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## **Death Marks the Spot: Where Presumptions Against Pretrial Release Live in New Mexico Law, and Where They Should Move**

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## Death Marks the Spot: Where Presumptions Against Pretrial Release Live in New Mexico Law, and Where They Should Move

### Erratum

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# DEATH MARKS THE SPOT: WHERE PRESUMPTIONS AGAINST PRETRIAL RELEASE LIVE IN NEW MEXICO LAW, AND WHERE THEY SHOULD MOVE

Andrew J. Pavlides\*

“Death’s a debt; his mandamus binds all alike—no bail, no demurrer.”

—Richard Brinsley Sheridan

## ABSTRACT

*Like other jurisdictions that have abolished the death penalty, New Mexico no longer has true capital offenses, where the potential of execution is still a legal punishment. The state has also undertaken cash bail reforms by enacting a constitutional amendment that seeks to detain individuals who pose a risk of flight or dangerousness, while never detaining anyone simply because they are financially incapable of posting bond. But, unlike many of the jurisdictions that have ceased the use of the death penalty and shifted away from cash bail, New Mexico approaches the pretrial release process uniformly, making no distinctions between felony offenses.*

*During pretrial release proceedings, presumptions that certain classes of offenders pose a flight risk or a danger to the community, particularly those charged with premeditated murder, are widely accepted and have been deemed constitutionally sound by the United States Supreme Court. Since 2018, however, New Mexico recognizes no presumptions that can be used in making pretrial release determinations for those charged with first-degree murder, which involves a willful and deliberate premeditated killing. New Mexico’s failure to distinguish first-degree murder from other felony offenses has resulted in calls by the public and lawmakers to repeal the state’s bail reform amendment due to public safety concerns. This Note argues that in order for New Mexico’s cash bail reforms to survive, the state should employ rebuttable presumptions of flight-risk or dangerousness against defendants charged with first-degree murder in pretrial detention hearings. This change would address the concerns of lawmakers and residents, and put New Mexico more in line with other bail reform jurisdictions.*

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\* University of New Mexico School of Law, Class of 2020. I would like to thank the previous editorial board of NEW MEXICO LAW REVIEW for seeing value in this Case Note, believing it would contribute to important discourse in New Mexico law, and selecting it for publication. I would further like to thank the outstanding faculty members at the University of New Mexico School of Law, whose dedication to their students never falters. Many thanks are due to my incredible friends at the law school, who aid in making things like this Case Note possible. Finally, I owe sincere gratitude to the most selfless and unfailingly generous people I know: my family.

## INTRODUCTION

Does the nature of first-degree murder somehow become less serious simply because a state ceases the use of the death penalty? Perhaps inadvertently, the New Mexico Supreme Court may have answered this question in the affirmative in *State v. Ameer*.<sup>1</sup> First-degree murder is still statutorily categorized as a capital offense in New Mexico, and involves one or more of the following: a premeditated killing that is willful and deliberate, killing done while committing or attempting to commit another felony offense, or killing done by an act that disregards human life.<sup>2</sup> However, in 2018, in addition to finding that capital offenses no longer exist in New Mexico because the state no longer imposes the death penalty and declaring a constitutional bail denial provision for capital cases moot, the court did away with any presumption trial courts can use against defendants charged with first-degree murder when considering pretrial release.<sup>3</sup>

On March 19, 2017, Muhammad Ameer stabbed thirty-year old Aaron Sieben in the middle of a busy Albuquerque, New Mexico intersection following a fight at a gas station.<sup>4</sup> The altercation ended with Ameer fleeing the scene with Sieben's wallet, and Sieben bleeding out in the middle of the road, unable to be revived.<sup>5</sup> Ameer was indicted for, and later convicted of, first-degree murder.<sup>6</sup> Pending trial, the prosecution sought to detain the defendant under a 2016 New Mexico Constitutional Amendment that allows for pretrial detention in felony cases "if the prosecuting authority . . . proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."<sup>7</sup> Presumably finding that the prosecution had not met this burden, the judge nevertheless granted the pretrial detention motion, relying on the capital offense exception that appears in the same section of the state constitution as the 2016 constitutional amendment and allows for detention pending trial in capital cases "when proof is evident or the presumption great."<sup>8</sup> The New Mexico Supreme Court reversed the trial court, ordering that a finding based on something more than the capital offense exception must be present in order to detain the defendant.<sup>9</sup> The court later issued a precedential decision expanding on its earlier order and clarifying its

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1. See *State v. Ameer*, 2018-NMSC-030, ¶ 3, NO. S-1-SC-36395, 2018 WL 1904680, at \*1 (holding that because capital punishment has been abolished in New Mexico, state courts may no longer use Article II, Section 13 of the New Mexico Constitution which allows presumptions against the release of defendants in capital cases for purposes of bail denial).

2. § 30-2-1(A).

3. See *Ameer*, 2018-NMSC-030, 2018 WL 1904680.

4. Elise Kaplan, *Man Charged with Murder in 'Senseless Crime' at Gas Station*, ALBUQUERQUE J. (Mar. 20, 2017, 8:34 PM), <https://www.abqjournal.com/972922/man-charged-with-murder-in-senseless-crime-at-gas-station.html> [<https://perma.cc/HX5P-ERAZ>].

5. *Id.*

6. Katy Barnitz, *Convicted Killer Sentenced to Life in Prison*, ALBUQUERQUE J. (Sept. 25, 2018, 11:35 PM), <https://www.abqjournal.com/1225520/convicted-killer-sentenced-to-life-in-prison-ex-man-was-found-guilty-in-2017-gas-station-stabbing-death.html> [<https://perma.cc/T5DJ-Q3U5>].

7. N.M. CONST. art. II § 13; *Ameer*, 2018-NMSC-030, ¶ 6, 2018 WL 1904680, at \*1.

8. N.M. CONST. art. II § 13; *Ameer*, 2018-NMSC-030, ¶ 6, 2018 WL 1904680, at \*1.

9. Order, *State v. Ameer*, S-1-SC-36395 (N.M. May 8, 2017) (order reversing trial court pretrial detention order based solely on capital offense exception).

position that because the death penalty was abolished in 2009, there are no longer capital crimes in New Mexico.<sup>10</sup>

The result is that the capital offense bail denial exception cannot be used.<sup>11</sup> The consequence is that there are now no presumptions of dangerousness or flight risk against defendants charged with first-degree murder.<sup>12</sup> New Mexico now has a standard of pretrial release that views first-degree murder as indistinguishable from any other felony. Indeed, the same standard of release is now applied uniformly to all felony offenses.<sup>13</sup>

This Note will argue that in order for New Mexico's 2016 Constitutional Amendment on cash bail reform to survive, the New Mexico Rules of Criminal Procedure should be amended to trigger a rebuttable presumption against defendants charged with first-degree murder for the purposes of pretrial release. Part I of this Note will discuss the doctrine of presumptions in criminal law, and the competing theories on why capital crimes have historically been deemed non-bailable. Part II of this Note will analyze the use of presumptions in pretrial release proceedings in other jurisdictions with bail reform measures similar to New Mexico's, as well as their use in the federal court system. Part III of this Note will take a critical look at New Mexico's current system of pretrial release. Finally, Part IV will survey the effects a procedural rule change will have on pretrial release proceedings in New Mexico, will scrutinize the proposals thus far to change the administration of pretrial release as inadequate or overbroad, and will examine a legislative fix as an alternative approach.

