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Mend It, Don't End It

Reforming Bail Reform in New Mexico

By Rebecca Ralph and D. Dowd Muska

Introduction

Crime in New Mexico is out of control. The most recent figures from the FBI show that "the Land of Enchantment had the highest violent-crime rate in the contiguous states," and the state's "property-crime rate ranks worst in the entire nation."[1] A recent poll found that 69 percent of residents of New Mexico's largest city consider crime their top concern.[2] A stunning 99 percent believe that crime is a "very serious" or "somewhat serious" in Albuquerque.[3] The worry is justified. Between 2014 and 2016, the number of murders in the city more than doubled, from 30 to 61, and in 2017, 71 murders were committed.[4]

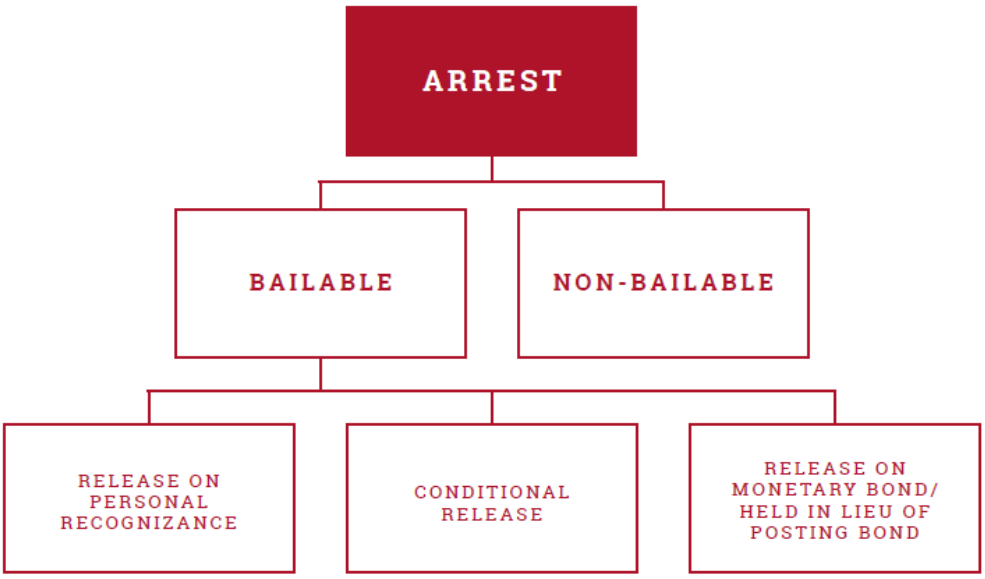
In New Mexico and throughout the nation, experts from across the ideological spectrum have joined forces to pursue reforms that include "performance measures that hold [the criminal-justice system] accountable for its results in protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution and conserving taxpayers' money."[5] A key component of their reform agenda is improvements to the pretrial system, which has been shown to be both unfair and ineffective.

The Pretrial Process

When a law-enforcement officer makes an arrest, a determination must be made about what to do with the accused prior to trial. A defendant can be held in custody, given a determination that he or she poses an unacceptable flight risk and/or is a danger to the public. Alternatively, the accused can be released

> from jail or government custody prior to trial with conditions designed to reasonably assure community safety and court appearance. In common parlance "bail" is used as both a noun and as a verb. An accused may "make bail" or be "admitted to bail" or "bail out" or "be bailed out" at different points following arrest or during a criminal prosecution. Police, bail staff, and courts have authority to release a person upon arrest or upon presentment in court, by setting conditions for bail release.[6]

The chart below illustrates the pretrial decision-making structure.



Source: "Moving Beyond Money: A Primer on Bail Reform," Criminal Justice Policy Program, Harvard Law School, 2016

A cash bond must be paid with cash to garner a release from custody, while a surety bond requires a third party, usually a bail bondsman, to post bail.[7] A bondsman typically requires a non-refundable premium -- usually 10 percent -- and often the promise of additional collateral.

