



Implementing Bail Reform in New Mexico

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Section I: Introduction

In November 2016, New Mexico voters approved a constitutional amendment altering pretrial release and bail practices for felony cases within the state. As part of a multi-phase study, this report evaluates the implementation of bail reform thus far. We primarily used information from stakeholder interviews; this was supplemented with court observations, media coverage, and legal documents. In this report, we document the current pretrial process; the way that pretrial release and detention decisions are made; the perceived impact of the amendment; reform success and areas for improvement; and recommendations for how New Mexico and other states may improve pretrial practices.

Background on National Bail Reform Efforts

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. Initially, bail reform occurred primarily at the federal level, particularly with the passage of the Bail Reform Act of 1984. This act requires defendants to be released on personal recognizance or unsecured appearance bond unless the court determines that this will not "assure the appearance of the person as required or will endanger the safety of any other person or the community" (Schnacke, Jones, & Brooker, 2010, p. 17). Thus, federal defendants can be preventively detained pretrial if they are shown to be a significant flight risk or pose a danger to the community (Adair, 2006). Interest in revising bail practices at the state level gained momentum in the last ten to twenty years, and has been promoted by groups such as the National Association of Counties and the Pretrial Justice Institute (*ibid*). However, states differ on the specifics of reform relative to each other and to federal rules.

First, the criteria used to determine who should be detained pretrial varies. The federal standard set by the Bail Reform Act of 1984 uses rebuttable presumptions to determine dangerousness (Schnacke, Jones, & Brooker, 2010). Presumptions outline those charges or other factors (e.g., criminal history) that flag a defendant for possible preventative detention; this often includes capital offenses and other offenses that meet a defined threshold of dangerousness and severity (see, e.g., 18 U.S.C. § 3142 (f)(1); D.C. Code § 23-1322, 2020; N.J. Ct. R. 3:4A(b)(4), 2020). The burden is on the defense to challenge or rebut preventative detention. In most states with preventive detention procedures in place, the decision is based on the severity of the offense with which the defendant is charged. A comparison of the types of crimes and other criteria states use to consider detention are summarized in Appendix A. In New Mexico, the determination of dangerousness is not based on rebuttable presumptions. Instead, prosecutors must screen cases for possible detention based on their assessment of dangerousness.

In addition to dangerousness, both federal and state rules consider flight risk, albeit in different ways. At the federal level, defendants can be detained if they are shown to be a significant flight risk regardless of the underlying charge (Adair, 2006). Conversely, in some states, like New York, a defendant cannot be held only for posing a flight risk, but must also be accused of certain offenses to be considered for detention (Center for Court Innovation, 2020). New York also requires that defendants be released on

the least restrictive conditions possible to ensure appearance. In the District of Columbia, like New Mexico, a defendant who poses a flight risk but is not found to pose a danger is subject to secured bond if deemed appropriate (National Center for State Courts, 2020). While the determinations vary by state, consideration of a defendant's flight risk and danger to the community universally factor into the decision-making process.

Second, besides determining who is eligible for detention, the rules governing the process of initiating pretrial detention hearings vary. The Bail Reform Act of 1984 mandates that, following motion by the prosecutor, an adversarial hearing be held in which the prosecution provides evidence that a defendant is too dangerous to be released under any conditions. States have adopted this adversarial process. In states that use presumptions, pretrial hearings may be scheduled following a motion by the court and/or prosecutor for certain classes of offense. While in most states, the prosecutor must file a motion, in D.C., a judicial officer may motion for preventive detention on charges identified as rebuttable presumptions. In states without presumptions, including New Mexico, prosecutors must screen all felony cases and determine whether to file a motion for pretrial detention, rather than only reviewing those cases that meet the threshold for a "rebuttable presumption."

Third, there are different rules regarding the timeframe in which a decision on pretrial detention must occur. While many states allow the prosecution to file for preventative detention at any point during the pretrial period, in practice, most preventative detention motions occur prior to the first appearance. If a motion has not been filed at that point, the defendant is released. The amount of time before first appearance varies by state, as does the time between filing a motion and holding the pretrial detention hearing. In New Mexico, the felony first appearance occurs within three calendar days of a defendant being arrested and booked. Once the motion is filed, the detention hearing must be held within five calendar days. In New Jersey, on the other hand, the first appearance must occur within 48 hours of arrest. If the prosecutor chooses to file for detention, the detention hearing must also occur within those same 48 hours unless the prosecution requests a continuance of up to three days or the defense requests a continuance of up to five days, or both (New Jersey Criminal Justice Reform Act, 2017). In California, the court must order a hearing for preventative detention within three court days of the first appearance, which occurs within 48 hours of arrest (excluding weekends and holidays) (National Center for State Courts, 2020). While the specifics of the timing for pretrial hearings vary slightly from state to state, all jurisdictions require the hearings to be held within a few days of filing the motion.

Lastly, the role of cash bail varies from state to state. Although it was rejected, California voted on a proposition in November 2020 on whether to eliminate the use of cash bail entirely (Emery & Rokos, 2020; McGreevy, 2020). In most other states, bail reform has drastically reduced the prevalence of cash bail without completely eliminating it. For example, in New Mexico, the District of Columbia, and New Jersey, monetary bail can be used in cases of flight risk (New Jersey Criminal Justice Reform Act, 2017). In other states, such as New York, monetary bail is only permitted for some specific felony charges. Even if there is a risk of flight, a judge is unable to set bail unless the charge fits the criteria outlined. In cases with a risk of flight that do not meet the criteria, judges must use alternative conditions of release to encourage appearance (Center for Court Innovation, 2020). Some states, such as Indiana, are attempting to preserve cash bail in some capacity in order to protect employment in the bond industry (Kobin,

2018). Overall, although states appear to agree that reliance on cash bail needs to decrease, there is not unanimity on whether bail should be completely eliminated.

Impetus for Bail Reform in New Mexico

Prior to New Mexico's bail amendment, judges often set high bonds to keep dangerous individuals detained. In an appeal brought under *State v. Brown*, the New Mexico Supreme Court ruled this practice unconstitutional (2014-NMSC-038, 338 P.3d 1276). In this case, the defendant had been held in pretrial custody for more than two years on a \$250,000 cash or surety bond. The Supreme Court determined that there were non-monetary conditions of release that would have reasonably assured that the defendant posed neither a flight nor safety risk. Furthermore, the Supreme Court ruled that judges could not set high bonds simply to prevent pretrial release. This case prompted the creation of an Ad Hoc Pretrial Release Committee in 2015 to review pretrial release statutes and procedures within the state, and recommend changes to improve pretrial release procedures. Ultimately, this led to the amendment of Article II, Section 13 of the New Mexico Constitution (see Appendix C for N.M. Const art. II, § 13 amend., 2016).

The amendment altered the conditions under which a defendant could be detained without bail. Prior to the amendment, the Constitution allowed the automatic denial of bail in capital cases where the proof is evident or presumption great. Bail could also be denied for sixty days if the person was accused of a felony after having been convicted on two previous unrelated felonies, or if they were accused of a felony using a deadly weapon and had a prior felony conviction within the state. Further, the Constitution required defendants to be released under the least restrictive conditions necessary to ensure court appearance and public safety (N.M. R. Crim. P. Dist. Ct. 5-401; *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276).

The amendment continued to allow automatic denial of bail in capital cases, expanded the conditions under which an individual could be denied bail, and removed the sixty-day time limit. Specifically, anyone accused of a felony can be held without bail if the prosecuting attorney can 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)). The amendment is intended to prevent the detention of individuals who are neither dangerous nor a flight risk solely because of an inability to post bond.

In their analysis of the amendment, the New Mexico Legislative Council Service (2016) provided four arguments in support of the amendment. First, the amendment would allow judges to detain dangerous defendants (previously, if the person could afford to post bail, they could be released); second, it would allow the release of those who are neither dangerous nor a flight risk; third, costs incurred by the county would be reduced by lowering rates of pretrial detention; and lastly, the amendment would protect the basic constitutional rights of citizens by requiring that the state provide evidence in order to detain a defendant pretrial (New Mexico Legislative Council Service, 2016). The NMLCS also identified several arguments against the amendment. These include: reduced use of bail to ensure defendant appearance; a negative impact on the bail bond industry; and an increased risk to the public due to the potential for

defendants to commit additional crimes while on pretrial release. Thus, the amendment was expected to have both pros and cons.

Purpose of the Study

This report represents the second stage of a multi-phase study examining bail reform. The first phase examined data from four New Mexico detention centers to understand pre-reform release practices (see Dole et al., 2019). The current phase focuses on the implementation of the amendment. We assessed the pretrial process since the passage of the amendment, the consistency and extent to which the rules have been implemented, and how stakeholders decide on pretrial release and detention. In this report, we explore the perceived impact of the amendment on the criminal justice system, defendants, and victims. We also address the supports that have aided the implementation of the new rules as well as the barriers that stakeholders face. Lastly, we include recommendations for improving bail reform in the state of New Mexico and for states considering similar legislation.

It is important to keep in mind that the law is continually evolving and practices change. Indeed, during the analysis and writing of this report, the New Mexico Supreme Court created a new Ad Hoc Pretrial Detention Committee to consider alterations to the procedures for pretrial detention and release. The committee was formed in January, 2020 and they submitted their recommendations in May and June of 2020. The New Mexico Supreme Court adopted some of these changes on October 9, 2020 which will go into effect on November 23, 2020 (after the completion of the current report). Some of the concerns and recommendations regarding implementation noted in this report are addressed with these rule modifications; however, other recommendations will continue to apply and other recommendations may yet emerge. This report reflects a snapshot in time during the course of the implementation of bail reform.

Content of Report

The remainder of this report consists of eight sections. In Section II, “Methodology,” we describe the data and analytical techniques used in this study. Section III, “Pretrial Process in New Mexico” provides an overview of the pretrial process in New Mexico as it pertains to preventative detention, including the rules which inform pretrial hearings and procedures. There are multiple stages throughout the pretrial process in which a defendant may be detained, released, or ordered to follow a set of conditions of release.

In Section IV, “Release Decisions,” we use various data sources to examine how stakeholders make pretrial release and detention decisions. Prosecutors and judges play significant roles in determining who will be detained pretrial, who will be released with a set bond, and who will be released without bond. In this section, we explore those decisions.

Section V, “Violations of Conditions” describes the process for learning about and handling violations of conditions of release, both by pretrial services divisions and the courts. Violations may lead to warnings, new conditions, or even revocation of release.

Section VI, “Perceived Impact of Bail Reform,” relays stakeholders’ perceptions of bail reform thus far. Participants describe changes to the number and frequency of defendants released pretrial; changes in the use of bond; and impacts on pretrial hearings. We included both positive and negative consequences as described by interviewees.

Section VII, “Support, Challenges, and Recommendations” considers supports and barriers to implementing the amendment in New Mexico, and offers recommendations for more effective bail reform. These areas are overlapping. For instance, the presence of a support in one area is a facilitator, while its absence may be a barrier. Broadly, this section discusses rules, guidelines, and policy; education; staffing for the courts, prosecutors, defense attorneys, and support staff; pretrial services; access to information; and community and social services. This section offers a variety of recommendations related to each of these areas, from amending the rules guiding bail reform to identifying and addressing deficits in community services.

Section VIII, “Recommendations for Other States” provides key lessons learned in New Mexico for any states considering bail reform. We identify recommendations for states to consider both prior to implementation and post-implementation.

The report wraps up with Section IX, “Summary and Discussion.” In this section, we identify key findings, limitations of the current study, and directions for future research.

II. Methods

We used several sources of data to assess implementation. We conducted observations of hearings, reviewed documents, examined media reports, and interviewed criminal justice stakeholders about the rollout of the bail reform efforts. The interviews comprise the primary source of data for this report; the other data supplements the interviews. This study aims to outline the process of implementation and the perceived outcomes of bail reform from the perspective of stakeholders who have been most involved in this process.

Stakeholder Interviews

Two staff members conducted interviews with 19 individuals from six judicial districts using a purposive sampling approach. This included a variety of stakeholders including judges, prosecuting attorneys, defense attorneys, and pretrial services employees. We met in person with over half of the interviewees (11), and interviewed the remaining eight by phone. Interviews typically lasted from 30 to 90 minutes. While this is not a representative sample, the intent is to solicit information from a broad and knowledgeable group of individuals, not to collect information applicable to all stakeholders. The districts participating in the project represent a mix of urban and rural areas, both larger and smaller districts, and have varying resources available to them for the implementation of bail reform.

Observations

We conducted observations of court hearings both prior to and after interviewing stakeholders. Prior to interviewing stakeholders, we observed metropolitan and district court hearings in Bernalillo County to document and improve our understanding of the release decision process. The initial observations occurred between January 2019 and February 2019. We conducted additional observations in Bernalillo and Rio Arriba Counties in February 2020. We observed various types of hearings where judges make decisions about release: felony first appearances; arraignments; hearings to review conditions of release; compliance hearings; detention hearings; preliminary examinations; and hearings for motions to reconsider detention. Initial hearings, such as felony first appearances and preliminary examinations, typically occur at a lower-level court (the metropolitan court in Bernalillo County and magistrate court in Rio Arriba County). Compliance hearings occur at whichever court has current jurisdiction over the case, i.e. lower court or district court, while detention hearings occur only in district court. Most courts publish court dockets daily and weekly. We used published dockets to find days that had the greatest number of pretrial hearings scheduled. We chose to observe hearings primarily in Bernalillo County because it processes the greatest number of cases in New Mexico and therefore offers the best opportunity to observe hearings.

Official Documents and Media Coverage

Throughout the project, we gathered and reviewed documents about the implementation of bail reform, which included articles published by local media outlets and documents published on the New Mexico Courts website (New Mexico Courts, n.d.-a). These documents include the court rules guiding

release and detention; court decisions on pretrial release in New Mexico and other states; information about the public safety assessment tool piloted in Bernalillo County; information about the Ad Hoc Pretrial Detention Committee to review pretrial release and detention procedures; preventative detention petitions and orders from all 13 jurisdictions, and other information and data concerning pretrial release and detention. First, we examined stakeholder comments on the proposed New Mexico Supreme Court pretrial detention and release rules published in 2017. In these, stakeholders outline their concerns about the rules of pretrial release and detention. In this report, we refer to this collection of letters as “Comments (2017).” Second, the New Mexico Supreme Court created an Ad Hoc Pretrial Detention Committee to consider changes to the procedures for pretrial detention. We reviewed documents and other content including numerous agendas and associated documents, reports, and a video of one of the proceedings. Collectively, we refer to this information as “Ad Hoc Pretrial Detention Committee,” citing the date of the meeting, notes, or specific document as labeled on the court website.

We supplemented official documents with reports by the local media. Using keywords such as “bail reform,” “pretrial detention,” “pretrial release,” “pretrial services,” and “bail,” we found numerous articles related to bail reform efforts. The information from these articles is included where appropriate.

Data Analysis

After completing and transcribing the interviews, staff coded and analyzed the data in two phases. First, we coded statements by categories addressed in the interview questions (e.g., facilitators). Second, we analyzed the data for themes that emerged from each category. We then coded the data according to these themes. These reflect the ideas commonly reported by participants. In addition, we looked specifically for “negative cases” or instances in which individuals held a different perspective from the majority. We use direct quotes from the interviews throughout the report to enhance understanding of a particular idea. These quotes are carefully chosen to either reflect the general theme or exemplify a negative case.

Qualitative research allows us to explore issues in depth. Unlike quantitative analysis, the results may not be generalizable. In other words, the results reflect the experiences and opinions of those who participated and these may not be the same for all stakeholders. In order to ensure the validity of the results, we used other sources of data to verify and supplement the results found in the interviews. We triangulated the interview data with reports and publications related to New Mexico bail reform, official documentation, and courtroom observations. For example, we identified recommendations that emerged from interviews and compared these with recommendations we gleaned from other data sources, such as the Ad Hoc Pretrial Detention Committee and the Comments (2017). Multiple researchers conducted interviews and analyzed data. By doing so, we attempt to limit the effects of researcher induced bias into the interviews and ensure the credibility of the data and analysis. Lastly, we sought feedback from participants prior to finalizing the report to ensure there were no errors, omissions, or clarifications needed.

A Note on Language and Abbreviations

There are three primary rules guiding the bail reform amendment in district court: N.M. R. Crim. P. Dist. Ct. 5-401, N.M. R. Crim. P. Dist. Ct. 5-403, and N.M. R. Crim. P. Dist. Ct. 5-409 (see Appendix B). There are corresponding rules for magistrate and metropolitan court (e.g., N.M. R. Crim. P. Magist. Ct. 6-401 and N.M. R. Crim. P. Metro. Ct. 7-401). However, most of our participants referred to rules in terms of the district court labeling in less formal terms (e.g., 5-409). Thus, throughout the report, we typically refer to the rules using the same naming system.

Throughout this report, we use the terms “bail” and “bond” interchangeably. There are, however, important differences between the two. Bail refers to the amount of money the judge orders a defendant to pay in order to secure their release from jail; this is the full amount ordered. Bond, on the other hand, indicates that a third party has posted money on behalf of the defendant to secure their release, often by a bail bond company. The defendant typically pays some percentage of the bond to the bondsman. Despite these differences, these terms generally refer to the amount of money the judge orders the defendant to pay for release to ensure the person will return to court. Therefore, we use the terms interchangeably as a matter of convenience.

Preventive or preventative detention refers to the decision to detain a defendant while awaiting adjudication based on the filing of a pretrial motion for detention. Since most of the participants used the term “preventative” detention, we typically use that over “preventive” detention.

Lastly, we use abbreviations for brevity. Preventative detention motions may be referred to as PTDs, and pretrial services divisions through the courts may be referred to as PTS throughout the report. The Arnold Tool, also called the Public Safety Assessment, may be referred to as the PSA.

Section III: Pretrial Process in New Mexico

Criminal cases involving felony charges progress through a two-tiered court system in New Mexico. Charges are typically filed first in the lower courts: the metropolitan court in Bernalillo County, or magistrate court in the rest of the state. The investigating officer determines the initial charges filed in a court case. The officer presents the complaint (or arrest warrant) and a statement of probable cause (or affidavit in support of arrest warrant) to the lower court judge. There are several key hearings in the progression of the criminal cases. An overview of felony case flow processing is available in Appendix E. The pretrial period ends when a judgement is rendered, meaning a defendant can be detained at any point before judgment.

The constitutional amendment is concerned with preventative detention of a defendant. Two rules govern decisions related to the amendment. Rule 5-401 guides pretrial release and outlines how judges should determine conditions of release (N.M. R. Crim. P. Dist. Ct. 5-401). Rule 5-409 describes the process under which the district court may order the detention of a defendant pending trial (N.M. R. Crim. P. Dist. Ct. 5-409). In addition, a key rule is Rule 5-403, which delineates the process in the event of a violation of conditions (N.M. R. Crim. P. Dist. Ct. 5-403), though the amendment does not address this. Detention occurs either under 5-403 or 5-409, depending on whether it was for the original charge (5-409) or for a violation of conditions (5-403).

One judge summarized the distinction between these rules by saying:

When it comes to any kind of release decisions that I'm gonna make, I rely upon 5-401, 5-409, and 5-403. 5-401 gives me the guidance. 5-409 are the ones that are the pretrial detention, where I am being asked to hold somebody without bond. And those are formal hearings. 5-403 are revocations, where somebody did not comply with 401, and they're asking me to revoke and reinstate. Or reissue a bond. So, I live by those three rules.

While decisions to detain a defendant during the pretrial period are guided by these rules, there are several steps in the process after someone is arrested and booked that may lead to release or detention. In this section, we describe some of the key steps in the progression of cases through the criminal justice system, highlighting those where decisions about detention and release occur. We generally refer to the rules here using the district court designation. Some rules do not have parallel numbering; in those instances, we include references to all rules.

Booking

After an incident occurs, a suspect may be arrested on the scene or with a warrant based on probable cause. The defendant is then booked into a detention facility. The case then typically proceeds to the metropolitan or magistrate court, although on rare occasions it may be opened at the district court level. The progression of the case varies somewhat depending on whether the defendant is arrested with or without a warrant.

Process if Arrested and Booked Immediately

If arrested at the scene, a defendant will be immediately booked into a local detention facility. Pursuant to Rules 5-401(N), 6-401(M), and 7-401(M), a judge or designee may release the defendant prior to the felony first appearance (FFA) in the event that the defendant's charge qualifies for release (N.M. R. Crim. P. Dist. Ct. 5-408; N.M. R. Crim. P. Magist. Ct. 6-408; N.M. R. Crim. P. Metro. Ct. 7-408).

If detained, the defendant will have a probable cause determination, which occurs either at the same time as or before the felony first appearance (N.M. R. Crim. P. Dist. Ct. 5-301(C); N.M. R. Crim. P. Magist. Ct. 6-203(C); N.M. R. Crim. P. Metro. Ct. 7-203(C)). The probable cause determination must occur within 48 hours of detention, and is intended to determine whether there is probable cause that the defendant committed the crime for which they are charged and could warrant detention (N.M. R. Crim. P. Dist. Ct. 5-301(A-C); N.M. R. Crim. P. Magist. Ct. 6-203). If probable cause is found, the judge must set the conditions of release according to Rule 5-401. If no probable cause is found, the defendant is released on recognizance.

Process if Arrested on a Warrant

A district court judge may issue a warrant for the arrest of a defendant if an indictment is issued or upon a sworn affidavit showing probable cause (N.M. R. Crim. P. Dist. Ct. 5-208; N.M. R. Crim. P. Magist. Ct. 6-204; N.M. R. Crim. P. Metro. Ct. 7-204). If arrested on a warrant, the authorizing judge will indicate on the warrant whether the person should be booked and released or held without a bond until first appearance. If released, the defendant will be ordered to appear in court for the felony first appearance; otherwise, the defendant is detained leading up to the FFA.

Felony First Appearance

Regardless of whether the defendant is arrested with or without a warrant, the next step is the felony first appearance (FFA) (N.M. R. Crim. P. Dist. Ct. 5-401, N.M. R. Crim. P. Magist. Ct. 6-501 and N.M. R. Crim. P. Metro. Ct. 7-501). The purpose of the FFA is to inform the defendant of the charges against them, the possible penalties, and advise them of their rights. Additionally, the defendant enters a plea, and the judge sets conditions of release. According to Rule 5-401(A)(1), 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)). However, jurisdictions may implement shorter time requirements for FFAs, so long as they are within this three- to five- day rule. These hearings may occur via video between the court and jail so that detained defendants do not have to be transported to court. The judge will also determine probable cause, if it has not yet been determined.

The FFA is a crucial point in the pretrial detention process. While the prosecuting attorney can file a motion for preventative detention (PTD) at any time during the pretrial period under Rule 5-409, in practice, they typically make the decision to do so before or at this hearing. Many defendants are in custody at this point; filing the motion keeps those defendants in custody until the motion can be heard in the district court. If not in custody and the motion is filed, the court issues a summons to appear to the defendant. If a motion to detain is not filed, the defendant is released with the least restrictive conditions, which could include secured bond (N.M. R. Crim. P. Dist. Ct. 5-401(A)(1)).

Pretrial Detention Hearing

The purpose of a pretrial detention hearing is to determine whether a defendant should be detained pretrial. These are also referred to as “no bond hearings,” “preventive detention hearings,” “LRs,” and “pretrial detention hearings.” If the prosecuting attorney files a preventative detention motion, a new court case is initiated in the district court. Currently, the underlying criminal case continues in metropolitan or magistrate court, only moving to district court if initiated there. The judge in the preventative detention case determines whether the defendant should be released under the rules set out by Rule 5-409. These hearings vary in length; one interviewee said that they last a half hour at most, however, we observed detention hearings that lasted over an hour. In order to detain under Rule 5-409, a judge must determine that there is clear and convincing evidence that the defendant is a danger to an individual or the community at large, and that no conditions of release can reasonably ensure the safety of the community or any person. 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.

If the judge denies the motion, the prosecutor may submit a subsequent motion for pretrial detention. Likewise, if the judge rules for detention, the defense may submit a motion to reconsider detention (N.M. R. Crim. P. Dist. Ct. 5-409(K)). When either side files these subsequent motions, they must show that there was information unknown at the time of the initial hearing and that it has “a material bearing on whether the previous ruling should be reconsidered” (N.M. R. Crim. P. Dist. Ct. 5-409(K)).

Review of Conditions of Release

If, after a judge orders release with conditions, a defendant remains in custody for more than 24 hours because they are unable to meet the set conditions of release, the defendant is entitled to a review hearing (N.M. R. Crim. P. Dist. Ct. 5-401(H)). This hearing is triggered by a move to review conditions of release, either from the defense or by court. The hearing must occur no later than (5) days after the move for revocation (N.M. R. Crim. P. Dist. Ct. 5-401(H)). Typically, this occurs when bond has been set as a condition of release and the defendant is unable to post bond; however, it may be that a defendant is unable to comply with a nonmonetary condition of release. At the review hearing, the defense may petition for a reduction or waiving of bond. After a review hearing, if the defendant remains in custody, the defense can move to reconsider conditions of release again.

Preliminary Examination or Grand Jury Indictment

Ultimately, felony cases must be tried in district court, as magistrate and metropolitan courts are courts of limited jurisdiction. The prosecuting attorney is required to initiate the case in district court. Article II, section 13 of the New Mexico Constitution provides two options for prosecutors to initiate cases in district court: (1) preliminary examination (also called preliminary hearing) before a judge in the magistrate, metropolitan, or district court (wherein the charging document is a criminal information) or (2) grand jury (wherein the charging document is a grand jury indictment) (N.M. Const., art. II, § 13 amend. 2016). Regardless of which method is used, if either the judge or grand jury determine there is

probable cause that the defendant committed a crime, the case is bound over for trial in district court and proceeds to an arraignment. Rules 5-302, 6-202, and 7-202 guide this process.

District Court Arraignment

The primary purpose of the arraignment is for the defendant to enter a plea (guilty or not guilty). These are generally perfunctory, but are an opportunity for the judge to reconsider or review release conditions if the defendant is not being preventatively detained. In the 2nd judicial district, the largest district in the state, there are anywhere from 30 to 100 arraignment hearings per day. Rule 5-303 governs the arraignment procedures. After the arraignment, the case will typically proceed to trial or be disposed of via a plea bargain.

Compliance, Custody, and Evidentiary Hearings

At any point, a defendant who has been released to the community may be accused of violating the conditions 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. 5-403). These hearings are called “compliance hearings” or, when the defendant is in custody following an arrest, these may be referred to as “custody hearing.” They may also be called “conditions of release violations hearings” or simply, “violations hearings.” The compliance hearing occurs in whatever court currently has jurisdiction (e.g., in metro court if not yet bound over to district court) (N.M. R. Crim. P. Dist. Ct. 5-403). At the initial hearing, the court may continue the original conditions, impose new conditions, or propose revocation of release.

When revocation of release is proposed, an evidentiary hearing is scheduled, unless the defendant waives this right. The judge then determines whether the defendant willfully violated a condition of release, and whether revoking release is a justified course of action. If the lower court orders a revocation, the defense may appeal that decision to the district court, resulting in a hearing to review the revocation order.

Section IV: Release Decisions

Prosecutors and judges make key decisions that determine whether a defendant is detained during the pretrial period. If released, judges decide on the appropriate conditions of release. Initially, there are three options for defendants: detention without any sort of bond, release with a bond (either secured or unsecured), or no bond. These options correspond with assessments of both dangerousness and flight risk, as described below:

if they're dangerous they shouldn't have a bond [they should be detained]. If they're a flight risk, then they should have a bond, and if they're not a flight risk then they shouldn't have any bond at all.

In this section, we explore the decision-making process using several sources of data. We asked interviewees a series of questions about decisions concerning pretrial release and detention. Additionally, we gathered samples of pretrial detention petitions and orders across all 13 judicial districts in New Mexico. These provided information on what prosecutors are including in their petitions and what factors go into judges' orders to deny or grant detention. Finally, we reviewed information posted on the New Mexico Courts' Pretrial Release and Detention webpage, such as reports and meeting videos from the Ad Hoc Pretrial Detention Committee as well as other information posted on that site (New Mexico Courts, n.d.-c).

The following sections explain how participants determine who should be detained pretrial; when bonds should be set; when release on recognizance is appropriate; and which conditions of release are used to ensure public safety and encourage pretrial compliance.

Detention

In order for a defendant to be initially considered for pretrial detention, the prosecutor must file a motion for preventative detention. The judge then determines at a hearing whether there is enough evidence to warrant detention. For detention to be granted, the judge must find that a defendant is dangerous and if so, that there are no conditions of release that could mitigate this dangerousness. As one participant explained,

Does the state prove by clear and convincing evidence that the defendant is a danger to the community and that there are no conditions that can be set to ensure the safety of the community if you find that they're dangerous?

Rule 5-409(F)(6) guides judges on what evidence to use in determining when to preventatively detain a defendant:

The court shall consider any fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community.

The policy goes on to state specific factors which may be considered, including: the nature and circumstances of the current offense; the weight of evidence; the history and characteristics of the defendant; the nature and seriousness of the danger to any person or to the community; any facts indicating that the defendant would or would not reoffend; whether the defendant has been detained in any other case; and any results of a pretrial risk assessment (N.M. R. Crim. P. Dist. Ct. 5-409(F)(6), 2018).

