

EXECUTIVE SUMMARY

IMPLEMENTING BAIL REFORM IN NEW MEXICO



INSTITUTE FOR
SOCIAL RESEARCH

New Mexico Statistical Analysis Center

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November 2020

Highlights

- New Mexico voters passed a constitutional amendment to reform bail practices in November 2016.
- The current report summarizes the results of interviews conducted with criminal justice stakeholders used to evaluate the implementation of the amendment thus far.
- Participants identified numerous changes since the amendment:
 - ◇ Pretrial release decisions are more deliberative, requiring careful consideration by both prosecutors and judges.
 - ◇ Bond is ordered less often and at lower amounts, but this varies by judge and district.
 - ◇ More defendants are released initially, but some stakeholders felt there has been an increase in pretrial violations, including failures to appear.
- Participants identified challenges with implementing bail reform:
 - ◇ Existing rules do not provide sufficient guidance to prosecutors to help them determine whether to file a motion to detain.
 - ◇ The short timelines for filing motions to detain and the associated hearings present challenges for prosecuting attorneys, defense attorneys and judges.
 - ◇ Districts often lack key resources needed to implement bail reform, such as adequate staffing, pretrial services, access to information for decision-making, and community services.
- Other states engaging in bail reform should: include a planning period before any changes take effect; assess current resources and infrastructure to implement changes; engage in efforts to ensure buy-in across all stakeholders; and engage in ongoing evaluative research.

Introduction

In November 2016, New Mexico voters approved a constitutional amendment altering pretrial release and bail practices for felony cases within the state. New Mexico's recent amendment is part of a broader movement to reform bail practices across the country. The primary purposes of bail reform are to ensure that defendants are not detained solely because of an inability to pay and to protect community safety by detaining dangerous defendants.

As part of a multi-phase study, the current report evaluates the implementation of bail reform in New Mexico thus far. We primarily use data from interviews we conducted with judges, prosecuting and defense attorneys, and pretrial services staff in six New Mexico judicial districts. We supplemented this data with court observations, media coverage, and legal documents. This report documents the pretrial process as it pertains to release decisions, the perceived impact of the amendment, reform success, and areas for improvement. It includes recommendations made by participants for improving pretrial practices in New Mexico and advice for other states considering bail reform. It is important to keep in mind that the law is continually evolving and

practices change. This report reflects a snapshot in time.

Pretrial Process in New Mexico

In order for a defendant to be considered for preventive detention, a prosecutor must file a motion to detain. While the prosecuting attorney can file a motion for preventive detention (PTD) at any time during the pretrial period, in practice, they typically make the decision to do so at the felony first appearance. This hearing must occur within three days of arrest and booking or, if the defendant is not in custody, within five days (N.M. R. Crim. P. Dist. Ct. 5-401(A)(1)). Many defendants are in custody at this point; filing the motion keeps those defendants in custody until the motion can be heard.

The hearing for preventive detention occurs in district court, where the prosecuting attorney must prove by "clear and convincing evidence" that the defendant is dangerous and there are no release conditions that can ensure the safety of another person or the community (N.M. R. Crim. P. Dist. Ct. 5-409(G)). If the judge denies the motion, they may release the defendant with conditions, including secured bond. If the judge rules in favor of the motion, the underlying criminal case is placed on an expedited trial

schedule. At any point, a defendant who has been released to the community may be accused of violating a condition of release. If this occurs, the prosecutor or court can move to revoke or modify the existing conditions of release (N.M. R. Crim. P. Dist. Ct. Rule 5-403).

Release Decisions

There are three potential pretrial release outcomes: preventative detention; release with bond; or release on recognizance. Simply put, judges rule for preventative detention when the defendant is found to pose a danger; secured bond when the defendant is a flight risk; and recognizance in the absence of those two criteria.

Detention

Only defendants deemed to be dangerous are eligible for detention. Taken at face value, determining whether someone is dangerous appears straightforward. In practice, stakeholders define and determine dangerousness in a variety of ways. Key factors indicating dangerousness include the nature of the current offense, criminal history, and strength of the case.