## BACKGROUND AND RATIONALE

Pretrial release and cash bail reforms in New Mexico have been in the works since at least 2014. Beginning with *State v. Brown*, and coming to a head with New Mexico's 2016 constitutional amendment allowing bail denial in certain cases, trial courts worked with considerable difficulty to administer pretrial release.<sup>14</sup> Perhaps this was rooted in an effort to balance perceived public safety concerns with the language of the amendment. Maybe it was due to a lack of precedent setting cases providing guidance. In either event, the New Mexico Supreme Court has issued at least three precedential opinions concerning what courts may consider when denying bail.<sup>15</sup>

Pretrial detention has long been regarded as an Eighth Amendment violation, particularly when it is the result of excessive bail, except in cases where the accused is charged with a "capital crime."<sup>16</sup> The most accepted definition of a

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10. *Ameer*, 2018-NMSC-030, ¶ 73, 2018 WL 1904680, at \*15.

11. *Id.* ¶¶ 70, 73, 2018 WL 1904680, at \*15.

12. *See* N.M. CONST. art. II § 13; *see generally Ameer*, 2018-NMSC-030, 2018 WL 1904680.

13. *See Ameer*, 2018-NMSC-030, ¶ 73, 2018 WL 1904680, at \*15.

14. N.M. CONST. art. II § 13; *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276.

15. *See Ameer*, 2018-NMSC-030, 2018 WL 1904680; *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201; *State v. Groves*, 2018-NMSC-006, 410 P.3d 193.

16. *Stack v. Boyle*, 342 U.S. 72 (1951) (holding that defendants arrested for non-capital offenses are entitled to affordable bail); *see also Brown*, 2014-NMSC-038, ¶ 53, 338 P.3d at 1292 (holding that defendants who are not entitled to bail under the New Mexico Constitution should be detained). At the

capital crime, and the one adopted by the New Mexico Supreme Court, is an offense that carries a potential penalty of death.<sup>17</sup> However, even in jurisdictions where the death penalty has been abolished or is no longer in use and cash bail reforms have been embraced, a heightened presumption against the release of those accused of murder or crimes of violence is permitted.<sup>18</sup> The same is true of the federal court system.<sup>19</sup> It is unclear why presumption language is absent in New Mexico's bail reform amendment. It is possible that the drafters of the amendment felt it unnecessary, as presumption language already appears in the same section of the state constitution that addresses capital offenses, and they believed judges would still be able to use it to deny bail to those charged with first-degree murder.<sup>20</sup>

Until *Ameer*, judges were able to evaluate whether a presumption against pretrial release was great enough against a defendant charged with first-degree murder (the only statutorily defined capital felony in New Mexico) in making pretrial release determinations.<sup>21</sup> New Mexico lawmakers, including the former and current governor, have noticed the absence of any presumption that can be used against defendants charged with first-degree murder and other serious violent offenses.<sup>22</sup> In the event capital punishment is reinstated, the capital offense exception in Article II of the New Mexico Constitution and the presumption language that accompanies it, will escape obsolescence.<sup>23</sup> In the interim, proposals to address the concern regarding the absence of any presumption have included amending New Mexico's Constitution again, which would require majority voter approval, or amending the New Mexico Rules of Criminal Procedure that govern the administration of pretrial release proceedings.<sup>24</sup> The more feasible solution is the latter, particularly because the

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time of the *Brown* decision, the New Mexico Constitution allowed bail denial in capital cases and in some other, limited situations.

17. *Ameer*, 2018-NMSC-030, ¶ 10, 2018 WL 1904680, at \*2.

18. *E.g.*, D.C. CODE ANN. § 23-1321 to 1325 (West, Westlaw through Sept. 11, 2019); S.B. 10, 2017–18 Sess. (Cal. 2018).

19. 18 U.S.C. § 3142(f)(1)(A)–(E) (2012); *see also* CHARLES DOYLE, CONG. RESEARCH SERV., BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 9–11 (2017).

20. N.M. CONST. art. II § 13.

21. N.M. STAT. ANN. § 30-2-1(A) (2018); *see Ameer*, 2018-NMSC-030, ¶ 70, 2018 WL 1904680, at \*15.

22. *See* Fernanda Lopez, *Lawmakers Talk Solutions to “Bail Reform” Constitutional Amendment Problem*, KRQE (Oct. 27, 2017, 12:56 PM), <https://www.krqe.com/news/legislative-criminal-justice-subcommittee-discusses-bail-reform-friday/1009273582> [<https://perma.cc/GSSZ-72U4>]; Dan McKay & Maggie Shepard, *Gov. Martinez Calls for Repeal of Bail Reform Amendment*, ALBUQUERQUE J. (Oct. 17, 2017, 9:26 PM), <https://www.abqjournal.com/1079274/gov-martinez-calls-for-do-over-on-bail-reform-amendment.html> [<https://perma.cc/TDN7-CG99>]; Kai Porter, *NM Lawmaker Wants to End “Catch and Release” System*, KOB (Aug. 18, 2018, 6:47 PM), <https://www.kob.com/new-mexico-news/nm-lawmaker-wants-to-end-quotcatch-and-releasequot-system/5033955/> [<https://perma.cc/4BZN-QLZ4>]; Chris Ramirez, *Vote 4 NM: Gubernatorial Candidates Agree; Bail Reform is ‘Not Working,’* KOB (Oct. 29, 2018, 7:24 PM), <https://www.kob.com/politics-news/vote-4-nm-gubernatorial-candidates-agree-bail-reform-is-not-working/5125778/?cat=500> [<https://perma.cc/FFX3-7URD>].

23. *See Ameer*, 2018-NMSC-030, ¶ 68, 2018 WL 1904680, at \*14 (stating that no branch of New Mexico government can change the meaning of “capital offense” as that term is used in the state constitution).