Rethinking and Reforming

While monetary bond has a long tradition in Anglo-American jurisprudence, deficiencies in the system have prompted critics to propose, and with increasing frequency implement, reforms. In 2016, Chief Justice Charles W. Daniels outlined a concern that is common in New Mexico and across the nation:

> throughout most of the United States, courts rely heavily on a wealth-based, instead of a risk-based, system to determine whether accused defendants will be held in jail or released before their trials that will determine their guilt or innocence with constitutional guarantees of fair adjudication and the bedrock principle that the accused

> is innocent until proven guilty. The result is a lack of any rational justice in our pretrial justice system, where clearly dangerous defendants or those who pose substantial flight risks can buy their way out of jail if they have access to the money required to secure their presumption of innocence, while large numbers of poorer defendants who are neither dangerous nor flight risks are held in jail simply for lack of money, with substantial harm done to them, their families, and the taxpayers who must pay for housing, feeding, guarding, medicating, and caring for them.[8]

Ohio offered a real-world example of a defendant employing the wealth-based loophole to free himself, and then proceed to commit an even greater crime:

> In 2015, Dragan Sekulic of Stark County … used his car as a battering ram attempting to kill his ex-wife. Sekulic's would-be victim survived the crash and Sekulic, who had been charged with domestic violence before, faced charges of felonious assault, domestic violence, and operating a vehicle while intoxicated. Working with a bail-bond agent, Sekulic posted the $100,000 bond set by the court and walked free to await his trial. Two weeks later, free on the posted bail, Sekulic found his ex-wife and finished what he had started, shooting her dead.[9]

As for those unable to pay or borrow their way out of jail, critics argue that money bail "actually is costly to taxpayers because a large percentage of defendants can't come up with the cash and end up spending long periods of time in jail. Those jail stays are costly, and the wheels of justice turn slowly."[10]

In 2016, Tom Chudzinski provided a New Mexico-based example of the damage that can be done. While "just $50 paid to a bail bondsman would have set him free while his case was pending," the retired architect could not come up with the funds, and spent 34 days in jail. Eventually, his charge of drunk driving was dropped, yet Chudzinski wound up "living in Albuquerque homeless shelters and eating meals at free kitchens. His motorhome with most of his possessions trapped inside sat on an impound lot, accruing fees he also couldn't afford."[11]

Chudzinski is hardly alone. If a defendant is held in custody due to his or her inability to make bail, the consequences can be traumatic for the individual and costly for taxpayers. "[J]ails have always been characterized by overcrowding, resource limitations, litigation, suicide and violence."[12] Detention facilities' "living and sleeping conditions expose inmates to unsafe and unsanitary conditions," with jails often providing "inadequate healthcare, activities, and programming."[13]

It is little wonder, then, that research shows that keeping low-income defendants who pose little threat to public safety and are likely to appear in court "locked up for as few as three days can have dangerously destabilizing effects. They risk losing their homes, their jobs, and their families. Moreover, unnecessary pretrial detention raises questions of whether public resources are being used effectively."[14]

Success Elsewhere

Pretrial-detention reform has been shown to produce measurable benefits. In the 1990s, the District of Columbia prohibited wealth-based bail. Today, no one arrested in the nation's capital is detained for lack of funds, yet 98 percent of defendants are "not rearrested on a crime of violence while in the community pending trial."[15] Former D.C. Superior Court Judge Truman Morrison told *The Washington Post*: "There is no evidence you need money to get people back to court. It's irrational, ineffective, unsafe and profoundly unfair."[16]

More recently, bail-reform efforts in other jurisdictions have yielded encouraging data:

● On January 1, 2017, New Jersey replaced its "monetary bail system with a risk-based approach, requiring courts to assess the likelihood that a defendant will flee, commit a new crime, or obstruct justice by intimidating victims or witnesses."[17] Courts now use "computerized risk assessment tool developed by the Laurie and John Arnold Foundation," which "takes nine factors into account," including "the age of the defendant at current arrest, whether the current offense is violent, [and] what the pending charge is at the time of the offense."[18] In September, the R Street Institute reported that "since the reforms went into effect, the state's jail population has fallen by 15.8 percent, while crime has decreased 3.8 percent and violent crime by 12.4 percent."[19]

● Lucas County, Ohio began to use the Laurie and John Arnold Foundation's Public Safety Assessment tool in 2015. One year later, the "percentage of pretrial defendants arrested for other crimes while out on release [was] cut in half," and "the percentage of pretrial defendants arrested for violent crimes while out on release … decreased." In addition, the "the percentage of pretrial defendants who skipped their court date [was] dramatically reduced – from 41 percent before the county began using the PSA to 29 percent."[20]

