

**OFFICIAL REPORT OF THE  
LAW OFFICES OF THE PUBLIC DEFENDER**

**ON THE SECOND JUDICIAL DISTRICT ATTORNEY'S  
MEMORANDUM REGARDING THE CASE MANAGEMENT  
ORDER**

September 28, 2017

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## INTRODUCTION

*Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquot modo destratur, nec super eum ibimus, ne super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.*

*Magna Carta, c. 39.*

*Nulli vendemus, nulli negabimus, aut differemus, rectum aut iusticiam.*

*Magna Carta, c. 40.*

Prior to the 2015 enactment of the Case Management Order (“CMO”) the Bernalillo County criminal justice system suffered from systemic failings brought about by improper utilization of scarce resources, cavalier prosecutorial charging decisions, and inadequate remedies at law. These widespread problems resulted in costly mass incarceration, unnecessary and extended disruptions in families and the community, and unconstitutionally long delays in bringing cases to trial which prejudiced victims and defendants alike.

To remedy these problems, the New Mexico Supreme Court found that “the delivery of fair and speedy criminal justice is a critical goal for all participants in the Bernalillo County criminal justice system”<sup>1</sup> and enacted the CMO with a clear path in mind. It would force criminal justice system stakeholders (the courts, prosecutors, defense bar, and law enforcement) to optimize resources for more efficient and effective resolution of criminal proceedings. In order to do so, it would provide both guidelines for constitutionally acceptable case adjudication, as well as sanctioning mechanisms to ensure compliance with these guidelines. As a result, the

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<sup>1</sup> IN THE MATTER OF THE ADOPTION OF LOCAL RULE LR2-400 NMRA TO IMPLEMENT A CRIMINAL CASE MANAGEMENT PILOT PROGRAM IN THE SECOND JUDICIAL DISTRICT COURT. No. 14-8300-025 (November 6, 2014).

hope was that parties would focus their resources on effectively and efficiently investigating, prosecuting, defending and adjudicating the most serious crimes committed in our community.

Unfortunately, despite the unquestioned right of the Supreme Court to promulgate rules for the effective administration of justice, and the universally-accepted need for such guidance, the Second Judicial District Attorney's Office ("the District Attorney") has abdicated its responsibility to adapt to the rules set forth by our Supreme Court. Instead, on June 15, 2017 the District Attorney issued a *Report on the Impact of the Case Management Order on the Bernalillo County Criminal Justice System and Proposed Rule Amendments* ("Memorandum" and "Proposal"). The Albuquerque Law Offices of the Public Defender ("LOPD") has thoroughly examined this Memorandum and now issues its Official Report.

In its Memorandum, the District Attorney argues that the CMO is a failed instrument which requires comprehensive revision. The District Attorney argues that the CMO is "routinely used to dismiss cases"<sup>2</sup> on procedural issues. It alleges that mere technical violations are resulting in widespread dismissals for the following reasons: (1) failures to transport defendants to court; (2) the court itself not complying with CMO timelines; (3) violations of CMO discovery requirements; (4) failure to provide discovery at arraignment; and (5) failure to provide pretrial witness interviews. These claims are based solely on anecdotes. Rather than providing statistical support, the District Attorney hand-picked 40 cases out of over 7,000 handled by the Second Judicial District Courts during that timeframe, and claims that these "unjust" dismissals are emblematic of a trend of injustice which has caused crime rates to soar.

The position of LOPD is that the CMO is addressing the problems which it was designed and does not need substantial revision. The rises in crime recently observed throughout the greater Albuquerque Metropolitan Area have resulted from complex societal and law

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<sup>2</sup> *Memorandum*, p. 5.

enforcement factors, and cannot be attributed to the CMO. Any unjust outcomes pointed to by the District Attorney are not the fault of the CMO, but of the demonstrated unwillingness of the District Attorney to implement policies and procedures to effectively fulfill its constitutional obligation to seek justice. Cases are, in all but the rarest circumstances, dismissed for substantial reasons, well-supported by caselaw applicable throughout the state of New Mexico, and in those rare circumstances where the District Attorney believes that an individual judge has erred, it should pursue appellate remedies. The changes which the District Attorney proposes to the CMO are not “revisions”, but rather attempts to dismantle the CMO by rendering its mandatory enforcement mechanisms void, rendering it little more than a list of suggestions. Any changes to the CMO should be designed to improve the practice of law, the foundations of our criminal justice system and further guarantee the fair and speedy disposition of criminal cases.

