

BAIL REFORM CONSTITUTIONAL AMENDMENT--KEY POINTS

I. The Two Serious Failings of Current Reliance on Money Bonds

A. The Wrong Defendants are Released to Endanger the Community

1. Under the current New Mexico constitution, copied from provisions of a pre-revolutionary war Pennsylvania constitution, our judges have no lawful authority to deny release to a defendant known to be a danger to the community or a substantial flight risk.
2. As a result, dangerous defendants are repeatedly arrested and repeatedly released to commit new crimes against the community if they find a way, lawful or unlawful, to come up with bail money, often targeting domestic violence and other especially vulnerable victims.
3. Most offenders who commit serious crimes have previously been released on money bonds.
4. Posting of money bond, whether in cash or through a commercial bondsman, can do nothing to protect the community against commission of new crimes.
5. The law does not allow bond money to be forfeited for commission of new crimes, no matter how many crimes or how serious they are.

B. The Wrong Defendants are Confined to Jail Before Their Trials

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

II. A Constitutional Amendment Would Address The Two Current Failings

A. Judges Could Deny Release Altogether for Undue Dangerousness or Flight Risk

1. The current proposed amendment would give the following new authority to New Mexico judges:

“[Bail may be denied] pending trial if, after a hearing, the court finds by clear and convincing evidence that no release conditions will reasonably assure the appearance of the person as required or protect the safety of any other person or the community.”

2. The new language would replace old language that limits a judge’s ability to detain in non-capital cases to such a small category of defendants and such a short period of time that the useless authority was never sought nor granted.

3. Similar pretrial detention authority is now provided by law in the federal courts, the District of Columbia, and a number of other states.

3. The New Jersey Legislature and New Jersey voters recently amended their constitution, which previously was worded identically to New Mexico’s, to give New Jersey judges similar authority.

4. All jurisdictions providing pretrial detention authority require a showing of dangerousness or flight risk by clear and convincing evidence, and the United States Supreme Court has held that the clear and convincing evidence requirement, along with expedited appeal and other procedural safeguards, can justify pretrial detention under the U.S. constitution.

B. Those Awaiting Trial Who Are Neither Dangerous nor Flight Risks Would Not Be Jailed Just Because They Cannot Afford a Money Bond

1. The amendment addresses the other major failing of the current release-for-money system by adding the language: *“[n]o person eligible for pretrial release pursuant to this section shall be detained solely because of financial inability to post a money or property bond.”*

2. This provision confirms that the proposed constitutional amendment would not result in pretrial detention of a person simply because of his or her financial status, as opposed to dangerousness or flight risk.

3. The provision is consistent with requirements of the U.S. constitution, national justice standards, federal statutes, and laws of other states.

4. The provision would avoid use of jail space, county resources, and taxpayer dollars to house, feed, provide medical care for, transport, and guard accused persons who do not need to be detained.

REFERENCES

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

The clear and convincing evidence hearing requirement for denial of pretrial release is prescribed by national standards such as the ABA Standards for Criminal Justice: Pretrial Release § 10-5.8 and the National Association of Pretrial Services Agencies, Standards on Pretrial Release § 2.10, federal law such as D.C. Code, § 23-1321 [applicable to courts in the District of Columbia] and 18 United States Code 18 U.S.C. § 3142(f)(2)(a)(b) [applicable to federal courts in the rest of the United States] States courts, and in the laws of other states permitting denial of pretrial release for dangerousness or flight risk, such as Arizona [Ariz. Rev. Stat. § 13-3961], California [Cal. Const. Art. 1, § 12], Illinois [Ill. Rev. Stat. § 110-6.3] Louisiana [La. Const. Art. 1, ¶ 18], Massachusetts [Mass. Gen. Laws 276 § 58A], New Jersey [N.J. Stat. Ann. § 2A:162-18], Oregon [Or. Rev. Stat. § 135.240], Utah [Ut. Const. Art. 1, § 8], Vermont [Vt. Const. Art II, § 40], and Wisconsin [Wis. Stat. § 969.035].

2. Prohibiting detention of persons solely because of their financial inability to post a money or property bond is based on federal constitutional and statutory law, and is recognized by national standards and by the law of other states.

See 18 United States Code 18 U.S.C. § 3142 (a judge "may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code, §. 23-1321 (a judge may impose a financial condition only if it "does not result in the preventive detention of the person"); ABA Criminal Justice Standards, Pretrial Release, § 10-1.4(e) (a judge "should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"); Mass. Gen Laws Ch. 276, § 58A ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person"); position statement filed by the United States Department of Justice in *Varden v. City of Clanton*, 2:15-cv-34-MHT-WC (M.D. AL 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment" of the United States Constitution); *Pierce v. Velda City*, No. 4:15-cv-570-HEA (R.D. Mo. June 3, 2015) (federal court judgment enjoining as unconstitutional detention of indigents for inability to post money bonds); and *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW (M.D. Al. June 18, 2015) (federal court order barring detention of indigents for inability to post money bonds). See also <http://www.pretrial.org/the-problem/>

3. For further reading on pretrial release issues, both in New Mexico and in the United States generally, see the following resources available readily from internet sources:

a. *State v. Brown*, 2014-NMSC-038 (2014):
https://scholar.google.com/scholar_case?case=5601705540973491459&q=2014-nmsc-038&hl=en&as_sdt=4,32

[The New Mexico Supreme Court opinion that traces the history, legal underpinnings, and practice of bail from its origins in medieval England to the United States and New Mexico.]

b. Report of the National Symposium on Pretrial Justice:

<http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf>

[2011 symposium under the auspices of the United States Justice Department documenting a “deeply flawed” national money bond system where “defendants who have access to money are able to purchase their release, regardless of the risks they may pose to the safety of the community; those defendants who do not, many of whom are low risk, must sit in jail until trial—at enormous public expense”]

c. Report of the Joint Committee on Criminal Justice:

http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf

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

d. Reports and other resources from the Pretrial Justice Institute:

<http://www.pretrial.org/solutions/>

[aided with funding from the United States Department of Justice, the PJI studies and shares information about needed pretrial justice reforms]

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

<http://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf>

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

f. Resources from the Pretrial Justice Center, a project of the National Center for State Courts:

<http://www.ncsc.org/Microsites/PJCC/Home/Issues.aspx>

[provides links to resources and analyzes the comparative effectiveness of the payment of money as the primary pretrial release condition versus evidence-based assessments of the risk of flight or threat to public safety]

g. Conference of State Court Administrators Policy Paper on Pretrial Release:

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

[study supports use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety]

h. Pretrial Justice Institute, Unsecured Bonds: The as Effective and Most Efficient Pretrial release Option:

<http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf>

[study concluding that secured bonds, requiring advance posting of money or security, are no more effective at achieving public safety or court appearance as unsecured bonds]

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http://www.abqjournal.com/?p=636452?paperboy=loggedin630am&utm_source=Albuquerque+Journal+Newsletters&utm_campaign=2565e57dc5-paperboy_daily_150830_062803&utm_medium=email&utm_term=0_2dcf4c82cd-2565e57dc5-108028989

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<http://www.abqjournal.com/636414/opinion/judges-should-have-more-latitude-in-setting-bonds.html>

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http://www.lcsun-news.com/newmexicoinddepth/ci_28760681/editorial-bail-system-must-be-more-fair-all

http://www.nytimes.com/2015/06/10/nyregion/after-a-shocking-death-a-renewed-plea-for-bail-reform-in-new-york-state.html?_r=0

<http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?ref=topics>