Bail Reform in New Mexico

Proposing an amendment to Article 2, Section 13 of the Constitution of New Mexico

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The Problem

There are two serious failings of New Mexico’s money-for-freedom constitutional bail provisions:

1. **The Wrong Defendants are Released to Endanger the Community**

   - Under the current New Mexico Constitution, copied from provisions of a pre-revolutionary war Pennsylvania constitution, our judges have no lawful authority to deny release to a defendant known to be a danger to the community.
   
   - As a result, dangerous defendants are repeatedly arrested and repeatedly released to commit new crimes against the community if they find a way, lawful or unlawful, to come up with bail money, often targeting domestic violence and other especially vulnerable victims.
   
   - Most offenders who commit serious crimes have previously been released on money bonds.
   
   - Posting of money bond, whether in cash or through a commercial bondsman, can do nothing to protect the community against commission of new crimes.

2. **The Wrong Defendants are Confined to Jail Before Trial**

   - New Mexico jails are housing defendants awaiting trial who neither pose a real danger to the community nor are substantial flight risks, but who are jailed simply because they cannot raise the money to pay their way out of jail, to the detriment of themselves, their families, and our taxpayers.
   
   - Studies show that pretrial release on court-imposed conditions or bonds that do not require advance payment of money can be at least as effective in minimizing flight risk or commission of crime as bonds that require advance payment of money.
   
   - Bond schedules that result in jailing otherwise releasable defendants just because they cannot afford to post a money bond have repeatedly been held by federal courts to be unlawful under the Due Process and Equal Protection Clauses of the U.S. Constitution.
The Solution

Passage of the constitutional amendment proposed by SJR1 would address these two failings of the current money bond system, without eliminating the use of money bonds in other contexts, in two ways:

1. Judges Could Deny Release Altogether for Undue Dangerousness

- SJR1 would give the following new authority to New Mexico district judges: "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."
- The new language replaces language that limits a judge’s ability to detain in non-capital cases to such a small category of defendants and such a short period of time that the useless authority was rarely sought or granted.
- Similar pretrial detention authority is now provided by law in the federal courts, the District of Columbia, and a number of other states.
- The New Jersey Legislature and New Jersey voters recently amended their constitution, which previously was worded identically to New Mexico’s, to give New Jersey judges similar authority.
- All jurisdictions providing pretrial detention authority require a showing of dangerousness by clear and convincing evidence, and the United States Supreme Court has held that the clear and convincing evidence requirement, along with expedited appeal and other procedural safeguards, can justify pretrial detention under the U.S. Constitution.

2. Those Awaiting Trial Who are Not Dangerous Would Not Be Jailed Just Because They Cannot Afford a Money Bond

The amendment addresses the other major failing of the current release-for-money system by adding the language: "a person who is not a danger and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond."
- This provision confirms that the proposed constitutional amendment would not result in pretrial detention of a person simply because of his or her financial status, as opposed to dangerousness.
- The provision is consistent with requirements of the U.S. Constitution, national justice standards, federal statutes, and laws of other states. Without this prohibition, detention for dangerousness will not be effective.
- The provision would avoid use of jail space, county resources, and taxpayer dollars to house, feed, provide medical care for, transport, and guard accused persons who do not need to be detained.
- Bail bonds could still be required for non-indigent, non-dangerous defendants.
A 2011 symposium under the auspices of the United States Justice Department documented a “deeply flawed” national money bond system where “defendants who have access to money are able to purchase their release, regardless of the risks they may pose to the safety of the community; those defendants who do not, many of whom are low risk, must sit in jail until trial—at enormous public expense.”

Report of the National Symposium on Pretrial Justice:

A National Institute of Corrections study traced the history and failings of the money bond system in most of the United States, detailing why “states that do not allow detention based on risk are putting judges at a disadvantage” in making pretrial release decisions.

Money as a Criminal Justice Stakeholder: The Judge’s Decision to Release or Detain a Defendant Pretrial:

Secured bonds, requiring advance posting of money or security, are no more effective at achieving public safety or court appearance than unsecured bonds.

Pretrial Justice Institute, Unsecured Bonds: The As Effective and Most Efficient Pretrial release Option:
http://www.pretrial.org/download/risk-assessment/the%2520recent%2520past%2520and%2520near%2520future%2520of%2520risk%2520and%2520need%2520assessment%2520-%2520andrews%25202006.pdf

A high money bond does not guarantee that a defendant will stay in jail.