● A Texas A&M University study compared two jurisdictions in the Lone Star State: "Tarrant County, which relies almost exclusively on money bail, and Travis County, which relies largely on validated risk assessment to inform release decisions without financial requirements." Researchers found that while "pretrial program costs were higher in Travis County ($406 per person vs. $263 per person in Tarrant County), Travis County also realized significant savings through reductions in costs to victims and detention costs. In Tarrant County, the victim costs per defendant were $469, compared to $133 in Travis County."[21]

Reforms are currently underway in many places, including Alaska, Indiana, Colorado, Maryland, and Kentucky. These efforts are sure to yield more research and analysis, with both government and private funds being dedicated to studying what works in pretrial detention.

New Mexico's Reform Precedent

In November 2014, the New Mexico Supreme Court issued its opinion in *State v. Brown*, the landmark case that sparked the Land of Enchantment's current pretrial-detention overhaul.[22] In

2011, Walter Brown was charged in Bernalillo County with first-degree murder following an altercation in which he allegedly stabbed a man. The district court imposed a $250,000 cash or surety bond at arraignment, meaning that Brown would have to pay 10 percent, or $25,000, for release. The accused then spent the next two years in jail. His motion to review conditions of release was not heard until July 2013.[23]

At the first of two hearings, the district court denied Brown's motion to release him on non-monetary conditions, relying on the fact that his charge of first-degree felony carried a possible life sentence. Thus, the ruling was premised *entirely* on the severity of the charges. This was notable, especially given the judge's later written order, in which he found that the state had failed to show evidence that Brown would be a flight risk, commit any new offenses, or be a danger to the community if released. Additionally, the judge stated that if Brown were to be released, he had a stable place to live with his father and would be gainfully employed. Yet bail remained as previously set.[24]

Bail was next addressed five months later, and the motion was again denied, for much the same reason. This time, however, the judge added that the charge – and the potential sentence – led him to believe the defendant would be a flight risk or a danger to the public if released.

Brown's counsel appealed to the New Mexico Supreme Court, and justices ruled that "the district court unlawfully failed to release Defendant pending trial on the least restrictive of the bail options and release conditions necessary to reasonably assure Defendant's appearance and the safety of the community." Brown was immediately released.

It is worthwhile to note the procedural catastrophe that this case presented at the district court level. Everything that could have gone wrong did. The state delayed its review of the defendant's initial plea offer, and was slow to offer a counter offer. There were several delays in setting the case for trial, given that the case was joined with several others. Most concerningly, the presiding judge had to be removed from presiding over capability concerns; he later confirmed that he had been diagnosed with Alzheimer's disease, and this removal led to another delay to allow selection of a new judge.[25]

In a way, the procedural delays, which ultimately resulted in the case's outright dismissal, along with the egregiously long pre-sentence confinement, created a perfect storm of righteous indignation. This was clearly evident in Chief Justice Charles W. Daniels's lengthy opinion, where he took aim at the bail bond system as a whole: "[T]he court … used its nearly 50-page ruling to address its perception that judges statewide were basing their bond decisions on the kind of crime, rather than looking at each defendant's risk factors."[26]

A Constructional Change

Public reaction to *Brown*, particularly within the legal community, echoed the chief justice's outrage over the system. The *Albuquerque Journal* noted that "in the wake of the opinion, the

Administrative Office of the Courts issued an advisory to magistrate judges statewide telling them bail-bond schedules – lists tying a bond amount to a crime – could no longer be used."[27] While the office's measure was later rescinded, it heralded impending additional reforms. Soon thereafter, the "Supreme Court set up an advisory committee of judges, prosecutors, defense attorneys, and bondsmen, and asked it to come up with recommendations for new pretrial release rules by August" of 2015.[28]

The workings of the Ad Hoc Pretrial Release Committee led to a legislatively referred constitutional amendment, put to the voters on November 8, 2016. Amendment 1, also known the New Mexico Denial of Bail Measure, added and struck language to the New Mexico Constitution. The measure sought to limit denial of bail to dangerous defendants. The proposed text read:

> 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.[29]

In addition, the amendment stated that "a person who is not a danger and is otherwise eligible for bail shall not be detailed solely because of financial inability to post a money or property bond.[30]

Voters resoundingly supported the measure, with nearly nine in ten New Mexicans voting in favor.[31]

Applying the Rules

Rule 5-409, which codified the intent of the bail-reform amendment, went into effect on July 1, 2017. Written by the New Mexico Supreme Court and still in effect, it allows district courts to order pretrial detention of a felony defendant for whom "no release conditions will reasonably protect the safety of any other person or the community." The prosecutor must first file a "expedited motion for pretrial detention," which shall include "the specific facts that warrant pretrial detention," and must immediately be given to the defendant and his attorney of record.