## **I. NONE OF THE RECENT REFORMS, INCLUDING THE CMO, IS TO BLAME FOR A RISE IN CRIME.**

The Bernalillo County Criminal Justice Review Commission (BCCJRC) was formed in 2013 to address unconstitutionally long periods of case delay and pretrial incarceration in the Second Judicial District, along with the attendant community and fiscal consequences of such delays. The Commission was tasked with identifying problem areas, setting goals based on best practices, and developing solutions grounded in law. Starting in 2014, dozens of initiatives, including the CMO, were discussed by the stakeholders represented on the BCCJRC. One of their conclusions was to institute the CMO, which itself closely tracked the discovery and case processing timelines in neighboring states' judicial systems. The BCCJRC's work was limited to Bernalillo County and Second Judicial District. The projects implemented so far do not affect other areas of the greater Albuquerque Metropolitan Area including Sandoval County or Valencia County (the Thirteenth Judicial District), or Tarrant County (the Seventh Judicial District).

The needed reform efforts of the BCCJRC, such as the CMO, have paralleled a rise in crime rates throughout the state of New Mexico, and Albuquerque metro area over the last four years. Unfortunately, those parties who initially opposed implementation of the CMO and purposefully failed to adapt to its ambits are now attempting to deflect their failures by blaming rising Albuquerque crime rates on the CMO. The arguments made come with no statistical support, and in fact are based solely on anecdotal evidence hand-selected by the District Attorney to support its position. The LOPD, by reviewing the FBI crime report data, has discovered that the crime rates in other parts of the state are increasing at similar rates as those in the Second Judicial District even though the other districts are not subject to the CMO.

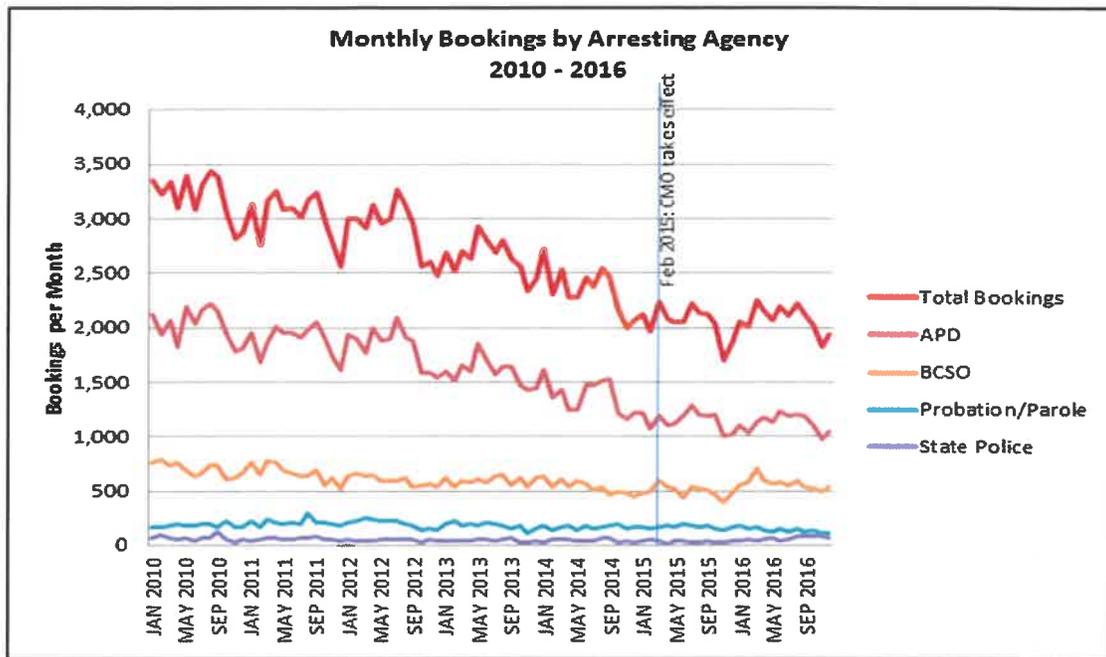
	Crime Rate – 2013	Crime Rate – 2016	Percentage Increase
Albuquerque, Violent	4,325	6,245	44%
Sandoval, Torrance and Valencia Counties, Violent	1,602	1,928	20%
Albuquerque, Property	30,531	38,528	26%
Sandoval, Torrance and Valencia Counties, Property	6,299	9,448	50%
<b>Albuquerque, Combined</b>	<b>34,856</b>	<b>44,773</b>	<b>28%</b>
<b>Sandoval, Torrance and Valencia Counties, Combined</b>	<b>7,901</b>	<b>11,376</b>	<b>44%</b>

Source: <https://ucr.fbi.gov/crime-in-the-u.s.>, last accessed 9-27-17.