If dangerousness is established, the judge must then evaluate whether there are conditions of release that can mitigate risk. This includes determining whether the defendant is likely to comply with ordered conditions. Participants delineated two main factors indicating an inability to comply with conditions of release: history of failures to appear or comply, and lack of ties to the community. Participants also explained that defendants struggling with substance use, mental health, or housing instability may be less able to comply with specific conditions of release and are at increased risk for failure to appear. Some stakeholders consider these extenuating circumstances before requesting or ruling for detention, or setting conditions of release.

Bond

Bond is still used in New Mexico, but judges typically use it only when there is evidence that the defendant is a flight risk. Participants explained that, like inability to comply, flight risk is indicated by a history of non-compliance and/or failure to appear, and a lack of community ties. When weighing flight risk, judges also may consider whether the defendant is facing a potentially

lengthy sentence, if their sentence could include mandatory prison time, and the strength of the evidence. When one or more of these factors are present and the defendant is not believed to be dangerous, the judge may set bond to encourage appearance. The amount of bond ordered varies immensely across districts, with amounts as little as \$10 to \$10,000 or more in some districts. In all districts, the use of bail bondsmen is limited.

Pretrial Release

The presumption is that most defendants will be released without bond, which generally occurs in two situations. First, judges will grant release for defendants who pose low or no danger and are not a flight risk. Second, judges may rule for release when they are convinced that, although the defendant poses some danger, that danger can be mitigated by setting appropriate conditions of release.

Besides prohibitions against committing crimes, commonly ordered conditions include restricting movement, prohibiting contact with victims or others, prohibiting substance use and possible testing for use, and monitoring by pretrial services (PTS). The available options, however, vary across districts.

Violations

While the amendment addresses the initial release decision rather than violations, defendants who violate one or more conditions of release are subject to sanctions, including detention. This is an important aspect of bail reform, both because more people are expected to be released initially and because responses to violations may lead to detention for the remainder of the pretrial period.

The type of violation and the context in which it occurs can influence the court's response. Some judges focus their attention on meeting the needs of the defendant in an effort to make compliance with conditions of release more realistic for defendants. However, if there is a new offense, particularly a new violent offense, the judge may be more likely to order detention. The magnitude of the initial offense may also influence the response to any violations.

The capacity to monitor for compliance varies by district. Some districts have a PTS division, while

others rely on limited contracted services or active monitoring by court personnel. Judges learn of violations through active monitoring as well as from victims, witnesses, or defendants themselves.

Perceived Impact of Bail Reform

We asked interviewees to describe their perceptions of the impact that bail reform has had thus far. Interviewees felt that there have been changes in three key ways: the number of defendants released pretrial, the use of bond, and pretrial hearings.

Impact on Defendants Released Pretrial

Nearly all participants agreed that there has been an increase in the number of defendants initially released pretrial, though they had mixed feelings about the impact of this increase. On the positive side, participants felt that the rights of individuals are now better safeguarded: defendants are presumed innocent until proven guilty and are not held in jail solely because they cannot afford to post bail. Additionally, while there has been an increase in the release of non-violent offenders, some participants felt that violent offenders continue to be detained at the same rate. Conversely, some participants perceive the lower rates of detention as a threat to public safety. They argue that dangerous defendants are being released more frequently and earlier in the process than they were prior to the amendment. Moreover, they note an increase in violations of release conditions, including technical violations, failures to appear, and new offenses.

Impact on the Use of Bond

Although judges still order some defendants to pay bond to secure release, participants reported that both the amount set and frequency of the use of bond set has greatly decreased. Some also noted an increase in unsecured bonds, which they viewed as a positive outcome, as defendants are not required to pay anything unless they fail to appear at court. Others point out negative consequences resulting from less frequent use of bond. First, participants explain that defendants are unable to secure immediate release using bond, and instead have to wait until the Felony First Appearance (FFA). Second, some felt that because the bond industry largely collapsed, defendants cannot secure release through bondsmen. Addition-

ally, bondsmen are not available to ensure defendants appear in court.