Once the motion is filed, the hearing must held within five days of either the motion's filing or the date upon which the defendant was arrested in relation to the motion. Extensions may be granted, but only for three days, and only if the defendant files a written waiver or if the parties stipulate to the continuance. Though the rules of evidence do not apply, and the hearing is not considered an evidentiary hearing, prosecutors must disclose to defense "at least twenty-four (24) hours before a hearing … all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor." In the same paragraph, the rule specifies that all "exculpatory evidence known to the prosecutor must be disclosed." The rule then swallows its own tail by stating that "the prosecutor may introduce

evidence in the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing."[32]

It is this sort of obfuscatory language that has caused problems in the application of the rule. The hearing time extension, barring "extraordinary circumstances," requires consent or waiver from a party inherently opposed to the purpose of the hearing, making the extension language impotent in practice. Evidence must be disclosed in a hearing not nominally bound by the rules of evidence, and must be disclosed within 24 hours of a hearing set five days after filing – which practically speaking, is often filed at a first appearance hearing, only days after the initial arrest of the defendant. It is folly to think that a criminal investigation ends at the arrest; indeed, it is often that an investigation is ongoing through a prosecution. As a corollary of this, the term "exculpatory" only makes sense when seen in context of all of the evidence, which is not possible in such a short time period so soon after the birth of the case.

While in theory, Rule 5-409 is about limiting harm to the community and improper detention, the New Mexico District Attorneys' Association (NMDAA) observed that in practice, it "has given rises to lengthy, cumbersome hearings and discovery litigation in district court, the results of which all too frequently are that defendants who pose significant threats to the public are released."[33] The focus in these hearings is not on whether the defendant is such a risk that no release conditions will protect the community, but rather on the ancillary issues of form of evidence and discovery.

The NMDAA notes that "continued disputes regarding the form of evidence are a common occurrence, despite the fact that the Rule states the rules of evidence shall not apply to these proceedings."[34] Further, "courts are routinely, and incorrectly, interpreting this language to require production of all case-related discovery prior to the detention hearing, and even going so far as to sanction the State when that production is not made or not available."[35]

In light of these issues, the NMDAA has suggested a number of revisions to Rule 5-409. The proposed fixes focus on the portions of the rule addressing its scope, the procedures for detained defendants and the detention hearing, and permissible evidence. The association recommended that the detention proceedings "be limited to determining whether release of the defendant would present a danger to any person or the community," and that "they are not intended to require any party to obtain or produce discovery except as set forth in this rule."[36] Additionally, it suggested that a detained individual only be released prior to his or her detention hearing if the case is dismissed, if the district court determines conditions of release will adequately assure safety, or if the district, metropolitan, or magistrate courts cannot find probable cause.

As to the hearing itself, it would be set seven days after either the filing of the motion or the date upon which the defendant was arrested in reference to the motion, in order to comply with the Victims of Crime Act, a statute that "gives victims and the families the same rights as offenders in the legal process that follows the crime."[37] Further, under the auspices of the Act, victims would have seven days' notice of the hearing. The hearing would not be used as a

defensive tool for obtaining discovery, and parties would only have to disclose evidence they intended to use in the hearing or which they knew at the time of the hearing was exculpatory. Judges would not delay decision on the state's motion "pending further discovery or submission of additional or different evidence, except that either party may move the court to continue the hearing for up to three (3) days for good cause shown."[38]

In terms of usable evidence, the association offered the clarification that the court not "require any party to submit evidence or information in any particular form," and that the court should also allow a proffer of evidence, documentary evidence, or testimonial evidence, or any combination of those three categories.[39] The NMDAA urged the court to consider more specific factors in determining release, highlighting history of the defendant, and whether the defendant was on probation when he picked up new charges or had a history of violating past probationary terms. Notably, the association also asked to be able to use "any available results of pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information" presented at the hearing.[40]