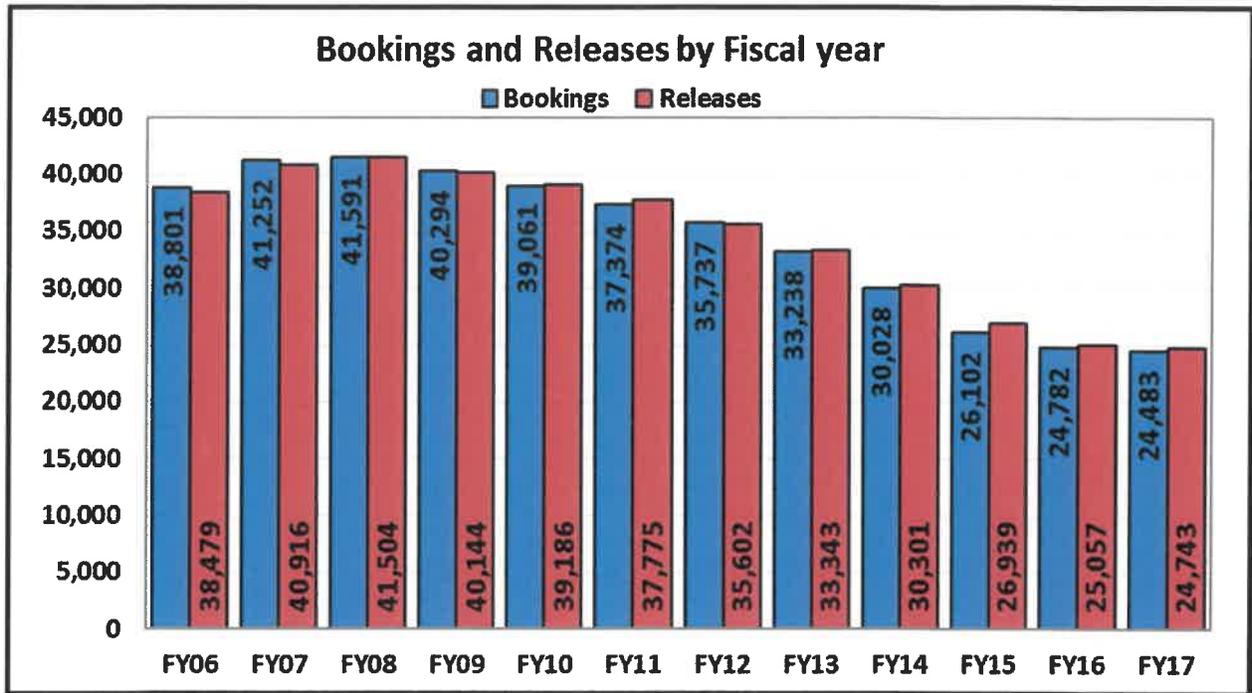
The above chart, based on recently-released FBI statistics, reveals that overall crime rates have risen at a higher rate in Sandoval, Torrance and Valencia counties from 2013 to 2016 than Bernalillo County, despite the former not being subject to the jurisdiction of the CMO. Similarly, a “heat map” generated by KOB News in reliance upon the same FBI statistics as utilized in the above chart revealed that crime in Taos and Gallup have risen at a higher rate than that in Albuquerque, again despite the Second Judicial District being the only place in the state covered by the CMO.<sup>3</sup>

The only pieces of the criminal justice system which the court system can control occur after a defendant is arrested and formally charged. Bernalillo County operates the Metropolitan Detention Center (“MDC”), which serves as the county’s jail. When individuals are arrested in Bernalillo County, they are processed and booked into MDC. Bernalillo County keeps records of all persons booked into MDC and tracks statistics for activity at MDC. These statistics, compiled by Bernalillo County in the chart below, show that since 2010 the number of individuals booked into MDC has declined sharply.

<sup>3</sup> <http://www.kob.com/albuquerque-news/fbi-new-mexico-crime-statistics-heat-maps/4616527/?cat=500>, last accessed 9-27-17.



From 2010 to 2014, the number of monthly MDC bookings decreased by nearly forty percent. In 2010, the average number of bookings per month by APD was approximately 2,000 persons. In 2016, this figure was down to nearly 1,000 – a decrease of almost fifty percent. Notably, only APD seems to have experienced such a marked decline. The Bernalillo County Sheriff’s Office, Adult Probation and Parole Department, and New Mexico State Police throughout this period have each been operating within expected statistical margins. This simple correlation between diminishing arrests and increasing crime is one which Albuquerque Police Officers themselves recognize: recently Shaun Willoughby, President of the Albuquerque Police Officers Association, noted that “[t]here is a direct correlation with felonious crime in Albuquerque and not having enough resources to investigate felonious crime. We’re making thousands and thousands less arrests than we were several years ago and that has a significant impact on crime.” The following chart summarizes the total number of bookings and releases at MDC from fiscal year 2006 through fiscal year 2017.