Impact on Pretrial Hearings

Prior to bail reform, prosecutors typically did not attend FFAs. Now, they are more likely to attend these hearings, both to submit motions to detain and to argue for particular conditions of release. Perhaps most notable is that the amendment resulted in the new pretrial detention hearings, and increased the number of compliance hearings, increasing the workload for some prosecutors, defense attorneys, and judges.

Support, Challenges, and Recommendations

We asked interviewees to describe the facilitators and challenges to achieving bail reform in New Mexico. While analyzing the data, we found that in every area where interviewees noted something that facilitated bail reform, they noted some barriers as well. In this section we discuss implementation facilitators and barriers within the six key themes that emerged from interviews.

Theme 1: Rules, Policies, and Guidelines

The rules guiding bail reform were published six months after the amendment to the constitution was adopted, leaving a period of ambiguity. Since the rules were published, case law and amendments to the rules have refined pretrial decision-making in the state. Despite these clarifications, there are outstanding concerns with respect to prosecutorial and judicial discretion. While these concerns are primarily about the initial release decisions, there are also concerns about decisions regarding violations of release conditions.

Rules about Initial Release Decisions

Some participants felt that prosecutors file motions to detain when it is not appropriate, or, less often, neglect to file motions to detain when appropriate. Similarly, some participants were concerned that judges release dangerous defendants, while others pointed to excessive rates of pretrial detention.

Lack of clarity in the existing rules leads to differences in interpretation. The rules do not define or limit which cases prosecutors can file for preventative detention, though prosecutors may look to the guidance provided to judges in Rule 5-401 when evaluating a case. Importantly, there is no common definition for what constitutes

“dangerousness.” Moreover, prosecutors must make the decision to file for detention within a very short timeframe. The amount of information available may be limited, leading to inappropriate or missed filings. Even when information is sufficient, prosecutors may not have access to it. Further complicating matters, some participants pointed out that when judge rule against detention, they do not consistently cite their reasons for doing so. This makes it difficult for prosecutors to understand why their motions were denied. Without that feedback, prosecutors may continue to pursue detention in inappropriate cases.

Several participants reported that release decisions also vary across judges. Ambiguity in the “clear and convincing” threshold perpetuates inconsistencies. Judges have different evidentiary standards justifying detention, including whether proffers are sufficient or if they are more swayed by live witness testimony. Additionally, some judges reportedly dismiss preventative detention motions on the basis of formatting technicalities such as font size, margin width, etc. Finally, some participants point out that judges are not equally knowledgeable about rules, case law, and existing resources, which may lead to differences in rulings.

Recognizing these inconsistencies, some prosecutors’ offices and judges have made efforts to ensure consistent and fair decision-making by compiling resources to use as references when making decisions. In addition, participants offered several recommendations to improve pretrial detention decisions: provide additional guidance to prosecutors and judges; enhance judicial transparency to improve consistency between judicial rulings; and address limited timeframes in the pretrial process.

[Recommendation: Provide More Guidance to Prosecutors](#)

Two suggestions to give prosecutors more guidance require amending Rule 5-409: institute rebuttable presumptions, and require prosecutors to consult a risk/public safety assessment before filing a motion for detention. Each of these suggestions has both advantages and disadvantages. A third recommendation, which would not require a rule change, is to create and share decision-making tools among prosecutors in the state.

[Recommendation: Enhance Judicial Transparency and Improve Consistency](#)

Participants suggested three rule changes to enhance judicial transparency. All three were also vetted by an Ad Hoc Pretrial Detention Committee, and one resulted in an amendment to the rules effective November 23, 2020. In this latter rule, stakeholders called for clarification about acceptable evidence. Rule 5-409 was amended summarizing evidence a district court may consider (including proffers). The second rule change would require judges to explain the merits of a PTD motion at the pretrial detention hearing, ensuring that they consider the facts of the motions and limit dismissal on the basis of technicalities such as formatting. While recommended by the committee, the New Mexico Supreme Court did not adopt this recommendation. Third, some participants recommended allowing judges to be excused from preventative detention cases. This was rejected by the Ad Hoc Pretrial Detention Committee, as it is untenable in some districts because of current staffing and timeframe limitations.