New Mexico is working on adopting the Public Safety Assessment (PSA), developed by the Laura and John Arnold Foundation. The purpose of this tool is to provide judges with information about the risk that a defendant poses in terms of new criminal activity and flight risk in order to make decisions about release (New Mexico Courts, n.d.-d). In addition, the PSA has a flag for new violent criminal activity. This flag is not intended to be a recommendation, but is used to provide information to the judge about the potential danger that a defendant poses.

Determining Dangerousness

Taken at face value, determining whether someone should be deemed dangerous appears straightforward. As one interviewee put it:

[T]he only issue is, are they dangerous or not? So, it's pretty common sense about what makes them dangerous and what doesn't, at least that's the way I view it.

However, though it appears simple, stakeholders define and determine dangerousness in a variety of ways. Key factors indicating dangerousness include the current offense and the criminal history of the defendant. Furthermore, the strength of the case is taken into consideration when evaluating whether a defendant can be considered dangerous.

Nature of the Current Offense

One key factor prosecutors and judges consider relevant to a determination of dangerousness is the nature of the current offense. While the name of the charge can flag dangerousness for some, for others, information about the circumstances and nature of the offense are necessary for determining the danger a defendant poses to an individual or the community at large. This information is initially gleaned from the criminal complaint.

Prosecuting attorneys often described first looking at the charge when screening cases for indicators of dangerousness, such as serious violent offenses. While many prosecutors do not base the decision to file for detention based solely on the current charge, there were some that said that they might file in order to have more time to get information for serious charges, such as rape and murder:

If it's a murder, we don't wanna take the chance that he's gonna do it again no matter his history is, no matter what information we have. I don't even need to see his history really. That's probably someone that we wanna at least hold until we have more information, same with rapes, certain crimes, and the second reason that we file detention is criminal history.

However, judges indicated they typically will not rule in favor of detention based solely on the charge. One reason for this is that the name of the charge does not describe the nature of the offense:

Well, it's an aggravated assault. All right. That could be as mild as, I make you think I have a weapon, and I threaten you, to I shoot at you 15 times, and because you're fast and ducking, I don't hit you. They're both the same charge, but they're completely different. And there's this great pressure to just look at the name of the charge. What that tends to promote is overcharging by the police and by the district attorney's office. Because, well, look at the charge. And it's like, no. I want to know the facts behind the charge.

According to this judge, prosecutors may overcharge in this way to have more leverage for a plea deal. Therefore, at least for this judge, *"no, you can't go by the name of the charge... I want to know as much about it as I can."* Indeed, judges are required to consider factors beyond the charge type in making their decision. In *State v. Ferry*, 2018-NMSC-004, 409 P.3d 918, the New Mexico Supreme Court ruled that defendants are not to be held solely on the basis of the current charge(s). Instead, judges are required to weigh multiple factors in making a release decision.

Local contexts shape the decision to detain as well. For example, as one interviewee explained, crimes like drug trafficking may have a larger impact in a small community that struggles with high rates of substance use. One respondent explained that when weighing the decision whether to file or grant detention,

you have to be aware of the community needs and the problems that are most impactful for that community.

Beyond the charge type, interviewees explained that what happened during the incident also factors into release decisions. This was evident in the petitions for pretrial detention, many of which went into detail describing the circumstances of the offense. Our interviews illuminated some of the circumstances that are taken into consideration by participants. For example, multiple judges cited strangulation as a factor that would make them inclined to detain, as strangulation signals potentially lethal behavior. Similarly, some prosecutors indicated that they use bodily harm as an indicator of dangerousness, with one attorney stating that *"if the victim suffered great bodily harm injuries, I think we need to always file in my view."*

Weapons are another factor that prosecutors look for in determining whether to move forward with pretrial detention motions. Prosecuting attorneys from two different districts listed the presence of a weapon as an indicator of dangerousness that may make them more likely to file for detention, though they differed on the threshold for filing. One attorney explained that even in cases that would *"typically not be a bell-ringing terrible offense,"* the mere presence of a gun, regardless of whether it was used, would influence a prosecuting attorney to file for detention. Another said that they would only file when a weapon was actually used in the commission of the offense.

Although some prosecutors interpreted the presence of a gun to mean an individual is dangerous, others disagreed. As one person explained,

The DA thinks sometimes that if you have a person who may even lawfully have a gun in the car... but they have pot on them that they... pose themselves as a danger. That's really not where the constitutional amendment really goes to. And I believe that the amendment is talking about folks who have demonstrated by clear and convincing evidence--demonstrated that they are gonna hurt somebody, kill somebody.

Other details of the case, such as the victim, can factor into determinations of dangerousness. Two judges from the same district highlighted the victim-offender relationship as a factor in their consideration of pretrial detention. One emphasized that a random act of violence against a stranger would indicate dangerousness. Another viewed repeated acts of violence towards the same person, such as in domestic violence or child abuse cases, as an indicator. While each judge provided a unique example, neither indicated that they would not grant pretrial detention in different circumstances. However, an interviewee from a different district perceived that judges do not take domestic violence cases seriously enough in pretrial decision-making:

If it's aggravated assault that is a household member, and they have a history of battering a household member, the judge isn't gonna keep him in jail.

This person opined that judges would rule in favor of detention if the defendant posed a danger to society as a whole, rather than an individual. Interestingly, and conversely to the reasoning of some judges, this may include crimes perpetrated against a stranger. Other interviewees concurred that judges may rule against detention in spite of a very serious charge if they determine that the defendant does not pose a danger to anyone in the community. For example, in one district, judges reported that they would not rule in favor of detention on a murder charge without considering whether the offense occurred in the heat of the moment, as this would indicate that the danger posed by the defendant has passed. As one person explained,

In a different case, in a murder case... you've got somebody that has focused their anger and the violence towards a specific individual. The individual is dead. They've been accused of the crime... The object of this person's anger and violence is out of the picture. Does that figure into now whether this person now still represents themselves as a danger to the community or somebody else? Well, I don't know. Maybe not.

Thus, the charge of murder itself may not warrant detention unless it can be shown that the defendant still poses a threat to other community members, including witnesses.

Strength of the Case

Prosecutors must present evidence to make a convincing argument for detention. Interviewees described the importance of evidence in both illustrating the danger the defendant poses as well as the strength of the case against the defendant. While 5-409(F)(6) asks judges to consider the “weight of the evidence against the defendant” during pretrial detention hearings, the New Mexico rules of evidence do not apply. Rather, the evidence must only meet the standard of being “clear and convincing” (N.M. R. Crim. P. Dist. Ct. 5-409):

And the proof's gotta be by clear and convincing – and it's not the highest standard, but it's a pretty high standard that these folks are dangerous and that it's justified in keeping them behind bars.

Although the standard of “clear and convincing” seems rather vague, one judge elaborated on the definition they use to determine whether evidence is clear and convincing.

There's a great definition, and it's out of one of our cases, the State of New Mexico v. Adonis. And it basically says that it's the information received that causes the fact finder to instantly tilt his head to the side of the argument that is being put forth.

This definition refers to one's initial reaction upon hearing the evidence presented and whether it instinctively leads one to believe that the person is a danger to the community or an individual. However, this could create disparate detention decisions based on race/ethnicity as a result of implicit biases (see, e.g. McIntyre & Baradaran, 2013; Menefee, 2018). Implicit biases are “attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it” (Kang et al., 2012). Research has shown that racial disparities are present in various stages of criminal justice processing, in part due to implicit racial bias in the decision-making of criminal justice actors (Maryfield, 2018). It is important to note that in the first wave of this bail reform evaluation, ISR's baseline measures found no evidence of implicit bias in pretrial judicial decisions, when controlling for other variables such as sex and type of offense (Dole et al., 2019).

The sample of pretrial detention petitions that we reviewed typically included a section in which prosecuting attorneys would indicate the “weight of the evidence” by reporting all the evidence they had acquired related to the current offense. This could include video surveillance footage, witness and officer statements, text messages, any available physical evidence, and anything else pertinent to the case. Judges often noted the strength of the case and cited the evidence that was included in the petition in their reasoning for their decision. The type of evidence presented is also perceived to increase the likelihood of a ruling for preventative detention. In particular, the presence and live testimony of victims and witnesses (including investigating officers) can factor into the weight of evidence against the defendant:

[I]f you have a cooperative victim that's willing to come and testify or even be present in the courtroom, I think they're more likely to detain as a generality.

However, live witness testimony is not required (see *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201; *State v. Groves*, 2018-NMSC-006, 410 P.3d 193), nor is it always feasible. Witness testimony can be presented by proffer. This can occur, for example, when witnesses answer questions on the record, with their responses then being presented to the court by the attorney without their physical presence at the hearing. In one district, witness testimony is typically presented by proffer:

We do most of our pretrial detention hearings via proffer. Rarely do we call witnesses. Our district court judges have been great in allowing us to proceed via proffer.

Even so, one judge expressed that live witnesses were better sources of information than written statements due to the limitation of not being able to ask questions when the witness does not testify in person:

They can present just paper evidence if they wanna do so. But again, usually what happens is the DA's office doesn't – they can't answer those questions. They can't provide evidence to support what's in the complaint. They don't bring the live witness in. And so, what happens is usually, there's not enough to meet the standard. And so, by doing so, they don't get the motion granted just on paper alone. But they don't bring in the live witness to answer any questions.

This viewpoint touches on one of the concerns raised by members of the Ad Hoc Pretrial Detention Committee: that some judges do not allow proffer, despite the ruling in *State ex rel. Torrez v. Whitaker* (2018-NMSC-005, 410 P.3d 201) that proffer is sufficient evidence on which to base preventative detention.

Criminal History

Criminal history is another key to evaluating the dangerousness of a defendant. Primarily, prosecutors and judges look for a pattern of criminal behavior, with specific concern for a history of violent offenses. As one interviewee explained,

[T]he more violence is associated with that person, the more – or the easier it is to convince a judge that they're dangerous.

Judges look for a pattern of violent offenses, escalation, and/or crimes committed against the same victim. When asked about the type of criminal history judges consider in detention decisions, one attorney said a “*violent criminal history. Either violent, or extensive.*” Respondents typically emphasized the importance of a violent criminal history over an extensive one for making pretrial detention decisions, while at least one prosecuting attorney said they are more inclined to file for detention when a defendant has a history of “*prior crimes against the same victim.*” Furthermore, when criminal history demonstrates a pattern of escalation, a judge might be more likely to find a defendant dangerous:

And you can see in a pattern the defendant that things are escalating. They may have a simple or petty battery thing. There may be some history of abusing animals. Over time, you can see it escalating and getting to a place where now we're talking about not just hitting somebody. And maybe we have the same victim throughout this period of time that – those are indicators for me that probably this person is just escalating and is just a waiting – is a gun waiting to go off basically before he kills somebody, or she kills somebody depending upon the circumstances.

Although many of the offenses that lead prosecutors to file for preventative detention are violent, as discussed above, an extensive criminal history could lead prosecutors to file for detention on a case with non-violent offenses, such as burglary or DWI. For example, in one case, a prosecutor sought detention for someone arrested for DWI. The prosecutor successfully argued for detention, not necessarily due to the offense itself, but because of the defendant's extensive history of similar offenses. Furthermore, the prosecutor was able to show evidence that no conditions of release would protect the community from the defendant.

Interviewees and pretrial detention forms illustrated that prior arrests, prior convictions, and pending cases are all used to demonstrate criminal history. However, some judges indicated that arrests alone do not bear much weight in decisions to detain. Rather, convictions are viewed as more reliable sources of information to determine dangerousness:

I look up these cases to see what the disposition was, if they're still pending. Then this shows the arrest, which I give little weight to, frankly. Because an arrest, that doesn't mean you did the crime.

Similarly, one participant expressed concern that the initial assessment to detain a defendant pretrial did include “*prior arrests where there was no conviction.*” Unlike the judge quoted above, others consider prior arrests, pending cases, as well as prior allegations as relevant to determining the potential dangerousness of a defendant.

Determining Ability to Comply with Conditions

If dangerousness is established, the judge must then evaluate whether possible conditions of release can mitigate risk. As articulated in Rule 5-409(F)(4), the prosecutor's burden is to “prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community” (N.M. R. Crim. P. Dist. Ct. 5-409). While some participants thought this was the most convincing argument to present to judges, it can be challenging to execute:

It's often much easier for the State to meet the risk prong or the dangerousness prong than it is for them to meet the last final prong that there are no conditions.

Participants delineated two main factors that indicate whether a defendant is unable to comply with conditions of release: a history of failures to appear or comply, and a lack of ties to the community. Participants also described extenuating circumstances that may play a role in ability to comply that may influence the decision to release or detain.

History of Failures to Appear or Comply

A defendant's history of failures to appear or comply is taken as an indication of their ability to comply with conditions in their current case. A history of noncompliance coupled with an indication of dangerousness can demonstrate a threat to safety.

[F]light risk or his failures to appear would come up if he had been on electronic monitoring and he'd cut his bracelet and things like that. Then I would consider those for pretrial preventive detention only in the sense that I don't think I could keep the community safe, or an individual, coupled with all these other factors, if that makes sense.

Other indications of an inability to comply include reoffending shortly after release from prison and a history of noncompliance with parole or probation:

[S]ometimes we'll see people that have just gotten out of prison, that's always a really compelling argument to make that they just were released from conditions of release and now they're already violating.

While our interviews evidenced that judges take into account history of compliance, the Ad Hoc Pretrial Detention Committee expressed concern that courts are not considering past failures to appear or comply when ruling on PTD motions (Chávez, 2020a).

Community Ties

In addition to failures to appear and comply, ties to the community can indicate a defendant's ability to comply with conditions by providing information about whether they are “*likely to flee the jurisdiction.*”

When evaluating ties to the community, participants stated that they consider whether or not the defendant is from a different county or state, employed or enrolled in school in the area, and whether their family is local.

Several interviewees indicated that whether the defendant is from the area in which they were arrested is important. If the defendant does not reside in that area, they are perceived as being less likely to have ties to the community that would ensure their compliance with conditions.

Current employment and employment history are also used to determine community ties. In cases in which the defendant is a student, their enrollment status and history may be taken into consideration rather than employment:

I look at the ties to the community. The 401 factors are what I look at very carefully. And I will ask questions. Where do you work? How long have you worked there? What kind of work do you do? If you're a student, how are your grades? What are you studying? I will ask questions to find out what the ties are.

However, one judge said that employment history can be a “double-edged sword.” Being employed can signal that you have ties to the community, or that you have the monetary resources to flee. Furthermore, employment status is not always permanent:

Well, he's working. He might have money saved up, therefore he can afford to flee the jurisdiction. You know, if he's got money to go, he can do something. Where, if a person has no job, hell, he can't even afford a Greyhound. You know? Where's he going?... So, the employment, he could quit tomorrow. He could get fired. There are a lot of people lose their jobs because they're in custody, and you have to have the hearing, preventative detention usually takes at least five to seven days to get it done. People lose their jobs. He had a good job, and he believes his boss will hire him back. Maybe, maybe not.

Having a family member that lives in the area can also demonstrate greater likelihood of compliance and appearance if the family member can serve as a third-party custodian responsible for monitoring compliance:

[T]he family members would come and say, 'I'm here, I'll be their third-party custodian, I'll make sure they show up at court, I'll make sure they're not doing anything,' and the judge can order them to report to pretrial services... And you have this employer who's gonna give you a job,' so that's what would compel them to release up there. I've got all these assurances in place that you're going to not just go right back out there and keep committing crimes.

Extenuating Circumstances

An individual's ability to comply with conditions due to other factors can also influence detention decisions. For example, those individuals experiencing homelessness, mental illness, or who have a substance use disorder may be at higher risk for non-compliance. In particular, interviewees described some of the challenges that unhoused defendants face that make compliance with standard release conditions difficult. They may not be able to check in with their attorney or with pretrial services if they do not have access to a means of communication like a phone. They may not receive mail related to

their case if they lack a stable address. Furthermore, conditions of release such as GPS monitoring require regular charging and are set to specific locations, making it difficult for someone who experiences transience to comply. Unhoused people may experience co-occurring mental health or substance use issues, making compliance even more difficult.

Interviewees explained that vulnerabilities such as homelessness can influence detention decisions by providing context for the defendant's criminal history, informing what conditions are realistic for a defendant, or in some cases, increasing the likelihood of detention. For example, one participant explained that homeless defendants may face more stringent pretrial outcomes:

But in general, you're going to see a person who's struggled with homelessness and the things you often associate with that, like mental illness, they're going to be far likelier in a preventative detention scenario to have had problems on probation or pretrial services in the past. And so a person who just has had a life where they just have not had stable housing is just going to have had worse outcomes in the criminal justice system, which is going to make it much more likely that that motion to detain them is going to be granted.

Thus, some individuals are more likely to have a history of non-compliance driven by their circumstances. Like this participant, some interviewees indicated that a defendant's ability to comply is influenced by whether they have a stable residence or other factors.

Due to their awareness of the role factors like homelessness and substance use play in compliance, some judges and prosecutors evaluate a defendant's history to determine the cause of prior non-compliance. For instance, one judge said that they are unlikely to hold a homeless defendant if the prosecuting attorney argues that the defendant is unable to comply solely due to their housing instability. In the same district, another judge refrains from imposing conditions that would be difficult for a defendant to comply with due to the defendant's lack of housing. Likewise, one prosecutor explained that in their effort to balance flexibility with establishing criteria to guide filing, they also consider how factors like homelessness can influence criminal history:

Like we've gone back and forth because sometimes you'll see like homeless people pick up a lot of crimes and you don't wanna detain them. So, they may have a bunch of arrests. So, we've played with a bunch of criteria because we wanna make it so that it's not dependent on whatever attorney is sitting there. We wanna make it so that there's some consistency in how we make filing decisions throughout the office, but it can't be so rigid that we're filing on homeless people that we don't wanna file on or that we're missing someone who may have a low-level crime and no history.

In addition to housing status, participants spoke of the role that substance use and mental health play in determining a defendant's ability to comply. One judge explained that substance use can make a defendant's behavior erratic and can indicate a likelihood to commit new offenses and an inability to comply with release conditions or appear in court:

I also think about the role that narcotics and drugs play in the behavior of the defendant. In other words, if he's got an addiction, sometimes the addiction will make his behavior less predictable.

In some cases, judges may consciously decide to detain vulnerable defendants who pose a risk to themselves or others in order to help the defendant. For example, one judge described ordering detention for an individual whose aggressive behavior was attributed to an untreated mental health condition. While the judge ordered detention due to the danger of the defendant's erratic behavior, they also recognized that jail could help the individual get on stabilizing medications. The judge offered to reconsider detention if the individual became stable and was no longer perceived as dangerous. If a community lacks the necessary resources to address issues such as mental health crises, jail might be one of the few places to effectively help someone while protecting the safety of both the defendant and others in the short term.

According to Rule 5-409(K), the court may hear motions to reconsider detention when there is new information available or a drastic change in circumstances (N.M. R. Crim. P. Dist. Ct. 5-409(K)). Although the defense can ask for a reconsideration of detention, participants perceive the success of such motions to be uncommon:

[I]f your client is being preventatively detained, there's nothing that the judge could do. The judge can't lift that preventative detention even though they're in district court now. Unless there's been an extreme change in circumstances, you can't file motions. Nobody's going to revisit the issue of preventative detention.

Thus, participants felt it is very hard for it to be reconsidered once the decision to detain has been made.

Setting Bond

After detention, the next most stringent option for judges is to set a bond. According to Rule 5-401,

If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary 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 (N.M. R. Crim. P. Dist. Ct. 5-401(E)).

Thus, bond is generally set in order to mitigate flight risk. Prosecuting attorneys may request bond; however, the judge ultimately determines whether a bond will be set.

Participants spoke to a number of factors indicating that a defendant poses a flight risk, which largely overlap with the criteria used to determine an inability to comply, such as a history of non-compliance and/or failure to appear and lack of community ties. Additional factors that are used to determine flight risk were also discussed, including 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, bond can be set to encourage appearance.

Interviewees also articulated alternate circumstances in which prosecuting attorneys may request bond. In some cases, prosecuting attorneys may request bond after a denied pretrial detention motion, requiring them to have an argument for bond to be set to ensure appearance in court. This process is exemplified by one prosecuting attorney's statement:

[W]hen we file our motion for pretrial detention, we ask the judge that if the judge denies pretrial detention under... Rule 409, that the judge consider the alternative setting bond and reasonable conditions under 401. So, we say if we lose the big argument, at least set some reasonable bond. So, if we do file a motion for pretrial detention and it is denied, we are more likely to get reasonable conditions of release and bond from the district court who denied the pretrial detention. More favorable conditions than we are to have done nothing at all and leave it to the district or the magistrate court judge who would release them on their own recognizance without any form of bond and give them a no contact order and hope they come back and abide by it.

Like the prosecuting attorney above, one judge indicated that besides setting bond when the defendant is identified as a flight risk in order to avoid prosecution, the judge will also set bond to mitigate dangerousness. This judge noted that they specifically look at whether the defendant will abide by set conditions of release:

Another [consideration] is, is it risk to reoffend while out on conditions for release? So, that is taken into account in determining the appropriate bond.

However, with the exception of the participant quoted above, judges in our sample expressed that they use bonds when there is risk of flight, rather than risk to reoffend or otherwise violate conditions of release. Judges can require an unsecured bond in lieu of a secured bond, which a defendant is only required to pay in the event that they fail to appear in court.

Release with or without Special Conditions

The presumption is that most defendants will be released, and will be released without secured bond. This 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 the judge is convinced that, although the defendant poses some danger, that danger can be mitigated by setting appropriate conditions of release.

Conditions of Release

When defendants are released pretrial, the presiding judge can order a specific set of conditions that the defendant must follow to continue on release. Rule 5-401 states that judges must 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 (N.M. R. Crim. P. Dist. Ct. 5-401).

These conditions always include that the court “shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release” (N.M. R. Crim. P. Dist. Ct. 5-401) but other conditions can vary. Form 9-303, the Order Setting Conditions of Release Form, includes a list of common conditions that the judge may choose to set for the defendant based on each specific case (see Appendix C). Judges may also order any alternative conditions that they deem necessary to ensure the safety of the community and any person or appearance in court.

While many interviewees spoke of “standard” conditions, descriptions of what is standard varied somewhat between districts and individual participants. In addition to following all laws, frequently set conditions include not possessing firearms, reporting to pretrial services, and maintaining contact with an attorney. Less common conditions may include prohibiting use of social media, mandating child support payments, surrendering custody, or release to a third-party custodian. Many of these conditions vary depending on the options available in each district as well as the type of offense and the defendant’s criminal history. In addition to these conditions, interviewees described certain conditions in more detail. These included restrictions on movement, prohibitions against contact with specified individuals or groups, substance use and testing, and reporting to pretrial services. In this section, we briefly recount these conditions.

Restriction of Movement

Judges commonly limit the movement of defendants as a condition of release through requiring defendants to remain in the county, to report any travel outside the county, to not return to the scene of the crime, or requiring monitoring through an ankle bracelet or alternate GPS system.

While it is common to prohibit defendants from leaving their county of residence, participants noted that these restrictions are often waived for employment purposes or other extenuating circumstances:

Oftentimes a defendant will request that he be granted permission to leave the county and I often grant permission to leave the county, especially for those defendants who have jobs that take them outside the county... And so it's frequent that I do grant that condition. We want defendants to be able to, if they can, to come out of this solvent and to have their families intact and so that's one of the objectives that I look for. And then we want them to be responsible citizens as well.

When resources are available to do so, compliance with restricted movement conditions may be enforced through electronic monitoring (EM), also referred to as GPS monitoring. In some districts, EM is a commonly ordered condition of release, while in others, it is not an option. As one participant explained,

[GPS monitoring is] basically not available. I've had attorneys recommend that we give them this. Unsecured bond, GPS monitor, ankle – yeah, that's fine. Except who's gonna do it? So, I don't authorize it. Not because I'm picking on the defendant. We just don't have the resources.

Complicating the use of EM is that in some districts, the costs of monitoring are the responsibility of the defendant. For example, one judge explained that, since GPS monitoring in their district must be paid for by defendants, “I’m not ordering it very often, I would order it and sometimes I’ve ordered it for well-to-do... defendants,” as it is unlikely that poorer defendants will be able to pay. As a result, this interviewee called GPS monitoring “the same thing as bail pretty much, or excessive bail.” Indeed, it can be an expensive option. In one district, the cost to defendants amounts to “about \$100 to sign up and about \$10 a day.”

Thus, even when EM is an available option in a district, it might not be a viable option based on ability to pay. This could penalize the poor, and indeed, studies have shown that those who cannot afford to pay the required fees remain in jail or are later remanded when they can no longer afford to pay them

(Pretrial Justice Institute, 2019). Furthermore, the Harvard University Criminal Justice Policy Project advises courts to avoid imposing fees for pretrial services, which they argue can leave defendants with criminal justice debts (Doyle et al., 2019).

However, from the perspective of those we interviewed, EM was not being used in financially penalizing ways in their districts. If the defendant is unable to pay, then EM would not be considered. It would not mean, however, that the judge would default to detaining the defendant. If a defendant *“is not able to afford an ankle monitor, it just means that that option is not available to them,”* because the court does not have a budget to pay for electronic monitoring. In those cases,

[T]he judge just would look at the case as if there was never an ankle monitor option to begin with, and that often means that the bond is just lowered. It doesn’t mean that the judge necessarily keeps them in jail.

Participants indicated that they would not rule for detention merely because GPS monitoring is unavailable or too expensive. Rather, they would set alternate conditions of release in order to ensure pretrial success.

Prohibiting Contact

Another commonly referenced non-monetary condition is the prohibition of contact with any victims or witnesses. This is particularly common in domestic violence cases. In some cases and districts, this is ordered automatically by the judge, and in others, the prosecuting attorney must request it. In one district the use of a no-contact order was described as a *“separate standing order,”* which means that violation of the no-contact order can result in a contempt of court charge.

In the case of child victimization, prohibition of contact may apply to all children. One participant explained,

[I]n cases where defendants are charged with crimes against children, we might ask for them to not have contact with children or certain children or children under a certain age, but that’s kind of typical for child sex cases or child abuse cases.

However, these orders can make it more difficult for a defendant to be released, especially if they are living with the person(s) for which contact is prohibited. As one interviewee explained,

But standard conditions, normally, are no contact with victims and witnesses, which obviously can be hard if there’s a family member who they live with, who’s a victim or witness, meaning that they can’t live at that address.

In these cases, the defendant must find an alternate address deemed acceptable to the court in order to be released.

Substance Use and Testing

Judges commonly order that defendants abstain from drug and alcohol use, even when the offense is not drug or alcohol-related. Enforcement of this condition can include an alcohol-monitoring bracelet or drug testing. In some districts, limited substance testing and supervision resources constrain the ability

to monitor for substance use. For instance, in one court, only those whose cases are processed through specialty courts, such as the drug court, veteran's court, or juvenile drug court, are eligible for drug testing. Thus, though courts may prohibit use, in many districts there is no way to enforce this condition. One district in our sample is an exception: in this jurisdiction, privately contracted electronic monitoring is used to surveil alcohol consumption.

Pretrial Services Monitoring

In districts with pretrial services, judges frequently order pretrial services monitoring as a condition of release. This may include requiring defendants to report to PTS at a certain frequency, either over the phone or in person. Pretrial services staff report when defendants miss an appointment, informing the court of violations of this condition. Interviewees in some districts explained that there are different levels of PTS monitoring which the judge can choose to order.

Interviewees from three of the districts with PTS described options for face-to-face meetings with pretrial services officers at different frequencies based on the judge-ordered level of supervision.

[L]evel one, face to face once a month; level two, face to face contact twice a month; level three, face to face contact once a week; level four, face to face contact three times a week; and level five, face to face contact five times a week

Face-to-face meetings are one form of pretrial monitoring. In addition to meeting with defendants, pretrial services oversees some conditions of release, including electronic monitoring and substance use testing. They also may issue court reminders via text or phone call and connect defendants to social services such as housing, health insurance, or treatment and counseling programs. Some districts still lack pretrial services divisions to fill these roles.

Section V: Violations of Conditions

While the amendment addresses the initial decision to detain or release someone pretrial, defendants who violate one or more conditions of release are subject to detention. Judges address violations in accordance with Rule 5-403. This rule was amended in July of 2017 when the rules guiding pretrial release decisions were promulgated, and again in 2018 and 2020 when the New Mexico Supreme Court amended the other rules guiding pretrial release. Addressing violations is an important aspect of bail reform.

In order for judges to respond to an alleged violation, they must first be made aware of the violation. In the following section, we describe the various ways courts learn about violations. Next, we describe how the court and others respond to violations.

Learning of Violations

The courts must learn about violations before addressing them. Information related to violations of conditions of release come from various sources. Pretrial services (PTS) and other criminal justice actors, and in some cases the court itself, actively monitor for violations by defendants. The court (and others) may learn of violations in other ways, including accidentally.

Active Monitoring for Violations

In districts with pretrial services, PTS will notify the court of violations. As one participant explained, “pretrial will file a notice of a violation... whether it’s major or minor.” Attorneys may also be notified in the event of a violation:

Sometimes [PTS will] call me and let me know. It’s usually at court. They’ll show up to court and let me know what the status has been, a bit about contact.