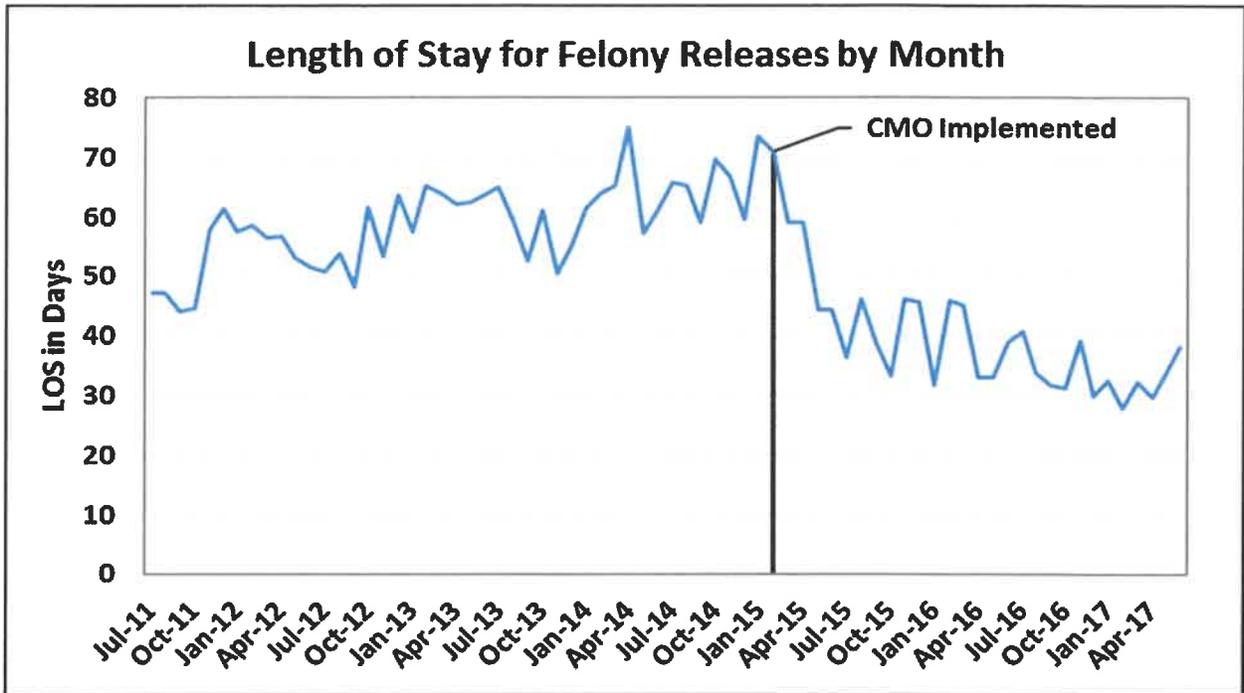
These numbers suggest that even though there is an increase in crime, APD is failing to arrest its perpetrators at the same rate it once had. The courts can only adjudicate those cases brought to it by law enforcement and the District Attorney. So, although there has been an increase in crime, there is no information to link that increase to anything within the criminal justice system.

## **II. THE CMO IS ACHIEVING THE GOALS IT WAS DESIGNED TO ADDRESS.**

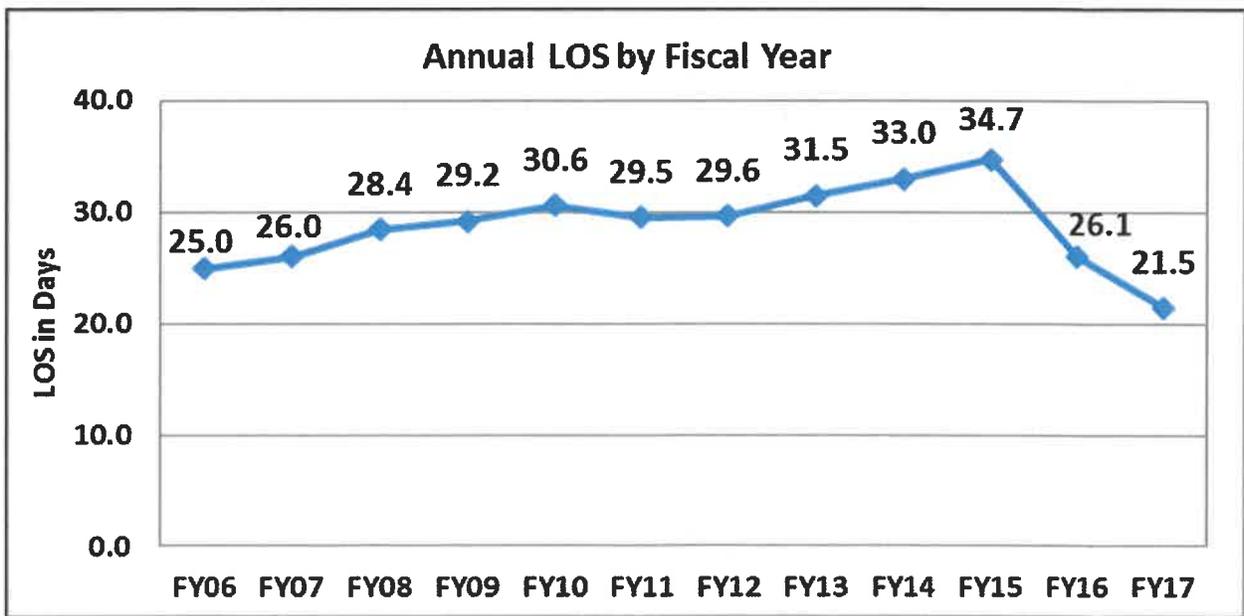
Although genuine efforts to subscribe to the CMO have only been made by two legs of the proverbial stool, it is still achieving the goals it was designed to address. In February 2015, the CMO was implemented to address several issues in the Second Judicial District Court's criminal dockets. As Justice Daniels recounted in his April 26, 2017 letter to Bernalillo County District Attorney Raul Torrez, "[f]or a number of years the criminal justice system in Bernalillo County was becoming increasingly dysfunctional, with unacceptable delays in processing cases, overcrowded jails packed with long-term pretrial detainees, inefficient application of our criminal laws, and adverse consequences to both accused defendants and the community from the system's inability to properly honor the constitutional guarantee of the right to speedy trial and resulting dismissal motions."