[Recommendation: Provide Options that Address Limitations Due to Timeframes](#)

Due to the short timeline set out in the rules, prosecutors may make erroneous filing decisions, and defense attorneys may not have time to adequately prepare. Three recommendations address this concern. First, participants recommended extending the time for FFAs and/or preventative detention hearings. Second, some recommended encouraging defense attorneys and prosecuting attorneys to pursue short-term continuances for pretrial hearings when warranted. Finally, participants and other stakeholders recommended that judges be allowed to temporarily detain a defendant. The New Mexico Supreme Court recently revised the rules to allow district court judges to schedule a pretrial detention hearing (N.M. R. Crim. P. Dist. Ct. Rule-501(G)) and allow lower court judges to temporarily delay ruling on conditions of release (N.M. R. Crim. P. Magist. Ct. 6-501(F)), which effectively allows judges to temporarily detain defendants. A prosecutor would still be required, however, to file a motion to detain before the next hearing is scheduled.

[Rules and Recommendation about Violations of Conditions of Release](#)

Some stakeholders expressed concern about Rule

5-403, which guides responses to violations of conditions. In particular, participants emphasized that release should not be revoked for technical violations, such as a positive drug test, but should only be used when there is evidence of dangerousness. Therefore, one recommendation is to require evidence of dangerousness to detain a defendant under Rule 5-403.

Rules and Recommendation about Expedited Trial Scheduling

When a defendant is preventatively detained, the underlying criminal case should be placed on an expedited schedule. The precise timeline of expedited, however, is undefined. To reduce the amount of time that a defendant is incarcerated prior to being found guilty, some stakeholders recommend setting a clear definition of an expedited trial timeline.

Rules and Recommendation about Court Jurisdiction

District courts are particularly burdened by bail reform, as they are the only courts that hear preventative detention motions. This can strain court resources. It may be particularly challenging to schedule hearings in small districts with fewer judges, but a relatively high number of preventative detention motions. Participants and other stakeholders recommended making the magistrate and metropolitan courts into courts of record, which would allow magistrate and metropolitan judges to preside over preventative detention hearings.

Rules and Recommendation about Financial Considerations

Although participants perceive that the use of bond has decreased with bail reform, monetary bail is sometimes used to ensure appearance in court. Moreover, other conditions of release, such as pretrial monitoring, may place a financial burden on the defendant. Participants indicate that judges do not consistently account for a defendant's financial situation when setting bond. To address this, the courts could adopt a standardized assessment of a defendant's financial situation to be completed before a judge sets a bond. For example, judges could consult an ability-to-pay calculator or review a completed financial affidavit before ordering any financial conditions of release.

Theme 2: Education

In order to implement bail reform, practitioners must be informed about the rules and have the same basic understanding of how these rules should be implemented across districts. Successful education facilitates bail reform. Participants indicated that there was minimal formal training on bail reform and the associated rules. Instead, learning has occurred primarily through experience and self-education. While this is sufficient for some, others felt that additional training would be helpful. Ultimately, additional education may help address issues of discretion and inconsistent implementation across and within districts. Participants had specific recommendations to bolster education about bail reform.