These changes are a good start to making for the rule work, for the simple reason that they address what the rule does not: the inherent practical difficulties of conducting an effective hearing. Victims, especially those of violent crimes, are hard to get to court. They often fear retaliation from the defendant or his associates for testifying, or they simply want to try to move on from a traumatizing experience as quickly as possible with as little fuss as possible. From their perspective, their role should have finished the moment they spoke to the police. Why should they be further punished by having to relive the experience that brought them to court? Even if they are not experiencing trauma, victims of crimes have lives; lives in which they often can't drop everything and show up to court. By changing the timing of the hearing from five to seven days, it provides the victims with the agency they are entitled to under the seven-day notice provision of the Victims of Crime Act.

The seven-day change also provides for a more productive hearing. It allows a reasonable amount of time for subpoenas to be served and for discovery to be reviewed. Far from slowing the process, it speeds it by making it more efficient. Few things are more frustrating for a judge than presiding over parties who are fundamentally unprepared for the hearing, especially when he knows it is neither party's fault.

As a hypothetical example, under the current rule, it would be perfectly permissible, and yet the wrong result, for the following to occur. In preparing for a detention hearing where Defendant C is currently in county jail, Prosecutor A listens to jail phone calls Defendant C makes. Prosecutor A is industrious in the short time between the filing of the motion and the hearing. Eighteen hours prior to the scheduled hearing, Prosecutor A hears a tape, recorded the previous day, wherein Defendant C admits that the first thing he plans to do when he gets out is rob a convenience store. Prosecutor A, conscientious of the rule, immediately sets out to get the tape to Public Defender B. Public Defender B is overworked and overbooked; he has two

full days of back-to-back hearings and does not receive the tape until 12 hours before the hearing. Because of his hearing schedule, he is not able to even discuss the evidence with his client until 20 minutes prior to the hearing, when Defendant C is brought from the jail.

This is clearly an absurd situation, but it is also commonplace for anyone who has practiced law in the criminal arena. Under the current rule, Prosecutor A has conscientiously done his duty; he disclosed it promptly to Public Defender B, and he should be allowed to use it. However, neither Public Defender B nor Defendant C has had adequate time to review it or discuss it. This places Public Defender B in the unenviable position of either stipulating to an extension, during which his client will remain incarcerated, or proceeding forward with evidence he has not reviewed. At that point, he has only the arguments that he is not prepared to go forward, or that the evidence should not admitted because of the date of the disclosure. In either case, the hearing is no longer about detention, and the court's time has been wasted, through no fault of either party.

This situation would be prevented by allowing more mechanisms for flexibility in the rules, in line with the NMDAA's revision. When both parties are allowed to ask for continuances, it allows each side to be more prepared for the hearing and minimizes the natural tendency among lawyers to play litigation games. Similarly, a limit on the scope of discovery allows the hearing to preserve its purpose; that is, to balance the public's safety against the rights of the accused not to be detained.

Conclusion

Change is rarely easy, and New Mexico's shift to a new pretrial-detention system is no exception. Several months after the issuance of Rule 5-409, Governor Susana Martinez called for the "repeal and replacement" of the bail-reform constitutional amendment in its entirety, charging that "the judiciary is using these new provisions to return criminals back to our neighborhoods, and it must stop."[41]

But Martinez's demand is premature. Pragmatically, it would be a mistake to scrap the New Mexico Denial of Bail Measure. Repeal is, by nature, a lengthy process, and the absence of guidance in such a fraught and turbulent arena as criminal litigation would make a bad fix worse, causing heightened risk of harm to crime victims and unnecessary detention to non-dangerous defendants. While Rule 5-409 is an imperfect and imprecise rule, it is possible, with revisions to both its language and its interpretation, to make it functional, and effectively underpin a successful model of a preventative detention system. Indeed, this is already evident in the New Mexico Supreme Court's most recent decision on the subject.[42]

Given New Mexico's crime crisis, bail reform was – and is – warranted. Starting the process all over again is unnecessary. The Land of Enchantment has made solid, if flawed, steps toward restructuring its pretrial-detention system. Bail reform should be mended, not ended.

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Notes

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