Since implementation, the CMO has dramatically improved the criminal justice system in Bernalillo County. Cases are being adjudicated in a timely fashion, and pretrial detainees no longer languish for years pending trial. As Justice Daniels explained in his letter, "[t]rials increased by 250% [in the two years since implementation of the CMO], and the chronic backlog was eliminated. Fewer cases are being dismissed for failure to meet discovery deadlines of the CMO, particularly those applicable in the early stages of the case. Because of more efficient operations under the CMO, the majority of cases are now resolved within seven months, with very few taking more than a year to resolve."

The success of the CMO is demonstrated by the following chart obtained from Bernalillo County, which shows the average amount of time spent in custody by felony defendants from July 2011 to April 2017.



The CMO has resulted in a nearly fifty-percent reduction in the average amount of time spent in MDC by defendants facing felony charges. This has contributed to a reduction of the average amount of time spent in MDC by all defendants of thirty-eight percent, as shown in the following LOS (Length of Stay) Chart which was also obtained from Bernalillo County and provides data current as of June 30, 2017.



This substantial reduction is a result of efficient processing of felony cases under the CMO and demonstrates the extent to which the CMO has achieved the goals it was designed to address.

The CMO has significantly reduced the average amount of time to resolve cases in the Second Judicial District Court. The timely administration of justice is essential to maintaining trust in the judicial system. This applies to all participants in the criminal justice system. Whether innocent or guilty, defendants have a right to speedy resolution of the accusations against them. Victims have a right to the prompt administration of justice so that they may begin the healing process. The community needs timely enforcement of the laws to ensure that justice is respected. The CMO has achieved these critical goals. Defendants are assured their constitutional right to a speedy trial; victims are given swift justice; and the community sees quick enforcement of its criminal laws. Significant revision of the CMO would threaten these advances and likely result in a return to long periods of pretrial delay.

As an example, on August 28, 2015 the state indicted Christopher Cruz and Donovan Maez for First Degree Murder in relation to the shooting death of Jaydon Chavez-Silver. Prior to the institution of the CMO, discovery likely would have trickled in over several months to years, and the two co-defendants would not have expected a trial for at least three years on such serious charges. However, because defense counsel was given all discovery immediately, within nine months they were able to determine that APD had failed to investigate a valid alibi for the two suspects, and that the state's chief witness against the two had given a false statement to conceal the fact that he, himself, was one of the shooters. In an example of the justice-seeking spirit engendered by the CMO, defense counsel met informally with the District Attorney, who shortly

thereafter dismissed all charges against the pair in the interests of justice. Because of the prompt provision of discovery in this case, Mr. Cruz and Mr. Maez were only forced to suffer nine months of unjustified incarceration, while the family of Mr. Chavez-Silver was able to take some small comfort from knowing that APD was able to change gears and make an arrest of a separate individual.

### **III. THE CMO RELIES UPON FIRM RULES AND DEADLINES, AND MEANINGFUL SANCTIONS ARE REQUIRED TO ENSURE ITS CONTINUED FUNCTIONING.**

The CMO was built on the principle that cases would not be filed until the District Attorney had investigated the case sufficiently to be prepared to proceed. Many of the delays in case adjudication prior to implementation of the CMO resulted from delayed disclosures by the District Attorney. The CMO sought to address this problem by establishing rules that require the District Attorney to provide all existing discovery at or before arraignment. Contrary to the District Attorney's repeated assertions both in judicial fora and media that it is required to dismiss cases where the investigation is not yet complete at the time of arraignment, the District Attorney is only required to provide discovery then currently existing. If law enforcement needs additional time, post-arraignment, to generate discovery, the CMO provides for this.

LOPD has reviewed the Proposals advanced by the District Attorney in its Memorandum. Our impression is that each proposal asks the Supreme Court to either expand the timelines for the District Attorney to meet its obligations, or asks the Supreme Court to remove all sanctions for noncompliance with the CMO's mandates. Such proposals are not "amendments" or "revisions" to the CMO, but attempts to completely undermine its existence to the point where it becomes a set of meaningless suggestions.