Preliminary data from the New Mexico Administrative Office of the Courts shows on average 85 defendants deemed dangerous enough to have a bond of $10,000 or more have been released pretrial by posting bond in each of the last three fiscal years. These included 12 defendants who were deemed a sufficient threat to public safety to warrant a bond of at least $100,000.
Releasing non-violent defendants improves public safety. Pretrial detention even for relatively short durations, results in higher recidivism. Controlling for variables other than pretrial detention, low-risk defendants held for 2-3 days are 40% more likely to commit new crimes before trial than low-risk defendants held less than one day. Low-risk defendants held 8-14 days are 51% more likely to commit a crime within two years of conviction than low-risk defendants held less than one day.

“The Hidden Costs of Pretrial Detention,” Nov. 2013, the Laura and John Arnold Foundation:


Research and practice have demonstrated the significant impacts that pretrial incarceration can have on access to justice and fairness of the criminal justice system, public safety, and the costs of detention for local jails and taxpayers. The following summary provides links to resources and analyzes the comparative effectiveness of the payment of money as the primary pretrial release condition versus evidence-based assessments of the risk of flight or threat to public safety.

Resources from the Pretrial Justice Center, a project of the National Center for State Courts: http://www.ncsc.org/Microsites/PJCC/Home/Issues.aspx

Before 1970, all defendants in Washington D.C. were eligible for pre-trial release if they could post a money bond. D.C law changed to: (1) permit judges to deny release to those who are a substantial public safety or flight risk; and (2) prohibit jailing of non-high risk defendants simply for lack of money. As a result, 15% of defendants are now denied any form of release pending trial and the remaining 85% are released on conditions they can meet. 88% of released defendants made all court appearances and 88% completed pretrial release without any new arrest.


Use of non-financial release conditions, to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety, promotes sound fiscal policy and public safety.

Conference of State Court Administrators Policy Paper on Pretrial Release:

http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20Final.ashx

Pretrial defendants made up more than 68% of New Mexico detention center populations.

The average length of stay in detention facilities pretrial was 167 days for felons in 2005. By 2010 the average had increased by 193 days for all felony defendants in district courts and 80 days for misdemeanor defendants.


The National Center for State Courts found in a study published in November 2009 that the average length of stay in New Mexico’s detention centers pretrial was 207 days and in Bernalillo County was 271 days.


The estimated cost savings associated with SJR1 are significant:

According to the New Mexico Sentencing Commission, the average cost to house a detention center defendant in New Mexico is $72.03 per day. New Mexico detention centers report that in FY 2015, they “booked” 99,771 defendants into jails. If SJR1 resulted in release of just 10% of the non-violent defendants who are unable to post bail among the 99,771 booked into detention centers in fiscal year 2015, for just 20 days each, the savings would be a staggering $14,364,222.60 ($72.03/day x 20 days x 9,997 defendants).
Pretrial services risk classification identifies defendants who are appropriate for release without paying for a bail bond. Compared to bond schedules and other practices prior to adoption of pretrial risk assessment, an estimate of net savings and revenue for Fiscal Year 2010 showed that Harris County, Texas gained $4.4 million in avoided detention costs and pretrial services fees collected after deducting for the costs of pretrial services.


A Bernalillo County study made several recommendations for reducing jail overcrowding, including “release pretrial inmates on OR [own recognizance] via a validated risk assessment instrument as most other courts do (page 12) and set up a small fund, public or private, to provide bail to low-level offenders who can’t meet bail. This concept was recently implemented in New York through the Bronx Freedom Fund. For profit bail companies frequently refuse to write bonds in cases where they see little profit in providing small amounts of bail, leaving those at the very bottom of the economic heap without any recourse. The central mission of the Fund is to post bail for those least able to afford it and most likely to return to court. The Fund posted bail of up to $1,500 for defendants charged with misdemeanors or nonviolent felonies and who were considered to have a low risk of fleeing while their cases were pending. From 2007 to 2009, the Fund reported a 93% appearance rate for participating defendants and helped release 160 defendants, who on average would have spent 16 days each in jail awaiting trial.” (page 13).

Pretrial jail time can result in job loss, home loss, and disintegrated social relationships, which in turn increase the likelihood of re-offending upon release.


Numerous research projects conducted over the past half century have shown that defendants who are held in pretrial detention have less favorable outcomes than those who are not detained—regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms.