24. Dan McKay, *Lawmakers Wrestle with New Bail System*, ALBUQUERQUE J. (Sept. 7, 2018, 9:11 PM), <https://www.abqjournal.com/1218228/legislators-wrestle-with-changing-new-bail-system.html> [<https://perma.cc/54HQ-DAFJ>].

proposed constitutional amendment is overbroad and undermined by public safety research that supports attaching a rebuttable presumption only to crimes that potentially expose a defendant by life imprisonment.<sup>25</sup> However, the rule amendments proposed thus far are not analogous enough to the presumption invalidated by *Ameer*.<sup>26</sup> The proposed amendments allow judges to make certain inferences against a defendant for purposes of pretrial release only after the defendant has been released on conditions while a felony case is pending and is charged with another felony in the interim.<sup>27</sup>

## I. PRESUMPTIONS IN CRIMINAL LAW

### A. Overview and Categories of the Presumption Doctrine

The high probability of an allegation's truth, or the assumption that it is true because of the existence of other facts, forms the basis for legal presumptions.<sup>28</sup> In the criminal context, there are two overarching types of presumptions that are distinct from one another because of the obligation each places on the factfinder.<sup>29</sup> Mandatory presumptions require the factfinder to affirmatively find the assumed fact, whereas permissive inferences do not.<sup>30</sup> A third category of presumptions used in criminal law are rebuttable presumptions. A rebuttable presumption is based on inferences that are drawn from facts delivered by the prosecution that create a prima facie case.<sup>31</sup> This type of presumption against a criminal defendant can be overcome through a slight showing of evidence that weighs in the defendant's favor.<sup>32</sup>

The United States Supreme Court has dealt with criminal presumptions primarily in the context of jury instructions. Specifically, when an instruction effectively undermines the prosecution's duty to prove each element of a crime beyond a reasonable doubt by directing the jury to assume certain facts, it curbs the jury's duty to find that the prosecution has met this burden and is unconstitutional.<sup>33</sup> However, when an instruction merely allows jurors to rationally infer a causal connection between a proven fact and the ultimate allegation, it is constitutional because jurors are free to reject such an inference.<sup>34</sup>

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25. Matthew Reisen, *Review Casts Doubt on DA's Pretrial Detention Plan*, ALBUQUERQUE J. (July 19, 2019, 12:10 AM), <https://www.abqjournal.com/1342255/review-casts-doubt-on-das-bail-reform-proposal.html> [<https://perma.cc/67LV-ERMB>].

26. *Ameer*, 2018-NMSC-030, 2018 WL 1904680.

27. Leo M. Romero, *Report and Recommendations of the Ad Hoc Pretrial Release Committee*, N.M. SUP. CT. AD HOC PRETRIAL RELEASE COMM. 13–14 (Aug. 3, 2018), [https://www.nmlegis.gov/handouts/CCJ%20090618%20Item%206%20Daniels%20-%20Ad%20Hoc%20Bail%20Committee%20Rules%20Revision%20Report%20\(8-3-18\).pdf](https://www.nmlegis.gov/handouts/CCJ%20090618%20Item%206%20Daniels%20-%20Ad%20Hoc%20Bail%20Committee%20Rules%20Revision%20Report%20(8-3-18).pdf) [<https://perma.cc/KMA4-KQDP>].

28. *Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

29. *Cty. Court v. Allen*, 442 U.S. 140, 157 (1979).

30. *Id.*

31. *Rebuttable Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32. *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010) (citing *United States v. Stricklin*, 932 F.2d 1353, 1355 (10th Cir. 1991) and *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991)); DOYLE, *supra* note 19, at 10.

33. *Allen*, 442 U.S. at 156 (citing *In re Winship*, 397 U.S. 358 (1970)).

34. *Id.* at 157.

## B. Use of Presumptions in Pretrial Release Determinations

While presumptions during the factfinding stage of trial may not always be constitutionally permissible, presumptions in the pretrial context are different. The accused are protected by the “innocent until proven guilty beyond a reasonable doubt” standard derived from the Due Process Clause during the factfinding stage.<sup>35</sup> During pretrial proceedings, however, the Eighth Amendment’s Excessive Bail Clause attaches, and the Supreme Court has recognized that not all offenses are bailable.<sup>36</sup> The Court has therefore given deference to legislative bodies responsible for passing statutes and promulgating regulations containing presumption language that govern who is entitled to bail.<sup>37</sup> The type of presumption used in pretrial bail proceedings varies, but rebuttable presumptions are quite common.<sup>38</sup>

## C. Presumptions in Capital Cases

There are two competing theories on why individuals charged with capital crimes are often subject to pretrial detention.<sup>39</sup> The first revolves around the potential of execution, rather than the nature of the crime. Labeled the “penalty theory,” this view rests on the belief that the accused would rather flee and forfeit any required appearance bond than face the possibility of a death sentence.<sup>40</sup> In contrast, the “classification theory” is indifferent to the crime’s potential consequence, but concerns itself with the nature of the offense.<sup>41</sup> Certain studies suggest that the severity of a crime does not necessarily indicate whether a defendant will reoffend or abscond while trial is pending.<sup>42</sup> While this certainly undermines the central view of the classification theory, it does not unfailingly lend support to the penalty theory. A reasonable inference can be made that a more severe sentence inevitably flows from the conviction of a more serious offense.

Both of these theories illustrate why some courts have historically been reluctant to release individuals charged with capital offenses, but they do not speak to the use of presumptions in pretrial release. While some states, like New Mexico, have only incorporated a presumption against defendants charged with capital crimes into their constitutional bail provisions, some have taken the additional step of incorporating a presumption against defendants charged with any number of felonies.<sup>43</sup> Other jurisdictions attach rebuttable presumptions, through regulations,

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35. See generally *Winship*, 397 U.S. 358.

36. U.S. CONST. amend. VIII; *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

37. See *United States v. Salerno*, 481 U.S. 739, 755 (1987); *Carlson*, 342 U.S. at 545–46; see also *Stone*, 608 F.3d at 945 (“[P]resumption[s] reflect Congress’ substantive judgment that particular classes of offenders should ordinarily be detained prior to trial.”); DOYLE, *supra* note 19, at 4–5.

38. See, e.g., 18 U.S.C. § 3142(e) (2012); D.C. CODE ANN. § 23-1321 (West, Westlaw through Sept. 11, 2019); S.B. 10, 2017–18 Sess. (Cal. 2018).

39. *State v. Ameer*, 2018-NMSC-030, ¶¶13–14, NO. S-1-SC-36395, 2018 WL 1904680, at \*3.

40. *Id.* ¶ 13, 2018 WL 1904680, at \*3; see also *Ex parte Dennis*, 334 So. 2d 369, 371 (Miss. 1976); *Roll v. Larson*, 516 P.2d 1392, 1393 (Utah 1973); *State v. Johnson*, 294 A.2d 245, 250 (N.J. 1972).

41. *Roll*, 516 P.2d at 1393.

42. Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 14–16 (2008).