Districts that do not have PTS must learn about violations from other sources. In some cases, the courts actively search for violations. For example, in one district, judges’ bailiffs search the local detention center website to look for new charges, warrants, and other information to determine whether a defendant has violated their conditions of release. Interviewees also described monitoring jail calls to assess whether the defendant has had contact with a victim or witness.

Informal Monitoring for Violations

Stakeholders may find out about violations of conditions of release through informal avenues, such as law enforcement officers. For instance, individuals may be arrested on new charges:

[H]ow you find out is mostly simply because they got arrested on new charges. It’s very rare that we find out any other way, other than like I said, new charges. So, absent being arrested on new charges, they can pretty much go back about their lives and do whatever they want.

Interviewees also explained that law enforcement officers may discover violations of no contact orders when they observe the defendant and witness or victim together. In some cases, victims or witnesses will report to the prosecuting attorney or judge when a defendant violates a no-contact order.

Similarly, stakeholders may learn about potential violations of conditions of release from others in the field:

Sometimes, you know it from one of your other cases. Sometimes another attorney in the office will say, 'Hey, I just saw this guy.' Sometimes it'll be the person who prepares the in-jails and says – like the last time I did in-jails, she goes, 'Hey, by the way, this guy is the guy who just happened –.'

Defendants might also accidentally report their own violations of conditions. One judge explained that defendants may inadvertently provide information during a hearing that could have consequences leading to revocation of conditions of release. For example, a defendant explained they were late for a hearing because they had been out of the state, which was prohibited by their conditions of release.

Responding to Violations

Once authorities become aware of a violation, there are various options for responding. The interviewees we spoke with explained that, in districts where there is a PTS division, violations may be initially screened and handled through the PTS office. Judges respond to violations with varying levels of severity once they are notified of an offense. Below, we summarize participants' descriptions of responses to violations.

Responses by Pretrial Services

Where they are available, PTS officers are typically the first to learn about and assess violations. PTS has guidelines that direct their response and the recommendations they make to the court. As one interviewee explained,

Every violation does get reported to the court in some form or another. [PTS has] the ability to recommend further assessment, and to follow recommendations. [PTS has] the ability, depending on the violation, to request a hearing, to address that violation. Recommendations for possible bench warrants if the individual has failed to report. The most severe is a recommendation for a remand, and that's typically if there's a concern of safety for the public... We could recommend increased reporting, increased testing, the use of GPS, the use of Sober Link... Just to name a few. There's several more.

For minor violations, such as a first-time positive test for drugs, PTS usually notifies the courts and issues a verbal warning. Subsequent minor violations, however, may result in more serious responses. More serious violations can result in more severe responses up to and including remand to jail.

In one district, PTS is in the process of altering their guidelines for responding to violations. Under these new guidelines, violations will be treated differently based on the risk level that has been determined for that individual. A first or second violation by someone deemed low risk would receive a different response than someone considered high risk. As they go on to explain:

[I]t's just kind of a matrix, if you can picture a matrix with risk on the top, and the level of violation on the side, and match it up to what our available responses are. So, that's the main change.

One standard condition of release is that a defendant may not violate the law. Therefore, when a defendant is arrested for new charges while awaiting trial, the new offense also constitutes a violation of their conditions of release. Pretrial services can request remand when this happens, which is the typical response in these situations.

Responses by Judges

While pretrial services, prosecutors, and defense attorneys can offer recommendations or request specific responses, it is judges that ultimately determine the appropriate response to a violation. As one interviewee explained, the court's response is largely based on the nature of the violation and the judge's discretion:

It depends on what the violation is. If what the violation is is that they're testing positive for an opiate that they're addicted to, is the answer just putting them in jail? Or is the answer then trying to figure out how we can get our pretrial services to direct them to services to address that issue? And that's appropriate under some circumstances. Some, it's not. If they're out picking up new charges that are of a violent nature, well, maybe those are those kinds of things where maybe we need to keep them in custody. So, it just depends upon the nature of the violation.

Thus, for minor violations, the judge may continue the same conditions of release. For instance, one judge explained that if a defendant picks up a traffic ticket, while the prosecutor may move to review the conditions of release, this judge will not revoke release. For more serious violations, judges may impose new conditions of release. For example, they may require increased monitoring or increased drug and alcohol testing, or any other condition they believe will encourage compliance and appearance.

The most severe consequence of violating conditions of release is detention; defendants may be detained for the remainder of the pretrial period. Besides the violation itself, multiple participants explained that the response to violations also depends on the magnitude of the initial offense. While interviewees generally did not explain what would result in continued conditions versus modified conditions, they did describe which violations would result in the defendant being remanded to jails. If the judge finds that the violation indicates that the defendant refused to comply with conditions and does not believe any other condition will ensure compliance, the judge will detain the defendant. This decision involves determining whether the violation is due to willful noncompliance versus inability to comply. For example, a defendant who displays willful noncompliance by cutting off their GPS bracelet would likely be detained, while a defendant that is homeless and unable to charge their GPS monitor would likely not be detained.

Another judge explained that the decision to detain depends on the type of violation and its circumstance. For example, if a defendant tests positive for drugs, there may be options to help the defendant to seek services. Rather than responding to these violations with detention or other punitive responses, 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.

Judges may also use pretrial detention as a mechanism for providing services to a defendant facing underlying issues. One judge provided an example of such a case in which the defendant was homeless, in contact with the victim, and using drugs:

Okay, so it's like, he's not complying. He's using drugs. And he's having contact with the victim. Okay, but it turns out she wants the contact. You know? So, my deal was for today was I don't know what to do with him. But because he's on drugs, I want him to go through the treatment program that's in the jail to get him clean. And then I told the defense, after that, come back. See if you have housing lined up. See if the state and you talk to see if you're going to go forward with this case. The main thing right now is to get him clean.

In a case such as this, the judge may work to connect the defendant to rehabilitative services and stable housing, rather than imposing more stringent conditions of release.

Finally, the violation itself can result in a new charge. For instance, a separate contempt of court charge may result from the violation of a no-contact order which could result in a sentence separate from the original offense. Other violations, though, may not result in the filing of new criminal charges.

Section VI: Perceived Impact of Bail Reform

We asked interviewees to describe their perceptions of the impact that bail reform has had thus far. Although bail reform is widely perceived to have achieved its intended goals, participants also identified some negative consequences. In this section, we outline these perceived impacts, both positive and negative. Interviewees felt that there have been changes in three key areas: the number of defendants released pretrial; the use of bond; and pretrial hearings.

Impact on the Number of Defendants Released Pretrial

With the exception of one interviewee, participants unanimously agreed that there has been an increase in the number of defendants initially released pretrial. These perceptions indicate that, at least in this regard, bail reform has been successful. However, this does not include those detained on violations after release. As one public defender explained,

I have substantially less clients in custody than previously. And even when you go to the jail... it used to be where you would walk into a pod and there were cots and mattresses all over the floor, and there were people everywhere. It seems like [the] jail population is substantially more under control than it had been in the past.

However, this perspective was not universal. One interviewee felt that at least in their district, bail reform made no difference in the number of defendants released. Furthermore, though most participants largely agreed that more defendants are being released pretrial, they held varying perspectives about whether this increase was beneficial. In the following sections, we explore these perspectives.

Perceived Positive Impact of Increased Pretrial Release

Interviewees identified two key benefits resulting from the perceived increase in the number of defendants released pretrial. First, some participants felt that the rights of individuals are better safeguarded in the new system: defendants are presumed innocent until proven guilty and are not held in jail solely because they cannot afford to post bail. Second, they argue that, while there has been an increase in the release of non-violent offenders, violent offenders continue to be detained at the same rate.

Protecting Defendants' Rights

Many participants perceived the uptick in pretrial release to be the result of safeguarding defendants' rights. Defaulting to pretrial release without requiring bond is widely seen to uphold the constitutional presumption that defendants are innocent until proven guilty. Prior to bail reform, defendants were frequently required to post bond to secure release. Thus, the new rules help to avoid detaining defendants:

There's our constitution... 'innocent until proven guilty'? That has much more meaning now. Presumption is release. So, individuals are no longer just held... pretrial, arbitrarily.

A key intention of bail reform was to ensure that defendants are not detained solely because they lack the financial means to secure their release. Many interviewees felt that the amendment is achieving that objective, resulting in the release of non-violent offenders who were formerly held because of their inability to post bail:

I think that less people are being held in jail purely because they can't afford to pay.

Since the passage of bail reform, prosecutors take a much more active role by screening cases for potential detention. One prosecutor explained that prior to bail reform, judges would order bond without much deliberation and prosecutors provided little or no input. Now, with the advent of pretrial detention hearings, decisions are more carefully considered at every step:

I think that the biggest change...is there is a lot of intention now...We're doing all this work on our end, and they're [judges] reviewing all the things, and then we're re-reviewing, and re-reviewing, and [if] we have to have a new hearing here, [determining if we should] file a 5-409 or a 5-403...Every step is so deliberate that it feels a little overwhelming because it used to just be done...But now it's like you revisit it at all these different places and in all these different ways.

Judges also report a more thoughtful approach to release decisions. As one participant explained,

The greatest impact in my opinion, is the fact that we [judges] now look at the setting of bail, or the non-setting of bail, much more carefully than we ever did before. That is the greatest impact. It allows people to have a fair say in their bond... So, just the fact that we're talking to people now, truly is the best part. I am a supporter of bail reform. I think it works. Have I seen people repeat? Yes, I have. But I don't see the great numbers.

Violent Defendants Are Detained

Importantly, many participants felt that *violent* offenders are still being detained, despite the overall reduction in pretrial detention. Not all participants agreed about whether this improves public safety. Some felt that bail reform has had no impact on public safety, since dangerous defendants were detained previously and currently. Others, however, felt that the amendment has improved public safety:

Preliminary reports and everything indicate that crime rates are going down. There has been a reduced crime rate. And I just think that overall we will improve community safety by implementing these best practice pretrial reforms.

There are several reasons bail reform may decrease crime rates. One is that prosecutors and judges are correctly identifying and detaining dangerous defendants for the entire pretrial period, whereas previously these defendants would have had an opportunity to be released if they could post bail. Second, some stakeholders felt that with sufficient supervision in place, such as GPS and other monitoring methods, defendants are less likely to violate conditions or commit new offenses. Finally, the courts' ability to revoke release, particularly if there are indications of potential violence, may also benefit public safety. However, comprehensive studies have not yet been conducted to assess whether there is an improvement in public safety due to bail reform in New Mexico.

Perceived Negative Impact of Increased Pretrial Release

Contrary to the views of participants presented above, some participants, as well as other stakeholders, 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.

The net result is that more defendants are out of jail and my view, there are a lot of them that are out of jail are dangerous and should be in, but the judges have a different view of what's dangerous than I do, so that's why they're out because I believe a lot of them should be in.

Another concern is that the release of defendants has increased pretrial violations. Although some violations are technical and do not necessarily compromise public safety, other violations and new offenses can harm individuals and the community. Finally, some participants perceived that some defendants are not getting the help they need because they are being released quickly. Many detention centers have the capacity to help defendants get on medication or help defendants transition from jail to the community by providing referrals or resources. While this is not an ideal way to assist defendants, in practice, it does occur and can be beneficial for some.

Dangerous Defendants Are Released

Contrary to the views presented above, some interviewees felt that bail reform has resulted in more dangerous defendants being released, either due to prosecutors not filing or judges not detaining when a motion is filed. Judges expressed concern that the public is unfairly holding them accountable for the release of dangerous defendants. In particular, some worried they would be blamed in the event that a released defendant commits a violent crime when detention is not warranted under the current rules:

I'm afraid that there [will] be some public outcry about—in certain parts of the state—about releasing of defendants.

Another interviewee explained that judges are limited in their ability to detain, because they can only rule for detention after a prosecuting attorney has filed a motion for pretrial detention. Despite this limit on judicial discretion, this participant perceived judges to bear the weight of pretrial release decisions, at least in the public eye.

This perspective is echoed by media accounts of the release of high-profile defendants who commit new crimes and by strongly voiced opposition by some political figures. With headlines such as “Stop NM judges from legislating catch-and-release” and “New Mexico needs to reform its bail system to protect the public,” sensational news coverage of the bail reform amendment may incite public outrage on pretrial release decisions.

One place in particular where participants noted the challenge with the release of defendants is in domestic violence cases. In one district, a prosecuting attorney stated that they have lost more domestic violence cases since the bail reform amendment went into effect. This interviewee thought that preventive detention is especially unlikely in cases without severe bodily harm, and because of that, they are seeing more victims who are less willing to testify. The participant explained that once released, the defendant returns home and convinces the victim not to testify, saying:

[The defendant returns home and says to the victim] *'Baby, I love you. I'll never do it again. Promise, promise, promise. Don't go, don't testify,' and we never hear from them [the victim]. Or if we do, they say they'll drop the charges.*

On the other hand, one judge expressed concern that dangerous defendants are being released because prosecuting attorneys do not file on DV cases, with potentially dire consequences:

And my fear on this, like on domestics, you know, like [the judge's assistant] said, these people, they're afraid. They're afraid [for] their life. They should know more than we do. And my fear on this, I just might release one, and he goes back there and kills her. And that's on me.

Increase in Violations

Due to the increased number of defendants being released pretrial, many interviewees felt that there has been an increase in the number of pretrial violations of release conditions. Interviewees not only noted increases in new offenses, but also increases in failures to appear and comply. As one participant explained,

[T]here's more people out, so if they're out, they have more of a chance to not show up than if they're in jail... there's a lot more people that are out on zero bond, so there's no bondsman to try to help get them there, right?... that results in more failures to appear.

In some cases, defendants may fail to appear for court hearings because they are worried the court will detect a violation of a condition of release. In particular, participants explained that ongoing substance use can deter a defendant from appearing. As one defense attorney described,

A lot of our clients don't show up for court because they know they're still using drugs. And they know that they're going to be arrested if they test hot... And so, we have a lot of people who are tested, and [the judge will] take them into custody if they show up to court high. So, people choose not to come to court. And so, I think [drug testing has] actually been counterproductive in terms of those aspects.

In some districts, judges have begun to acknowledge the role of substance testing in defendants' FTAs. Haywood (2019) outlined one such judge's approach to addressing drug use in the *Santa Fe New Mexican*. The article explains that Judge Lidyard of the 1st Judicial District "favors naloxone, peer support and practical aid over pretrial drug tests" for nonviolent offenders (Haywood, 2019). Haywood goes on to write, "defense attorneys in the First Judicial District say drug testing defendants who haven't been convicted is more of a preconviction punishment than a service – which sometimes makes addicts less likely to appear for hearings because they are afraid of being tossed in jail for testing positive" (2019).

National research supports this perception. One study of pretrial risk assessment in the Federal Court found that, for low-risk defendants, imposing pretrial drug testing increased the likelihood of nonappearance and the likelihood of subsequent arrests, but had no effect for high-risk defendants (VanNostrand & Keebler, 2009). In light of this, it is possible that monitoring low-risk defendants for drug use increases the rate of failures to appear, rather than ensuring appearance in court. This has also been suggested by Doyle et al. (2019) at Harvard University's Criminal Justice Policy Project. Furthermore, continued drug use violations may ultimately lead to detention:

But they keep getting out and keep going back to the drugs and to [the judge's] credit, I saw him one time hold a person in jail. I think it was second or third case where she kept using heroin, and he finally – she was in court and it seemed like she was high on heroin at the time she was there for one of the hearings, so he finally said, 'I'm just going to hold you without bond now.' And so that needs to happen – sometimes it needs to happen sooner.

Interviewees also explained that some non-violent defendants are reoffending. Particularly concerning are those with an extensive criminal history who may be released and reoffend:

So, the violent guys, and the guys with the crazy violent history – or women, are staying in jail. But it's the prolific offenders. The people stealing cars, shoplifting over a certain amount, getting caught with drugs, burglarizing homes, they're the ones that because it's not a violent felony, we're not gonna file pretrial detention on. Those prolific offenders are the ones that, until they show they can't comply with conditions of release, are the ones that are adversely affecting community safety.

Not only is this situation frustrating for those in the criminal justice system, but it is also difficult for victims who discover they have been victimized by a defendant who was released pretrial.

In addition to threatening public safety, increased cycling of defendants in and out of detention can place a strain on the courts, detention centers, and other stakeholders when addressing the violation(s). FTAs also strain resources by delaying the timely progression of the underlying case. When someone fails to appear, scheduled court hearings are not able to proceed, which can disrupt the schedules of judges, attorneys, and support staff. The court may issue a bench warrant, requiring law enforcement to arrest those that have failed to appear at court, contributing to the perceived “catch and release” dilemma.

Defendants Unable to Receive Key Services

Another unintended consequence of pretrial release is the inability of defendants who are released to access the types of assistance that they may have received in custody. For instance, many defendants who have mental health issues receive medications in jail that they may be unable to obtain otherwise. Now that the vast majority of defendants are released within a few days of their arrest, detention centers are unable to help stabilize defendants in need or provide them with in-jail services. While necessary services would ideally be provided through social workers, caseworkers, and community resources, most counties lack the resources to provide such services. Even in jurisdictions where services are available, there may still be barriers to access for some defendants.

Impact on the Use of Bond

While the use of bonds continues under bail reform, participants reported that the amount of bond set has lowered and the frequency of bonds has been greatly reduced. As one participant stated,

The bonds are much lower now than they used to be... these new rules drastically lowered the bonds. There's fewer bonds and they're lower.

Moreover, bond is now used primarily for the purpose of mitigating flight risk, and the rules require the courts to consider the financial situation of the defendant when setting an appropriate bond amount.

This is intended to protect defendants from differential detainment solely on the basis of their economic status.

Some interviewees felt that judges in the lower courts set unsecured bonds much more often than they did prior to bail reform. This is viewed as a positive outcome, as defendants are not required to pay anything unless they fail to appear at court. Thus, these participants view bail reform as successful in this regard.

Others point out negative consequences resulting from less frequent use of bond. In the following sections, we describe those unintended negative consequences.

Defendants Unable to Secure Release through Bond

Participants explained that defendants are largely unable to secure release through bonds as they were prior to bail reform. This results from two major changes since bail reform was implemented. First, defendants are not eligible to post bond during their initial detention. Second, the collapse of the bond industry has impeded defendants' ability to post bond when it is ordered.

Defendants Unable to Secure Release Initially

Under the new bail reform rules, defendants are held for up to three days leading up to their first appearance. If a motion for pretrial detention is filed, they may be held for an additional five days. Previously, these defendants would have been eligible to post bond. Now, however, all felony defendants can face up to at least eight days of pretrial detention without any opportunity to get out of jail, which some see as compromising defendants' rights. As one participant described, *"The impact on defendant's right[s] are the defendant is held without bond, pending a hearing in front of the district court. That's a definite impact on the defendant's rights in that regard."*

In Comments (2017), stakeholders expressed concern about there being a lack of procedure for the immediate release of non-violent offenders (Strickland, 2017). Without the immediate ability to secure release, defendants face material consequences. Following just 24 hours of detention, defendants begin to suffer serious consequences that ultimately could interfere with their pretrial success and lead to subsequent offending (Lowenkamp et al., 2013). The outcomes worsen with each successive day: Lowenkamp et al. (2013) found that low risk defendants held for 2-3 days were 22% more likely to fail to appear at subsequent hearings and were almost 40% more likely to incur a new criminal arrest than those held for less than 24 hours. Those held for 4-7 days were more likely to be arrested and more likely to recidivate within two years than those held for fewer days (Lowenkamp et al., 2013). The impact on low risk defendants is the most significant; however, research has demonstrated negative impacts of detention on medium and high-risk defendants as well (e.g., Digard & Swavola, 2019; Lowenkamp et al., 2013; Heaton et al., 2017). In addition to the challenges relating to employment and custody, research has found that "detained defendants are 25% more likely than similarly situated releases to plead guilty, are 43% more likely to be sentenced to jail and receive jail sentences that are more than twice as long on average" (Heaton et al., 2017). Therefore, detaining someone for up to eight days without the option for release pending the pretrial detention hearing could very well cause the harm that bail reform was intended to mitigate.

Inability to Post Bond without Bondsmen

A second outcome of the decreased use of bonds has been the disintegration of the bond industry in New Mexico. According to some participants, this is a positive outcome, as businesses are no longer profiting off of defendants. However, the collapse of this industry is not without challenges.

In areas where the frequency of bonds has lowered enough to drive bondsmen out of business, but the bond amounts remain substantial, defendants are unable to find bondsmen to finance their release. One participant explained,

So, the bonds have – that’s been the biggest thing, seeing the bonds come down. The problem is a \$1,000.00 bond is the same as a \$10,000.00 bond because they can’t get a bondsman, so they have to come up with cash.

Thus, these defendants end up spending more time in jail than they would have prior to bail reform due to an inability to pay.

More FTAs Resulting from Lack of Bondsmen

Some participants observed that the increase in failures to appear is associated with the lack of bondsmen, particularly in areas without pretrial services. According to one participant, bondsmen can play a role in monitoring and checking in with defendants. With fewer bondsmen, defendants may have less oversight or incentive to appear. As one participant explained, bondsmen often monitor defendants and ensure their appearance in court:

The bail bondsman will just try to keep them in touch with him so they can find them when they need them for court.

Due to the absence of bail bondsmen, this interviewee observed that defendants are less likely to appear.

Impact on Pretrial Hearings

As a result of bail reform, the pretrial process has changed. Most notably, the amendment resulted in the new pretrial detention hearings (under Rule 5-409) and increased the number of compliance hearings. In addition, prosecutors now attend felony first appearance hearings (FFAs) more frequently than before the amendment was implemented. Below, we talk about these three changes.

Felony First Appearances

Interviews revealed that the frequency of FFAs varies across districts. In part, these differences reflect the volume of cases in each district. For example, in the 2nd Judicial District, FFAs occur daily, including on weekends. One participant estimated that 63 hearings had been held on the Sunday prior to our interview. In other districts, FFAs are held “almost daily,” with some days having no FFAs. 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. However, there are differences across districts in whether or not the prosecutor attends the FFA hearings. In some districts, for example, a prosecutor attends the weekend FFAs, but in others they do not. Furthermore, some

stakeholders expressed concern that neither the prosecutor nor the defense attorney attend any FFAs in some magistrate courts (Chávez, 2020a). If the prosecutor does not attend the hearing then they are unable to submit a motion to detain the defendant at that time. Without that motion, judges may not detain the accused even if they believe the defendant to be a danger to the community.¹

Pretrial Detention Hearings

Pretrial detention hearings are initiated when the district attorney files a motion for detention; these did not occur prior to bail reform. Participants explained that these hearings pose a significant burden. Prosecuting attorneys in particular bear the burden of this change. As one prosecuting attorney explained,

[W]hat's changed is the accountability on prosecutors very early on in cases to act... So, the state has a duty to assess cases early on to determine whether we need to move for pretrial detention because if we need to do that, we need to do it before they're released. Back in the day, they would always get held in jail and it would be the defense attorney who would motion the judge to let them out and we would have time to get ready and respond. This change in the rules puts the burden on the prosecutors to get their act together to determine and tell the judge we need to hold somebody and convince the judge why.

Some defense attorneys spoke of their own increased workloads prior to a pretrial detention hearing. For instance, one explained, *"We never had the preventative detention hearings before, so now we're preparing for [them] ... we sit down with the client very quickly... we never even had that process before."*

Pretrial detention hearings also impact district courts. Pretrial detention hearings can only occur in district courts and have very strict timelines. As one participant explained, the workload on district court stakeholders has increased while the impact on the lower courts is less notable.

However, the number of pretrial detention hearings varies greatly across jurisdictions. One attorney explained that their district sees about four pretrial detention hearings per week. In another district, multiple pretrial detention hearings occur daily, accounting for a significant share of attorney workload. In yet another district, a participant explained they *"don't see too many of those motions... Every now and then... only if they got a long history."* While this partially reflects the volume of felony cases in each district, it does not entirely correlate to the district size. Instead, this likely reflects prosecutorial discretion or other factors. As one participant explained, *"it sometimes goes in cycles"* depending on the types of cases.

Some participants also noted an impact of pretrial detention hearings on victims. Pretrial detention hearings offer an opportunity for victims to be more involved in pretrial decisions than they were prior to bail reform: *"It actually creates a system where a victim could potentially come and testify at the preventative detention hearing... So in some ways, it actually creates an opportunity for them to have a greater voice."*

¹ The New Mexico Supreme Court recently changed two rules that effectively allow judges to delay the release of individuals for a short time in a limited number of cases pending a motion by the prosecuting attorney to detain; these rules go into effect on November 23, 2020. (see (N.M. R. Crim. P. Dist. Ct. Rule-501(G) and (N.M. R. Crim. P. Magist. Ct. 6-501(F)).

Other participants disagreed that this was a positive outcome of the reform. A few participants expressed concern that the increased release of defendants pretrial is negatively impacting victims:

No, I think that that's probably one of the larger adverse impacts, and adverse effects, is on victims. It requires – especially if they're engaged in the process, it could require that they're testifying for the first time after the incident in five days. Subject to cross examination.

Compliance Hearings

Compliance hearings, which are initiated when the prosecutor moves to revoke conditions of release, occurred prior to bail reform, although their frequency has increased. At these hearings, the judge rules on whether to keep or alter conditions of release, or remand the defendant to detention. Multiple interviewees in different jurisdictions perceived a significant increase in the number of compliance hearings since the passage of the amendment. The burden may be especially acute for the court. As one explained, *“Just the constant motions for revoke. The theme that I really want to display is, it is the motions to revoke that are encumbering the Court.”* The increase in compliance hearings has also impacted prosecuting and defense attorneys, who now must spend more time in court arguing in favor or against these motions.

Section VII: Support, Challenges, and Recommendations

Successful bail reform requires rules and policies to guide implementation, as well as adequate support and resources to execute bail reform. To address these topics, 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. In this section, we discuss implementation facilitators and barriers within each of the key themes that emerged from interviews: rules and policies; education; staffing; pretrial services; access to information; and community resources. It is important to note that, while this section focuses on barriers to implementation, an overwhelming majority of participants ultimately support bail reform. Only one interviewee wholeheartedly disliked the policy. Those participants in support of the bail reform amendment still identified a number of challenges with the implementation of the new rules.

We include data from interviews, court observations, and New Mexico Courts reports to ascertain how to best address barriers to implementation. Our recommendations primarily reflect the opinions of the interviewees, but when appropriate, we supplement participant recommendations with information and findings from technical reports and peer-reviewed articles. Where appropriate, we describe possible consequences of and limitations to implementing the recommendation. Although there was some variation across districts and court positions, many agreed on key issues that should be addressed to effectively implement bail reform. Additionally, some recommendations may be less feasible than others, but all are important to relay as they are concerns that participants have about bail reform.

Concurrent to the analysis and writing of the current report, the state convened an Ad Hoc Pretrial Detention Committee to review the rules guiding bail reform. Many of the issues and recommendations raised there are the same as in this report, although the Ad Hoc Committee only made recommendations for changes to the rules while ours are much wider reaching. We note when this is the case and, in the instances where the Ad Hoc Pretrial Detention Committee rejected a recommendation, we note their reasons for doing so. While finalizing this report, the New Mexico Supreme Court made changes to key rules based on these approved recommendations; we provide that updated information here.

Theme 1: Rules, Policy, and Guidelines

The New Mexico Supreme Court published the rules guiding bail reform six months after the amendment was adopted. These key rules guide judicial decision-making to determine whether to release an individual upon the motion of the prosecutor (N.M. R. Crim. P. Dist. Ct. 5-401) and procedures for pretrial detention (N.M. R. Crim. P. Dist. Ct. 5-409). The New Mexico Supreme Court also modified the rules for responding to violations of conditions of release (N.M. R. Crim. P. Dist. Ct. 5-403). While these clarifications help facilitate implementation, there are outstanding concerns. In addition to

concerns about discretion and its impact on initial and subsequent release decisions, participants raised concerns about the implementation of other rules. These rules guide expedited trial scheduling when a defendant is preventatively detained, rules guiding jurisdiction over pretrial release hearings, and rules about financial considerations. In this section we relay how these rules have facilitated implementation and their associated challenges, primarily using information from the interviewees.

Rules about Initial Release Decisions

During the gap between the adoption of the constitutional amendment and the promulgation of the rules, criminal justice actors in each judicial district were implementing bail reform without any formal guidance from the state. During this period, prosecutors and judges made decisions about whether to detain based on varying criteria. Even after the New Mexico Supreme Court published the rules, there were legal challenges to and different interpretations of the rules, leading to amendments, clarifications, and the development of case law (see, e.g., *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201; *State v. Ferry*, 2018-NMSC-004, 409 P.3d 918; *State v. Groves*, 2018-NMSC-006, 410 P.3d 193). These modifications have helped stakeholders make sense of the written policy guiding bail reform. As one interviewee explained,

If you'd asked me two months ago [whether there need to be any changes to the rules]... I would have had something to say to you about that, but now I think there's been a clarification in the rule, which quite honestly I'm very pleased about.