The Federal Bureau of Justice Assistance noted that “research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become ‘reentry’ clients because of their pretrial detention – regardless of charge or criminal history.”


The impact of financial release conditions on minority defendants reflects disparate rates of poverty among different ethnic groups. A study that sampled felony cases in 40 of the 75 largest counties nationwide found that, between 1990 and 1996, 27% of white defendants were held in jail throughout the pretrial period because they could not post bond, compared to 36% of African-American defendants and 44% of Hispanic defendants.

The report of the study committee created by the New Jersey Supreme Court with membership including prosecutors, defense lawyers, and representatives of all three branches of government, recommended amending the bail provisions of New Jersey’s constitution, which was approved by voters in November 2014.

Report of the Joint Committee on Criminal Justice:

See also Marie Van Nostrand, Ph.D., New Jersey Jail Population Analysis; Identifying Opportunities to Safely and Responsibly Reduce the Jail Population. March 2013, p.10

In New Jersey, “more than half of all inmates had primary charges that are considered non-violent such as drug (17%), fraud/theft (8%) and traffic (5%).” In addition to a majority of defendants facing criminal charges for non-violent crimes, “[n]early three-fourths of all New Jersey jail inmates had a primary custody status of pretrial because they were pending trial or sentencing in either Superior Court (66%) or municipal court (7%).” The average length of pretrial detention for municipal court was 89 days and in total the average time in pretrial detention for all levels of courts was 314 days. “38.5% of the total population had an option to post bail but were held in custody solely due to their inability to meet the terms of bail.”
https://www.nmcompcomm.us/nmcases/nmsc/2014/14sc-038-.pdf

The New Mexico Supreme Court opinion that traces the history, legal underpinnings, and practice of bail from its origins in medieval England to the United States and New Mexico. Contrary to some inaccurate public statements, Brown created no new law in any respect, but simply repeated the mandates of existing constitutional law, statutory law, court rules, and case law.

THE CLEAR AND CONVINCING EVIDENCE STANDARD

- Laws denying pretrial release to defendants who have been shown by clear and convincing evidence in a due process hearing to be dangerous to others have been held to be lawful under the federal constitution. In United States v. Salerno, 481 U.S. 739, 741 (1987), the United States Supreme Court cited procedural safeguards that included an evidentiary hearing where the government had to prove dangerousness by clear and convincing evidence and the availability of an expedited appeal as grounds for upholding the constitutionality of the federal detention statute.

- The clear and convincing evidence hearing requirement for denial of pretrial release is prescribed by national standards such as


JURISDICTIONS ADOPTING PREVENTIVE DETENTION ALSO PROHIBIT DETENTION BASED SOLELY ON A DEFENDANT'S INABILITY TO POST BOND

See,

- 18 United States Code 18 U.S.C. § 3142 (a judge "may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code, §§ 23-1321 (a judge may impose a financial condition only if it "does not result in the preventive detention of the person");

- Mass. Gen Laws Ch. 276, § 58A ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"); Mont. Code 46-9-108 (2) (2013) ("The court may not impose an unreasonable condition that results in pretrial detention of the defendant and shall subject the defendant to the least restrictive condition or combination of conditions that will ensure the defendant's appearance and provide for protection of any person or the community."); W. Va. § 62-1C-4 (When the court is satisfied an indigent defendant will appear as required, the indigent defendant "shall not be denied bail because of his inability to furnish recognizance"); position statement filed by the United States Department of Justice in Varden v. City of Clanton, 2:15-cv-34-MHT-WC (M.D. AL 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment" of the United States Constitution); Pierce v. Velda City, No. 4:15-cv-570-HEA (E.D. Mo. June 3, 2015) (federal court judgment enjoining as unconstitutional detention of indigents for inability to post money bonds); Cooper v. City of Dothan, No. 1:1 5-CV-425-WKW (M.D. Al. June 18, 2015) (federal court order barring detention of indigents for inability to post money bonds); Jones v. City of Clanton, 2:15-cv-34-MHT-WC (M.D. Ala. 2015) (federal court declaratory judgment and opinion holding that "[c]riminal defendants, presumed innocent, must not be confined in jail merely because they are poor"); Thompson v. Mass City, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015) (federal court declaratory judgment holding that "[n]o person may, consistent with the Equal Protection Clause of the Fourteenth Amendment Clause to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."); Rodriguez v. Providence Community Corrections, Inc., 3:15-cv-01048 (M.D. Tenn. Dec. 17, 2015) (federal court injunction against jailing defendants for inability to afford money bail on federal constitutional grounds); City of Billings v. Layzell, 789 P.2d 221 (Mont.1990).