43. N.M. CONST. art. II § 13; e.g., OHIO CONST. art. 1, § 9.

to violent crimes and crimes where weapons are alleged to have been used.<sup>44</sup> Furthermore, although the Eighth Amendment of the United States Constitution guarantees a right to bail and the United States Supreme Court has generally held that capital crimes are not bailable, the federal court system has also incorporated presumptions into its pretrial release statutes for many crimes.<sup>45</sup> Presumptions against certain classes of offenders are especially apparent in jurisdictions that have shifted away from cash bail release systems.<sup>46</sup>

## II. USE OF PRETRIAL PRESUMPTIONS IN CASH BAIL REFORM JURISDICTIONS AND FEDERAL COURTS

California and Washington, D.C. have moved away from cash bail, and have embraced systems of pretrial release that detain defendants when certain criteria are met.<sup>47</sup> In both of these jurisdictions, the guidelines for pretrial release include rebuttable presumptions for certain offenses or in certain situations.<sup>48</sup> Both of these jurisdictions are similarly situated to New Mexico in that the death penalty has been statutorily abolished or is no longer in use.<sup>49</sup> This section will also analyze the federal system of pretrial release, which relies on rebuttable presumptions in pretrial release proceedings for certain offenses, is largely based on Washington D.C.'s system, and has acted as a partial model for New Mexico.<sup>50</sup> It is important to note that while rebuttable presumptions work against the defendant, they still require the prosecuting authority to deliver facts that create a prima facie case.<sup>51</sup>

### A. Washington, D.C. Statutory Scheme

Washington, D.C. abolished the death penalty in 1981.<sup>52</sup> Since 1970, the District has been using a statutory scheme that almost entirely rejects cash bail.<sup>53</sup> The statute requires courts to determine the defendant's risk of flight and the danger they pose to the community.<sup>54</sup> The court must then order release, release on

44. *E.g.*, S.B. 10, 2017–18 Sess. (Cal. 2018).

45. U.S. CONST. amend. VIII; 18 U.S.C. § 3142(e)(2)–(3), (f)(1)(A)–(E) (2012); *United States v. Salerno*, 481 U.S. 747–48 (1987); *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952).

46. *E.g.*, D.C. CODE ANN. § 23-1322, § 23-1325 (West, Westlaw through Sept. 11, 2019); Cal. S.B. 10.

47. *See generally* § 23-1321 to 1325; Cal. S.B. 10.

48. § 23-1325; Cal. S.B. 10.

49. *State and Federal Info District of Columbia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/district-columbia> [https://perma.cc/N9ZA-M2EC]; John Gramlich, *California is One of 11 States that Have the Death Penalty but Haven't Used it in More Than a Decade*, PEW RES. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/> [https://perma.cc/UMZ4-U56L].

50. § 3142(e)(2)–(3); *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 46–47, 70, 410 P.3d 201, 209, 213.

51. *Rebuttable Presumption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

52. DEATH PENALTY INFO. CTR., *supra* note 49.

53. *PSA's History*, PRETRIAL SERVS. AGENCY FOR D.C., <https://www.psa.gov/?q=about/history> [https://perma.cc/4E6L-LAZS].

54. D.C. CODE ANN. § 23-1321 to 1325 (West, Westlaw through Sept. 11, 2019).

conditions, or pretrial detention.<sup>55</sup> A rebuttable presumption is triggered in pretrial detention hearings if the defendant is charged with first-degree murder, second-degree murder, or assault with attempt to kill while armed if the defendant is suspected to have committed the offense while armed with a firearm, or if a firearm was readily available during the commission of the offense.<sup>56</sup> In Washington, D.C., first-degree murder involves a killing with malice aforethought involving premeditation and deliberation.<sup>57</sup> The statute requires the prosecution to prove by clear and convincing evidence that the defendant will not appear in court as ordered or poses a risk to the safety of others or the community.<sup>58</sup>

### B. California Proposition

In August 2018, California passed a reform bill that seeks to completely do away with cash bail.<sup>59</sup> California voters will have the opportunity to ratify the bill in the 2020 general election.<sup>60</sup> Lawmakers in the state have sought bail reforms for nearly forty years, and a 2018 California Court of Appeal decision allowed the movement to gain steam.<sup>61</sup> The court's decision declared the state's system of assigning money bonds based on the severity of the offense unconstitutional, particularly when a high bond is effectively used as preventative detention because the defendant is unable to pay.<sup>62</sup> The bill does not explicitly mention first-degree murder, which is defined as "killing of a human being . . . with malice aforethought" and statutorily continues to carry a potential penalty of death in California.<sup>63</sup> However, though the death penalty is still legal in California, the state has not executed an individual convicted of a capital crime since 2006.<sup>64</sup> The bill employs a rebuttable presumption in cases where the defendant is charged with a crime of violence, is alleged to have made threats of violence, or was armed with or used a deadly weapon at the time of the alleged offense.<sup>65</sup> The court must still determine that clear and convincing evidence has been shown by the prosecution that no release conditions will reasonably assure the safety of the public or the defendant's appearance in court.<sup>66</sup>

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55. *Id.*

56. § 23-1322, -1325.

57. § 22-2101.

58. § 23-1322.

59. Scott Wilson, *California Abolishes Cash Bail, Aiming to Treat Rich and Poor Defendants Equally*, WASH. POST (Aug. 29, 2018), [https://www.washingtonpost.com/national/california-abolishes-cash-bail-aiming-to-treat-rich-and-poor-defendants-equally/2018/08/29/70891a9e-abad-11e8-b1da-ff7faa680710\\_story.html?utm\\_term=.423a6f827605](https://www.washingtonpost.com/national/california-abolishes-cash-bail-aiming-to-treat-rich-and-poor-defendants-equally/2018/08/29/70891a9e-abad-11e8-b1da-ff7faa680710_story.html?utm_term=.423a6f827605) [https://perma.cc/JU4Y-QET6].

60. Michael McGouh, *The Fate of California's Cash Bail Industry Will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 11:58 AM), <https://www.sacbee.com/news/california/article224682595.html> [https://perma.cc/2A8Q-RP58].

61. Wilson, *supra* note 59.

62. *In re Humphrey*, 228 Cal.Rptr.3d 513 (Cal. Ct. App. 2018).

63. CAL. PENAL CODE §§ 187(a), 190(a) (West, Westlaw through Ch. 860 of the 2019 Legis. Sess.); S.B. 10, 2017–18 Sess. (Cal. 2018).

64. Gramlich, *supra* note 49.

65. Cal. S.B. 10.

66. *Id.*

### C. Federal Law

Congress noted the success of the pretrial release system used in Washington, D.C. that detains certain defendants, and embraced a similar model for use in United States Federal Courts in 1984.<sup>67</sup> These courts employ rebuttable presumptions when determining pretrial release.<sup>68</sup> Rebuttable presumptions are triggered either by specific offenses or other risks.<sup>69</sup> Offenses that will trigger a rebuttable presumption in pretrial detention hearings include those that are of a particularly violent nature, felonies where a dangerous weapon is alleged to have been used, and crimes that are punishable by death or life imprisonment.<sup>70</sup> Though the rebuttable presumption remains at work, the prosecuting authority's *prima facie* case against the defendant's release must still meet the clear and convincing evidentiary standard in order for the defendant to be detained pending trial.<sup>71</sup> The federal model is among those cited by the New Mexico Supreme Court as support for its pretrial release guidelines.<sup>72</sup>

### III. PRETRIAL RELEASE IN NEW MEXICO

The New Mexico Constitution, with limited exceptions, has guaranteed the right to bail since it took effect when New Mexico achieved statehood in 1912.<sup>73</sup> Since adoption, it has always contained an exception for capital offenses.<sup>74</sup> It previously included exceptions for felony cases where certain determinative criteria were met.<sup>75</sup> Those exceptions were as follows:

Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration in the following instances:

- A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction with the case at bar;
  - B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state.
- The period for incarceration without bail may be extended by any

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67. Thomas C. French, *Is It Punitive or Is It Regulatory?* *United States v. Salerno*, 20 U. Tol. L. Rev. 189, 197 (1988).