Some participants felt that, while there was some initial confusion, now the rules are “incredibly clear.” Indeed, when asked what has facilitated bail reform, one participant explained, “*I think that the rules themselves, I mean, the process seems to be working well.*” However, although some participants indicated that the New Mexico Supreme Court has adequately clarified and refined the rules in the months following their implementation, others felt there are still changes to be made:

I think I'm pretty up on the stuff, but I think there's a lot of questions that I'm not sure that training would answer. I think that we still need some direction from the higher courts on some of these issues.

Our interviews also indicate that the rules leave room for interpretation, which results in variation across participants and jurisdictions that makes consistent implementation difficult. Those interviewed generally referred to two primary needs for clarification: when it is appropriate for prosecutors to file a motion for detention and when a judge should rule in favor of pretrial detention. All sources of data included in this study indicate that there are concerns surrounding these decisions, and in some instances, relationships are strained as a result.

Prosecutorial Discretion

Prosecutors approach the decision to file for preventative detention primarily from the perspective of ensuring community safety. Due to limited resources, they must prioritize which cases to file on, taking into account the defendant's dangerousness, the appropriateness of filing, and whether the judge is

likely to approve or deny the motion for detention. Other factors, such as workload and political backlash, can also play a role.

In an effort to be more efficient, prosecuting attorneys may choose to only file on cases that will likely result in detention. For example, indications of violence are one of the key factors that flag a case for consideration of detention, but this alone may not suffice:

We can't file on every violent case because we just don't think it's – it might be that some of the prosecutors don't think it's necessary even though the case is violent, but another reason is the judges are not gonna grant it on every violent case, so it'd be a waste – in a way, it'd be a waste of time unless we're just going up there to make a record, but we know the judges are not going to grant everyone even if it's violent, so that's one thing that mitigates against wanting to file on every violent case.

However, prosecuting attorneys may also file on cases when they are less sure that the judge will rule in favor of detention. As indicated in the quote above, the prosecutor may want to have it on record that they filed a motion for detention in case the defendant is released and fails to comply. Another interviewee explained that some prosecutors do so to ensure that they are not responsible for the release of dangerous defendants—the burden shifts to the presiding judge:

I think, in this district at least, that it's highly political, in that [prosecutors] don't want the backlash if something happens and the person comes out. In fact, prosecutors have told me that. They'd rather have the judge be accountable if something happens down the line, when the person's out on conditions.

This can result in over-filing of pretrial detention motions, which may be “clogging the docket,” or over-burdening the courts. This concern was communicated by interviewees from multiple districts. As one interviewee explained, over-filing can lead to the temporary pretrial detention of a defendant who otherwise may not have been detained:

[T]here's nothing in the law that constrains the State in filing [a preventative detention motion]. And in fact, they could file a motion for a preventative detention on a simple possession of a controlled substance case. And that's going to keep that person in custody for five days until their hearing. And that motion's going to almost certainly be denied by the district court judge who hears that, but there's nothing to stop the State from doing that. And so a lot of people end up doing five days in jail because the State saw the word 'gun' in the complaint and there's no limitation on them doing that. It's really the only thing the government can do totally on its own discretion without any limitation to keep a person in custody for five days.

Furthermore, due to the discretion held by prosecutors, practices across districts vary widely depending on the perspective and management style of the district attorney. Depending on the approach, variation can even occur within a district, as noted by one prosecutor who compared the practices in two different districts: [In one district] *there was very strict guidelines. There it was super micro-managed. Here it's -- an incredible amount of autonomy.*

On the opposite side of over-filing is under-filing. Prosecutors screen many more cases than they file motions on, some of which may meet the criteria for detention. Indeed, while most interviewees expressed concerns about over-filing, interviewees and others also criticized prosecutors for failing to file on some cases. In these cases, the judge must release the defendant, even if they believe the person is dangerous. Members of the Ad Hoc Pretrial Detention Committee raised similar concerns, writing that “there are times when the prosecution does not file a pretrial detention (PTD) motion and the judge believes a court should take a closer look at whether the accused could be a danger to a person or the community” (Chávez, 2020 a, p.3).

Reasons for Variation in Filing Decisions

There are reasons for the differences in filing criteria prosecutors use within and across districts. Perhaps most importantly, 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. Some interviewees described the process as “*looking into a crystal ball*” or a “*gut-check*” decision. One interviewee explained that in some cases, prosecutors understand the backlash they have encountered:

There’s no guidance about when we should file and it causes so much hostility because then our decisions are constantly being criticized by both defense and the court. I’ve recognized that many of them are worthy of criticism because it’s really been a struggle for us.

This participant goes on to explain that, because of the lack of guidance, their office has had to figure out on their own when it is most appropriate to file. A core principle of bail reform is that only those deemed dangerous should be detained during the pretrial period, however, one of the challenges is the lack of a common definition for what constitutes “dangerousness.” Thus, prosecutors may file on defendants they perceive as dangerous, even though the judge does not agree. As one interviewee explained,

And it [filing a preventative detention motion] usually garners the folks that are – at least from the DA’s perspective, they feel are the most dangerous, so- called dangerous folks in the community. What that really means is up for debate, which is why I think that we find who the DA feels is dangerous doesn’t always meet the definition or at least the standard that many of us criminal judges feel.

A second challenge is due to the short timeframe in which prosecutors must make the decision to file for detention. In order to ensure that defendants are not unnecessarily detained and to minimize detrimental consequences of unnecessary detainment, the New Mexico Supreme Court enacted strict timelines for pretrial detention hearings. Rule 5-409 allows prosecutors to file a preventative detention motion at any point during the pretrial period; once filed, the hearing must occur within five days. However, if the prosecuting attorney does not file the motion by the felony first appearance, which must occur within three days if the defendant is booked and detained, the defendant is released. This has potential consequences for community safety or may result in future failures to appear.

Further complicating matters, some districts impose their own timelines that are even shorter than those defined in the statewide rules. One respondent indicated that the time allowed in the rules is sufficient, but their district court requires the FFA to be held within 24 hours of arrest, which is not enough time for the prosecutor to adequately prepare:

I would say that with the timeline, it makes – and of course, all of the information and the burden bearing down on the prosecution, it's really hard to make a decision on pretrial detention with the limited information that we have. Because we're making these decisions based solely on criminal history, which of course, we can pull, and often the only piece of paper in front of us is a criminal complaint. We don't have access to anything else. And to make these really important decisions, and be accountable for the decisions, within a 24-hour period, is tough...There are risks associated with it, and it's scary.

The timeline can be as short as a few hours in some districts. As one participant explained,

people who were arrested yesterday, we get their paperwork at about 8:00 to 8:30, and they get arraigned at noon. So, we have about three, three and a half hours to get everything done, to make the decision, draft the paperwork and file it, and let everybody know we filed it.

Third, varied access to information contributes to inconsistent filing decisions. Prosecutors often do not have all of the information they need to make a decision due to the legal time limits. While limited information may lead to inappropriate filing, it may also lead to prosecutors failing to file in appropriate cases. Prosecuting attorneys explained that it is challenging to gather key information needed to make pretrial decisions within the current timeframes. Oftentimes police reports, videos, and other pieces of evidence are not available until weeks into the case:

[A]fter the case has been going for a few weeks, and we get all the police reports, and videos and audios, we know a lot more then... it'd be nice to have all that information, but it's impossible to have it on the first or second day of the case.

Besides lack of information related to time limits, in some districts, prosecutors do not have access to all of the same information as judges. Prosecutors may not see the results of risk assessments completed prior to the FFA, or may not have access to information in automated data sources. With this information, the judge can see that the defendant poses a danger, but the prosecutor may lack all the pertinent information to file for detention.

Efforts to Improve Consistency in Filing

To combat inconsistency in filing and improve clarity for prosecutors, some districts have begun establishing their own guidelines for prosecutors. For example, a participant explained that in their district,

[The DA's office has] standardized the information that [prosecutors] get, how we make the decisions, what information we're considering. That's the information that's then transferred to the person who is gonna argue the hearing.

Districts are also making efforts to ensure that prosecutors are considering all appropriate information before filing. Many of the districts have created their own forms for preventative detention motions that capture the key pieces of information judges use to evaluate the merits of the motion. Forms include information such as the charge(s), circumstances of the offense, criminal history, history of appearance and compliance, and ties to the community.

Additionally, some judges described taking time during court hearings to explain to the prosecutor why they denied the motion. This helps prosecutors to assess the appropriateness of filing in future cases and to prepare motions that are more likely to be successful. However, that does not always occur and prosecutors are sometimes left to try to figure out the judge's reasoning on their own.

Judicial Discretion

Judges approach the decision to detain from a different perspective than prosecutors. They must weigh community safety with the rights of a defendant who has not yet been, and may not be, found guilty. Bail reform requires judges to proceed from the presumption that the defendant should be released. Similar to prosecuting attorneys who face critique around filing for detention, judges face critique for their rulings on pretrial detention and release. Some stakeholders believe that judges are detaining too many defendants; more often, critics feel that judges are releasing potentially dangerous defendants.

Several stakeholders raised concerns that release decisions vary across judges, both across and within districts. In the Comments (2017), the Law Offices of the Public Defender similarly noted wide variations in the proportion of defendants who are detained within a particular district (Baur, 2017). They cite data showing that judges' rates of granting motions range from 7% to 65%, indicating that some judges are less likely to order detention than others (Baur, 2017). More recently, the Ad Hoc Pretrial Detention Committee raised concerns that "the rate of granting or denying pretrial detention motions varies significantly from judge to judge which calls into question perceived unfairness" (Chávez, 2020a). Media outlets, former New Mexico Governor Susana Martinez, and some state legislators have also weighed in on the issue, largely lambasting the judiciary for releasing dangerous defendants. In addition to variations between judges, interviewees also suggested that individual judges rule inconsistently across similar types of cases, exemplified by statements such as: *"the only thing consistent is he's [the judge] inconsistent."*

Reasons for Variations in Judicial Decision-Making

Those who critiqued judges for inconsistency in pretrial rulings provided possible explanations for different perceptions of who should be detained pretrial and variations in rulings by judges. One of the key issues is that there is a tension between what prosecutors think is sufficient evidence to detain a defendant and what judges require. Rules of evidence do not apply to pretrial detention hearings, but the prosecutor is required to show "clear and convincing evidence" that the individual should be detained (N.M. R. Crim. P. Dist. Ct. 5-409(A)). What constitutes "clear and convincing evidence" though, is up for debate. For example, one participant explained that judges should detain a defendant because probable cause has been established:

[M]ost of the judges don't like jail, don't like holding people in jail because when there's a presumption that you're innocent until proven guilty... 'it's just not fair to hold them when they're not convicted... They're innocent, why should we hold them in jail?' Well, the reason is because probable cause has already been found they committed the crime even though they're not convicted, but probable cause has been determined that they committed the crime. So, that's enough evidence of dangerousness that they should be held, but the judges don't see it that way.

However, as one judge from another district explained, probable cause for pretrial detention is a relatively low standard. This judge explains that there must be clear and convincing evidence, because using [J]ust probable cause, or reasonable certainty, which are much lower standards, anybody could say anything and you could find yourself behind bars. And I just don't think that's right.

What is allowed and preferred as evidence may vary by judge. Some judges are more convinced when there are live witnesses at a hearing. Those witnesses may be victims or eyewitnesses to the offense or law enforcement investigating the case. Prosecutors vary greatly in their use of live witnesses. In some districts, the cases are presented primarily by proffer (written testimony); in others, live witnesses are more commonplace. In smaller districts, it may be easier to secure law enforcement to testify:

I think it's risky if you can get a live witness to answer questions for the judge to not do that. We are not so big and great that I can't know every single cop who works here and their boss, and I can call them and make sure to follow up. So, we do not have an issue with detectives not showing up or of case agents not showing up for the hearing. We subpoena them, they come.

In other districts, it may be more complex to have live witness testimony. In one district, prosecutors have tried various approaches. Having a live witness can extend the length of the hearing and result in a "mini-trial." Moreover, it can be challenging to include witnesses at the time of the pretrial detention hearing. Prosecutors (and defense attorneys) need to interview witnesses beforehand, ensure they receive notice of the court hearing, and show up for court (they may be too traumatized or afraid to be there, or have logistical problems like lack of transportation), all of which are complicating factors.

The Ad Hoc Pretrial Detention Committee noted in their report (Chávez, 2020a) that some judges refuse to allow proffers as testimony, despite the ruling in *State ex rel Torrez v. Whitaker* (2018-NMSC-005, 410 P.3d 201), which states that proffer may be used in lieu of in-person testimony. Judges we spoke with offered explanations for this refusal. For example, one judge explained that if the written evidence is not strong enough to support the motion, then the judge will not rule in favor of the motion. Instead, if the judge were allowed to speak to a witness to answer questions, the judge's decision could be different. A second judge explained that in one case, a witness statement presented via proffer was not taken under oath and therefore could not be allowed as evidence.

Besides differences in assessing sufficient evidence, participants pointed to other reasons for variations in judicial decision-making. Some stakeholders have raised concerns that some judges dismiss motions for inappropriate reasons. For example, both interviewees and members of the Ad Hoc Pretrial Detention Committee argued that judges dismiss motions on the basis of technicalities like font size, margin width, and other form-related issues that have nothing to do with whether a defendant is dangerous:

We've had to have like behind the scenes meetings with judges because we'll fix the form in one way and then they'll find another issue... the title was an issue for a second and then we had a footnote in there that they didn't like, and then the margins were a thing, and then we didn't have enough information, and then we put too much information... Or like we'll use like a form and like someone will leave the language in from a previous case and so it's inaccurate and then they're fining us.

Lack of transparency, or perceived lack of transparency, along with a lack of accountability can also play a role in judicial inconsistencies. Per Rule 5-409(H), judges are required to make written findings for the decision to detain or release. However, some participants explained that judges do not always cite reasons for failing to detain a defendant:

And they're really not required to give a reason if they're letting somebody go or not holding them pretrial detention, so sometimes we're just at a loss for understanding what a judge sees. And often it can be stuff that may be inappropriate. That they look young or they appear to be based on looks or age or factors that are not anywhere with anything we should consider.

If judges do not submit written findings justifying release, it can make it difficult for the prosecutor to understand what aspects of the case led to the decision. It also can allow inconsistent decisions to occur more easily.

A related issue is accountability. Some stakeholders feel that certain judges may be biased for or against detention, but they are unable to seek a remedy for this concern due to the inability to remove judges from pretrial detention cases. However, judges cannot be removed from pretrial detention cases. Similarly, some participants raised concerns that *pro tempore* judges are able to hear pretrial detention hearings. These judges are not subject to performance evaluations or to constituents via election. Without annual evaluation, these judges may have more impunity in pretrial rulings, which could contribute to inconsistent or unfair pretrial decision-making.

Finally, differences in judges' knowledge may lead to different release and detention decisions. For example, one participant felt that some judges were not aware of what they are allowed to order under the rules:

Under the rules, there's actually no real good reason why almost everybody just gets OR-ed [released]. A lot of people do have a history that would make it appropriate for some amount of – even if it's not monetary bond, but additional conditions. Judges could order conditions that people attend treatment or counseling, or that they stay under the supervision of a third party, or have a curfew, or look for a job... I think they have more power than they know and somebody's telling them not to use it or do it.

One area where participants expressed differing perspectives about what is allowed was about requiring defendants to seek substance abuse treatment. Some judges view this as an infringement on the rights of defendants who have not been convicted:

We have to keep in mind, you know, people at the pre-judiciary stage. I'm not going to order treatment for somebody who's not been adjudicated yet. But if they want to go and agree to it, then our pretrial services can refer them to treatment... when needed.

Others, though, view this as a legitimate condition of release. Still others may not order it, but may actively encourage the defendant to do so.

Efforts to Ensure Consistent Rulings

Like prosecutors, some judges have made efforts to ensure their decision-making is consistent and fair. For example, one judge keeps a bench book to refer to at hearings. The information includes the relevant rules, the judge's rulings on prior cases, and other information needed to make informed and fair decisions. Several other participants reported that judges are making efforts to ensure fairness in their decision-making, and some described how the rules promote increased equity. For example, one interviewee stated,

Right, and judges are doing their job rather than erring – It's not fair to the defendant to just err on the side of caution. And that's what these rules make you do. They make you go through the factors.

Preparation by Defense Attorneys

Finally, defense attorneys also play a role in preventative detention. While prosecutors bear the burden to screen cases and file motions for detention, and judges bear the burden to decide whether to uphold the motion, defense attorneys bear the burden of preparing an argument against detention. Our interviews indicate that defense attorneys may have even less information than prosecutors when preparing for detention hearings. Indeed, some participants described the defense at these hearings as going "off the cuff," explaining that they often do not present any evidence to challenge the prosecutor's assertions. When asked what kind of information the defense provides to try to sway the judge not to detain, a respondent replied,

We rarely have information ahead of time...So basically, just whatever information we can get from the client if we have the opportunity to speak to them...they're [case files] just thrown on our desk in terms of whoever can be in court that day, which really gives us very little preparation time for those hearings.

Like prosecutors in this district, defense attorneys are not provided with the same information given to the judge before a hearing, further complicating their preparations. While this sentiment was common across districts, not all districts operate in this way. One defense attorney described the process in preparing for these hearings in their district:

[The prosecutors] give us the complaint. They give us our client's history, and we have lots of attorneys that will go out into the community and get witnesses to testify at their preventative detention hearings on behalf of our clients.

However, the interviewee explained that this amount of information is not typical. Instead, such thorough preparation is reserved for "super serious cases" or serious violent offenses. In some cases, there is no opportunity to prepare:

Some of them [case files involving preventative detention] we don't even get until the morning of. Yeah. So, the option to do hearings and to get a full investigator on isn't even there.

One remedy available to defense attorneys who have not had enough time to prepare is to request an extension. Per Rule 5-409(F)(1)(b),

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.

However, according to our participants, this rarely occurs in practice. One interviewee felt that this was because the defense does not request an extension often enough. It may be especially important to do so in districts where hearings are held in even shorter times than those allowed in the rules as they have even less time to prepare.

Currently, both parties have the right to appeal a ruling for or against pretrial detention at any point. Rule 5-409(K) states that a case may be reconsidered if “(1) information exists that was not known to the movant at the time of the hearing or circumstances have changed subsequent to the hearing, and (2) the information or changed circumstance has material bearing on whether the previous ruling should be considered.” However, the perceived likelihood of success is low. Therefore, participants stated the need for a greater ability to reconsider judicial rulings:

In practice, it's very difficult – next to impossible – to reconsider a preventative detention hearing. So, it can really shape the case at the very beginning of it, before the case is even indicted because, typically, the preventative detention hearing happens before the case is indicted. And that's a little disturbing, too, that you're making this decision that could take away somebody's liberty for six months to a year, without even having an objective probable cause determination.

While either party has the right to appeal, interviewees suggested that it is more likely for the defense attorney to do so. One defense attorney explained that, while it is difficult to successfully appeal a case, it is possible in some circumstances. However, reconsideration may not occur until the defendant has been detained for a significant amount of time. As this interviewee explained,

We can't file a motion to revisit the preventative detention unless there's been an extreme change in circumstances... And these are serious cases, presumably. If they're being preventatively detained, it's serious cases with lots of witnesses and a greater track number.

For example, defense attorneys may file when witnesses are not cooperative, the evidence in the case does not materialize, or new evidence suggests the defendant may be innocent.

Another complication is that, at least in one district, the attorneys who would be responsible for appealing the court's decision are not the most knowledgeable about effectively arguing that appeal:

We have a whole appellate division that says that the attorney that argued it has to direct appeal it. And it's not handled by the appellate division. And so, that's a huge new area for many of us. And so, no, we need one person who's really skilled in that, in appealing these so that we can challenge the court's rulings... And so, there's very little, at least in our office, there's very few of those get appealed, even though they probably should.

Recommendations Regarding Pretrial Detention Decisions

Although there have been efforts by both prosecutors and judges to ensure consistency and fairness, there is more to be done. Stakeholders offered a variety of possible solutions to the challenges raised here, which addressed three of the problems identified above: lack of guidance for prosecutors and judges, judicial discretion, and timeframes. In this section, we describe these recommendations without advocating for or against any one in particular.

Provide More Guidance to Prosecutors and Judges

To address the inconsistencies of prosecutorial discretion, participants recommended providing additional guidance on when it is appropriate to file a motion for preventative detention. Interviewees made comments such as *“I think we need to look at 5-409 and add some criteria and guidance to the DA’s office”* and *“I think [we need] a clear guideline as to what criteria is to be used in the district attorney’s determination of whether to ask for a pretrial detention hearing.”* This sentiment was repeatedly and consistently stated across districts and positions (prosecutors, judges, and public defenders). However, interviewees did not agree on how to achieve such a goal.

Below, we discuss three of the recommendations stakeholders offered to give prosecutors more guidance, two of which include altering Rule 5-409. First, interviewees and other stakeholders advocated for rebuttable presumptions.² The second recommendation requiring a rule change would require prosecutors to consult a risk/public safety assessment tool before filing a motion for detention. The third recommendation, which would not involve a rule change, is to create and share decision-making tools amongst prosecutors in the state. We discuss each of these recommendations in more detail below.

Recommendation: Include Presumptions of Dangerousness

Both interviewees and others have called for including presumptions in the rules that would define the charges or other conditions that make a defendant eligible for pretrial detention. Such presumptions are used by the federal courts and some states, such as California and New Jersey. Federal rules allow the prosecutor to file a motion for a pretrial detention hearing when a presumption of dangerousness is met (e.g., crime of violence or with a sentence of 10 or more years) and either the prosecutor or the judge may file a motion for detention if the defendant poses a risk of flight or obstructing justice (18 U.S.C. § 3142).

Using presumptions in New Mexico could provide clearer guidance for prosecutors on when to file, as it would flag certain cases for preventative detention. Specific charges or a defendant's particular criminal history could be used to flag cases as eligible for detention. For example, one participant explained,

² Rebuttable presumptions are included in the Federal rules on pretrial detention and in many states. Rebuttable presumptions require that defendants charged with certain crimes are presumed to be a risk unless the defendant shows otherwise.

...before we changed the constitution, it was specific in there. They had to have two prior serious violent offense convictions, and be charged with a third. Which showed somebody had a pattern, right?

In addition to clarifying when prosecutors should file a motion for detention, developing presumptions could provide more guidance for judicial decisions. Besides promoting consistency in filing and ruling, proponents also argue that presumptions improve public safety by ensuring cases involving dangerous defendants are immediately identified.

Finally, the use of presumptions would potentially limit the number of cases on which prosecutors file a motion for detention. As one participant explained, by adding presumptions, prosecutors are “disincentivized” from filing on cases that do not meet rebuttable presumption criteria. Furthermore, defense attorneys are more likely to successfully argue against detention when such criteria are not met.

The possible use of presumptions is not without controversy. One reason is the vast difference in resources, demographics, and challenges across New Mexico court jurisdictions, which make it difficult to apply the same guidelines across the state. Interviewees explained,

It can't be a 'one size fits all.' What works in Santa Fe, doesn't work in Reserve, New Mexico, for example. Or even what works in Santa Fe, doesn't work in Rio Arriba, or [the] Española office. And so, to kind of have this one size fits all, across the state that is so diverse, both in demographics and population, just probably needed to be – I don't know, tailored to the individual districts.

This concern was relayed in multiple interviews. Some districts may have specific issues they are concerned with that would lead them to flag cases that would not make sense to do so in other districts. Contrary to calls for increased consistency, these stakeholders recommended catering the rules to jurisdiction-specific, and even office-specific, needs.

The literature points to further problems associated with the use of presumptions. For instance, some legal commentary has concluded that rebuttable presumptions violate due process rights under the constitution (see, e.g. Marcella, 1988; Natalini, 1985). Furthermore, it is possible that use of presumptions, since they are based on criminal history or the current offense, may lead to over-detention of defendants who are not dangerous. This, in turn, contributes to a higher likelihood of recidivism, in addition to myriad collateral consequences of detention in outcomes such as housing, childcare, employment, and health (see, e.g. Austin, 2017; Kim et al., 2018).

In New Mexico, the issue of adding presumptions is ongoing. The Ad Hoc Pretrial Detention Committee considered a recommendation to include rebuttable presumptions of dangerousness for certain violent crimes (e.g. crimes involving the use of a deadly weapon, crimes authorizing a sentence of life in prison without parole) or for defendants with Public Safety Assessment flags for new violent offenses, as long as probable cause is established. The committee debated this recommendation at length, ultimately rejecting it for at least two reasons. First, opponents were concerned that all cases involving a rebuttable presumption would require a PTD hearing. Second, opponents were concerned that judges

would “interpret [the] presumptions to mean that defendants accused of committing a rebuttable presumption offense must always be detained” (Chávez, 2020a). Proponents’ response was that prosecutors would still be able to screen out cases even if the case involved a rebuttable offense; therefore not all cases that meet the rebuttable presumption criteria would be pursued. Presumably, by focusing on rebuttable offenses, the sample of cases screened and ultimately filed on would be smaller than it is currently.

While they did not approve the implementation of rebuttable presumptions, the Ad Hoc Pretrial Detention Committee did approve an amendment allowing district court judges to schedule PTD hearings without a prior motion by the prosecutor. Judges may only do so if the defendant meets criteria reflecting dangerousness, including but not limited to a potential life sentence, use of a firearm, use of a deadly weapon resulting in great bodily harm or death, or PSA flag for new violent criminal activity. The prosecutor would still be required to file a motion for detention at the time of the scheduled hearing. Additionally, the time detained pending the PTD hearing may not exceed what is currently allowed (Chávez, 2020a; Chávez, 2020b). This change to the rule, which allows some presumption of dangerousness, was approved by the New Mexico Supreme Court.

While many stakeholders referenced the need to limit prosecutorial discretion, and presumptions are perhaps the most straightforward way to address this need, there has been strong resistance to the adoption of such measures. As such, the state has instead considered and adopted alternatives that may provide similar benefits to rebuttable presumptions.

Recommendation: Provide Guidance in Rules for Prosecutors

Participants advocated for providing guidance to prosecutors through the rules themselves. This could occur through additions similar to the section that guides judicial decision-making regarding setting conditions of release (N.M. R. Crim. P. Dist. Ct. 5-401(C)). This rule lists criteria for judges to consider when making their decisions, but is not based on charges. One interviewee suggested that prosecutors be provided with similar guidelines for determining whether to file a motion for detention. They proposed that these guidelines should mirror what the judges must consider when assessing a case for dangerousness rather than for setting conditions of release.

Some participants recommended heavier reliance on the results of a risk assessment tool. The state is working on adopting the Public Safety Assessment developed by the Laura and John Arnold Foundation. This tool provides stakeholders with information about the risk a defendant poses in terms of dangerousness and failure to appear, which is meant to aid decisions about release (New Mexico Courts, n.d.-d). While the PSA is meant to inform judicial decision-making, participants in all roles argued that prosecutors should use it to inform their decisions about filing motions for pretrial detention. For instance, one interviewee said about motions for pretrial detention, *“There should be some limits on the state’s ability to file it. And there should be some way to make them [prosecutors] rely on the risk assessment instrument.”*

While most participants expressed a desire for access to the PSA, some stakeholders advocated for a risk assessment tool that was specific to the individual district attorney’s office. They explained that the

decisions should not necessarily be based on a uniform assessment of risk, because jurisdictions face different issues and numbers of court cases. Instead, having a tool specifically for prosecutors could be more appropriate. According to the AOC Statewide Pretrial Services Manager, the PSA is not intended to be used by prosecutors to screen cases for possible detention. Rather, it was developed and tested to inform judges as they make their release decisions. However, it is clear from our interviews and from publicly-made statements that prosecutors do sometimes consult the PSA, and indeed, are expected to do so.

However, while it may be inappropriate for prosecutors to consider the recommendation to detain or not, some consider it appropriate to consider the flag for violence. Indeed, this is one of the rebuttable presumptions used by New Jersey. Studies have supported its usefulness as well, showing that those with the flag are significantly more likely to have new violent criminal activity than those without the flag (DeMichele et al., 2018; Grant, 2018). However, the flag is not perfect in its predictions, as relatively few flagged defendants are subsequently arrested for a crime of violence while on pretrial release, though the reported percentage of defendants charged with a new violent crime varies greatly (DeMichele et al., 2018; Grant, 2018). Regardless, it seems reasonable for all key players to have access to the results of any risk assessment when preparing for pretrial hearings, especially since both prosecutors and defense attorneys could use the results to make arguments for or against conditions of release.

While most participants felt that risk assessment is necessary to successfully implement bail reform, not all agreed. For example, one participant felt that judges can get the information they need from the Odyssey courts database and saw the risk assessment as redundant. Furthermore, there are challenges inherent to using a common assessment, which have made it difficult to adopt this suggestion. One issue, discussed above, is that the currently adopted tool is meant to support release decision-making by judges, but may not be appropriate for prosecutors. Second, even if there were a tool that was universal or separate tools for each role, as alluded to above, there are problems with equal access to these tools. Third, risk assessments are not perfectly accurate and may provide unexpected results.

Recommendation: Create and Share Decision-Making Tools

While the above recommendations require changes to the existing rules, participants also suggested a less restrictive approach of creating or adopting shared decision-making tools. For example, one interviewee suggested a checklist model to help prosecutors determine the relevant information for filing a PTD motion:

I... think a matrix of just how to help a prosecutor assess, approach whether to make a recommendation, whether to file a request to hold somebody. [Something] to help guide a person's thought process when they are having to consider this in a short amount of time with limited information, knowing that other people's safety is on the line based on the decision. It would be nice if there was something organized that a person could look to that would refresh them, make sure they've considered everything that needs to be considered when making a determination because often when we're put in a moment, like when there's an emergency, we don't think of everything.

