If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court's jurisdiction to set or amend conditions of release shall then be terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial release until the case is remanded by the district court following disposition of the detention motion under Paragraph I of this rule. . . . .

E (2) Defendant not in custody when motion is filed. If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant's arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. Pretrial detention hearing. The district court shall hold a hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community.

(1) Time.

(a) Time limit. The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

(i) the filing of the motion for pretrial detention; or
(ii) the date the defendant is arrested as a result of the motion for pretrial detention.
(b) Extensions. The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court may extend the time limit for holding the hearing as follows:
(i) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the delay;
(ii) upon the defendant filing a written waiver of the time limit; or
(iii) upon stipulation of the parties.
(2) Discovery. At least twenty-four (24) hours before the hearing, the prosecutor shall provide the defendant with all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing.
(3) Defendant's rights. The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.
(4) Prosecutor's burden. The prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.
(5) Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing. . . .
J. Expedited trial scheduling for defendant in custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.
K. Successive motions for pretrial detention and motions to reconsider. On written motion of the prosecutor or the defendant, the court may reopen the detention hearing at any time before trial if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on whether the previous ruling should be reconsidered.
L. Appeal. Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.
M. Judicial discretion; disqualification and excusal. Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.