68. 18 U.S.C. § 3142(e)(2)–(3) (2012); DOYLE, *supra* note 19, at 9–11.

69. § 3142(e)(2)–(3), (f)(1)(A)–(E), (f)(2); DOYLE, *supra* note 19, at 11.

70. § 3142(e)(2)–(3), (f)(1)(A)–(E); DOYLE, *supra* note 19, at 11.

71. *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001) (“Even in a presumption case, the government bears the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community.”); DOYLE, *supra* note 19, at 10.

72. *See State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 46–50, 410 P.3d 201, 209–10; *State v. Brown*, 2014-NMSC-038, ¶ 34, 338 P.3d 1276, 1287.

73. *State v. Ameer*, 2018-NMSC-030, ¶ 1, NO. S-1-SC-36395, 2018 WL 1904680, at \*1; *see also Brown*, 2014-NMSC-038, ¶¶ 19–20, 338 P.3d at 1282.

74. *See* N.M. CONST. art. II, § 13.

75. *Id.* (amended 2016).

period of time by which trial is delayed by a motion for continuance made by or on behalf of the defendant.<sup>76</sup>

In 2014, the New Mexico Supreme Court recognized that the system of assigning monetary bonds was contrary to state constitutional guarantees.<sup>77</sup> *Brown* emphasized that bonds were set in amounts that corresponded to the perceived seriousness of the offense, without a deeper inquiry into the facts and circumstances surrounding the alleged crime.<sup>78</sup> More significantly, the case emphasized that the New Mexico Constitution recognizes that some individuals should not be afforded bail in any amount.<sup>79</sup> As support, the court points to the text of Article II of the New Mexico Constitution wherein bail denial is appropriate.<sup>80</sup> At the time, bail could be denied in capital cases “when the proof is evident or the presumption [against the defendant is] great,” or when the criteria mentioned above were met.<sup>81</sup> In 2016, an overwhelming majority of New Mexico voters passed a constitutional amendment that moved the state away from cash bail and expanded the circumstances under which a defendant could be detained pending trial.<sup>82</sup> The amendment left the presumption that may be used against defendants in capital cases untouched, but replaced the determinative criteria for bail denial in other felony cases with the following language:

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. 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.<sup>83</sup>

Five months after the amendment took effect, the New Mexico Supreme Court issued its initial order in *Ameer*, reversing the order of the trial court that found the defendant detainable under the capital offense exception.<sup>84</sup> In January 2018, the court also issued guidance on how trial courts should make pretrial detention determinations, including what evidentiary support must be produced by the

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76. *Id.*

77. *See generally Brown*, 2014-NMSC-038, 338 P.3d 1276.

78. *See generally id.*

79. *Id.* ¶ 53, 338 P.3d at 1292.

80. *Id.* ¶¶ 20, 53, 338 P.3d at 1282, 1292.

81. N.M. CONST. art. II, § 13 (amended 2016); *see also Brown*, 2014-NMSC-038, ¶ 20, 338 P.3d at 1282.

82. Maggie Shepard, *New Amendment Permits ‘No Bail’ Option*, ALBUQUERQUE J. (Nov. 30, 2016, 11:31 PM), <https://www.abqjournal.com/899204/new-amendment-permits-no-bail-option.html> [<https://perma.cc/DXP8-UQDF>].

83. N.M. CONST. art. II, § 13.

84. Order, *State v. Ameer*, S-1-SC-36395 (N.M. May 8, 2017) (order reversing trial court pretrial detention order based solely on capital offense exception).

prosecution.<sup>85</sup> As a basis for this guidance, the court referenced what evidence is required for bail denial in capital cases “when the proof is evident or the presumption [against the defendant is] great.”<sup>86</sup> Because the court made clear that there is essentially no difference between what evidence the prosecution must put forth in capital cases with a presumption and cases where pretrial detention is sought under the 2016 Constitutional Amendment, it seems as if the clear and convincing evidentiary standard is at play in both situations, even though there is only a presumption against the defendant in the former.<sup>87</sup> This is remarkably similar to what is required by Washington D.C.’s statute, the California regulations, and the federal system, where the clear and convincing evidentiary standard remains at play though the defendant must overcome a rebuttable presumption working against their release.<sup>88</sup>

Three months later, the court issued its precedential opinion in *Ameer*, holding that there are no capital offenses in New Mexico.<sup>89</sup> Specifically, because “capital offense” refers to crimes that are punishable by death, and New Mexico abolished the death penalty in 2009, the state no longer has any true capital crimes.<sup>90</sup> The central holding of *Ameer* has left New Mexico without presumptions in first-degree murder cases.<sup>91</sup> Now, in what would be a capital case prior to 2018, the prosecuting authority must file a motion for detention, and the trial court must hold a separate hearing.<sup>92</sup> Prior to this shift, the request for detention could be made at arraignment, without the separate hearing requirement.<sup>93</sup>

The court flatly rejects the classification theory approach to pretrial detention of defendants charged with first-degree murder, noting that the New Mexico Legislature deemed capital punishment an inappropriate punishment for that crime.<sup>94</sup> It appears as though the New Mexico Supreme Court has adopted a penalty theory approach to release in first-degree murder cases, which emphasizes the defendant’s risk of flight.<sup>95</sup> According to this theory, because capital punishment is no longer a penalty in New Mexico, the defendant’s flight risk is diminished.<sup>96</sup> However, as previously discussed, just because the court has acceded to a theory as to why defendants charged with first-degree murder should not ordinarily be released, neither of these theories are material to criminal presumptions. Rather, presumptions against certain classes of defendants are applied to many offenses, not

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85. See generally *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201.

86. *Id.* ¶ 92, 410 P.3d at 216.

87. See *id.*

88. 18 U.S.C. § 3142(e)(2)–(3), (f)(1)(A)–(E) (2012); D.C. CODE ANN. § 23-1321 (West, Westlaw through Sept. 11, 2019); S.B. 10, 2017–18 Sess. (Cal. 2018); See also DOYLE, *supra* note 19, at 11.

89. *State v. Ameer*, 2018-NMSC-030, ¶ 70, NO. S-1-SC-36395, 2018 WL 1904680, at \*15 (“There [is] no death penalty statutorily authorized for any crimes committed on or after July 1, 2009. . . .”).