The District Attorney controls when cases are set for grand jury or preliminary hearing. This means that if the District Attorney has not obtained complete discovery from law enforcement, it can postpone proceeding on a case until it has. The defendant does not have this luxury under the CMO. Arraignment is the triggering event that starts the clock running on the CMO deadlines for both parties. If the District Attorney is permitted to shirk its obligation to

provide discovery at or before arraignment, the defense will suffer the consequences because it will have less time to fully prepare for trial under the rapid track assignments. The additional time must come from somewhere; wherever the State is given more time, that time is taken from the defense. The danger in every case will be that either the defendant's constitutional right to an effective counsel and defense will be diminished because the defense will not have enough time to effectively investigate and prepare the case for trial, or the court will then have to begin extending the defense deadlines in order to compensate. This will result in a return to the same trial continuances and delays that caused the backlog the CMO was meant to address. The District Attorney is supposed to be preparing its cases prior to seeking an indictment or preliminary hearing, which ensures that proper charging decisions are made and defendants do not sit in jail while the State trickles evidence over to the defense.

Further, requiring the District Attorney to be proactive on the front end in gathering the existing evidence, rather than allowing them to be passive receivers, benefits all parties in that it forces the District Attorney to become immediately familiar with the cases on which it chooses to move forward. Knowing what evidence exists in a case at the outset thus assists the District Attorney in its quest to conserve resources by allowing individual prosecutors to make more informed decisions about case disposition well in advance of trial. Indeed, this is exactly the goal the District Attorney notes that it is working towards on page 21 of its Memorandum.

Deadlines, without enforcement mechanisms, will not ensure the District Attorney's compliance with the CMO. A rule without a remedy is simply a suggestion, and the success of the CMO depends on compliance with the rules. If the deadlines in the CMO do not have meaningful sanctions for non-compliance, there will be no disincentive for failing to comply. As is evident from the cases the District Attorney highlighted in its Memorandum, despite the threat

of available sanctions under the current version of the CMO, the District Attorney often fails to put forth sufficient effort to meet deadlines, even after having been given multiple opportunities to do so on the same case.

Dismissal without prejudice is a meaningful sanction. It informs the prosecution that it has erred and that the court will not tolerate noncompliance, but it is not so harsh that it bars the community from seeing justice. Typically, cases are dismissed without prejudice when the State has not prepared the case for compliance with the CMO. At that time, the case is properly returned to a pre-indictment stage where the defendant is relieved of the burdens of pretrial release or detention and where the case does not clog the court's already heavy dockets. Nothing prevents the State from quickly refileing the case after having taken the necessary steps to prepare for compliance with the CMO. Where the State chooses not to do so, the fault lies solely with them.

The CMO was developed to implement practices which impose definite and enforceable time limits on criminal case processing as one important step toward the speedy resolution of criminal cases.<sup>4</sup> To change the CMO and remove provisions designed to impose enforceable time limits would prohibit the necessary steps forward and is an unnecessary blow to the criminal justice reform movement of this state. Meaningful sanctions must remain and be strengthened to improve our criminal justice system.

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<sup>4</sup> IN THE MATTER OF THE ADOPTION OF LOCAL RULE LR2-400 NMRA TO IMPLEMENT A CRIMINAL CASE MANAGEMENT PILOT PROGRAM IN THE SECOND JUDICIAL DISTRICT COURT. No. 14-8300-025 (November 6, 2014).

#### **IV. THE DEFENSE COMMUNITY AND COURT SUCCESSFULLY ADAPTED TO THE CMO, BUT THE DISTRICT ATTORNEY'S OFFICE HAS NOT EVEN ATTEMPTED TO ADAPT.**

The CMO was a dramatic yet necessary change in the Bernalillo County criminal justice system. For years justice had stagnated in the county due to overly-frequent requests to delay case dispositions made by both prosecutors and defense counsel. This was exacerbated by judicial acquiescence, and appellate decisions which stripped from district court judges control over their own dockets.

One of the primary goals of the CMO was to force prosecutors and defense counsel to adapt to a stricter legal landscape in order to optimize efficiency on both sides. Similarly, courts were empowered to enforce rules and manage their dockets in order to achieve said efficiency. Each of these changes required criminal justice stakeholders to affirmatively raise their standard of practice. The Second Judicial District Court system did.<sup>5</sup> The criminal defense community did. Only the District Attorney and Albuquerque Police Department decided that rather than make a good-faith effort to comply with CMO rules, they would continue to engage in “business as normal” and attempt to use political attacks to undermine the legitimacy of these needed reforms.