- ABA Criminal Justice Standards, Pretrial Release, § 10-1.4(e) (a judge "should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"); National Association of Pretrial Services Agencies (NAPSA) Standards on Pretrial Release, Standard 1.4 (c) (3d ed. 2004) ("Financial conditions should never be used in order to detain the defendant."); Standard 1.4 (e): "The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.")

See also http://www.pretrial.org/the-problem/
Supporting Organizations

New Mexico

In addition to the wide bipartisan support in both chambers of the Legislature the following organizations have formally supported SJR1:

- New Mexico District Attorneys’ Association
- New Mexico Coalition Against Domestic Violence
- Greater Albuquerque Chamber of Commerce
- New Mexico Criminal Defense Lawyers’ Association
- American Civil Liberties Union of New Mexico
- Board of Directors of the New Mexico Association of Counties
- Criminal Justice Reform Policy Committee of the New Mexico Association of Counties
- ROBD (Repeat Offenders Bring Death, Destruction and Devastation) the organization of families of violent crime victims

No organization, other than the commercial bailbonding industry, has taken a position against SJR1.

National

On the national level, virtually every organization, other than the bailbonding industry, studying the issues has supported the concepts embodied in SJR1: (1) evidence-based risk assessment for detention of dangerous defendants; and (2) the use of non-financial conditions for pretrial release of non-dangerous defendants, particularly those who otherwise would be jailed simply because of lack of financial resources to pay a money bond.

These organizations include:

- International Association of Chiefs of Police
- American Jail Association
- National Conference of Chief Justices
- Conference of State Court Administrators
- National Association of Counties
- Pretrial Justice Institute (federally-supported)
- Pretrial Justice Center (supported by National Conference of State Courts)
- National Institute of Corrections
The following news articles have either discussed the issues calling for bail reform or have explicitly expressed support for the constitutional amendment:

**EDITORIALS:**

Albuquerque: “This common sense proposal should get the green light so the people can weigh in.”

[http://www.abqjournal.com/636414/opinion/judges-should-have-more-latitude-in-setting-bonds.html](http://www.abqjournal.com/636414/opinion/judges-should-have-more-latitude-in-setting-bonds.html)

Albuquerque: “The time is here for lawmakers to ask New Mexico voters to change the state Constitution to provide judges with the legal tools to keep serial offenders with a penchant for violence off the streets while awaiting trial.”


Albuquerque: “Fixing the bail bond system is an important component of a comprehensive criminal justice package.”


Albuquerque: “Legislators should pass a constitutional amendment and let New Mexico voters decide when and how judges can hold dangerous defendants without bail.”


Las Cruces: “We support the principle that the wealth of a defendant should not be the primary factor in determining whether they are able to remain free or are held in jail in the weeks and months leading to trial.”


Taos: “As it stands now, detaining a suspect is not about safety for everyone, but about that person’s ability to pay. We hope New Mexico voters will get a chance to decide for themselves.”

[http://www.taosnews.com/opinion/article_7db0b372-4c2d-11e5-9b31-e36771a8d428.html](http://www.taosnews.com/opinion/article_7db0b372-4c2d-11e5-9b31-e36771a8d428.html)
NEWS STORIES

Lawmakers propose anti-crime legislation and support “proposed constitutional amendment that would allow judges to hold people in jail without bail if they are a danger to the community.”

Part of a series on changes to the state’s bail system, including a proposed constitutional amendment
http://www.abqjournal.com/?p=636452
papperboy=Loggedin630am&utm_source=Albuquerque+Journal+Newsletters&utm_campaign=25
65e57dc5-paperboy_daily_150830_062803&utm_medium=email&utm_term=0_2dcf4c82cd-
2565e57dc5-108028989

Part of a series on proposed changes to the state’s bail system, including a proposed constitutional amendment

Part of a series on proposed changes to the state’s bail system, including a proposed constitutional amendment

Slain officer’s widow calls for crackdown on repeat offenders

Plea for New York Bail Reform

The Ball Trap: Every year thousands of innocent people are sent to jail because they can’t afford to post bail, putting them at risk of losing their jobs, custody of their children – even their lives.