Another participant made a similar suggestion, further advocating for a matrix that is distinct from the PSA. Stakeholders could develop their own tools or consider and adopt tools from other states for either state-wide or district-specific use. Ideally, these would be developed with input from individuals representing a variety of interests within the criminal justice system.

Enhance Judicial Transparency and Improve Consistency

In addition to recommendations targeted at improving consistency in prosecutorial decision-making, stakeholders also offered suggestions to standardize judicial decisions. These recommendations aim to improve transparency and consistency of rulings. Below, we outline three recommendations: requiring judges to explain the merits of their case, whether they rule for or against pretrial detention; defining evidence clearly within the written guidelines; and allowing the excusal of judges from pretrial hearings. All three recommendations in this section were made by interviewees and considered by the Ad Hoc Pretrial Detention Committee.

Recommendation: Explain Merits of Case

Stakeholders indicated that more transparency regarding judicial decision-making is needed, particularly when judges deny a motion for detention. Currently, Rule 5-401(F) does not include a requirement that judges justify their decision to release, but it is required under 5-409 (H). This rule states, “The court shall file written findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than two (2) days after the conclusion of the hearing.”

Some judges provide this information when they rule for release. In some of the orders on preventative detention we reviewed, judges offered lengthy explanations. They often cited conditions that may mitigate dangerousness or indications that a defendant does not pose a danger as support for rejecting the motion.

Despite this, interviewees indicated that they often do not know why the judge rejected a motion to detain. The Ad Hoc Pretrial Detention Committee recommended proposing an addition to Rule 5-409(F) that judges explain the merits of the PTD motion at the hearing (Chávez, 2020a). This would require judges to 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.

Recommendation: Define Evidence

Stakeholders were also concerned that some judges do not allow proffers as evidence, despite the ruling in *State ex rel Torrez v. Whitaker* (2018-NMSC-005, 410 P.3d 201). To prevent this, the Ad Hoc Pretrial Detention Committee approved adding a sentence to 5-409(F)(5) that summarizes what evidence a district court may consider (including proffers). Since adoption by the New Mexico Supreme Court, this rule now states:

The court may make its decision regarding pretrial detention based upon documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof presented at the hearing (N.M. R. Crim. P. Dist. Ct. 5-409(F)(5)).

Recommendation: Allow Judges to be Excused

Lastly, due to the noted disparities in detention rulings across judges, some interviewees recommended allowing for excusal of judges from pretrial detention motions. The Ad Hoc Pretrial Detention Committee vetted this suggestion. They ultimately rejected this proposal because of the time limits in which hearings must occur and associated logistics to ensure both the prosecutor and defense appear at the hearings. Thus, the New Mexico Supreme Court did not make any such changes to these rules.

Provide Options that Address Limitations Due to Timeframes

The timelines set out in the rules present challenges for all parties. One challenge is that prosecutors do not always have enough information that would prompt them to file a motion for detention when appropriate. One suggestion to remedy this problem is to allow judges to temporarily detain a defendant without a motion by the prosecutor. A second recommendation is to extend the time limits to hold hearings, which would allow all parties to adequately prepare for pretrial hearings. Lastly, some stakeholders recommended encouraging both defense attorneys and prosecutors to petition for continuance of pretrial hearings.

Recommendation: Allow Judges to Temporarily Detain Defendants

Prosecutors are most often criticized for bringing too many motions for preventative detention; however, they are also criticized for failing to bring motions in certain cases. In part, this is a product of the short time frames required by the rules. Both interviewees and members of the Ad Hoc Pretrial Detention Committee proposed amending the rules to allow judges to detain without prosecutorial filing:

But I think what needs to be revised would be with the more serious crimes, the domestic violence, to give the judges that discretion to hold them and not have to go through the process of waiting for the DA's to see if they're gonna file any kind of motion to try to keep the person in jail. I think that part needs to be changed. It needs to be revised giving the judges more discretion on what to do with these individuals, especially repeat offenders of violent crimes.

A participant further explained the ramifications of judges not having that discretion:

After the job, if I go home, and if I release somebody [because the prosecutor did not file to detain], and I find out this morning that he kills her or she kills him, I'm the one they're looking at. And it's bothersome. It's scary. And it stays with the judge, believe me.

The Ad Hoc Pretrial Detention Committee recommended an amendment allowing district court judges to temporarily detain a defendant for up to 48 hours (Chávez, 2020a). The prosecutor would then need to motion for detention to keep the defendant detained beyond that. However, this does not resolve the problem in the lower courts. Recognizing this, the Ad Hoc Pretrial Detention Committee

subsequently recommended changes to the lower court rules. These changes allow lower court judges to detain a defendant up to 24 hours after their initial appearance given certain circumstances suggesting that the defendant is dangerous (e.g., if the defendant used a firearm or a PSA flag for new violent criminal activity).

In the LOPD's supplemental report (Baur & Ibarra, 2020), the authors argue against this change. They note that the most concerning aspect of the amendment is "the change to the role of the court. Judges should never be placed into a position where they are expected to be adversarial to defendants" (Baur & Ibarra, 2020). However, prior to bail reform, judges made release decisions, which often resulted in detention. Moreover, in other states, judges are allowed to move to detain and in New Mexico, judges can move to detain a defendant for violating conditions of release (N.M. R. Crim. P. Dist. Ct. 5-403), placing judges in an adversarial role.

Other concerns from the LOPD report were also raised by our interviewees. For example, the LOPD object to the use of a firearm as a criterion for judges to detain, as there is debate about what it means to "use" a firearm in an offense. They also object to using the violence flag from the PSA. Despite these objections, the New Mexico Supreme Court 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.

Recommendation: Extend Time to Key Hearings

In response to the challenges with scheduling pretrial hearings, many interviewees felt it would be beneficial to all parties to extend the amount of time to hold key hearings. For example, some interviewees felt it would be helpful to extend the time to the FFA by up to 24 hours. Alternatively, in districts where the FFA is held relatively quickly, participants felt that DAs should be allowed to request a delay to determine whether a motion is required, at least up to what is currently allowed for FFA hearings. Participants also advocated for more time to prepare for the pretrial detention hearing. While most participants did not provide a specific number of days that it should be extended, one argued for up to ten days. This would allow defense attorneys time to prepare for the hearing "*in light of the extreme consequences of them.*"

Extending the time limits does have consequences. A central motivation for the bail reform amendment was to minimize the amount of time that defendants spend in jail. The potential consequences of detaining or releasing someone long-term solely on the basis of information that is available within the first few days after arrest can be detrimental to either the defendant or the community. Thus, the lack of information due to time is a serious issue.

Recommendation: Pursue Short-Term Continuance

Rather than extending the time limits for hearings, another recommendation was for prosecutors and defense attorneys to pursue requests for a short-term continuance. Per Rule 5-409(F)(1)(b), the court can grant an extension as follows:

- (i) for up to three (3) days if in the motion for pretrial detention the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing; (ii) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the extension; (iii) upon the defendant filing a waiver of the time limit; or (iv) upon stipulation of the parties.

New Jersey's rules are similar to New Mexico's in that the pretrial detention hearing must occur within three business days of filing the motion for preventive detention; New Mexico requires the hearing within three calendar days. However, in their evaluation of New Jersey's Pretrial Justice System, Anderson et al. (2019) note that "in practice detention hearings commonly occur about a week after first appearance hearing" due to "brief adjournments granted to either the prosecution or the defense" (p. 10). Thus, other states with similar rules do regularly grant extensions. One participant felt that defense attorneys do not request this often enough, even though they are allowed to do so. However, this may be difficult in part because the defense attorney must convince the client that it is in their best interest to stay in jail a few more days. As one participant observed, [the defense attorney] *could ask for continuance, but that means you're telling your client you're going to sit here longer. I need to go get ready. And the clients often don't want that, I imagine.*

Rules about Violations of Conditions of Release

While most of the concerns about pretrial detention surround Rule 5-409, some stakeholders also had concerns about Rule 5-403. This rule allows judges to detain defendants during the pretrial period if they violate conditions of release. While Rule 5-403 existed prior to bail reform, it was modified at the same time as Rule 5-401 and Rule 5-409. Under this rule, the court is able to consider revocation "(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" (N.M. R. Crim. P. Dist. Ct. 5-403). Therefore, any violation may result in the defendant being detained until their trial, which, according to one participant, could be upwards of 18 months.

Some participants view the ability to detain someone for violating conditions of release as a positive aspect of bail reform. These participants perceive this as a safeguard to catch those defendants who pose a danger and were not preventatively detained, or who continue to commit relatively low-level offenses but may not be "dangerous." They argue that by having the option to revoke for new offenses at a lower standard than is required for preventative detention, the community can be kept safe even if there is a "lag" from the initial release.

However, detaining someone on what may be a minor violation of conditions can lead to detrimental outcomes, particularly in light of the fact that these defendants have not yet been found guilty:

If they're held in custody more than 30 days, they lose their housing. They lose their Social Security benefits. They oftentimes lose their children to CYFD, because they didn't show up for a court hearing, and let's say they're high. Or they showed up late, and the court takes them into custody, and then their kids are left at home without them. And so, CYFD takes their children. So, there are extreme consequences for those, and for very small actions, and so that's my biggest concern with these 403 hearings.

One interviewee contrasted this rule with 5-409, which requires a finding of dangerousness in order to detain pretrial; Rule 5-403 does not. This participant expressed concern that some defendants are remanded to custody inappropriately. Another participant expressed concern with the broadness of this rule: *"So, in the 5-403, which is the one I have the biggest issue with, it's normally that [release is revoked because] they tested positive for drugs, or that they missed a pretrial services appointment."*

As with preventative detention rulings, interviewees critiqued judges' responses to violations, perceiving them to be inconsistent. One participant explained that whether someone is detained for a particular violation *"[d]epends on your judge. I think it depends on your judge."* This sentiment was echoed repeatedly, across districts and by various stakeholders. Thus, the same type of violation may elicit varying responses based on the presiding judge.

Similarly, several participants were concerned that certain violations are not appropriately addressed. For example, participants in one district explained that judges do not detain an individual who picks up new charges while on release, even if the new charges involve violence. One interviewee explained that this is because the judge views the defendant as innocent until proven guilty, and therefore does not hold the defendant accountable for those new charges. In other districts, however, judges will revoke release when the defendant has new charges levied against them.

Another example of inconsistency is how judges treat violations of no-contact orders. A participant in one district said that judges do not punish violations of *"any of those [no-contact] conditions."* However, in another district, judges take these violations more seriously: *"when it comes to simple violations of no contact orders, our judges treat them as petty misdemeanors."*

Recommendation: Modify Rule 5-403 to Include Evidence of Dangerousness

One recommendation is to require evidence of dangerousness under Rule 5-403. One interviewee explained,

And on the 403 hearings, I think that being able to hold them indefinitely without some finding of dangerousness, because that's what's required for the 409, I don't know why you wouldn't have a similar standard to hold them indefinitely. If the violation of the court rule was dangerous, then I could see holding them indefinitely, but I think that some modification needs to happen to 403 to say that you could modify their conditions, but you shouldn't be able to hold them indefinitely without some finding of dangerousness under 403.

The rule currently allows judges to detain defendants if they have shown that they are willfully noncompliant with the court orders, but does not specify conditions for which release should be

revoked, nor does it require that judges consider any particular factors in their decision. The Ad Hoc Pretrial Detention Committee proposed an amendment to Rule 5-403 to require a status review on cases where a defendant has been detained for more than one year for violations. The New Mexico Supreme Court adopted a rule change allowing a status review upon the motion of the prosecution, defense, or court. This partially addresses the concerns surrounding Rule 5-403 by allowing for a review of these cases, but defendants can still be detained for an extended amount of time on less serious violations. However, decisions to revoke can be appealed, which allows a defense attorney to argue for release particularly if a defendant is detained on a relatively minor violation.

Rules about Expedited Trial Scheduling for Detainees

Per Rule 5-401 (L) and 5-409 (J), the underlying criminal case involving preventatively detained defendants is on an expedited schedule. This is intended to minimize the amount of time defendants are detained pretrial. Some participants argued that, despite this, the cases are not quickly resolved. They pointed to two main problems with the current rule as it pertains to expedited trial scheduling. First, the rules do not define “expedited,” and, as such, cases are not really prioritized. Second, the state sometimes requests and is granted a continuance, which exacerbates the lack of priority scheduling:

The problem is, is they’re saying these are priority cases, and the DA’s office isn’t prioritizing them, and the court’s not backing up the rule that says they get priority scheduling. And so they’re allowing for continuances of these cases because the DA [is not prepared].

However, as one interviewee explained, cases that result in pretrial detention are often complex and serious cases. In these cases, it may take longer to gather all the evidence. Contrary to the observation above, one participant provided an example in which the state asked the court for a continuance while waiting for the forensic evidence. The judge denied the request. In this situation, the prosecutor must decide whether to then agree to release the defendant or push forward with a case that is not ready for trial.

Recommendation: Explore Rule Changes to Ensure Cases are Expedited

While many participants pointed out that cases are not always prioritized as they should be, only one recommended a solution. This participant argued for a rule showing “*some kind of exceptional circumstances for a reason that we need a continuance.*” The Ad Hoc Pretrial Detention Committee also recognized that “expedited” is not defined in Rule 5-401, and considered a recommendation to address this. Some committee members suggested adding deadlines for defendants who were detained, with separate deadlines for misdemeanors, simple felonies, intermediate felonies, and complex felony cases. However, this proposal was rejected, in addition to similar proposed amendments regarding setting deadlines (Chávez, 2020a).

Rules about District Court Jurisdiction over Pretrial Detention Hearings

District courts have sole jurisdiction for hearing preventative detention motions. Currently, once the prosecutor files a preventative detention motion on a case in the lower courts, a new case is opened in

the district court for the sole purpose of determining pretrial detention. This has led to an increase in the number of hearings that district court judges hear. Moreover, scheduling these cases within the existing docket, given the short (three to five day) timelines, can be challenging. This may be especially true in small districts with fewer judges but a relatively high number of cases. In one district with a limited number of judges responsible for criminal proceedings, scheduling pretrial hearings is particularly challenging:

...I would say [we each have] an average of between three and eight [pretrial detention hearings] a week. So, that's a substantial increase on our time. And in setting aside that time, as you can tell from what I've already said, it's an imposition on the court.

Districts accommodate these hearings differently. For example, in one district, participants told us they often only set aside 15 minutes for these hearings due to time constraints. In other districts, judges allot more time, and participants felt that the process was working well:

I think our courts handle the process well. Each time we file a pretrial detention motion, we give it to everybody, the judges know how to handle it. They set them on time. The defense attorneys can ask for continuance if they need, but they're usually ready. And the hearing usually only takes less than an hour, and within two days – well, right away the judge gives a decision, and within two days they give their written order. The way that they're handling application of the rule is working well.

This district does not have the same volume of cases, however, which likely plays a role. In other districts, it is motions to revoke conditions of release that are clogging the docket.

Recommendation: Magistrate and Metropolitan Courts as Courts of Record

The reason district courts have sole jurisdiction over preventive detention hearings is because the lower courts are not courts of record. Article II Section 13 of the state constitution specifies that detention decisions can only be made by a court of record (N.M. Const art. II § 13 amend. 2016). Interviewees and others in the state explain that amending the rules to make lower courts into courts of record would allow pretrial detention hearings there. As one participant explained, *"I'd like a rule change making the Magistrate's Court a Court of Record... Because then, I think they could hear pretrial detention motions."*

This change could lessen the resource strain and scheduling challenges experienced by district courts. By allowing metropolitan and magistrate courts to hear pretrial detention hearings, the additional workload of pretrial hearings would be spread out, ultimately decreasing the burden on the district courts.

The suggestion to make magistrate courts into courts of record is not a new one. It was noted in the commentary to the rules published in 2017. The district judges wrote, "We district judges in the Seventh would like to see legislation passed making the magistrate courts of record for detention hearings." (Reynolds, 2017, p. 18) In 2019, state Representative Paul C. Bandy proposed legislation (House Bill 224) that would make all New Mexico metropolitan and magistrate courts into courts of record. This alteration would have contributed to increased efficiency in the pretrial release process by removing the

need to open a *de novo* case in district court. However, the bill was struck down in March of 2019. Furthermore, this concern was not addressed in the Ad Hoc Pretrial Detention Committee report.

Rule about Financial Considerations

Although interviews indicated that fewer people are required to pay bond since bail reform, interviews also revealed that the use of bond varies across districts. In some court jurisdictions, bond is typically set around or under \$100. In other districts, the average bond amount remains in the thousands of dollars, although it has decreased since bail reform. While Rule 5-401 mandates that the courts must consider a defendant's ability to pay when setting bail, it is unclear whether judges are doing this in practice. Participants and courtroom observations indicated that judges may not be considering ability to pay, as defense attorneys are subsequently requesting judges to lower bonds. There is no standardized mechanism for evaluating the amount that a defendant can pay, which may contribute to inconsistent evaluations of a defendant's financial situation.

Judges' answers varied when asked whether they account for ability to pay, indicating a lack of clarity. When asked whether they account for a defendant's ability to pay, one judge said,

I don't. The Supreme Court has made it very clear that that's not a criteria. But by implication, they're saying if you know the defendant can't post the bond, you don't set a secured bond so that it would otherwise seem reasonable, but you know that he cannot post that bond. So, I don't take into consideration his ability to pay because I don't think that whether you can afford a bond or not is a criteria that should be used. If he fits the other criteria, then I'm not involved in his finances, or her finances.

In contrast, another judge asks questions throughout the hearings to "get a financial picture, using that information to set an appropriate bond. Some public defenders expected judges to account for a defendant's ability to pay, and were concerned when they did not. When a judge does not consider ability to pay, the defense attorney must appeal to lower the bond, resulting in the detention of the defendant for up to five days until the bond can be reconsidered at a review hearing (N.M. R. Crim. P. Dist. Ct. 5-401, 2018).

Outside of bond, there are other potential financial barriers to release. For example, judges may have the option to place defendants on electronic monitoring as a condition of release. While this can help protect public safety and safeguard victims, it can also perpetuate inequities due to its associated costs. In Comments (2017), district court judges pointed out that it is unclear whether GPS and alcohol monitoring constitute non-monetary conditions (Townsend, 2017, p. 10). The New Mexico Criminal Defense Lawyers Association (NMCDLA) proposed an amendment inhibiting the courts from requiring these expensive conditions of release in the case of non-dangerous defendants. They argued that holding defendants because they cannot pay for their ordered conditions of release constitutes the same economic barrier as setting high bonds (Strickland, 2017, p. 16). Our interviews indicate that judges are not holding defendants due to an inability to pay for these types of conditions, however that does not mean that it is not happening in other districts in New Mexico.

Recommendation: Standardize the Evaluation of Ability to Pay Bond

Participants indicated that judges do not always evaluate defendants' ability to pay bond as they are required per Rule 5-401. One recommendation to address this issue is for the courts to adopt a standard mechanism to allow judges to evaluate a defendant's situation before ordering any financial conditions of release. This would increase fairness in the amount and type of bond set and increase consistency across judges.

One option would be to utilize an ability-to-pay calculator. This tool is being piloted in New York and was created by the Vera Institute as part of their Bail Assessment Pilot ([Rahman](#) et al., n.d.). This calculator, which is free to download as an app and available for use by anybody, accounts for income and expenses to evaluate a reasonable amount for a defendant to pay in bail or bond.

Another option is the use of a standard form. The AOC has a form used to assess financial standing (Form 9-301A. Pretrial release financial affidavit). This form is optional and is meant to be used in cases that have been appealed. Courts should explore whether it could be adopted for use at the FFA in cases, particularly in cases where there is a concern that the defendant will not be able to post bond.

Theme 2: Education

In order to implement bail reform, criminal justice actors across districts must be informed about the rules and have the same basic understanding of how they should be implemented. In our interviews, participants spoke about the formal and informal training and education they received regarding the rules guiding pretrial release and detention. This education facilitates bail reform by helping criminal justice actors to interpret and apply the rules, which encourages greater consistency across the state. We also asked participants if there was anything unclear about the rules or if there were areas in which training was still needed. While most felt that no additional training was needed, some participants did feel some additional training could be beneficial. Furthermore, some challenges to implementation point to areas where additional training could be helpful.

In this section, we report the training and education participants received regarding bail reform. Interviewees described receiving formal and informal training specific to state practices, as well as training about bail reform at the national level. We highlight where more training could be beneficial and offer recommendations for bolstering bail reform education.

Formal Training on New Mexico Pretrial Release Rules

Interviewees learned about bail reform through a variety of formal training sessions. Some formal statewide training was offered in conjunction with annual meetings. One such annual meeting is the judicial conclave. Many judges described learning about bail reform during this professional development conference, which includes all district, metropolitan, magistrate, and appellate court judges. As one judge explained,

We've had two judicial conclaves since the amendment was issued... The first year it was a pilot program. And the second... So, I attended that one and got some good input from how they treat it... So, yes. I have had training in two judicial conclaves on pretrial detention hearings.

Similarly, one prosecuting attorney described discussing pretrial detention rules at the annual “district attorney's conference.”

Additionally, special trainings throughout the year were offered both in-person and remotely organized by professional associations. For instance, one judge described a lunch webinar provided by the “the DMJAA, the District and Metro Judges Association.” Likewise, there have been webinars targeted to defense attorneys, such as a New Mexico Criminal Defense Lawyers Association-sponsored webinar offered after the rules were first issued.

Besides statewide training, some respondents described training at the local level. Some of these trainings targeted a single group, such as judges. For example, one district hosted a training for judges that was open to the surrounding districts. Another district-specific training included a variety of justice partners:

We have a justice partners meeting in the magistrate court once a month where the cops and the defense attorneys and the prosecutors and the judges all get together and talk, so we talked about it there when the rules were coming out, and then I read the rules myself and we talked about them here in the office a few times, so that's been my training.

Although participants described both statewide and district-wide formal training, formal training most often occurs at the office level. Judges, prosecutors, and defense attorneys all indicated that they received some formal training within their individual offices. For example, one respondent stated, “We certainly had multiple official office-wide trainings. Our office tends to be pretty good about doing office-wide trainings when there is a shift in law or rules for criminal procedure.”

These office-wide trainings may occur on a regularly recurring basis or simply as needed. For example, training may occur when court cases clarify the rules of pretrial detention or when onboarding new attorneys. This education can come from supervisors or colleagues.

Formal training provides a way for practitioners to see how others are responding to the rules both within their own district and in others. This can lead to more uniformity across the state and allows practitioners to interact with and learn from one another.

Informal Training on New Mexico Pretrial Release Rules

Frequently, as in many jobs, education has occurred informally. Participants described both “on-the-job” learning and active “self-education.” On-the-job training happens in real-time, as attorneys learn what works in the course of their everyday procedures. While this often supplements formal training, sometimes it is the only form of education available to stakeholders:

We just had to essentially know that the rule was coming with the constitutional amendment. Know that the rules were coming, and it really was – our procedure, our day to day procedure, was a result of just trial and error, and figuring out what was gonna work.

Some judges described educating prosecuting attorneys about the rules by explaining the reasons for their ruling. This courtroom education can serve as a type of on-the-job training that allows attorneys to develop discernment around judicial discretion:

Every time [the judge] makes a ruling, I get an education. No, but I think part of the education is seeing how different judges approach it, because by seeing that I can say, 'Well, I liked that judge's reasoning, and I think that that judge's reasoning was superior to that judge's reasoning.'

Judges and attorneys have also actively engaged in self-education on the new rules by reading statutes, rules, and court opinions. Indeed, some participants argue that this should occur more frequently:

...I think that there's nothing wrong with self-education. I think we need to reclaim the lost art of reading. And then kind of not worry about so much about folklore and anecdote and rumor and we're lawyers too. We need to base our actions on the law and we need to read it and understand it. And so there's some training, but I mean why – I mean it doesn't take any effort to think.

Training at the National Level

Bail reform is not unique to New Mexico. Some participants described learning about bail reform through information provided by national organizations and with working groups on the subject. For example, some national organizations have provided training to educate members on best practices related to bail reform. While these trainings are not specific to implementing New Mexico's new rules, they provide a broader context for understanding bail reform. Moreover, the lessons learned from other states can improve implementation in New Mexico.

Challenges with Available Education

Participants described formal training on bail reform and the associated rules as minimal; instead, learning has occurred primarily through first-hand experience and self-education:

I have taught myself most of what I know by reading the statutes and the rules, listening to Supreme Court oral argument and Supreme Court decisions on bail and bond and issues of the pretrial detention, and there was one training... but there is not a real meaningful, educational system or training put in place, at least in our area. It's just teaching the ones I supervise based on what I've learned.

While this is sufficient for some stakeholders, others felt that additional training would be helpful. Additional education may help address issues with prosecutorial and judicial discretion and inconsistent implementation of rules across and within districts. Participants had specific recommendations to bolster education about bail reform, which we describe below.

Recommendation: Provide Opportunities for Additional Learning

While interviewees felt all practitioners could use additional training, some noted specific areas where more education would be beneficial. First, participants noted high turnover of prosecutors and defense attorneys in some districts. They explained that newer, less experienced attorneys in particular needed more education. This could occur informally through mentorships with more experienced attorneys, and

by providing additional resources. Continuing formal legal education and “refreshers” are also important for both newer and more experienced attorneys.

Interviewees also suggested providing checklists to ensure attorneys take into account all the information needed for a particular hearing, as well as compiling and regularly updating case law relevant to bail reform. As one participant explained, not only do attorneys need to know about the rules, they need to know case law at both the state level (within and outside of New Mexico) as well as federal law, and how it relates to the rules:

...arming them with that case law and giving them the confidence to use it is one of the big challenges, and keeping it updated is another as things develop because I think no matter what our arguments are in terms of the facts of the case and the criminal history, if we're not couching it in the legal language that we should be, we can't expect the judges to give us favorable rulings.

Stakeholders also had suggestions regarding ongoing education for judges. For example, some interviewees pointed out that lower court judges have the authority to change or review the conditions of release set by the district court at the time of the preliminary hearing. However, they often do not, either because they do not know they can or choose not to do so: “Most... are unwilling to review conditions of release at preliminary hearing. However, they can.” This participant went on to explain that, even if the defense and prosecuting attorney have stipulated to a change in conditions, they often have to wait until the case goes to district court to have the judge approve the change approved.

Similarly, in another district, an interviewee explained that even though lower court judges can review the bond amount set, they do not recognize that they can do so: “So, if there's a secured bond set on the defendant and it's remanded to magistrate court, magistrate can reduce that bond. They don't realize that.”

At the time of these interviews, Rule 5-409(I) did allow the lower courts to modify conditions of release. The new rules slated to take effect November 23, 2020 will make this particular concern moot as the underlying criminal case will be closed in the lower court once the pretrial detention hearing is completed.

The Ad Hoc Pretrial Detention Committee also identified an area for additional education. The committee considered requiring judges to issue a bench warrant over a summons when there is “probable cause that the defendant committed a crime punishable by more than one year, the crime was committed in another state, or the crime is one listed in Rule 5- 408(B)(2) NMRA” (Chávez, 2020a, p.8). The recommendation was rejected because judges already have this discretion. Instead, committee members suggested judges require more training in this area.

Recommendation: Provide Education about Resources Available to Make Decisions

One participant explained that different people have different levels of aptitude with the resources available. Therefore, in addition to other training, key personnel should be trained on how to effectively use available tools:

I think if you were to just be able to get good training, even if it was by video, as to what resources we do have, what basic resources we have, how you can analyze a case and look at the different factors to get background information, how to listen carefully to the defendant and the prosecutor and the defense attorney. Just more refined training to focus on this.

However, the usefulness of resources often depends on one's ability to use a given data system or software. For example, one participant felt that judges' knowledge of how to navigate Odyssey varied widely:

It depends on the judge's aptitude with the system. So, it depends on the judge's aptitude with the computer system....And once you get to learn how to manipulate it and find cases in other courts it really helps. But you have to learn.

Despite the variations in user aptitude, Odyssey remains a widely cited tool for gathering information related to pretrial release.

Stakeholders also need ongoing education about the PSA. Although this risk assessment tool can be useful for guiding decisions, it is important to understand that it is not flawless. As the Justice Management Institute explains:

On its face value, the PSA is a straightforward assessment using criminal history and administrative court data to score nine risk factors. However, the risk factors have specific definitions that must be interpreted correctly by the assessor to produce a valid assessment of the defendant. Proper training on these definitions, and adapting to local laws and processes, as well as state statutes is critically important to accurate scoring to establish stakeholder trust and ensuring public safety (Justice Management Institute, n.d.).

Training on the PSA should include an explanation of the results of any validation studies completed on the tool, including a thorough explanation of its strengths, weaknesses, and intent. For example, the AOC Statewide Pretrial Program Manager explained that the PSA is designed for release recommendations rather than for guiding prosecutor's decisions to file for detention. However, our interviews make clear that this is not the understanding of most participants; indeed, prosecutors are criticized for not consulting the results of risk assessments by individuals in all types of criminal justice roles. Ongoing education efforts should target all stakeholders to ensure a clear understanding of what the PSA is for, who should use it under what circumstances it should be used, and how each stakeholder can best use the results. Furthermore, it is imperative that all stakeholders use the PSA as a tool, but not the sole guide, in making decisions. The statewide PTS is available to engage in such education efforts.