Recommendations to Improve Education

Participants had several recommendations to ensure that all stakeholders are well informed. First, participants noted that high attorney turnover requires educating new staff. Interviewees suggested both mentoring and formal legal education should address training needs for new staff. Refreshers should be offered for all staff. Participants also noted that there are some areas where judges need more training. For example, stakeholders assert that judges do not always act on their authority to modify conditions of release and some issue a summons to appear when a bench warrant would be more appropriate. Further education for judges would also help ensure consistent implementation of the rules and allow for up-to-date training as pretrial procedures are altered. Second, participants explained that people have different levels of aptitude with the resources available to inform decision-making. Therefore, they recommend additional training for using and understanding resources such as Odyssey (the New Mexico Courts' database) and the Public Safety Assessment. Finally, several stakeholders described successful collaborative training across multiple justice partners. This sort of training should be promoted across the state as it can encourage communication and buy-in across the criminal justice system, ultimately improving the bail reform process.

Theme 3: Attorneys, Judges, and Support Staff

Staffing is central to the implementation of bail reform. Most interviewees stated that there has been an increase in the number of hearings since

bail reform, particularly preventative detention and compliance hearings. This increase has coincided with frontloading the work that attorneys must do to prepare for these hearings, with limited time and resources. Prosecuting attorneys must screen cases for possible detention, and now attend FFAs and pretrial detention hearings along with defense attorneys. Judges now preside over the pretrial detention hearings along with all the pre-existing types of hearings. In addition to attorneys and judges, support staff play a significant role in gathering information and helping attorneys and judges prepare for pretrial hearings.

Recommendation for Staffing

Participants indicate that attorneys, judges, and support staff are spread thin. Therefore, one recommendation is to conduct a needs assessment to determine gaps in staffing. A second is to allocate additional funding to address these needs.

Theme 4: Pretrial Services

PTS has an integral role in the pretrial process, but not all districts have a PTS division. Where they exist, the primary functions of PTS divisions are to (a) monitor pretrial compliance, and (b) gather information to assist judicial decision-making. They complete background reports, administer risk or public safety assessments, report violations, and make recommendations for addressing violations. They may also connect defendants to social services or community resources, and help defendants comply, for instance by offering court hearing reminders. The types and extent of monitoring and service options vary across districts. For example, while some pretrial monitoring services can be provided through private contractors or others, districts with a PTS division typically have more options for supervision.

Interviewees identified two key challenges concerning PTS. First, some participants explained that an absent or under-resourced PTS is a barrier to implementing bail reform since the key functions PTS provides either do not occur or are minimal. Second, while some participants felt that PTS has become more rehabilitative since bail reform, others felt it is excessively punitive, which may lead to increased pretrial detention.

Recommendations for Pretrial Services

Participants made two key recommendations related to PTS. First, interviewees endorsed addi-

tional funding for PTS throughout the state. Second, participants recommended additional research to ensure effective pretrial practices, including methods of supervision. They also recommended further assessing the state-adopted public safety assessment (PSA) tool for accuracy and equity.

Theme 5: Access to Information

In order to effectively implement bail reform, courtroom actors need access to relevant data. Attorneys, judges, and PTS when they exist, need information about defendants—criminal history, ties to the community, pending charges—and the current offense in order to make recommendations or decisions about release. Currently, information comes from a wide array of sources. These include but are not limited to: the criminal complaint, Odyssey, the FBI's National Crime Information Center reports, and the results of any risk or public safety assessment used in a district. While this information is crucial to making informed decisions, access to and availability of data varies across districts and between actors within the same jurisdiction. In part, this is because some data is restricted to use by authorized individuals only. Conversely, other data is simply not provided to all key individuals when it could potentially be made available. Participants also point to limitations with existing data.

Recommendation: Improve Access to Information

To address these issues, participants recommended increasing access to existing information, such as the results of the PSA, and equalizing access to information available from commonly-used sources like Odyssey. Additionally, participants recommended creating cross-jurisdictional databases. One such database could centralize information needed for pretrial decision-making, including data from the Department of Public Safety, the New Mexico Corrections Department, and others. A second suggestion was to create a function within a centralized database that would alert key stakeholders of arrests or violations within and across districts. Notably, DPS is working on creating the first system, while the New Mexico Sentencing Commission is in the nascent stages of creating an integrated database for bookings occurring in several jurisdictions. The latter database could be configured to alert stakeholders of new bookings. While resource-intensive, these are valuable long-term goals.

