

## 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 pretrial and those we allow to remain free until their guilt is determined at trial 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 guide to key facts about those reforms.

## **INDEX**

- Page 1: Original Court-Proposed and Final Legislatively-Passed Versions of the 2016 New Mexico Constitutional Amendment Approved by NM Voters**
- Page 2: Requirements of the Passed Version of the 2016 Constitutional Amendment**
- Page 3: Court Rule Updates Required By Constitution Changes**
- Page 4: Why Money Bonds Never Protect Public Safety**
- Page 5: Fixed Money Bond Schedules are Dangerous and Unjust**
- Page 6: Risk Assessments Help Identify Danger and Flight Risks**
- Page 7: New Court Rules Have Not Caused Higher Crime Rates**
- Page 8: Early Release Must Be Based On Low Risk And Not Money**
- Page 9: NM Bail Reforms are Part of National Reform Efforts**

## **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**

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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 PASSED VERSION OF THE 2016 CONSTITUTIONAL AMENDMENT**

1. The New Mexico 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 New Mexico 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, 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, 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 408) 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 updated rules 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 New Mexico or the United States 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 8<sup>th</sup> 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 a bail bond 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](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/>

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 for judges to use, but do not replace a judge’s 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 the 2010-to-2016 crime rate increase 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, and during that time prosecutors, 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 release-on-recognizance (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, as New Jersey had recently done as a result of its 2014 constitutional amendment.

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

<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/>

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

[http://www.theiacp.org/portals/0/pdfs/Pretrial\\_Booklet\\_Web.pdf](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)

<https://www.pretrial.org/download/policy-statements/Conferene%20of%20Chief%20Justices%20Resolution%20on%20Pretrial%20Justice%20-%20202013.pdf> (National Conference of Chief Justices)

<https://1newsnet.com/aba-house-supports-bail-reform-other-criminal-justice-measures/>  
(American Bar Association)

<http://lawenforcementleaders.org/wp-content/uploads/2017/09/Press-Release-for-Pretrial-Integrity-and-Safety-Act.pdf>

Authorized and printed by the  
Administrative Office of the Courts of New Mexico  
September 28, 2017