[Recommendation: Encourage Collaborative Training](#)

Several interviewees described successful collaborative training involving justice partners from all key positions (judges, attorneys, law enforcement) in neighboring districts. Utilizing this approach could help participants understand how the rules are interpreted and implemented by other justice partners. Moreover, this cooperative working group approach could lead to improved communication and efficiency and serve as a model for best practices. However, it is important that all partners buy into the

process and feel respected and valued. As one interviewee explained, strained relationships between participating agencies can extend to these working groups and undermine their utility.

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 of the work that attorneys must do to prepare for these hearings with limited time and resources. Furthermore, prior to bail reform, prosecutors typically did not attend FFAs; in most districts, they now do so to file for preventative detention. Defense attorneys must also prepare for preventative detention and other key pretrial hearings.

Before bail reform, much of the burden in pretrial hearings was on defense attorneys, who had to make the case for a defendant's release. However, with the passing of the amendment and creation of the pretrial detention hearing, the burden has shifted to prosecuting attorneys. This has increased the preparation required for cases, including deciding whether to file for pretrial detention. Judges now preside over the pretrial detention hearings along with all the pre-existing types of hearings. They may hear a greater number of motions to revoke conditions of release. For example, in one district, judges are expected to “squeeze it in” when presented with a pretrial detention hearing. If the designated judge is unable to accommodate a hearing, another will step in:

And since you can't disqualify a judge for a pretrial detention, if I'm in the middle of a jury trial and [another judge]... doesn't have a jury trial, he may volunteer to handle the LR that I've been designated to hear. And it's heard because it's an emergency hearing, it's set. I do the same for [another judge].

In another district, judges rotate responsibility for pretrial detention hearings to adjust for the addition of this hearing through bail reform.

In addition to attorneys and judges, support staff play a significant role in gathering information and helping attorneys and judges prepare for pretrial hearings. In some districts and workplaces, support staff have been heavily utilized to aid in the implementation of the amendment. Support staff may fill multiple roles; for instance, assistants in attorney's offices help conduct background research and prepare cases, and social workers or case workers may help defendants connect to social services. In one district, social workers and caseworkers housed in the public defender's office connect defendants to services such as housing, medical care, and substance use treatment:

Each attorney has a social worker... We have a social worker who's our assigned social worker, but basically, what we do is we just send an email to the social worker manager, and then she assigns the case to one of our case workers. And we actually have case workers and social workers.

Districts have responded to the changes in different ways. For example, one district attorney's office reallocated an existing position to dedicate time to prepare documents for pretrial detention hearings: “We had a guy working here already and we sort of assigned half of his – more or less probably 20 hours

a week of his duties to work on these, so that was a change in the office.” Others have increased the number of days attorneys are expected to work to ensure staff can review cases prior to FFAs.

Challenges with Staffing

Bail reform is perceived to have increased workloads of attorneys, judges, and support staff through increased hearings and stringent timelines. Although there were participants who indicated that their offices are adjusting as needed to this increased workload, a common theme that emerged was a need for increased funding for staffing. For example, when asked whether resources and supports were sufficient to implement bail reform, one interviewee responded,

[N]o, it's not sufficient. I think, basically, it's an unfunded mandate for our office. We're going to give you a bunch more cases, and no resources to help you with that. And so, no. It would be drastically helpful if we had one person that would handle these hearings.

While the pressure may be felt most acutely by prosecutors who have to screen each case for possible detention, it impacts all system actors. Judges also noted the scheduling challenge presented by additional hearings:

Now, we're required to have expedited hearings, you know, within two or three days depending on what kind of hearing we have. It's just very difficult to schedule those when you only have [a few] criminal judges. So, one of those judges has to be available almost all the time. You can't ever go to the same trainings together. It's put a big burden on our schedules.

Judges also called for more personnel to share the workload; however, this varied somewhat by district, with judges in some districts seemingly facing more strain than others.

Participants also relayed that there is an under-utilization of existing staff. In some cases, this was perceived to be due to a lack of adequate or relevant training to effectively support attorneys in preparing for pretrial hearings:

Well, we do have staff. Although, it's usually a one to one for each attorney has an assistant. Some of them are shared right now. But no, usually it's the attorney's job to do the attorney's work. We could ask. An attorney could ask his assistant, 'Would you go onto Odyssey and print off all of his prior convictions.' Or, 'Go to Odyssey to check for any failures to appear.' But to me I consider that legal work that the lawyers should do, but under the time crunch I wouldn't be opposed to an attorney [assistant] doing that. But other than that, there's nobody. We do have an investigator per office, but they haven't had any training in assisting us with pretrial detention preparations.

If there were greater emphasis placed on the training of support staff, attorneys might be alleviated of some of the burden of preparing for these cases in such a limited timeframe. Depending on the district, this may not necessarily require hiring new staff. However, overall, underfunding and understaffing were commonly identified challenges to implementing bail reform across the state.

Recommendation: Allocate Funds to Increase Staffing Based on Needs Studies

The bail reform amendment could be implemented more efficiently with an increase in staffing. Interviewees in multiple districts advocated for more lawyers and support staff, for both prosecutors

and defense attorneys. Though some participants recommended more funding for judges, this sentiment was less frequent.

Additional prosecuting attorneys could share the burden of appearing at preventive detention hearings. Support staff could aid in gathering key information to assist attorneys when preparing motions to detain. One participant explained why funding more prosecuting attorneys and associated support staff would be helpful:

Probably more lawyers, and more resources to adjust and adapt to how frontloaded this process has become. Because there's steps beyond the pretrial detention. Of course, you're having to build the case faster ... you have to get the case to grand jury in ten days. And that pulls in ... two different lawyers, and two to three different support staff to make that happen. ... We have a process in place, but it still requires that everyone stop what they're doing, and work these cases with a sense of urgency. And I think more resources, of course, always would be more helpful.

Participants recommended an increase in staffing both attorneys and judges in smaller districts so that felony first appearances could be held over the weekend. Currently in these districts, arrests over the weekend result in the release of defendants prior to their felony first appearance, as attorneys and judges are unavailable to appear in court.

Similarly, some participants advocated for improved funding for defense attorneys and their support staff. For example, one interviewee proposed increasing the number of defense attorneys and investigators to assist in the preparation process, as well as social workers. Having someone else available to interview families and identify potential witnesses could free up defense attorneys to better prepare for cases. With additional funding for more defense attorneys, caseloads for current attorneys could be lowered. Moreover, more effectively representing clients at this stage could prevent the unnecessary detention of defendants:

We don't have enough attorneys and social workers...if we could put an investigator on every single preventative detention case, to get an investigator out to talk to the client's family [and identify] witnesses...if we could get witnesses into preventative detention hearings early... We wouldn't be holding people in jail for six to nine months until it's dismissed because [they could determine earlier that the case was not that strong].

Finally, additional judges could help alleviate the burden felt by those who are hearing most of the preventative detention and related pretrial hearings.

If not already completed, a staffing needs study should be undertaken in each office to determine which positions are needed where. Funding could then target those offices and positions that would be the most helpful for implementing bail reform. A recent workload study found that the courts need an additional 17 judges to address current demand across the magistrate, metropolitan, and district courts (Administrative Office of the Courts, 2020).

Theme 4: Pretrial Services

In addition to judges, attorneys, and their corresponding support staff, pretrial services (PTS) has an integral role in the pretrial release process. Indeed, interviewees often described PTS as key in facilitating bail reform. Particularly in areas where PTS was lacking, participants felt having PTS would help: *“If we had pretrial services I would love that. Because it would truly provide me with more information, and someone to monitor these individuals immediately. That would be the best thing.”*

Over half of the districts in which we conducted interviews had a PTS division overseen by the court. Where they exist, the primary functions of PTS divisions are to (a) gather information to assist the court in making decisions and (b) monitor pretrial compliance. They may also connect defendants to social services or community resources and help defendants by reminding them of upcoming court hearings. While pretrial monitoring can be provided through private contractors or through community resources, districts with a PTS division tend to have more options for supervision. However, the types and extent of options for monitoring compliance and providing services vary across districts.

In the following sections, we describe some of the functions of PTS. Next, we outline existing challenges with pretrial services. Finally, participants offered two recommendations related to pretrial services and the use of risk assessment instruments.

Gathering Background Information and Make Release Recommendations

Pretrial services divisions play a central role in gathering information that informs pretrial release and detention decisions. As one interviewee explained,

[Pretrial services officers] gather basic information. Current housing, or upon release where will they be staying, demographic information. Try to gather some information regarding behavioral health concerns, needs that maybe need to be addressed. That information is brought back to our office and included in our background investigation.

The information from PTS is then used to assess public safety and flight risk. Based on the results of these assessments, PTS may make recommendations to inform pretrial detention, release, and conditions of release. Even when a risk assessment tool is not available, the information gathered by PTS is integral to the decision-making process. For example, when asked how the court gets the information that they need for making detention decisions, one judge responded,

I ask pretrial services to do a report. They’ll provide a report to me within 48 hours of request. If I have to make a decision prior to that, I rely on the State and the defense attorney.

Pretrial Monitoring and Supervision

The second key function PTS provides is monitoring. Monitoring defendants is key to ensuring their compliance with conditions of release and appearance in court. This in turn aids in preserving the safety of the community and individuals. Where they are available, PTS officers use a variety of methods to supervise defendants.

In all districts we spoke with that have PTS, officers regularly communicate with defendants face-to-face or telephonically. The frequency of these communications may vary depending on what the judge orders and what the PTS officers feel is most appropriate. Officers may also be responsible for ensuring compliance with electronic monitoring and abstaining from substances, when ordered. In districts with PTS, monitoring for substance use violations tends to be much more extensive, and may include random testing throughout the pretrial period.

In addition to monitoring for violations, PTS may also engage in proactive efforts intended to promote defendant success during the pretrial period. For example, some districts with PTS remind defendants of upcoming court hearings to reduce their chance of failing to appear. These court reminders can be automated or manual, depending on the district and the resources available. One district has an opt-in automated reminder system in which *“Defendants will receive three court hearing reminders: one seven days, one three days, and one day prior to their court hearing. They can also receive them for their office visits.”*

A district may also have reminders for office visits with pretrial services; however, the availability and consistency of these reminders vary greatly. Participants perceived court reminders as very helpful, and their efficacy at increasing appearance has been noted in other reports (Doyle et al., 2019).

Ideally, defendants who are appropriately supervised during the pretrial period will not commit new crimes. One participant explained that, by detecting and addressing technical violations, PTS can potentially prevent a defendant from escalating to the point of committing new offenses.

Finally, pretrial monitoring may benefit defendants. Since PTS officers monitor defendants, they are in a position to identify underlying needs of defendants that contribute to their criminal behavior and non-compliance. PTS may refer defendants to services in the community to help address these underlying issues.

In addition to addressing underlying needs, pretrial monitoring can benefit defendants by demonstrating a pattern of compliance. As one participant explained, a defendant who has effectively complied with pretrial conditions may be treated more favorably as their case progresses:

I don't understand why we don't have pretrial services down here because it's beneficial to defendants also. Because if they're in pretrial services, and they're in pretrial services six months or a year, and if they're doing well, you can point to that and say, 'Look, they are a good candidate for this because they've done all these things,' and 'Look, they're not because they did all these things.'

Other Pretrial Services Functions

Pretrial services officers also play a role at compliance hearings when there is an alleged violation. In one district, prosecuting attorneys no longer have to subpoena PTS officers for these hearings. Prior to this change, defendants were able to contest violations when there were no PTS officers present to testify, leading to an additional hearing. Now, if defendants contest the violation, PTS officers are present and an additional hearing is less likely. However, even when in the courtroom, an additional

hearing may be scheduled. In one case that we observed, the PTS officer did not have all of the information about the defendant's compliance in the courthouse, which resulted in the defendant being held pending the evidentiary hearing.

Challenges with Pretrial Services

Interviewees identified two key challenges related to pretrial services. First, some participants pointed to the absence or under-funding of PTS as a barrier to implementing bail reform. Second, while some participants felt that pretrial services have become more rehabilitative since bail reform, others were concerned that PTS is still excessively punitive.

Consequences of Absent or Under-Resourced Pretrial Services

Absent or under-resourced pretrial services presents challenges with both information gathering and monitoring. When pretrial services divisions are unavailable in a district, information-gathering is completed by attorneys, judges, and support staff. Though these groups are able to gather necessary information, there may be differences in the thoroughness of their investigation depending on who is conducting it and their aptitude with and access to available resources.

Multiple participants highlighted the importance of having PTS gather information and issue recommendations to assist judges when determining release conditions. Per statute, the results of a public safety assessment, if available, are to be considered when making decisions about conditions of release (N.M. R. Crim. P. Dist. Ct. 5-401). Districts without PTS may not have the resources to conduct risk or public safety assessments.

Even in districts with PTS, they are sometimes understaffed and have heavy workloads. This may hinder the amount of information they can obtain to inform decisions about release:

Our pretrial services used to do a more comprehensive report that will, you know, reach out to the alleged victim and confirm housing and things like that. Because of the caseload, it's just how many clients they have. They don't do that anymore because it takes longer.

Districts without PTS also face challenges with monitoring defendants who have been released. Privately contracted companies may provide limited GPS and substance use monitoring in these districts. Courts may also learn about violations of conditions from victims, law enforcement, attorneys, probation officers (if the defendant is already on probation in another case), or their own efforts. Similarly, in one court that does not have PTS, we observed that judges and attorneys discovered defendants' reasons for failure to appear from case managers and family members. In general, interviewees expressed concern that a lack of PTS inhibits pretrial monitoring by making compliance difficult to ensure. One interviewee reiterated the importance of PTS and the monitoring they provide by explaining what happens when PTS is absent:

Because saying 'comply' but there's nobody monitoring it, that's like telling your kid 'Don't eat ice cream,' but yet the ice cream machine is in their room and nobody checks to see if it keeps getting empty.

However, even when PTS exists, if the office is under-resourced, they may not be able to keep track of all defendants ordered to report to them. For example, one participant stated that the PTS division in their district requested bench warrants for defendants who had been committed to the hospital or inpatient mental health services. Although PTS should be aware of extenuating circumstances, they may not have the resources to adequately monitor these situations. In turn, defendants may be charged with failure to appear in situations beyond their control. Participants also pointed to ineffective communication between PTS and defendants as an issue:

They're not meaningfully supervising these people, and you see it on both sides. Like I see it when people are reoffending, but I also see a defense counsel will make arguments that their defendant didn't know they had to go to pretrial services or didn't understand where to go because of the communication. I don't think [PTS is] staffed well enough to really meaningfully establish the relationships and the supervisory dynamic that they need to.

Perceptions of PTS as Punitive

Participants in one district held conflicting views on whether pretrial services has become less punitive since bail reform went into effect. When asked what PTS was like prior to bail reform, one participant said that it is “*very punitive, probation-type model rather than pretrial model. [When] somebody tested positive, rather than trying to... mitigate that risk... they're in custody.*”

This participant explained that PTS is more likely to recommend continued pretrial release rather than detention in the case of a first or second positive drug or alcohol test. This allows defendants to seek treatment. This policy is consistent with the objective of preventatively detaining only when someone proves to be a danger to the community and helps to minimize the number of people detained pretrial. Thus, this individual felt that their PTS division is now working towards reducing risk rather than punishing defendants.

However, another participant in the same district disagreed, saying that “*the pretrial services system hasn't changed with bail reform. It's the same system*” and that it is “*basically probation pretrial.*” This participant perceived PTS as heavily surveilling drug and alcohol use, an observation echoed by another interviewee, who said that pretrial services is “*really just drug testing. They're policing. They're not servicing.*” Although these individuals differed on whether or not there has been a change in the way PTS functions in this district, both parties agree that a more rehabilitative approach to pretrial services would better facilitate the implementation of bail reform.

Recommendation: Ensure PTS is Adequately Funded

When bail reform was initially passed, there was no provision to provide funding to meet the increased demand for monitoring defendants and assessing risk. One very common recommendation from participants was to provide funding for PTS. As one interviewee explained, “*Where we need money more than anything to implement these rules is we need pretrial services in every district in the state to monitor conditions of release and report when they're violated.*”

Even in districts with PTS, participants expressed a need for additional funding. Many interviewees even advocated for prioritizing funding for PTS over funding for their own offices. The Administrative Office of the Courts (AOC) received funding earmarked for PTS. With that funding, PTS has established a unit dedicated to completing a background investigation and the PSA for each defendant booked into participating detention centers.³ This unit is a step in creating the infrastructure for statewide PTS. Participating detention centers provide a list of newly arrested individuals to the unit each day. The unit then completes its reports and uploads them to Odyssey. The background investigation report is only available to judges, due to the privileged information it includes from the NCIC. The PSA is visible to any stakeholder with secured access to Odyssey. The AOC Statewide Pretrial Program Manager explained to us that the PSA is completed in time for judges to view prior to the FFA, as the PSA is intended to help judges with their decision-making. Currently, this unit serves two counties as part of the first-year pilot for AOC's pretrial initiative: San Juan and Sandoval. The AOC also provided funding for additional pretrial staff in these counties. Doña Ana County and the counties comprising the 6th Judicial District are expected to be added as funding allows.⁴

New Mexico is exploring utilizing the current delegated release process to allow jails to release eligible defendants (those with non-violent charges) based on their PSA scores.⁵ This would require additional funding in order to staff this full time (24 hours a day, seven days a week). New Mexico would not be the only state to use a delegated release process based on PSA scores. For example, in New Jersey, law enforcement officers must decide whether to issue a complaint-warrant (book an individual who has been arrested) or a complaint-summons (release the individual with a summons to appear). If an officer wants to issue the complaint-warrant or is unsure, the officer takes the defendant's fingerprints, which provides criminal history information (state only). This information is then used to create a preliminary PSA. If the individual is issued a complaint-warrant or a complaint-summons but the officer feels a complaint-warrant may be justified, the information is provided to the judicial officer as well as police supervisors and prosecutors. Thus, prosecutors are alerted that a defendant may be eligible for pretrial detention. In their decision-making framework, NJ includes a list of offenses that lead to an automatic recommendation for detention at the warrant point; it was expanded after the initial rollout of the PSA (see Anderson et al. (2019) for details). However, the AOC Statewide Pretrial Services Manager notes that New Mexico lacks the sophisticated integrated data system that New Jersey has which facilitates this approach.

The legislature provided funding for PTS, however, it is not sufficient to develop and implement pretrial services statewide. While some participants desired access to the PSA and others wanted the monitoring and compliance functions pretrial services provide, PTS should include both. The AOC Statewide Pretrial Services Manager explained that PTS cannot assist counties in implementing just one

³ New Mexico is the first state in the country to have a centralized background investigation and PSA unit.

⁴ PTS defines jurisdictions as county-specific, not judicial district-specific. An exception is the 6th Judicial District as they have worked towards a unified approach encompassing all three counties (Grant, Luna, and Hidalgo Counties). Therefore, PTS is treating it as if it were a single county

⁵ Judges may delegate the decision to release a defendant to another person in certain circumstances. In New Mexico, the detention center may release a defendant who meets the criteria for release; this change would include the PSA results as another criterion.

of these aspects of PTS. Before adding any more counties, PTS expects to develop a competitive selection process. This is expected to allow the AOC to assess the readiness of a county to implement PTS, based on such criteria as the current capacity of pretrial services in that county (if any), the existing collaboration amongst stakeholders, and the results of any systems analyses. They will also weigh this against funding available locally and through PTS.

The National Institute of Corrections is providing technical assistance to the AOC to use legal and evidence-based practices in implementing pretrial services in the state, based on their framework (Pilnik, 2017). With their guidance, AOC will be developing a strategic plan to identify the current capacity of PTS across New Mexico, including a financial analysis. Adherence to best practices includes ensuring that PTS is a robust system. A PTS official explains that this should include assessments; pretrial release recommendations based on those assessments; supervision that is locally driven, legal, and not excessive (i.e., make sure defendants are not over-monitored or charged for supervision); responses to violations are risk-driven; and ongoing data collection and analysis occur to ensure effective practices.

However, creating fully functioning PTS divisions throughout the state is expensive. Currently, while the funding allotted to PTS is substantial (just under \$2,000,000), it is insufficient, according to the AOC Statewide Pretrial Services Manager. In some other states, funding for statewide PTS ranges from \$17,000,000 to \$27,000,000. It is reasonable for New Mexico to begin slowly and allow PTS to develop and establish best practices for our state, using the thoughtful and strategic approach that officials indicate they are pursuing. In the long term, though, in order for PTS to be developed in each county, additional funding will be required. The current funding supports approximately 14 full time employees, with funding budgeted for an additional 7 to help “ramp up” new sites and increase the capacity of the BI/PSA unit. We anticipate that the AOC will work with the NIC to determine what those costs will be as they develop the strategic plan. Successful bail reform requires an effective pretrial services system with adequate funding. As Alexander Shalom of the ACLU explained, “justice is not cheap” (O’Dea, 2018).

Concerns about Accuracy of PSA

As noted previously, the PSA is expected to be adopted statewide. However, stakeholders have raised concerns that the results from the PSA are sometimes erroneous. This stems primarily from attempting to use the results for assessing a case for preventative detention:

There was a point ... when the [risk assessment] first took effect where the directive was ‘file on anything that says detain.’ We were filing on so many crazy things. I understand why everyone was angry, but how were we supposed to know? We had some faith in this [risk assessment tool], which was brand new thinking that it was telling us something better than what we were doing, and it just wasn’t true. It was telling us to file on the craziest stuff.

One example of this type of unexpected result was articulated in the Minority Report to the Ad Hoc Pretrial Detention Committee. In it, they explain that the PSA does not differentiate between types of offenses, and someone with a current offense of a drug crime and one charged with murder may both be flagged for detention (Torrez & Luce, 2020). They further explain that the PSA is scored for both risk of committing any new crime as well as flight risk. In their response, the Institute for Social Research

(2020) explained that the PSA does sometimes result in recommendations of detention for defendants who are not dangerous because the defendants may have the “exact same risk factors in common other than their charges” (p. 2). They further point to the violence flag, populated with information about the nature of the current offense, as one important consideration for judges (Institute for Social Research, 2020).

The district attorneys are clearly aware of the utility of the violence flag, indicating that it can be effective to “highlight potential dangerousness” but argue that it is “overshadowed by the PSA scores” and associated recommendations. The Ad Hoc Pretrial Detention Committee also recognized the utility of the violence flag. In their recommendation to allow district court judges to temporarily detain defendants, one criterion includes whether the PSA indicates a violence flag. Whether the PSA should be used in this way is up for debate. An official with PTS unequivocally asserts that the PSA is only to be used by judges in making decisions about release; the use of the tool for making decisions about whether to detain is not appropriate. In particular, the risk scores are not intended to guide prosecutorial decision-making. When pressed whether the violence flag may be used for deciding on detention, this official indicated that it depends on who you ask. This all points to the need to use caution when utilizing the PSA or any other risk assessment tool.

Recommendation: Conduct Additional Research

Some participants felt that additional research is needed to support effective implementation of bail reform. They noted two areas in which more research would be helpful. First, research is needed to assess the effectiveness of pretrial services. Second, some participants felt more research is needed to ensure the efficacy of the PSA.

Some participants felt that it is important to have data that shows how the bail reform amendment has affected New Mexico, including evaluating the efficacy of pretrial services. As one person stated, “It’d be nice to have a lot more data so we could actually see what the impact has been compared to what we were doing previously.”

They went on to explain,

There isn't much research out there at all on what conditions of release are effective. So, does ordering somebody to provide UAs weekly, does that have an impact on their pretrial success? There isn't really any research out there. The only research that is out there that – we can, as far as conditions, is that if you provide court hearing reminders, those have a huge impact on failure to appear rates. But outside of that, I think people are starting to look at that, but there isn't a lot out there. So, I think we'd get a lot more information about what is effective... obviously we could be more effective.

This is an especially important point in light of the potential link between failures to appear and pretrial monitoring that some stakeholders discussed. For example, some stakeholders argue that drug testing may contribute to higher rates of failure to appear; additional research would help to support or refute this supposition.

There have been some studies which indicate that some pretrial monitoring practices are more effective than others. For example, as noted by the participant above, numerous studies show that court reminders lower failure to appear rates considerably (e.g., Bornstein, Tomkins, & Neely, 2011; Bornstein, Tomkins, Neeley, Herian, & Hamm, 2013; Bechtel et al., 2017; Cooke et al., 2018). Doyle et al. (2019) also recommend minimizing the use of electronic monitoring, as it has not been shown to be effective and has adverse consequences (Doyle et al., 2019). Examining the efficacy of pretrial conditions on rates of appearance and compliance will help PTS planners hone conditions to the specific needs of defendants and communities.

Analyses should include assessments of the population overall as well as by subgroups. For example, the AOC Statewide Pretrial Program Manager explains that supervision should be tied to risk levels, stating that they know “moderate to high risk defendants who receive pretrial supervision do perform better (court appearance and arrest free during the pretrial phase) than those defendants who do not receive supervision.” She further explains that “not over-supervising is key...” (K. Bradford, personal communication, 10/19/2020). New Mexico should engage in research to assess the extent to which supervision is tied to risk levels and parse out whether certain forms of supervision are more or less effective and for whom. Research should also examine whether conditions of release are equitable. For example, research has shown racial disparities in who is placed on electronic monitoring (e.g. Sainju et al., 2018).

A second key area for research is the PSA. PTS is expected to work on validating the PSA in each jurisdiction where implemented, pending funding and adequate data. It is currently being assessed in the 2nd Judicial District. However, additional research is needed. For example, research on the PSA completed in other jurisdictions has found that the PSA differentially predicts FTAs by race (DeMichele et al., 2018). Similarly, like studies on other risk assessment tools (see Skeem et al., 2016), DeMichele et al. (2018) found the PSA differentially predicts new violent criminal activity for men and women. Equivalent research should occur across New Mexico to evaluate the equity and efficacy of the PSA by subgroups such as sex and gender, presuming the available data support such analyses. Furthermore, careful analysis of cases involving defendants who succeed or fail pretrial contrary to predicted outcomes, or whose risk scores are contrary to stakeholder expectations, should be assessed to determine if the instrument could be further refined for improved accuracy.

It is important to understand the limitations of risk tools in general. Numerous studies have found entrenched racial and class bias with risk assessments, requiring careful vetting to avoid perpetuating racial discrimination (e.g. Brooker, 2017; Doyle et al., 2019). Even with risk assessment tools such as the Arnold PSA that aim to be racially unbiased, the data on which results depend are taken from criminal justice sources, which are fraught with existing bias. Arnold Ventures, the creator of the PSA, has addressed the issue of bias, acknowledging that “[i]t would be unrealistic to expect that the PSA could remedy all racial bias in the pretrial phase of the criminal justice system” (Arnold Ventures, 2019, p. 4). They go on to say: “But we believe that the PSA can promote consistent decision-making by judges and can help reduce disparities that may otherwise arise in process [sic] of making decisions on pretrial release or detention” (ibid).

While the aim of risk assessments is to reduce inconsistent decision-making, extant studies have shown that judges weigh risk assessment results to varying degrees (e.g. Albright, 2019; DeMichele et al., 2018; Terranova et al., 2020). For instance, Albright (2019) found that judges in Kentucky were more likely to rule in favor of financial bonds for Black defendants who were moderate risk compared to white moderate-risk defendants, even after controlling for other key factors (e.g. current offense). These studies suggest that risk assessment tools may be a step, but not a final solution, in achieving pretrial equity.

Moreover, experts warn that future offending behaviors are not easy to predict in the way that risk assessments aim to:

As researchers in the fields of sociology, data science and law, we believe pretrial risk assessment tools are fundamentally flawed. They give judges recommendations that make future violence seem more predictable and more certain than it actually is. (Barabas et al., 2019)

The potential inaccuracy of risk assessments also can mean that the absence of flags for violence or flight risk do not imply that there is no risk.

In addition to bias with the tool and its implementation, there may be bias in the evaluation of the tool (Porter et al., 2020). Porter et al. (2020) explain that “a preexisting bias could be propagated by a risk-assessment tool and then not be detected in an evaluation of that tool” (ibid, p. 3). Therefore, thorough evaluations must account for these multiple areas of bias and uncover areas for continued improvement. As the authors explain: “An evaluation should compare the bias in the new system with the bias in the old. A good evaluation of a successful reform could both establish some degree of improvement and also highlight opportunities for future change” (ibid, p. 3).

Importantly, all studies rely on complete and accurate data. New Mexico struggles with a lack of adequate data to ensure evidence-based practices. For example, assessing whether there are differences by race and ethnicity may be impossible depending on which data source is used. The courts often do not record this information; thus, researchers would need to supplement from other sources to assess whether the PSA has different outcomes based on race. New Mexico is not alone in this regard; the Public Policy Institute of California reports that lack of data can hinder counties who wish to assess the accuracy of their adopted risk assessment tool (Harris et al., 2019).