90. *Id.* ¶¶ 69–70, 2018 WL 1904680, at \*15.

91. *Id.*

92. N.M. CONST. art. II, § 13; see *Ameer*, 2018-NMSC-030, ¶ 73, 2018 WL 1904680, at \*15.

93. See *State v. David*, 1984-NMCA-119, ¶ 23, 692 P.2d 524, 527 (stating that a separate review hearing is not required when bail is denied).

94. *Ameer*, 2018-NMSC-030, ¶ 61, 2018 WL 1904680, at \*13.

95. See *id.*; see also *Ex parte Dennis*, 334 So. 2d 369, 371 (Miss. 1976); *State v. Johnson*, 294 A.2d 245, 250 (N.J. 1972); *Roll v. Larson*, 516 P.2d 1392, 1393 (Utah 1973).

96. See *Ameer*, 2018-NMSC-030, ¶ 13, 2018 WL 1904680, at \*3.

just capital crimes, in many jurisdictions and the federal court system.<sup>97</sup> The absence of presumptions in New Mexico's system of pretrial release is not *Ameer's* preeminent holding, but it happens to be a consequence of declaring the capital offense exception moot.

The 2016 Constitutional Amendment moved New Mexico away from a pretrial release system centered on cash bail, and towards a system of release that treats defendants equally regardless of their financial situation.<sup>98</sup> For example, the algorithm used to determine risk factors for defendants in New Mexico's largest county does not take into account race or socioeconomic status.<sup>99</sup> This is a positive step towards fundamental fairness in the state's pretrial release system. However, the release of defendants charged with first-degree murder has been met with intense public criticism.<sup>100</sup> Working without presumptions against defendants charged with first-degree murder in pretrial release proceedings in New Mexico has arguably resulted in the release of certain defendants who may have been detained had they been required to overcome a presumption that they are a flight risk or otherwise pose a danger to the community.<sup>101</sup> This has also sparked concern among lawmakers, including the former governor, who is among those who have called for the repeal of this amendment.<sup>102</sup> The current governor has noted the current pretrial release system's ineffectiveness.<sup>103</sup> A significant overhaul of the pretrial release system would undo the progress the state has done in its move toward treating defendants equally regardless of their ability to post a cash bond. Incorporating rebuttable presumptions into New Mexico's pretrial release rules, as has been done by other cash bail reform jurisdictions, allows New Mexico to continue a pretrial release system rooted in fairness.

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97. OHIO CONST. art. I, § 9; 18 U.S.C. § 3142(e)(2)–(3), (f)(1)(A)–(E) (2012); D.C. CODE ANN. § 23-1321 (West, Westlaw through Sept. 11, 2019); S.B. 10, 2017–18 Sess. (Cal. 2018).

98. N.M. CONST. art. II § 13.

99. Ryan Boetel, *Courts to Implement New Risk Assessment Tool*, ALBUQUERQUE J. (May 31, 2017, 11:45PM) <https://www.abqjournal.com/1011380/courts-to-implement-new-risk-assessment-tool-for-suspects.html> [<https://perma.cc/Z46S-KWKF>]; see also *About the PSA*, LAURA & JOHN ARNOLD FOUND., <https://www.psapretrial.org/about> [<https://perma.cc/4BZL-88Q6>] (“The PSA uses nine factors to predict a person’s likelihood of success while on pretrial release. The factors include the person’s age, prior convictions, pending charges, and prior failures to appear in court pretrial.”).

100. See Joshua Kellogg, *Residents Hold Rally Against New Pretrial Detention Rules*, FARMINGTON DAILY TIMES (Sept. 18, 2017, 1:38 PM), <https://www.daily-times.com/story/news/crime/2017/09/18/residents-hold-rally-against-new-pretrial-detention-rules/668758001/> [<https://perma.cc/RMS5-UJ9U>].

101. See, e.g., Katy Barnitz, *Second Murder Tied to Woman out of Jail on Bond*, ALBUQUERQUE J. (July 31, 2018, 11:18 PM), <https://www.abqjournal.com/1203311/prosecutors-host-of-party-was-facing-murder-charge.html> [<https://perma.cc/VK8B-XQ6U>]; Maggie Shepard, *Murder Suspect Arrested After Missing Court Hearing*, ALBUQUERQUE J. (Apr. 27, 2018, 9:48 PM), <https://www.abqjournal.com/1164331/murder-case-suspect-fails-for-show-for-court-again.html> [<https://perma.cc/D94A-Q7JH>]. The defendant in the latter example was subsequently convicted of first-degree murder and sentenced to life in prison. *Woman Sentenced in May 2017 Death*, ALBUQUERQUE J., Oct. 17, 2019, at A7.

102. Lopez, *supra* note 22; McKay & Shepard, *supra* note 22; Porter, *supra* note 22.

103. Ramirez, *supra* note 22.

#### IV. THE EFFECT OF PRESUMPTIONS ON PRETRIAL RELEASE IN NEW MEXICO

##### A. Pretrial Presumptions and the Prosecution's Burden

If the New Mexico's Rules of Criminal Procedure are amended in to include a rebuttable presumption against defendants charged with first-degree murder, the burden of the prosecution will not change significantly.<sup>104</sup> Notably, a presumption of this sort will not run contrary to the most recent constitutional amendment's clear and convincing evidence standard.<sup>105</sup> The federal rules for pretrial release, Washington, D.C.'s statutory scheme, and California's bail reform regulations all make clear that the prosecution must still make a clear and convincing evidentiary showing of dangerousness or risk of flight, and federal caselaw has interpreted the defendant's burden to rebut any presumption as minimal.<sup>106</sup>

If changes to New Mexico's pretrial detention rules are modeled after any of the approaches discussed above, the accused would still be entitled to a separate pretrial detention hearing,<sup>107</sup> unlike the pre-*Ameer* requirements where defendants charged with capital crimes and detained under the capital offense exception were entitled only to arraignment if the prosecuting authority did not move for pretrial detention pursuant to the 2016 Constitutional Amendment.<sup>108</sup> As was true prior to *Ameer*, the nature of a first-degree murder charge would trigger a presumption against the defendant.<sup>109</sup> This would allow the trial court to *sua sponte* order a separate hearing at the accused's first court appearance if the court believes the defendant may pose a danger to the community or a risk of flight. Currently, the prosecution must specifically request a separate pretrial detention hearing regardless of the felony offense.<sup>110</sup> This change would comply with the 2016 Constitutional Amendment's mandate that a separate hearing is required in all cases when bail denial is being considered.<sup>111</sup> It also comports with the New Mexico Supreme Court's desire to give district judges broader authority in pretrial release determinations.<sup>112</sup>

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104. See, e.g., *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001) ("Even in a presumption case, the government bears the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community."); DOYLE, *supra* note 19, at 10.

