AMERICAN BAIL COALITION

Justice for All

STATEMENT BEFORE THE NEW MEXICO SUPREME COURT ON BAIL REFORM

10/29/15

I. Introduction

The American Bail Coalition works nationally to protect the constitutional right to bail. I am Jeff Clayton, Attorney at Law, and National Policy Director for the American Bail Coalition. It is my pleasure to appear here today.

II. The New Mexico Supreme Court should not endorse any constitutional amendment pertaining to any substantive legal issues, whether it be bail issues or otherwise, because to do so would damage public confidence in the independence of the Judicial Branch of Government and erode respect for the rule of law.

New Mexico Judges and Justices are sworn to both "uphold" and "respect" the Constitution of the State of New Mexico—such officers are not sworn to advocate for the repeal of all or part of that Constitution or show disrespect for the Constitution of New Mexico. Justice Cardozo described the nature of the challenge of judging more eloquently than I:

> The Judge, even when he is free, is still not wholly free. He is not to innovate at his pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty and goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized analogy, disciplined by system, and subordinated to the primordial order in the social life.[1]

Judges are required to conduct their duties in a fashion that preserves the independence of the judicial branch, and to conduct judicial business in a fashion that does not invade the province of the political branches of government to make and enforce the laws.

In fact, employees of the Judicial Branch within the State of New Mexico are not permitted to engage in the very conduct in which the Supreme Court appears poised to engage—to support under color of state authority specific political causes. The Judicial Branch's Code of Conduct in New Mexico reads in relevant part:

> Consistent with the rules and policies, Judicial Employees may express opinions on all political subjects and candidates provided that Judicial Employees do not give the impression that the Judicial Entity or the Judicial Branch endorses political candidates or supports political causes.
>
> Commentary:

[1] Benjamin Cardozo, *The Nature of the Judicial Process*, pp. 140-141 (Yale Univ. Press 1921).

> The Judicial Branch seeks to maintain neutrality in political matters. While Judicial Employees may express and act on personal opinions about political candidates and issues as other citizens, they should maintain neutrality in action and appearance when performing their duties on behalf of the Judicial Branch.[2]

While Judges are permitted to engage in political activities that improve the law, advocating for substantive policy reforms that are informed by a litany of normative judgements can hardly be called improving the administration of justice. Neither can it be said that the State Court Administrator's extensive media campaign, including the drafting of articles making policy judgments and specifically endorsing a change to the New Mexico Constitution, which is a political issue, could be called simply the improvement of the administration of justice.

If the Supreme Court, as a Court, lends its support to this constitutional amendment, or any others that involve the legal policy issues that are properly left to the people and the political branches of government, such actions will significantly erode public confidence in the rule of law and call into question the independence of the judicial branch that is fundamental to a free society.

III. The New Mexico Supreme Court makes Numerous Statements in Favor of the Constitutional Amendment that Are Simply Not Backed by Reality

Judges should be faithful to the law—not decide at a policy level who are the "right" people to keep in jail, and who are the "wrong" people to keep in jail.

The New Mexico Constitution does allow for limited preventative detention. The statement to the contrary is erroneous. Judges can also set any other combination of monetary and non-monetary conditions in cases where preventative detention is not allowed which would secure the release of a defendant.

There was no data from the ad hoc committee that demonstrated that the "wrong" people were getting out, how many of them, and they were in fact primarily domestic violence or other "especially vulnerable victims." That is pure assertion.

The statement that most offenders who commit crimes have previously been released on monetary bonds means nothing—repeat offenders are released on all types of bonds including recognizance bonds. Such persons simply climbed a ladder of criminality.

The Court stated that posting of money bond "can do nothing" to protect the safety of the community. That is also a false assertion—the bail agent has the power to re-arrest, the co-signor can request re-arrest, and when a person is at-large due to absconding and the criminal intervention cannot occur (i.e., prison, jail, probation, rehab, etc.), they are at high probability to commit additional crimes. This issue was not studied at all by the Committee—the various safety and benefit costs analyses of the various forms of release.

[2] NM Judicial Branch Code of Conduct for Judicial Employees 2/9/2010, p. 12.

It cannot be simply concluded that people who have been arrested and are in jail pending trial are there "simply because they are too poor to afford bail." That is a national talking point that is also false. Instead, this is a question of fact for a judge on a case-by-case basis. If poverty is the sole factor, then the bail should be lowered. Nearly all state statutes, including New Mexico, require financial resources or employment as a factor in a bail setting decision. There are numerous reasons people stay in jail when a bond is set—legal strategy, multiple pending cases, immigration holds, etc. Such a generalized conclusion is devoid of the type of scientific nuance in methodology necessary to make such a conclusion. The conclusion also implicitly assumes that judges improperly set bail *too high* and the system of due process for review in New Mexico is inadequate to allow for sufficient review. The Committee did not similarly study the situations where the assumption would then be that judges then set bail *too low*, i.e, when people fail to show up. The Court is going down a dangerous road when "science" is substituted for judicial discretion.

To add to the Constitution that a person shall be detained "solely" due to inability to pay does nothing—the accused are detained because law enforcement officers use the discretionary power afforded to them by the State Constitution to arrest, which must supported by probable cause to believe they committed a crime. So, no one is "detained" exclusively because they cannot afford bail. In addition, this is a question of fact that cries out for due process—due process that would require someone to *assert* thaty claim and prove *with evidence* that the "sole" reason for continuing detention is inability to pay.

The alleged "studies" that show that non-financial conditions of release can replace financial bail conditions are from groups specifically designed and funded to eliminate all financial conditions. No peer-reviewed academic studies have made such a conclusion. In fact, they have all made the opposite conclusion.

The citation to the various cases brought in the South (*Clanton*) are misleading—all were orders approving settlements. In the *Clanton* case, the Plaintiffs specifically admitted that bond schedules *are constitutional*. To pull information from a website rather than cite the actual settlement documents is completely misleading.

Further, to assert that bond schedules unnecessarily keep people in jail ignores those people who are able to get out of jail quickly under the bond schedule that must now wait longer in custody to have a bond set so that they can be released. The proposed solution to the "solely" cannot afford their bail problem, is more pretrial detention for all. In Jefferson County Colorado, the more jail for all is a reality—the number of people who spend more than one day in jail has increased by 140% since the reforms were implemented.

Pretrial detention for all is too expansive. Locking people up and throwing away the key is not the answer.

IV. The Supreme Court Should Slow Down The Rules Process for A Minimum of Six Months

The Supreme Court does not cite with particularity which studies underpin the Court's substantive policy conclusion that risk-assessments are empirically validated, and the Court admits that none have been validated in New Mexico by stating that one in the 2nd Judicial District is in a "pilot" phase. The rules require the Court to approve a risk assessment. That cannot be competently done right now.

In addition, the Supreme Court is proceeding down the road to change the rules before the public or the legislature approves the Courts' proposed constitutional amendment, which is the linchpin of the entire scheme. Further, the rules themselves contain quotation of the proposed constitutional amendment, which has a lengthy period of first amendment debate before it becomes law, if at all.

Thus, the Supreme Court should delay the rules process for six months to permit the legislature and the public to act, and to allow for the validation and approval of the risk assessment to first take place.