Theme 5: Access to Information

In order to effectively implement bail reform, criminal justice actors need access to relevant data. Attorneys, judges, and pretrial services need information about a defendant’s criminal history, ties to the community, pending charges, and current offense to make recommendations or decisions about release. Currently, attorneys and judges may receive information from a wide array of sources. In this section, we give an overview of information used to make decisions about pretrial release and detention. We explain some of the barriers to accessing data, and then offer two recommendations for creating more efficient and consistent access to relevant information.

Type of Information that May be Available

All key stakeholders have access to the criminal complaint, which provides information about the current charges. Prosecuting and defense attorneys may also obtain information from interviews with defendants, witnesses, law enforcement, and victims prior to the pretrial detention hearing.

Judges and attorneys may learn about the defendant's criminal history through searching on Odyssey. Odyssey is a searchable database that houses information about civil and criminal court cases throughout the state (excluding municipal cases). Information on criminal history outside of New Mexico may be gathered from the FBI's National Crime Information Center (NCIC) reports, which includes arrests that never resulted in a court case. Another source of information that participants in one district described was the bond information sheet, which provides *"a history of convictions, pending cases, things like that. Dismissals. It also gives me a history of failures to appear to court, contempt of court, those kinds of things."* Pretrial services officers also provide background reports and risk assessments to judges.

Barriers to Accessing Data

While this information is crucial to making informed decisions, access and availability of data varies across and within districts. One area where this is most evident is in access to the results of the PSA.

While there are currently three districts that have implemented the PSA, only one had implemented it at the time of our interviews. Others are expected to follow, but in the meantime, there are districts that have no access to the PSA or any other risk assessment tool. Some participants indicated that they would like to have access to a tool:

I think that we're doing a good job with our gut check process, I just wish we had tools, we had a matrix, we had a risk assessment evidence-based tool, that we could rely [on] to make these decisions.

An interviewee from another district expressed frustration that the AOC is prioritizing training on the use of the tool in larger districts in which it is being piloted. Thus, that district does not have access to the PSA through the AOC. Expanding access to the PSA across the state may result in more consistent decision-making by stakeholders across judicial districts.

Even when tools like the PSA, or other sources of data, are available in a district, not all key decision-makers have equal or timely access to the results. For example, participants explained that sometimes the results of the PSA and other risk assessments are only available to judges prior to the hearing. Lack of access prevents prosecuting attorneys from using these results to help inform whether to file a motion for preventative detention. As one participant explained, *"That's an issue with the [risk assessment tool]. We don't get it until that afternoon and we've already had to make our decision."*

Timing is in large part responsible for this disparity in information, as judges do not need case files until immediately before a hearing. This disconnect in timing and access to information can contribute to the frustration judges have with prosecuting attorneys who fail to file for preventative detention in

appropriate cases. The rules guiding detention at the time of these interviews prohibit a judge from acting to protect public safety in these circumstances:

The [release] decisions aren't any harder... One place where it is a little weirder, is you get the risk assessment, which is [high risk] on the failure to appear, [high risk] on the new crime, and there's a violence flag. And the state hadn't filed a preventative detention. I'd really like to keep this guy in jail, but I can't. Because, if they don't file it, I can't.

A lack of information sharing also hinders the ability of defense attorneys to prepare their case. Some defense attorneys reported that they never see the results of risk assessments, even in districts where they are commonplace. Defense attorneys advocated for access to risk assessment results in advance of pretrial hearings:

We are not given any flight risk assessment tools that the courts look at. We are not given a copy of those, which I think is wrong. I think we should have the same evidence that the courts are relying on. And we are not given that information.

However, this desire is not universal. As another defense attorney explained,

We have a paralegal that goes down to the jail before we get there, and she gathers a lot of that information from the client. So, it's all written down for us. And there's also a chart that pretrial services does, which says what pretrial services wants, which the judges put a lot of weight to."

If the PSA is not completed in time for the prosecution or defense to review before-hand, neither side has the opportunity to adequately prepare, and judges may make decisions based on information that is not available to either party in the case. Although the New Mexico Courts website contains a page that states that all parties receive a copy of the PSA prior to the defendant's initial appearance in court (New Mexico Courts, n.d.-b), our interviews indicate this is not always true. Notably, in other states like New Jersey, the PSA is provided to all parties before the first appearance hearing (Anderson et al., 2019).

There is unequal access to other information as well. For example, in one district, attorneys' access to Odyssey is more restricted than judges', making it difficult to pull necessary information on defendants. One participant's exchange with a judge in their district demonstrates how judges can be unaware of this differential access to information:

And when, for example, Judge [name redacted] actually, we were having a meeting, she pulled me over to her computer, and she said, 'Well, here it is up here. You could just click on his name.' And I'm talking about the Odyssey system. 'You could just click on his name, and see all of his active cases.' And I said, 'Judge, we don't have that same access, and we don't have those buttons. Our platform and our dashboard is very different from what you're seeing.' But the judge expected that, because we have access, we're seeing the same thing, and she was astounded that it was so different.

While many attorney's offices have access to the NCIC as well as Odyssey, this access can be quite limited. For instance, in one office, only two employees have access to the NCIC, making it difficult to utilize it in preparation for pretrial hearings. In at least one district, judges and district attorneys have access to NCIC, while the public defenders do not. When asked whether their office has access to the

same information in a similar timeframe as the prosecuting attorneys, a defense attorney stated, “They may have access through NCIC or different things that we don’t have access to, because we don’t have a NCIC account at the public defender’s office that we can search.” In one district, judges will allow the attorneys to see the NCIC report, but not keep it. Access to NCIC is restricted, so not all stakeholders will be able to use this information.

In the Comments (2017), a number of stakeholders expressed concern about differential access to data in courts. For instance, in some districts, municipal courts do not have access to important information, specifically “triple I information, NCIC information, or any other government-based information systems”⁶ (Rael et al., 2017, p. 22) for making release decisions. In some districts, designees have access to immediate charges but lack information on full criminal history (Rael et al., 2017, p. 21). Meanwhile, metropolitan court judges expressed concern that cases that have been transferred from metropolitan to district court are not always linked in Odyssey, making it difficult to find full background information on the case (Benavidez & Chavez, 2017, p. 27).

Besides access to existing sources of information, participants also expressed desire for new sources. Multiple interviewees were concerned that New Mexico does not have a database that notifies the courts or other stakeholders of arrests or violations occurring in different jurisdictions.

If I’m prosecuting somebody for a horrible crime and they’re on conditions of release and they go pick up a new crime – let’s say they’re just on conditions of release on a DWI here and they go pick up a few more in Albuquerque, I might not know it at all unless I am quite often on top of running their name through the Odyssey and NM Courts to find out if they have new cases. There’s nothing out there that does the job of alerting me.

Recommendation: Increase Access to Existing Information

Some interviewees recommended equalizing the access to Odyssey and the NCIC to allow the prosecution and defense to fully prepare for pretrial hearings and ensure that decisions on pretrial detention are well-informed. Gaining access to at least some modules in Odyssey should be attainable; however, gaining access to NCIC may not be as simple. Access to the system is very limited: “And there’s also very good and close record keeping about using NCIC...So, only two people in our office of 30 people have access to NCIC. Two of the senior secretaries, so it’s not all the time.” However, agencies that do not currently have anyone certified to use NCIC may wish to look into the process and determine whether the system would provide them with helpful information.

PTS has access to multiple systems. For example, in one district, pretrial services officers can use Odyssey, NCIC, detention center data, and MVD records when completing a background investigation. While pretrial services plays an integral role in gathering background information, they might not share this information with all parties. One public defender explained,

⁶ Triple I information is the national criminal history record index maintained by the FBI; it is part of the NCIC system which also includes information on wanted and missing persons, and records of identifiable stolen property (Belair & Woodard, n.d.).

We don't get anything from pretrial services. What we do get is an email from the prosecutor with the charges. I just got this one. We got the criminal complaint, and we got the felony first appearance paperwork from magistrate court. And that's it.

Access to the PSA is also vital for all courtroom actors. Although the PSA may not be appropriate for determining whether to file for detention, it is a key piece of information that may influence the judge's decision. One participant explained that,

[The judge] relies on some of the Arnold tool, but we are not – she doesn't usually cite that. But she will cite some things in it. But we are not given that before the hearing to look at. Occasionally, when we argue that in court, she'll let us come up to the bench, and look at it. But that doesn't give us any opportunity to investigate it or argue against – prepare evidence against it.

Unequal access to other information generated by PTS is also exemplified in the quote above. As the state moves toward adopting the PSA, protocols should be put in place to ensure all stakeholders have equal and timely access to its results, as well as to other information that helps guide decision-making. This issue may have already been resolved in the 2nd Judicial District, at least for prosecutors. During the May 12, 2020 Ad Hoc Pretrial Detention Committee meeting, James Grayson from the 2nd Judicial District stated that their office is using the results of the PSA along with other criteria to determine when to file motions for detention, implying that they receive these results prior to filing. It may be helpful to examine their current protocols along with those of other states to ensure timely access to the results.

[Recommendation: Create a Central Database that Houses All Needed Data](#)

Another recommendation is to establish a centralized database that could be queried. For example, a participant explained that a consolidated, up-to-date database on defendant history would be immensely helpful in implementing bail reform:

We look on Odyssey support database. We look on our case management system. Of course, it's not a data repository, it's just a case management tool. And we pull from running NCICs... I know that DPS, Department of Public Safety, is working on it, but gosh it would be nice to have some sort of consolidat[ed] offender query that was real time and live. That would be really helpful.

As noted in the quote, there is an ongoing effort by DPS to construct a database using administrative data from multiple criminal justice sources. This would allow stakeholders to access information about a defendant's criminal history from multiple in-state sources (e.g., DPS, AOC). This is a huge undertaking, however, and is several years out from being realized.

Some stakeholders advocated for adding a component to a centralized database that would notify court stakeholders of arrests or violations within and across jurisdictions. This is available in other states, where systems have been constructed to notify all key personnel when a defendant with a pending case has been arrested. Such a system would relieve staff from having to manually query databases. However, it would likely be limited to solely in-state information.

Currently, the New Mexico Sentencing Commission is overseeing the development of an integrated database for bookings occurring in multiple jurisdictions. Participating detention centers contribute to this database. This is not the same as the database that DPS is creating. This dataset is intended to be used by all key criminal justice stakeholders. Long term, it could be configured to alert stakeholders of new bookings. However, the development of this database is in the preliminary stages and the implementation of an alert system could be many years out.

Theme 6: Community and Social Services

Many defendants have underlying circumstances, such as mental health issues, substance use disorders, and unstable housing, which may contribute to criminal justice contact. Several interviewees pointed to the role these circumstances may play in both failures to appear and new offenses. Therefore, we asked participants about the social services available in their communities to understand where there is support for underlying needs, and where these services are absent.

While it is not the role of pretrial services to act as a social service agency, PTS divisions can refer defendants to community resources. In addition to PTS, others can connect defendants to social services, including social workers and case workers within the public defender's office. According to participants, defense attorneys are in a position to identify a defendant's unmet needs and connect them with appropriate services, though others in the criminal justice system could also refer defendants to services.

Although Rule 5-401 states that a possible non-monetary condition of release is to “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,” interviewees were divided on whether judges should order defendants to receive treatment pretrial (N.M. R. Crim. P. Dist. Ct. 5-401(D)(10)). While some judges order treatment as a condition of release, others argue that treatment should not be ordered pretrial because the defendant has not been convicted. When treatment is not ordered, any efforts to address underlying problems must be voluntary. However, this often requires that defendants have the *“insight to say, hmm, I really need to work on my aggression... or I need drug treatment, help me.”*

In this section, we describe the resources available in communities to address some common challenges defendants face. These resources include substance use and mental health services as well as housing support. We also outline barriers to connecting defendants with services. Finally, we provide three recommendations to address these challenges.

Substance Use Services

Although substance testing is frequently used in pretrial monitoring, studies indicate that substance use treatment may be a more effective way to increase pretrial success. Currently, one way that substance use treatment is provided through the courts is through specific drug courts, which hear drug-related cases. Research on drug courts has shown that substance treatment results in lower levels of recidivism compared to those who have not received substance treatment (Belenko, 2001; Wilson et al., 2006;

Shaffer, 2010; Brown, 2010). Since courts in New Mexico do not offer substance use counseling, defendants must rely upon services within the community.

A few interviewees explained that judges may look favorably upon a defendant who has willingly taken steps to attend treatment. However, many participants perceived barriers to accessing programs or counseling. One barrier is financial: substance use services can be expensive. A participant explained that in one rural district,

There's nobody to pay for people. It's not the rich kids using drugs here. It's people who have no money and the government's not paying for treatment programs, unless they're in criminal trouble and it's a part of a court ordered sentence. And even then, there's very few of those.

Many participants recognize substance use as a serious challenge that needs to be addressed in order for defendants to be successful pretrial. As such, judges may refer or order defendants to programs that address addiction. However, there is reason for caution when considering ordering defendants to seek services. In a report from Harvard University, Doyle et al. (2019) concluded that imposing fewer mandatory conditions leads to better case outcomes. Fewer conditions are easier for a defendant to meet, while more conditions result in more opportunities for violations. Studies have reached different conclusions regarding the effects of requiring substance use and mental health treatment on pretrial success (see Bechtel et al., 2017). One study found that requiring treatment for lower risk defendants results in higher pretrial failure rates, while there was no significant effect for higher risk defendants (VanNostrand & Keebler, 2009). Overall, the report from Harvard's Criminal Justice Policy Project concluded that referrals to social services may be helpful, but recommended that they should not be mandatory (Doyle et al., 2019).

Mental Health Services

As with substance use treatment, the availability of mental health services varies across districts. Some districts have mental health courts. Like drug courts, these courts help link defendants to community-based treatment. These courts monitor defendants for compliance with treatment and to ensure the safety of the community.

Generally, though, defendants must seek mental health counseling on their own. They may be referred to treatment by pretrial services, defense attorneys, or social workers. However, services are not always available in every jurisdiction. As one interviewee explained, *"we don't have anything for mental illness."*

Housing and Homeless Shelters

Unstable housing is another complication faced by some defendants. Lack of affordable housing and homelessness can both impede a defendants' ability to be successful pretrial and play a role in pretrial release decisions. One interviewee explained that defendants are more likely to be released if they have housing lined up upon release. However, landlords, halfway houses, and other housing services often *"won't talk to [a defendant] unless [they are already] on conditions of release or probation."* Therefore, the defendant could possibly remain in jail due to their housing status.

There are ways to mitigate the disadvantage that homeless defendants experience. For instance, in one district, when a defendant is unhoused, the court uses the address of a specific shelter as the defendant's address for purposes of notifications. This also ensures that the court does not *"use the fact that they are homeless against them in determining bond."* Additionally, stakeholders such as PTS officers, case workers, and social workers may help homeless defendants find housing through community resources.

Basic unmet needs can create a barrier, making compliance more difficult for some defendants. For instance, a lack of housing may have multiple impacts on a defendant pretrial:

If you're homeless, you're not going to get letters from your attorney. You may not be getting phone calls from your attorney. You're going to miss mail from the court, notifications. So, something that would address homelessness, even if it's just temporary homelessness, which is something that low-income folks deal with all the time – that would be a major thing, a game changer.

Therefore, it is important to identify and address underlying needs that influence pretrial success. There are ways to mitigate the disadvantage that homeless defendants experience. For instance, in one district, when a defendant is unhoused, the court uses the address of a specific shelter as the defendant's address for purposes of notifications. This also ensures that the court does not *"use the fact that they are homeless against them in determining bond."* Additionally, stakeholders such as PTS officers, case workers, and social workers may help homeless defendants find housing through community resources. However, there are several barriers limiting defendants' access to social services. In the next section, we describe these barriers.

Barriers to Connecting Defendants to Social Services

Participants identified three key barriers prohibiting defendants from accessing the services they need. First, many communities simply do not have needed rehabilitative services, mental health services, and affordable housing. One participant identified substance use disorders as a root cause of many local crimes and expressed concern that their district does not have long-term residential rehabilitation programs of any sort. Another participant identified mental health treatment and support as a primary need in their community, but noted the absence of mental health services available to meet this need. Participants also addressed the need for affordable housing. For example, one district has *"essentially a total lack of any sort of service that could provide housing for low income people on a large scale,"* with *"no federal or state system in place that can provide housing in the way that's really needed to address the problem."*

Although social workers are available to help defendants in this district, housing options are limited and often difficult to access. The absence of these three key services in a jurisdiction can inhibit pretrial success and contribute to recidivism.

A second concern is that pretrial services are not effectively linking defendants to services and supports. While most of the prosecuting attorneys we interviewed indicated that the primary role of pretrial

services is to monitor, others felt that a key role of PTS is to provide or link defendants to social services: *“More people are being given a chance to be out of custody, but when pretrial services doesn’t do the job that they’re supposed to do in supporting people outside in the community, it fails.”*

Third, even when services are technically available in the community, many defendants lack the material means to access those resources. This can interfere with a defendant’s ability to comply with conditions of release. Barriers such as transportation, housing insecurity, and employment make adherence to conditions of release and reporting to pretrial services difficult:

One of the big difficulties is that a lot of people don’t have access to health insurance or any way to pay for things that are ordered. So... you end up with a lot of situations where an individual is required to do substance abuse counseling and, maybe, they’re homeless. They don’t have a driver’s license. They don’t have a birth certificate. They can’t get health insurance, whether that’s through the government or otherwise, so they have difficulty obtaining these things that are ordered. There are lots of options for substance abuse treatment, but the court doesn’t pay for that... So, you end up with a lot of situations where the problem is that people can’t access insurance to get treatment services. There are all sorts of services out there, but for poor people, they’re not always easy to get those services... But there are other practical issues. People don’t have cars so they have to take the bus to try to access these things. So, there’s a wealth of services out there, there’s just barriers for people to access them.

These problems are not unique to New Mexico. For example, New Jersey has struggled with similar problems as they implement bail reform (see, e.g., O’Dea, 2018).

Recommendation: Assess and Address Community Needs for Services

Several participants recommended addressing deficits in the availability of and access to social services. As an initial step, the state should assess the need for social services in each district and complete a gap analysis comparing this with what services are available. Short term, this would generate a comprehensive list of resources available in each community, allowing for better informed referrals to services. Long term, a gap analysis would reveal areas where funding, staffing, and new services are needed. This could include transportation to other areas that have the services currently available or expanding telehealth services.

This recommendation extends beyond the criminal justice system, requiring collaboration with healthcare providers, community leaders, organizations, and others. Community services are integral to effectively meet the needs of defendants and keep communities safe. Addressing the needs of defendants would improve the well-being of the whole community, particularly in rural areas where fewer services are typically available and accessible.

...the problems in the criminal justice system don’t just exist in a vacuum. They exist because of economic forces and issues with poverty and all sorts of other societal issues that affect that. So it’s difficult to say, is there one thing we can do to fix bail issues? It’s really, if you wanted to fix that, you really need to target the things that cause criminality to happen. And that’s economic issues and mental health issues, and things like that that just- without addressing those things, it’s hard to imagine how you could fix bail.

Recommendation: Provide a Mechanism to Assess Defendants' Needs

While defendants may have underlying needs that play a role in pretrial failures to appear and new offenses, their individual needs may be difficult to determine. While needs are sometimes divulged by defendants or ascertained from their charges, some needs may be less visible. Many interviewees spoke to the lack of a reliable mechanism to assess these needs.

In order to address this deficit, one interviewee recommended implementing a needs assessment tool. An example of this is the Criminal Court Assessment Tool (CCAT) developed by the Center for Court Innovation in New York, which screens risk and needs, such as education, employment, housing, rehabilitative services, and mental health treatment (Picard-Fritsche et al., 2018). As with risk assessments, however, administering a needs assessment requires staffing. In New Mexico, these staff could be housed in PTS, the public defender's office, or any other location deemed appropriate.

Recommendation: Identify Ways to Connect Defendants to Needed Social Services

Currently, it is unclear whether any one entity is responsible for connecting defendants to services. Several interviewees recommended that pretrial services could perform this function. Specifically, participants argued that pretrial services could substantively connect people to existing services, such as housing, counseling, and other needed supports:

When we're releasing people to pretrial services and they're coming out of custody, they're going to need help. They're going to need maybe more than just a list of shelters or places and stuff. They're going to need real help on how to succeed in life, because if they can't – if they don't have a place to sleep, they're not going to make their appointment the next morning at 10:00. It's just not going to happen... They're going to need real counseling. Maybe pretrial services need social workers.

Counselors, caseworkers, or social workers could fill this role, whether within PTS or outside of it. Social workers in another office could also perform this task. For example, in two districts in which we did interviews, social workers are housed in the public defender's office. These social workers provide referrals to community resources and assist defendants in finding programs and treatment before they are released from jail. Social workers could also be housed in other parts of the criminal justice system, or outside of the criminal justice system altogether, so long as defendants were connected to these social services.

Section VIII: Recommendations for Other States

New Mexico is one of many states reforming their bail system; other states will likely follow in the future. Based on New Mexico's experience to date, we asked interviewees if they had advice for other states. Despite the challenges experienced in New Mexico, nearly all participants agreed with the concept of bail reform, and most felt New Mexico was headed in the right direction. As one interviewee said, *"I would say begin with New Mexico's model. I like this. I like it a lot."*

In this section, we provide recommendations for other states considering bail reform to help them smoothly execute bail reform, both before and after initial implementation.

Prior to Implementation

Before implementing bail reform, policymakers should first include time for planning. Second, states should evaluate existing criminal justice resources available to support reform efforts, and generate a plan for addressing new financial and staffing needs. Third, stakeholders should consider community context, including specific community needs and available community services. Lastly, officials should build coalitions to promote buy-in from both criminal justice stakeholders and constituents.

Include Time for Planning

In New Mexico, the amendment was passed without any time built in for planning prior to implementation. Participants emphasized the need to deliberately plan for implementation. As one interviewee explained, states should *"Do it slowly. I feel like our rules were passed quickly. It took a little bit for everybody to get on board and know what they were doing."*

One way to approach this would be to delay the date the statute takes effect for six to twelve months after it is approved by voters. Planning should occur on multiple fronts. First, states should carefully consider how the law will be written, and under what circumstances someone will be detained (dangerousness and/or flight risk), and the consequences of that choice. Providing guidance to prosecutors to help them make decisions about filing in a timely manner is important.

Second, states should complete a thorough assessment of current court, prosecutor, and defense attorney procedures and practices within each district, noting any processes that may be altered by bail reform. Stakeholders should explore how changes would be supported, to help each district anticipate issues with implementing bail reform, from staffing to court logistics. States should also consider whether changes will result in the collapse or severe curtailing of the bond industry, and how that might impact defendants. In New Mexico, we found that some participants observed unanticipated negative consequences for defendants who were ordered to pay a bond.

Third, the rules should be drafted and vetted before the change takes effect. In New Mexico, the specific rules governing bail reform (Rules 5-401, 5-409, and the modifications to Rule 5-403) were not provided until six months after the amendment was officially enacted. Delaying implementation of the amendment would have allowed time for the judiciary to draft the rules governing bail reform and allow adequate time for stakeholders to vet those rules.

Fourth, policymakers should build in time to coordinate and conduct training for all stakeholders on the rules and associated policies *prior to* implementation. As the present study finds, consistent and comprehensive training for judges, attorneys, pretrial services employees, and support staff is needed for effective and consistent implementation of bail reform. However, training can only occur once the rules have been promulgated.

Evaluate Resources to Support Changes

Bail reform requires adequate infrastructure to be as successful as possible. States considering implementing bail reform should prepare the resources necessary to effectively enact a bail reform amendment. Stakeholders should consider risk assessment instruments and decision-making frameworks, existing pretrial services, existing and anticipated staffing needs, and mechanisms for information sharing. Since there are costs associated with each of these needs, states should carefully assess currently available resources to support bail reform efforts.

First, if effective, bail reform will result in an increase in the number of defendants released during the pretrial period. Thus, stakeholders should assess whether their current statewide infrastructure will adequately and fairly support monitoring defendants. In New Mexico, some districts have well-developed pretrial services divisions, while others have none at all. New Mexico is in the process of expanding pretrial services throughout the state, but it will take many years for that to come to fruition. Other states should generate plans for supporting pretrial services prior to the implementation of reform efforts.

Second, and intimately tied to the first issue, bail reform requires some assessment of risk. Planners should inventory risk assessments currently used in their states and determine whether these adequately measure the type of risk they need to assess (e.g., risk of new criminal activity, flight risk) based on their state laws. States must consider whether a single tool will be required, whether it is currently available across the state, and how long it will take to make it available if it is not. It is notable that just three of the 33 counties in New Mexico officially have access to the PSA. As we found here, this can contribute to disparate decision-making across the state. States undertaking bail reform should research risk assessment tools and associated decision-making frameworks, and determine whether resources are available to implement these tools. Logistically, policymakers should consider the cost of implementing a risk assessment instrument statewide. This should include an assessment of current procedures, who would be responsible for completing the assessment, what training would be needed to interpret the results, and validating the tool.

Third, the mandate should include funding to support changes, including additional staffing in criminal justice positions. Workloads on attorneys, judges, and support staff may increase, which may

necessitate funding for additional hiring. For example, bail reform increased the preparation required of prosecuting and defense attorneys for new pretrial detention hearings, who must quickly gather criminal history information, interview witnesses and/or victims, etc. This may require additional staffing for each office. Policymakers should evaluate the investment in time and financial resources required for effectively reforming pretrial practices. For instance, each office should consider how much time will be invested in the pretrial process, whether hearings will happen more frequently under the new rules, and whether there is adequate staff to fulfill these requirements. Each office should assess whether existing resources could be shifted to accommodate the change, and if not, what is needed to do so:

I even think that they probably should have... met with the support staff, and meet with the teams, to see how a case comes in, what's required around opening, and the logistics of how we operationalize a case, and how many we deal with on a given day, and what's the process. Because we have a whole team that that's all they do, and it would have been nice for people to have an understanding of how that was going to affect, not just the lawyers, but of course, the support staff behind the scenes doing it.

Fourth, states should ensure all relevant parties have equal access to reliable information. This includes information for initial release decisions in a case (e.g., criminal history, risk assessment, current offense), as well as information sources for monitoring defendants. A critical assessment of existing infrastructure related to availability of data is crucial. This should include assessing whether a comprehensive data system exists, how reliable the data are for decision-making and assessment of practices, who has access to which data sources, how any differential access may impact defendants and the community, and what resources are available to alert officials if defendants are arrested while on release.

Finally, other resources pertinent to implementation (e.g. rules, case law, and any useful decision-making guidelines) should be compiled and made available in a centralized location. For example, in New Mexico, the Administrative Office of the Courts has a webpage dedicated to bail reform. On this page, they provide information on bail reform nationally, New Mexico court rules and case law, research on bail reform, and more. This allows the public and practitioners to quickly and efficiently access relevant information. In addition to compiling rules, case law, and research, district attorneys may consider assembling resources such as decision-making matrices and guidelines in a centralized location that is accessible to other district attorneys throughout the state. Defense attorneys could similarly compile information relevant for preparing for pretrial detention hearings and other hearings.

Consider Community Context and Plan for Defendants' Needs

It is also important to recognize the individual needs and resources of communities that influence crime and the criminal justice system. Taking a broad look at available community resources is important for evaluating support for bail reform implementation. For instance, a community with established services for substance use treatment, housing assistance, and other social services may be better prepared to provide for increased numbers of released defendants, facilitating greater pretrial success. If resources are not readily available in a community, stakeholders should assess what options might be available to

help defendants whose crimes are driven by or associated with underlying problems. Understanding the limitations of community resources will help stakeholders anticipate and address challenges and needs.

States must also consider how they will assess and address defendants' acute and chronic mental health and other needs that influence pretrial success. States should consider who will be responsible for assessing needs and what will occur if it is determined that there is a need. States should also assess whether defendants are likely to encounter any barriers to accessing services, including but not limited to, insurance, capacity of service providers, transportation, language barriers, and cultural barriers.

Build Coalitions and Increase Buy-In

Participants identified another key recommendation for other states considering bail reform: garnering buy-in. As a first step, policymakers need to understand how bail reform will impact each practitioner. As one interviewee explained, buy-in is more than getting feedback on rules:

I would just say that it would have been really, really helpful to have more buy in. They'll say that, of course, the rules were promulgated. The promulgation process has its own structure around it, in terms of notice, and comment, and opportunity to be heard. But I do think that it would have been helpful to actually have buy-in to say, great, this all looks good on paper, but the realities of how the [practitioner] has to adjust and adapt on [a] day to day basis, the logistics around it, were not very thought out.

Another interviewee explained that “there's still a lack of buy-in from some of the stakeholders.” They went on to explain that, while stakeholders have bought into the broad goals of bail reform, there are outstanding disagreements on some of the specifics, such as the use of a risk assessment tool and the criteria for pretrial detention. Our report demonstrates this; while many participants appreciated the general intention of bail reform, there is a lack of buy-in and continuing tension around the specifics of implementation.

Other participants discussed attending meetings prior to and after reform occurred, with varying success across districts. It is important that all key players be invited to participate in such meetings, as they each have invaluable information to contribute. Sometimes communication between stakeholders can break down; anticipating this break down and making plans for it can be helpful for successfully achieving the goals of bail reform. Lack of communication can also lead to inefficiency, such as the duplication of services (e.g., Pretrial Services and others). Ensuring that all key stakeholders are communicating and working together is imperative.