At the time of its adoption, LOPD was unsure whether it would be able to adapt to such a different, faster-paced system. However, LOPD appointed a committee of attorneys to study the upcoming rule changes and determine the best method for LOPD to implement them. This committee reviewed the proposed rule changes in late 2014. This committee identified areas which would potentially cause resource distribution issues and developed a system to redistribute

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<sup>5</sup> Although LOPD is not privy to all the behind-the-scenes operations of the court system, and what structural and procedural changes it enacted to prepare for the implementation of the CMO, the court has been very transparent and its increased ability to adjudicate cases and ensure timely and just case resolutions from 2015 through present speaks to the fact that significant internal improvements were made in response to the CMO.

LOPD resources to those areas. The committee also created a mandatory training program and prepared a litigation manual to prepare both in-house attorneys and contractors for the upcoming alterations to court rules. These formal training programs were so successful within LOPD that shortly after enactment of the CMO, the New Mexico Criminal Defense Lawyers Association (“NMCDLA”) asked LOPD to train its attorneys as well, which we did.

Perhaps most importantly, the committee recommended substantial structural changes to the roles of attorneys, paralegals, investigators and support staff which the department administration implemented. LOPD attorneys were reorganized into special calendar and general calendar assignments, and our case assignment system was restructured to accommodate the new judicial reorganization. Our paralegals expanded their duties to provide an additional presence during heavy court dockets and arraignment calendars, while giving up some of their duties to social workers and investigators. These measures allowed the LOPD to successfully adapt to the new system.

Even now, change is ongoing. LOPD continues to implement changes to ensure strict compliance with the CMO while also providing zealous representation for all indigent criminal defendants. For example, the office is beginning to adopt digital solutions that will allow our support staff to spend less time shuffling papers and performing clerical work and more time assisting with investigation, social work, and litigation. Adaptation and evolution are core principles at LOPD. This mentality has resulted in a strong indigent defense system in New Mexico, despite the challenges of chronic underfunding.

In contrast to the ongoing efforts started by LOPD prior to the institution of the CMO, and continuing to the present day, the District Attorney now writes that it “has already initiated a wholesale reorganization of the office in order to better serve victims, protect the community and

meet its constitutional obligations to resolve criminal cases in a timely manner.” The District Attorney explains that it is “phasing out the Grand Jury Division and implementing a vertical prosecution model that requires attorneys to assume primary responsibility for screening and charging their own cases.” The District Attorney states that “[t]he goal of this model is to force prosecutors and law enforcement partners to commit more time early in the process to make sure that, to the extent possible, all cases are adequately investigated and evaluated *before* a formal charging decision is made.”

While LOPD respects that the recently-elected District Attorney is in the process of beginning to institute needed structural reforms within the office, it is appalling that these changes are only now being made two and a half years after the CMO took effect. It is disturbing that only now, perhaps for the first time in its recent history, is the District Attorney attempting to fully investigate an alleged crime *before* making the momentous and life-altering decision to charge a person, presumed innocent, with a felony. It is galling that the District Attorney attacks the CMO as failing “to help facilitate genuine criminal justice reform” when every other criminal justice stakeholder has made genuine reforms which have improved their ability to function in their role within the criminal justice system. Instead of adapting to and embracing the CMO and improving its level of practice, as the courts, county, and public and private defense bars have, the District Attorney has stubbornly refused to adapt to changes which it knew were coming, then proclaimed that the elements of the CMO have failed to spark needed reforms and therefore should be abandoned.

One of the foundational principles of the CMO was that the District Attorney would only pursue criminal cases which it was prepared to effectively prosecute and prove at trial.<sup>6</sup> Such a requirement is not novel, but rather wholly consistent with nationwide understandings of

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<sup>6</sup> See generally LR2-308(C)(2)

prosecutorial ethics and the role of government. American Bar Association Criminal Justice Standard 3-4.3(a) states, “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.” Effective case screening procedures would ensure that the District Attorney complies with its responsibilities and allow for greater resources to pursue viable cases. When resources are expended on dead-end cases, fewer resources are available for viable prosecution of the remaining cases. The prosecution of dead-end cases creates an unnecessary burden not only on the District Attorney’s resources, but also on the limited resources of the other criminal justice stakeholders.

The District Attorney must commit to front-loading its charging decisions as proscribed by the CMO. Front-loading the work will help identify those cases which should be prosecuted fully as well as those cases which will likely lead to a dead-end. As demonstrated by the figures obtained from the court for 2017 dismissals, most of the dismissals this year are voluntary dismissals relating to the District Attorney’s failure to continue its prosecution. Hundreds of cases have been dismissed by the District Attorney because it did not have participation from key witnesses, lacked sufficient evidence to ensure a conviction, failed to timely discover that essential evidence had been destroyed by law enforcement, or other easily-identifiable flaws of a dead-end case. Neither LOPD, nor the court system, can control the District Attorney’s decision to file a case. Yet both of these stakeholders must devote significant resources and taxpayer dollars to defend and adjudicate these cases nonetheless. The LOPD has spent untold hours of staff and attorney time on those dead-end cases that were not adequately screened and prepared.