Theme 6: Community and Social Services

Many defendants have underlying conditions and circumstances, such as mental health issues, substance use disorders, and unstable housing, that may impact appearance, compliance with release conditions, and reoffending. Addressing such issues may improve pretrial success. Participants identified several barriers that limit defendants' access to needed services: limited or absent social services, limited or no mechanism to link defendants to social services, and a lack of material means necessary to access these resources.

Recommendations to Address Barriers to Services

Steps can be taken to address these barriers. One recommendation is to assess and address community needs for social services. Conducting a needs assessment would allow communities to identify and work towards filling gaps in necessary services. A second recommendation is to assess defendant needs. This would require identifying agencies that may be able to conduct the assessment and associated staffing. Lastly, policymakers should identify ways to connect defendants to needed social services, whether through PTS or otherwise.

Recommendations for Other States

Participants provided recommendations for other states considering bail reform. Prior to implementation, states should undertake careful planning. This should include considering under what circumstances someone will be detained (dangerousness and/or flight risk), how stakeholders will assess eligibility for detention, and the consequences of these criteria (or lack thereof). Additionally, stakeholders should conduct a thorough assessment of current court, prosecution, and defense attorney procedures and practices within each district, noting any processes that may be altered by bail reform and how to address those changes. Time should be built in to construct and thoroughly vet rule changes, and allow time for stakeholders to be trained on statutes and rules.

States should evaluate resources available to implement bail reform, including the strengths and limitations of current infrastructure. Areas to fo-

cus on include pretrial services, risk assessment tools, statewide data sources, and staffing. States must assess the resources and needs of each community, considering how this may influence both crime and the criminal justice system. States should also consider how they will assess and address defendants' acute and chronic mental health and other needs that influence pretrial success, and how this may vary across the state. Finally, stakeholders should actively work towards comprehensive buy-in, particularly from those responsible for implementation.

After implementation, states should expect to engage in ongoing training about bail reform as new personnel are hired and rules change and continue to engage in efforts to ensure buy-in. Finally, to ensure that pretrial practices are effective and evidence-based, stakeholders should invest in ongoing evaluative research after implementation.

Study Limitations

The current study relies primarily on interviews with a limited number of stakeholders. We used purposive sampling in order to get representation from various parts of the state, and individuals in different stakeholder positions. However, as with any qualitative study, the number of people included is limited and we did not get representation from all areas of the state. We triangulated our data with other sources of information to ensure that our report accurately represents information about the implementation of the amendment thus far.

Though we believe that the perceptions and viewpoints represented here are common to many stakeholders implementing bail reform in New Mexico, it is likely that others have different experiences.

Second, we conducted interviews during a specific period of implementation. The rules guiding bail reform changed as we were completing our report. Furthermore, it is likely that some practices have evolved since our interviews as stakeholders learned more from case law and from one another. Thus, some concerns raised here may have been resolved while others may have arisen.

Conclusions

Bail reform is an ongoing process. The current study shows areas where consistency and improvement are necessary. However, the overall perception from stakeholders is that bail reform has been effective in meeting one of its key objectives: fewer people are being detained simply because they are unable to post bail. While there is a need to bolster consistency in pretrial detention, participants perceived that bail reform has been mostly effective at maintaining public safety while working towards pretrial justice. Although all participants identified one or more areas where implementation could be improved, nearly all felt bail reform was necessary and positive. One participant summed this up by saying,

The reforms we're making are working. We need to continue to reform as much as we can to make sure that we, one, protect the rights of citizens, which is utmost. Also protect the safety of the community. And all those things are part of bail and criminal justice reform that I think we're trying to accomplish now. And I hope we will continue to try to accomplish and move forward on in the future.

**A full-length version of this report
can be obtained by contacting:**

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This project was supported by 2018-86-CX-K024 from the State Justice Statistics program. The State Justice Statistics program is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.