Following Implementation

Once implemented, states should carefully identify and address any problems associated with rules as they arise. Further, stakeholders should provide ongoing, up-to-date training, invest in evaluative research on all aspects of reform efforts, and continue to encourage collaboration between various stakeholders and community members.

Provide Regular Trainings for Stakeholders

Participants emphasized the importance of staying up-to-date on bail reform policy, since case law and amendments are likely to change the interpretation and implementation of the rules. Providing regular training facilitates communication between stakeholders on pretrial decision-making, best practices, and policy changes; moreover, it can help educate new staff. Any state implementing a bail reform amendment should prepare for training not only on the initial policy change, but on a regular basis after the amendment has gone into effect.

Continuous Evaluative Research

To ensure that pretrial practices are effective and evidence-based, stakeholders should invest in ongoing evaluative research after implementation. Stakeholders need to understand how pretrial outcomes have changed, how pretrial decisions are made, the effectiveness of risk assessment tools, and ensure best practices for pretrial services and monitoring. Research can help identify problems that arise and identify possible solutions.

Promote Collaboration

While buy-in from stakeholders and constituents is key before implementing a bail reform amendment, encouraging collaboration is a continual process. Ensuring that there is continuing discussion between different stakeholder groups as the amendment takes effect and evolves is critical. This would provide participants an opportunity to discuss problems they have identified and explore solutions together. Within and across districts, stakeholders should meet to respectfully listen to and address the concerns of each member within multidisciplinary team settings. Collaboration and buy-in are keys to success.

Section IX: Summary and Discussion

New Mexico constituents approved the bail reform amendment in November of 2016. The constitutional amendment was intended to ensure public safety while preventing the pretrial detention of defendants simply because they are unable to post bail. In this report, we explored how these rules are being implemented across the state. We focused on how judges and prosecutors make decisions about pretrial release and detention and how the information that they consider and factors that they weigh lead to different release outcomes. We explored how those decisions and related outcomes vary across and within districts. We identified the role that defense attorneys play in the pretrial release process and how these roles have shifted with the amendment. The current study finds that much has changed about the pretrial process since bail reform began, and it is still evolving. We identified supports and barriers to implementation, as well as ways in which bail reform is working well and ways it could be improved. Finally, we relayed recommendations offered by our participants and compared these to suggestions made in other contexts. While bail reform is a work in progress, and participants identified a number of areas for improvement, the vast majority of stakeholders we spoke with felt that New Mexico's bail reform has successfully reduced reliance on bonds as a release condition.

Bail Reform in Action in New Mexico

New Mexico's constitutional amendment on bail has resulted in a number of changes to the pretrial process. Initially detaining a defendant pretrial depends on two events. First, the prosecutor must motion for pretrial detention under Rule 5-409. Second, the judge must rule in favor of the motion. Judges may only grant pretrial detention if presented with "clear and convincing evidence" that a defendant poses a danger to the community or any individual, and that no conditions can mitigate that dangerousness. In addition to detention, there are two other possible release outcomes. The judge may order release with secured bond; this is primarily used to mitigate flight risk and ensure a defendant's appearance in court. If the judge finds neither dangerousness nor risk of flight, a defendant is released on their own recognizance which may include unsecured bond and other conditions.

Decisions about Detention

In New Mexico, a finding of dangerousness is required to detain a defendant pretrial. Unlike other states, detention cannot be used solely to mitigate flight risk, though in practice, it is likely that defendants who pose a flight risk also pose a danger. In this way, New Mexico aligns with literature emphasizing the need to disaggregate evaluations of flight risk and community risk when determining whether to detain a defendant (Gouldin, 2016). Moreover, risk of fleeing a jurisdiction is often conflated with local nonappearance, and circumstances of failure to appear are often not considered when assessing flight risk or nonappearance (Gouldin, 2018). Therefore, there are reasons to be cautious when using flight risk as a criterion for detention.

However, stakeholders differ on how they define "dangerousness" as well as what constitutes "clear and convincing evidence." This has led to frustration for all parties; some perceive that prosecutors are filing

inappropriately or failing to file when warranted. Furthermore, some stakeholders believe judges release dangerous defendants or detain inappropriately. One point of contention is whether prosecutors should use the charge to screen for dangerousness, given that the charge may not capture the true nature of the offense.

Defining Dangerousness

Since bail reform went into effect, additional guidance has been provided through case law and amendments to the initial rules. In *State v. Groves*, the New Mexico Supreme Court clarified that the charge itself is not sufficient for ruling for detention; in *State v. Ferry* (2018-NMSC-004, 409 P.3d 918 (2017)), they further clarified that the nature and circumstances of the charged offense may be sufficient to prove that a defendant is a threat to others. However, the prosecution still has to prove there are no conditions of release that will ensure the safety of others. Thus, when screening cases for detention, prosecutors and judges consider the nature of the current offense, criminal history, and a history of noncompliance to be central.

One of the criticisms frequently levied against prosecutors is that they do not take into account the results of a risk assessment when determining whether to file for pretrial detention. Currently, three counties use the state-approved Public Safety Assessment (PSA) developed by the Laura and John Arnold Foundation. Other counties use a different risk assessment or none at all. However, we discovered that not all criminal justice actors have access to the PSA or other risk assessment prior to the felony first appearance where prosecutors typically make the motion to detain. If prosecutors do not have access to the results of a risk assessment prior to this hearing, they cannot consider those results before they enter the courtroom. Even if the results were available, though, stakeholders have raised concerns that the PSA's recommendations may not be appropriate to guide prosecutorial decision-making. Specifically, the PSA may suggest detention for an individual who does not pose a danger to any individual or the community. The flag for new criminal violent activity, however, may be helpful for prosecutors when assessing dangerousness.

In addition to posing a challenge for prosecutors when weighing cases for pretrial detention, the lack of a shared definition of dangerousness has led to some inconsistencies in pretrial outcomes across districts. While we do not yet have data to show whether each district detains defendants pretrial using different standards of dangerousness, our interviews indicate that community context does shape this definition. Although it is important to allow implementation to vary across different communities to address local concerns and needs, this can present challenges. It is critical for attorneys and judges to come to a common definition of dangerousness, so that they can prioritize cases for detention that fit these criteria. These criteria would not prohibit prosecutors from filing on other cases, but may help to limit the perceived frivolous filing, as well as flagging cases that might be appropriate for pretrial detention that may have slipped through the cracks.

One way to standardize “dangerousness” is to use rebuttable presumptions as both the federal government and other states do. Rebuttable presumptions help prosecutors identify a limited number of defendants for whom detention is warranted. However, the use of rebuttable presumptions is not

without controversy, and some studies suggest that the practice increases the number of defendants detained pretrial as it has become “an almost de facto detention order” for those who meet the criteria (Austin, 2017 p. 61).

Clear and Convincing Evidence

Criminal justice actors in New Mexico also disagree on what constitutes sufficient “clear and convincing evidence” of danger to warrant pretrial detention. Conflicting perspectives on this matter led to another key case: *State ex rel. Torrez v. Whitaker* (2018-NMSC-005, 410 P.3d 201). In this case, the New Mexico Supreme Court justices ruled that live witnesses are not required at a pretrial detention hearing and that proffers are acceptable. Recent revisions to Rule 5-409(F)(3) reiterate this ruling.

Decisions about Bond

The criteria for bond, on the other hand, differ. Judges may order release with bond for defendants who do not meet the conditions for detention but present a risk of flight. Interviewees explained that they consider a history of failures to appear, the possibility of a long sentence if convicted, and a lack of ties to the community when assessing whether a defendant poses a flight risk.

Our interviews revealed that the use of bond varies across the state. In some districts, judges rarely order bond, and when it is ordered, judges typically set very low amounts. In other districts, judges continue to use bond regularly, sometimes in ways that it is not intended under the current rules (i.e., to prevent the release of dangerous individuals), and bond can be set at multiple thousands of dollars or more. When judges set high bonds, whether by intent or default, defendants may not be able to secure their release. There are safeguards in the rules requiring judges to reconsider the bond amount when a defendant does not post bond within a few days. Participants indicate that frequently, judges set unsecured bonds, meaning that a defendant is only required to pay in the event that they fail to appear for a court date. However, there is no data yet to show how often judges order bonds, how high bonds are initially set, and whether judges lower bond amounts and, if so, when that occurs.

Decisions about Release

The third, and perhaps most common, pretrial outcome is release on recognizance. Defendants who are not dangerous, or for whom dangerousness can be mitigated through conditions, and who do not pose a risk of flight are released without a bond. Judges can impose a variety of release conditions, depending on both what they deem appropriate and what is available. Judges typically order a standard set of conditions (e.g., do not break any laws, do not possess drugs or firearms, do not contact the victim(s) or witness(es), appear to court), and may set conditions which are specific to the nature of the case (e.g., do not contact any children, in the event of a child abuse case). They may also order an unsecured bond, which would only be paid if the defendant fails to appear at court.

Monitoring for Compliance

The options available for monitoring a defendant’s compliance with conditions vary from district to district. Some districts have well-funded, established, comprehensive pretrial services; others have no

pretrial services at all. In those districts without pretrial services, the courts may use contractors to provide specialized monitoring, such as GPS or alcohol bracelets, but defendants may be required to pay for those services themselves. In the absence of contractors and PTS, courts may actively search detention center records for new arrests of people currently released. Others learn of violations through law enforcement or others with information about violations. No data is yet available to assess whether violations are more or less likely to be detected when there is not active monitoring, but one would expect that, unless the violation leads to arrest or is reported by a victim, violations are less likely to be detected in areas without pretrial services.

If a defendant violates a condition of release, they face a range of responses: a verbal or written warning, the imposition of new conditions, or the revocation of release. The severity of the response may depend on the severity of the violation and the original charge; however, there are no common statewide standards for responding to violations. Judges may choose to detain any defendants who violate conditions of release during the pretrial period, per Rule 5-403. In these cases, dangerousness is not a required element for detention. Some participants view this as a safeguard, catching those defendants who have shown that they should not be released pending trial. Others see this as a violation of defendants' rights, because judges may detain a defendant for relatively minor technical violations.

Impact of Bail Reform

Participants identified three central areas of impact from the implementation of bail reform. First, participants perceive bail reform to have increased the number of defendants released pretrial. Some see this as positive: it may be an indication of preserving defendants' rights and upholding the constitutional presumption of innocence. For others, this is negative, as increased release of defendants may place communities at risk or result in greater rates of failures to appear.

A second area of impact is the use of bond. Interviewees noted that bonds are now set much less often and in lower amounts. Rather than being used to secure release, bond is typically used to encourage appearance in court. This is a significant change from pre-reform practices, when judges often set bond as a condition of release. However, judges' use of bond varies.

Finally, there have been changes to the pretrial process, including new hearings. In many districts, prosecutors now attend felony first appearances, whereas previously they typically did not. Most notably, participants indicate that the new preventative detention hearings and increased number of compliance hearings can place an increased burden on the courts, attorneys, judges, and support staff.

Supports, Challenges, and Moving Forward

While there are supports available to implement bail reform throughout New Mexico, they are not consistent across all jurisdictions. Participants and other sources of data identify supports and challenges with rules and policies guiding bail reform; education about those rules; accessibility and

completeness of information available to make decisions; and needed supports such as pretrial services, additional staff, and community and social services.

Stakeholders made many recommendations that would help ensure consistent and fair implementation of bail reform. The most common area identified is that prosecutors need clearer guidelines for filing motions for preventive detention. The recent modifications to the rules addressed one concern that stakeholders have: that prosecutors fail to file when warranted. The amendment allows judges to delay the decision to release for up to 24 hours if the case is in the lower courts or up to 48 hours if the district court schedules a pretrial detention hearing; this allows prosecutors time to vet cases involving potentially dangerous defendants. However, this does not address the concern that stakeholders had regarding the perceived over-filing of motions where detention is not warranted. New Mexico stakeholders need to continue to work together to resolve this issue. Resolution could occur formally, by amending the existing rules to include rebuttable presumptions and/or other criteria, or informally, by creating and sharing agreed upon decision-making tools. Furthermore, judicial decision-making should be more transparent to help prosecutors better evaluate their cases.

The short time limits in the rules often contribute to challenges with prosecutorial decision-making. Many participants noted that having to make the decision to file for detention with limited information due to time constraints was challenging; this is bound to lead to some erroneous decisions. Participants suggested changing the rules by extending the time limits to key hearings or encouraging attorneys to pursue a continuance when warranted. Furthermore, all parties should have timely access to consistent information key to decision-making.

In order to be successful during the pretrial period, defendants should have the appropriate amount of monitoring, as well as access to resources to address underlying needs. Interviewees from several districts recommended increased funding of pretrial services to adequately staff or implement PTS statewide. Furthermore, participants expressed a need for a vetted risk assessment tool, as well as ongoing assessment of pretrial services and any risk assessment tool in order to ensure effective and evidence-based practices. Interviewees also recognized the challenges that some defendants face that influence their ability to comply with release conditions, including remaining crime-free. Substance use, mental health, and housing instability are all conditions that influence success. Identifying defendants' needs, resources in the community to meet those needs, and referring defendants to services when warranted and available are key to successful bail reform. Long-term, New Mexico should work towards ensuring adequate funding for behavioral health and other services to increase access in each community.

Limitations of Current Study

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.

Future Research

Ongoing research is required to ensure that bail reform efforts are effective in achieving the desired results. Locally and nationally, policymakers are calling for evidence-based and data-driven pretrial justice (e.g. PJI, CJPP, Vera, and The Marshall Project). This involves accurate data collection of release and detention decisions, pretrial outcomes, appearance rates, sentencing outcomes, and more.

The current report is the second phase of the New Mexico Statistical Analysis Center's planned research on bail reform. In the next phase, we will focus on quantitative measures of change since the amendment was enacted. Using data from select detention centers in a sample of New Mexico counties, we will examine whether and how detention rates and lengths have changed since bail reform, whether there are differences in pretrial success as measured by rates of reoffending and appearance, and any changes in the use of bail. We will also gather data to assess how frequently pretrial motions are filed and the outcomes of those motions.

Research is also being completed by others in New Mexico. For example, performance measures from the Legislative Finance Committee are beginning to look at the number of preventative detention motions filed, the percentage of detention motions granted, and changes in attorney workload (New Mexico Legislative Finance Committee, 2020). Additionally, the Center for Applied Research and Analysis at the Institute for Social Research is continuing research in Bernalillo County. Together, these studies are expected to provide valuable information to stakeholders engaging in bail reform in New Mexico and across the nation.

However, more research is needed. The current study identifies some of those needs. It is clear that implementation and outcomes should be assessed across all districts in New Mexico. Extant research and evaluation provide a framework for continuing to research bail reform efficacy in New Mexico. States have used performance measures such as jail populations (Vera Institute of Justice, 2020b; Tafoya et al., 2017), appearance rates (Pretrial Justice Institute, 2019), crime rates, and new arrests (Jones, 2020; Pretrial Justice Institute, 2019) to ensure effective practices. Further delving into whether such rates vary by crime type and race can point to differences in pretrial equity (Tafoya et al., 2017). The

However, as the Vera Institute notes, this information is often not publicly available in real-time, making evaluations of bail reform difficult and creating a lag before studies can be completed (Jones, 2020). Challenges with access to criminal justice data are also present in New Mexico, sometimes slowing down or inhibiting key research. Overall, these existing studies and others provide additional direction for New

Mexico to follow in order to ensure that bail reform is evidence-based and effectively meets its intended outcomes. Importantly, researchers must clearly identify the limitations of their studies to ensure that stakeholders understand and use the results of those studies appropriately.

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. Moreover, detention decisions are carefully deliberated; defendants are no longer automatically ordered to pay bond to secure release. While there is a need to bolster consistency in pretrial detention practices, most participants perceived that bail reform has been generally 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.

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Appendix

Appendix A: Preventative Detention by State

Table A.1 Preventative Detention by State

State	Defendants Eligible for Pretrial Detention
Alaska	Defendants charged with capital offenses, unclassified felonies, class A and sexual felonies, felony DWI, failure to submit to a chemical test; repeat felony crimes against a person; domestic violence offenses (A.R.S. § 13-3961, 2017)
Arizona	Defendants charged with a capital offense, sexual assault, or sexual conduct with a minor if one of the following is true: the perpetrator was at least eighteen years of age and the victim was under thirteen years of age OR the victim was thirteen or fourteen years of age and the perpetrator was at least ten years older than the victim
California	Specified crimes of violence, on post-conviction supervision, pending felony, threatened witness or victim, or pretrial supervision will not assure protection of the public and victim and the defendant's appearance (National Center for State Courts, 2020)
District of Columbia	Specified violent or dangerous crimes, offenses under DC Theft and White-Collar Crimes Act, or serious risk that the person will obstruct justice or flee (National Center for State Courts, 2020)
Illinois	Defendants charged with capital offenses, offenses punishable by life, stalking, aggravated stalking, felonies not eligible for probation, unlawful use of weapons within a school zone, or terrorist threats
Indiana	Defendants accused of murder or treason
New Jersey	Defendants accused of the first or second degree of: murder, aggravated manslaughter, manslaughter, vehicular homicide, aggravated assault, disarming a law enforcement officer, kidnapping, aggravated sexual assault, sexual assault, robbery, carjacking, aggravated arson, burglary, extortion, booby traps in manufacturing or distribution facilities, strict liability for drug induced deaths, terrorism, producing or possessing of chemical weapons or biological agents or nuclear/radiological devices, racketeering, firearms trafficking, child sex offenses, and domestic violence; any other crime subject to punishment by life imprisonment
New Mexico	Any defendant charged with felony for whom a pretrial detention motion is filed
Texas	Defendants who are 1) charged with felonies AND one of the following conditions are met: 2) the defendant has two prior felony convictions; 3) the defendant is charged with an offense involving a deadly weapon and they have at least one prior felony conviction
Washington State	Defendants charged with capital offenses or any offense punishable by life

Appendix B: Pretrial Detention Rules

N.M. R. Crim. P. Dist. Ct. 5-401 (eff. Nov. 23, 2020) (copied verbatim, revisions eff. 11/23/2020 are underlined)

5-401. Pretrial release.

A. Hearing.

(1) **Time.** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the 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) 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 findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary 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 defendant 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 M 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 5-401.1 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 M of this rule, or
(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 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.

- (1) If the prosecutor files a motion for pretrial detention, the court shall follow 18 the procedures set forth in Rule 5-409 NMRA.
- (2) The court may schedule a detention hearing within the time limits set forth in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and defendant when
 - (a) The defendant is charged with a felony offense
 - (i) involving the use of a firearm;
 - (ii) involving the use of a deadly weapon resulting in great bodily harm or death.
 - (iii) which authorizes a sentence of life in prison without the possibility of parole, or
 - (b) A public safety assessment tool flags potential new violent criminal activity for the defendant.
- (3) If the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under this rule and issue an order setting conditions of release

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.
- (2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is thereupon released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and

convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) **Work or school release.** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) **Subsequent motion for review.** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

J. **Record of hearing.** A record shall be made of any hearing held by the district court under this rule.

K. **Cases pending in magistrate, metropolitan, or municipal court; petition for release or review by district court.**

(1) **Case within magistrate, metropolitan, or municipal court trial jurisdiction.** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) **Felony case.** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) **Petition; requirements.** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(4) **Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.** Upon the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) **District court review.** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) **District court order; transmission to magistrate, metropolitan, or municipal court.** The district court shall promptly transmit to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. Expedited trial scheduling for defendant in custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

M. Return of cash deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. Release from custody by designee. The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. Bind over to district court. For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

P. Evidence. Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

R. Judicial discretion; disqualification and excusal. Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a

secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. See 18 U.S.C. § 3142.

This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, see Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, see Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, see Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to 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.

Paragraph D lists various non-monetary conditions of release. The court must 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 and the community. See *Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose nonmonetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, ABA Standards for Criminal Justice: Pretrial Release, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. See *State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); see also NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. See *Brown*, 2014-NMSC-038, ¶ 53 ("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."); see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of nonmonetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the

defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 5-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. See Form 9- 303 NMRA (order setting conditions of release). Paragraph F also requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody due to inability to post bond or meet the conditions of release. See generally *United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161”); Am. Bar Ass’n, ABA Standards for Criminal Justice: Pretrial Release, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”).

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief district court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant’s first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court upon notice from the district attorney that an information or indictment has been filed. See Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in district court with respect to matters of pretrial release. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release hearing the court is responsible “for assessing the reliability and accuracy” of the information presented. See *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); see also *United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. See NMSA 1978, § 38-3-9. Paragraph R of this rule does not prevent a judge

from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. See N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

5-403. Revocation or modification 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 hearing.
- (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 5-401 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.

G. **Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. **Review of conditions.** If the court enters an order setting new or additional conditions of release, the defendant may file a motion to review the conditions under Rule 5-401(H) NMRA. If, upon disposition of the motion, the defendant is detained or continues to be detained because of a failure to meet a condition imposed,

or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. 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. On the written motion of the prosecutor or the defendant, or on the court's own motion, the court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

J. Appeal. If the court revokes the defendant's release, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.

K. Petition for review of revocation order issued by magistrate, metropolitan, or municipal court. If the magistrate, metropolitan, or municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph.

(1) Petition; requirements. The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition. Upon the filing of the petition, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The case shall proceed in the magistrate, metropolitan, or municipal court while the petition is pending.

(3) District court review. The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release in accordance with Rule 5-401 NMRA.

(4) Transmission of district court order to magistrate, metropolitan, or municipal court. The district court shall promptly transmit the order to the magistrate, metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

(5) Appeal. If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

L. Judicial discretion; disqualification and excusal. Action by any court on any matter relating to pretrial release or detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from reviewing a lower court's order revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order Nos. 20-8300-013 and 20-8300-019, effective for all cases pending or filed on or after November 23, 2020.]

5-409. Pretrial detention.

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 the case.

D. **Case pending in district court.** If a motion for pretrial detention is filed in the district court and probable cause has not been found under Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203 NMRA, Rule 6-204(B) NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the district court finds no probable cause, the district court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion for pretrial detention without prejudice.

E. **Detention pending hearing; warrant.**

- (1) **Defendant in custody when motion is filed.** If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.
- (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. The court may make its decision regarding pretrial detention based upon documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof presented at the hearing.

G. Order for pretrial detention. The court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The court shall file written findings of the individualized facts justifying the detention as soon as possible, but no later than two (2) days after the conclusion of the hearing.

H. Order setting conditions of release. The court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file written findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than two (2) days after the conclusion of the hearing.

I. Further proceedings in magistrate or metropolitan court. Upon completion of the hearing, if the case is was pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate or metropolitan court may modify the order setting conditions of release upon a showing of good cause, but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court an order closing the magistrate or metropolitan court case.

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.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-8013, effective for all cases pending or filed on or after November 23, 2020.]

Committee commentary. —

Paragraph A - In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in “capital offenses when the proof is evident or the presumption great.” As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed.

Paragraph B - Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant’s arrest under Rule 5-208(D) NMRA.

Paragraph C - Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction to set or amend the conditions of release. The filing of the motion does not, however, stay the case in the magistrate or metropolitan court. Nothing in this rule shall prevent timely preliminary examinations from proceeding while the detention motion is pending.

Paragraphs C and D - Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

Paragraph F - Paragraph F sets forth procedures for pretrial detention hearings. Subparagraph (F)(3) describes the defendant’s rights at the hearing. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing. Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11- 1101(D)(3)(e) NMRA. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible “for assessing the reliability and accuracy” of the information presented. See *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); see also *United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I - If the district court issues a detention order under Paragraph G of this rule, the magistrate or metropolitan court cannot release the defendant while the case is pending. The 4 magistrate or metropolitan court should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.

Paragraph J - Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. See generally *United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, ABA Standards for Criminal Justice: Pretrial Release, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”).

Paragraph L - Either party may appeal the district court’s ruling on the detention motion. Under Article II, Section 13, an “appeal from an order denying bail shall be given preference over all other matters.” See also *State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

Paragraph M - Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. See NMSA 1978, § 38-3-9. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. See N.M. Const. art. VI, § 18; Rule 21-211 NMRA. [Adopted by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

Appendix C: Article II, Section 13 of the New Mexico Constitution

Bail; Excessive Fines; Cruel and Unusual Punishment

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 a danger detainable on 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.

Appendix D: Conditions of Release

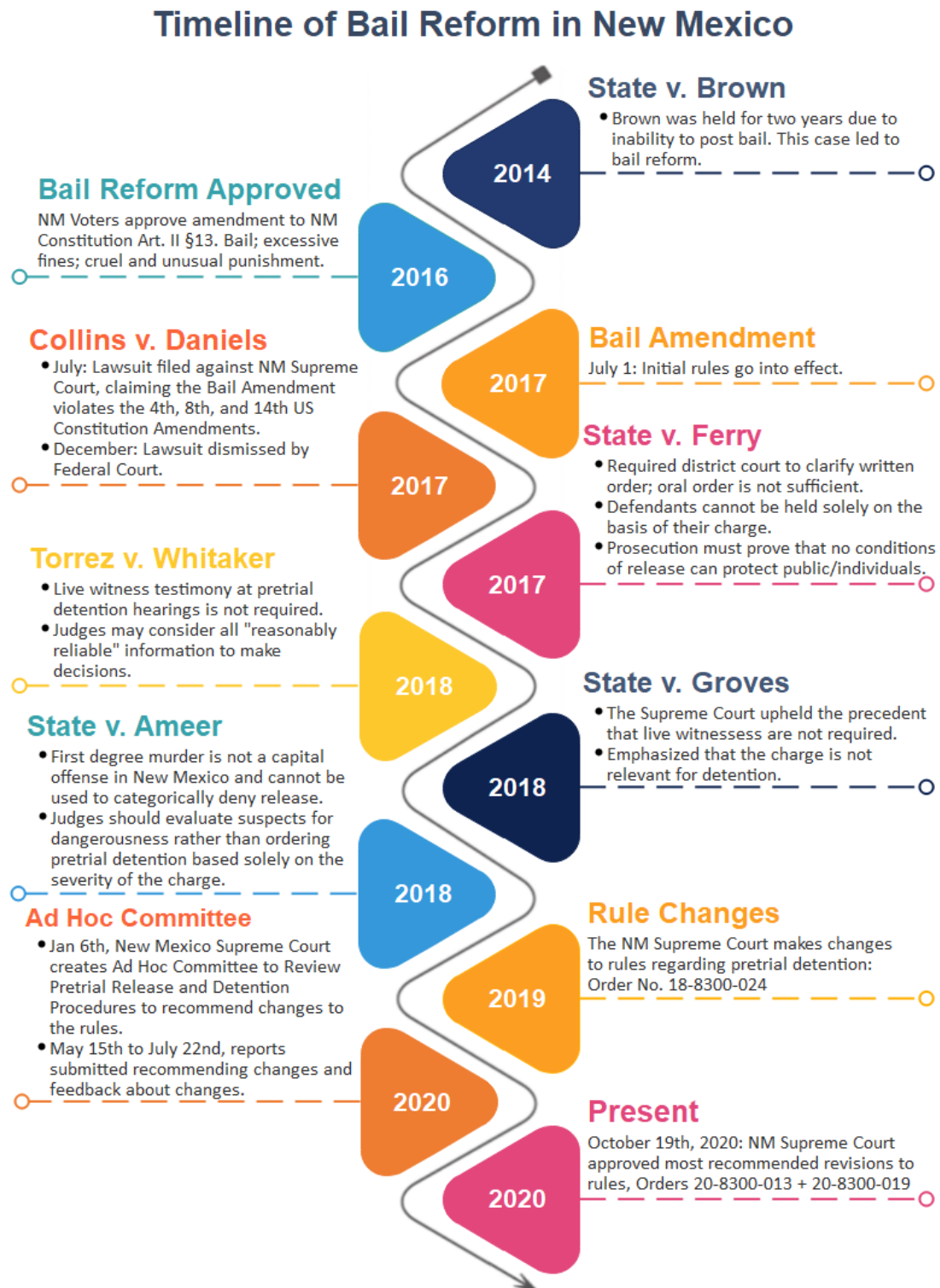
Extracted from New Mexico Form 9-303

Common conditions may include one or more of the following, that the defendant shall:

- *“not possess firearms or dangerous weapons;*
- *not return to the location of the alleged incident;*
- *not consume alcohol;*
- *not buy, sell, consume, or possess illegal drugs;*
- *notify the court of any change of address;*
- *not leave the (county of _____) (State of _____) without prior permission of the court;*
- *maintain contact with the defendant’s attorney/seek and consult with an attorney*
- *avoid all contact with the alleged victim or anyone who may testify in this case;*
- *have an ignition interlock device installed on any vehicle the defendant may drive; ([] camera capable ignition interlock device);*
- *be on pretrial supervision and abide by all conditions set by the court and by pretrial services;*
- *reside at _____ (address) unless otherwise agreed to by the court;*
- *submit to drug or alcohol testing upon the request of _____;*
- *not leave the defendant’s residence between the hours of _____ p.m. and _____ a.m. without prior permission of the court;*
- *maintain employment, or, if unemployed, actively seek employment;*
- *maintain or commence an educational program”*

Appendix E: Charts

Timeline of Bail Reform in New Mexico



Release Decision Flowchart