105. *Mercedes*, 254 F.3d at 436; DOYLE, *supra* note 19, at 10.

106. 18 U.S.C. § 3142(e)(1) (2012); D.C. CODE ANN. § 23-1322 (West, Westlaw through Sept. 11 2019); *Mercedes*, 254 F.3d at 436 ("[The defendant] bears a limited burden of production—not a burden of persuasion—to rebut that presumption by coming forward with evidence that he does not pose a danger to the community or a risk of flight."); S.B. 10, 2017–18 Sess. (Cal. 2018).

107. See § 3142(e)(1); § 23-1321; Cal. S.B. 10.

108. See *State v. David*, 1984-NMCA-119, ¶ 23, 692 P.2d 524, 527 (stating that a separate review hearing is not required when bail is denied).

109. N.M. CONST. art. II, § 13.

110. *Id.*

111. *Id.*

112. See *State v. Ameer*, 2018-NMSC-030, ¶ 71, NO. S-1-SC-36395, 2018 WL 1904680, at \*15.

## B. Amending Rules of Criminal Procedure is Appropriate

The New Mexico Supreme Court has the power to promulgate rules governing the operation of state courts.<sup>113</sup> This is a power shared with the State Legislature, but the final authority rests with the court.<sup>114</sup> Given that incorporating a rebuttable presumption into New Mexico's pretrial release rules simply guides how courts are supposed to administer pretrial detention hearings, it is not substantive in nature because the defendant's rights are not significantly impacted. A legitimate concern in making a rule amendment that contains a rebuttable presumption is the rule's ability to withstand a constitutional challenge based on the clear and convincing evidentiary standard contained in the 2016 constitutional amendment.<sup>115</sup> However, the federal release model, Washington D.C.'s statute, and California's reform bill still require the prosecution to make the prima facie case demanded by rebuttable presumptions to the clear and convincing evidentiary standard.<sup>116</sup> Additionally, three federal circuits agree that a rebuttable presumption against a defendant can live harmoniously with the clear and convincing evidence burden that the prosecuting authority must meet in pretrial detention hearings.<sup>117</sup> Furthermore, prior to holding that the capital offense exception and accompanying presumption cannot be used, the New Mexico Supreme Court emphasized that the evidentiary burden borne by the prosecutor's reliance on either the capital offense exception or the 2016 Constitutional Amendment requiring clear and convincing evidence is largely the same.<sup>118</sup> It should also be noted that the rule amendments that have already been proposed include a type of presumption against the defendant's release.<sup>119</sup> For these reasons, an amendment to the New Mexico Rules of Criminal Procedure adopted by the Supreme Court is an appropriate way to incorporate a rebuttable presumption into the current pretrial detention rules.

## C. Current Proposals are Insufficient or Overly Zealous

### 1. Permissive Inference Rule Amendment

New Mexico lawmakers have been critical of applying the same standard of release to all felony defendants, including those charged with first-degree murder and other serious violent crimes.<sup>120</sup> Among the proposals to combat the absence of presumptions against certain offenders from New Mexico's system of pretrial release was an unadopted rule amendment that allows judges to make permissive inferences

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113. *State v. Roy*, 1936-NMSC-048, ¶ 40, 60 P.2d 646, 659 (“[t]he power to provide rules of pleading, practice, and procedure . . . is inherently ours.”).

114. *See Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 15, 805 P.2d 603, 607–08; *see also State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 19, 315 P.2d 223, 227 (“[S]tatutory regulation[s] must preserve to the court sufficient power to . . . administer its judicial functions.”).

115. N.M. CONST. art. II, § 13.

116. 18 U.S.C. § 3142(e) (2012); D.C. CODE ANN. § 23-1322 (West, Westlaw through Sept. 11, 2019); S.B. 10, 2017–18 Sess. (Cal. 2018); *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001).

117. *See United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010); *United States v. Stricklin*, 932 F.2d 1353, 1355 (10th Cir. 1991); *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991).

118. *See State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 92–93, 410 P.3d 201, 216–17.

119. *See Romero*, *supra* note 27, at 13–14.

120. McKay, *supra* note 24.

only after a defendant has been released on conditions while a felony case is pending and the defendant is charged with another felony offense in the interim.<sup>121</sup> Even if a similar rule amendment is adopted, New Mexico will not be in the position it was prior to *Ameer*, and it will not be in line with other jurisdictions that have abolished or no longer use the death penalty and have undertaken bail reform.<sup>122</sup> Notably, this proposed rule amendment does nothing to directly address any felony offenses specifically.<sup>123</sup> While a rule amendment of this sort may be a way to address the concern that certain felony defendants cannot comply with release conditions, it does not speak to the concern that individuals charged with first-degree murder should not be eligible for release in some circumstances. Rather, it would require an individual charged with first-degree murder and not detained to re-offend before a permissive inference against the defendant could be employed by the court in determining if pretrial detention is appropriate.<sup>124</sup>

## 2. Further Constitutional Amendments

Other elected officials, including the District Attorney for New Mexico's largest county, have proposed amending the state constitution again to incorporate rebuttal presumptions for an exceedingly wide array of offenses.<sup>125</sup> Significantly, the charges are not limited to violent offenses or those carried out while in possession of a deadly weapon, but include witness intimidation, felonies committed by individuals completing a sentence of probation or parole for another felony, and other crimes that researchers have found to be equivocal touchstones of an individual's dangerousness.<sup>126</sup> The list of offenses that would trigger a rebuttable presumption under this proposed constitutional amendment is far more exhaustive than those of the other jurisdictions discussed above.<sup>127</sup> Tellingly, researchers have concluded that limiting the use of a rebuttal presumption to pretrial release proceedings in which the defendant is charged with a crime punishable by life imprisonment would simultaneously address public safety concerns and place New Mexico on level ground with similarly situated jurisdictions.<sup>128</sup> As argued herein, this can be accomplished without further amendment to the state constitution.<sup>129</sup>

## D. Legislative Fix Alternative

The New Mexico Legislature has certain powers to promulgate substantive and procedural court rules.<sup>130</sup> As discussed above, the inclusion of a rebuttable

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121. Compare *Romero*, *supra* note 27, at 13–14 with Rule 5-409 NMRA.

122. *State v. Ameer*, 2018-NMSC-030, NO. S-1-SC-36395, 2018 WL 1904680.

123. *Romero*, *supra* note 27, at 13–14.

124. *Id.*

125. Katy Barnitz & Elise Kaplan, *DA Torrez to Unveil New Pretrial Detention Proposal*, ALBUQUERQUE J. (May 21, 2019, 12:05AM), <https://www.abqjournal.com/1318399/da-to-unveil-new-pretrial-detention-proposal-ex-some-defendants-would-have-to-prove-they-should-be-released-pending-trial.html> [https://perma.cc/Q2SA-6PV5]; Reisen, *supra* note 25.

126. Barnitz & Kaplan, *supra* note 125; Reisen, *supra* note 25.

127. See *supra* Part II.

128. See Reisen, *supra* note 25.

129. See discussions *supra* Section IV.B and *infra* Section IV.D.

130. See *Sw. Cmty. Health Servs. v. Smith*, 1988-NMSC-035, ¶ 12, 755 P.2d 40, 43.

presumption in first-degree murder cases is procedural in nature, because it directly impacts the judiciary's function of administering pretrial release proceedings. Though the New Mexico Supreme Court has the final authority over procedural rules, the legislature may enact statutory changes that include procedural rules provided they are not in conflict with existing court rules.<sup>131</sup> The addition of a rebuttable presumption in first-degree murder cases would not conflict with the existing procedural rules, because no presumptions currently exist.<sup>132</sup> Adding a rebuttable presumption is an expansion of the current procedural rules for pretrial detention.<sup>133</sup> When a statutory enactment is an expansion of a procedural rule, it is permissible.<sup>134</sup> Even so, the court that is subject to the procedural mechanisms contained in the statutorily enacted rule retains the power to temper it as the court sees necessary, provided a party is not unduly prejudiced.<sup>135</sup> If a rule containing a rebuttable presumption in first-degree murder cases is relaxed by the court, the prosecuting authority is arguably prejudiced. For this reason, a procedural rule change adopted by the New Mexico Supreme Court is a more favorable alternative. Lastly, while this Note argues that the addition of a rebuttable presumption is a procedural change, it could reasonably be viewed as an issue of legal substance that impacts the rights of the accused or articulates a general public policy. If so, the New Mexico Legislature has broader authority to facilitate a statutory enactment that adds rebuttable presumptions in first-degree murder cases.<sup>136</sup>

#### E. The Goal of Bail Reform Survives

Members of the New Mexico Supreme Court were driving forces behind New Mexico's shift away from monetary bonds.<sup>137</sup> The court's opinions related to assigning bonds and determining pretrial release and detention make clear that the court believes the severity of a crime is not a legitimate factor in determining pretrial detention.<sup>138</sup> The solution proposed by this Note does not contradict that belief. Rather, this solution requires trial court judges to conduct a deeper inquiry into the facts and circumstances surrounding a first-degree murder charge as mandated by the New Mexico Supreme Court in *Brown*.<sup>139</sup> If the prosecution cannot make a persuasive clear and convincing prima facie showing that the defendant poses a

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131. See *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 14, 805 P.2d 603, 607.

132. See generally Rule 5-409 NMRA.

133. See generally *id.*

134. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d 820, 824 (holding that the statutory expansion of a court rule is permissible when "expanded . . . within the boundaries of its purpose").

135. See *Mendez*, 1991-NMSC-002, ¶ 14, 805 P.2d at 607.

136. See *Sw. Cmty. Health Servs. v. Smith*, 1988-NMSC-035, ¶ 12, 755 P.2d 40, 43 ("this Court should not invalidate substantive policy choices made by the legislature under the constitutional exercise of its police powers. . . .").

137. Dave Tomlin, *NM Chief Justice Daniels Backs Bail Reform Amendment*, ALBUQUERQUE J. (July 20, 2016, 8:21 AM), <https://www.abqjournal.com/811174/nm-chief-justice-daniels-backs-bail-reform-amendment.html> [https://perma.cc/B7CB-PLL4].

138. See *State v. Ameer*, 2018-NMSC-030, NO. S-1-SC-36395, 2018 WL 1904680; *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201; *State v. Groves*, 2018-NMSC-006, 410 P.3d 193; *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276.

139. See generally *Brown*, 2014-NMSC-038, 338 P.3d 1276.

danger or will flee if released, the court must refuse pretrial detention.<sup>140</sup> Likewise, if the defendant meets his or her burden of production to overcome a rebuttable presumption against release, the court cannot order detention.<sup>141</sup>

The language of New Mexico's Constitutional Amendment is similar to that of other jurisdictions, such as Washington, D.C.<sup>142</sup> This is an important consideration in gauging the success of bail reform, because Washington D.C.'s retreat from cash bail has lasted nearly fifty years with limited amendment.<sup>143</sup> However, there were growing pains, as its statutory scheme for pretrial detention in first-degree murder cases has been amended five times since enactment.<sup>144</sup> The New Mexico Constitutional Amendment's goal of a fair system of release that detaches itself from cash bail can be furthered if appropriate safeguards like a rebuttable presumption in first-degree murder cases are put in place, because it puts New Mexico's pretrial release system in a parallel position to jurisdictions that have successfully adopted similar measures.

### CONCLUSION

The gravity of first-degree murder does not change when a jurisdiction ceases the imposition of the death penalty as a potential sentence. Notwithstanding the New Mexico Supreme Court's apparent subscription to the penalty theory of why those accused of first-degree murder are often detained pending trial, the state's system of pretrial release stands out among jurisdictions that have embraced bail reform because of its absence of presumptions of dangerousness or flight risk against defendants charged with first-degree murder.<sup>145</sup> Deficiencies like this have led lawmakers to rethink the state's approach to pretrial release, with some going as far as calling for the repeal of New Mexico's bail reform amendment.<sup>146</sup> A procedural rule amendment, or alternatively, a legislative fix, could add a rebuttable presumption against defendants charged with first-degree murder without undoing the progress the state has made in its shift toward a fair system of release. This approach addresses the safety concerns of the public and lawmakers, corresponds with the clear and convincing evidentiary standard required under New Mexico's 2016 Constitutional Amendment, and furthers the state Supreme Court's goal of giving judges expanded discretion in pretrial release decisions.<sup>147</sup> Furthermore, it

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140. *See* *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001). In the federal court system, the evidentiary standard is not the same to demonstrate flight risk. The New Mexico Constitution demands the same standard for both flight risk and danger.

141. *See id.*

142. *Compare* N.M. CONST. art. II, § 13 with D.C. CODE ANN. § 23-1321 to 1325 (West, Westlaw through Sept. 11, 2019).

143. N.M. CONST. art. 2, § 13; § 23-1322, § 23-1325.

144. *See* § 23-1325.

145. *See* *State v. Ameer*, 2018-NMSC-030, ¶¶ 13, 61, NO. S-1-SC-36395, 2018 WL 1904680, at \*3, \*13; *see, e.g.*, § 23-1325; S.B. 10, 2017–18 Sess. (Cal. 2018).

146. McKay & Shepard, *supra* note 22; *see also* Porter, *supra* note 22.

147. N.M. CONST. art. II, § 13; *see Ameer*, 2018-NMSC-030, ¶ 71, 2018 WL 1904680, at \*3.

makes New Mexico's system of release more analogous to those in jurisdictions whose bail reform approaches helped shaped the state's amendment.<sup>148</sup>

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148. See *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 70, 410 P.3d 201, 213; see also 18 U.S.C. § 3142(f)(1)(A)–(E) (2012); § 23-1321 to 1322, § 23-1325.