This does not account for the human impact such blind prosecutions have had on the citizens of Bernalillo County. How many days have innocent people spent in jail for these dead-end cases? How many jobs have been lost? How many homes have been foreclosed on, apartments, vehicles, and belongings lost, while people sat in jail for cases the District Attorney ultimately was unable to proceed with? The fact is that when the District Attorney initiates cases without utilizing the considerations of LR2-308(C)(2), it impacts not only the resources of the court and LOPD but, most critically, the constitutional rights, livelihoods, and freedom of New Mexico's citizens.

Because the District Attorney chooses which cases to file it can comply with the CMO. Any difficulties for the District Attorney under the CMO on an individual case are the direct result of failures of leadership to implement simple and common-sense adjustments to ensure the rights of defendants, the rights of victims, and the efficient administration of justice are achieved.

Failing to provide discovery at arraignment happens when the District Attorney – the head law enforcement official in the county – has not coordinated with APD and other law enforcement entities to establish a functional discovery production system. Throughout the rest of New Mexico, other district attorney's offices use a digital cloud-based system called CMS to obtain discovery from law enforcement and provide that discovery to defense counsel. Such a system is virtually automatic; evidence which would be required to be stored is stored as normal, and defense attorneys are authorized to view it. Not only is this system utilized throughout the rest of the state, it's used by the District Attorney itself in its Metropolitan Court division. However, for its felony division, the District Attorney still routinely obtains and provides discovery on compact disc and in paper form, which takes longer, is less efficient, and runs the risk that such items will be lost or misplaced before production.

Similar to CMS, the Albuquerque Police Department already pays for a system, evidence.com, that allows for cloud-based upload and viewing of all digital discovery, whether that takes the form of scanned paper, audio files, lapel camera footage, or any other evidence. The fact that the District Attorney has not fully utilized either CMS or Evidence.com is inexplicable and further illustrates that there are other avenues available to the District Attorney, aside from a complete rewrite of the CMO, that it has not fully explored as a possible means to ensure compliance.

This failure to adapt is reflected in the high number of *nolle prosequis* flowing from the District Attorney to this day. One area in which LOPD was not able to obtain comprehensive statistics of the type otherwise seen in this Report is on the *timing* of filing of *nolle prosequis* by the District Attorney. Although we have strived, in drafting this Report, to avoid relying upon the kind of unreliable, anecdotal evidence which serves as the backbone of the District Attorney's Memorandum, our every-day experience bears out that the District Attorney will still frequently file *nolle prosequis* late in the case-adjudication process.<sup>7</sup> The timing of these filings is strongly suggestive of the proposition that these are cases which the District Attorney failed to properly investigate and charge pursuant to LR2-308(C)(2), straining already-stressed judicial resources without hope of a just outcome. The District Attorney's commitment to reforming its office to improve its practice and fully comply with the CMO has been insufficient.

This presupposes, of course, that the District Attorney is even now making a good faith effort to comply with the CMO, the statements in its Memorandum being the only "proof" of ongoing changes criminal justice stakeholders have yet seen. Prior to drafting his office's Memorandum the elected District Attorney affirmatively proclaimed that he will not follow the

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<sup>7</sup> Typically, anywhere from two weeks prior to the mandated "pretrial conference/docket call", up to and including days before a scheduled trial.

CMO, but will instead proceed on cases under his own timeline, in an effort to derail the district court's proper enforcement the CMO deadlines by allowing so many inadequately prepared cases to go forward that the courts would become hesitant to issue the appropriate sanctions:

“My predecessor’s policy was essentially to hold off on indicting, charging, and moving forward with cases until we had everything we could possibly need to keep the prosecution alive once we filed it. We’re not going to do that anymore. We’re going to file these cases and we’re going to let the court make the decision on whether or not they want to impose these strict deadlines.”

*Justice Derailed*,<sup>8</sup> quoting District Attorney Raul Torrez, Feb. 10, 2017.

The District Attorney made a conscious choice that, rather than raising the level of practice in accordance with the CMO and making more well informed charging decisions, he would have his office flood the courts with cases in which he knew his attorneys would be unable to meet the CMO deadlines, essentially “daring” the judges to dismiss so many cases. It was a calculated risk and his intentions were clear. Either the courts would have to back down from following the rule of law, or the District Attorney would use the courts’ rulings to level accusations against the judges that they were “soft” on crime. Indeed, the public saw both the District Attorney and APD repeatedly attacking judges through both traditional and social media for issuing sanctions like dismissal, suppression, or exclusion, no matter how egregious the prosecution’s failures had been leading up to the sanctions.

Whether coordinated or coincidental, the course charted by the District Attorney was paralleled by APD. Chief Gordon Eden set the tone when, in remarks on rising crime rates in

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<sup>8</sup> <https://www.abqjournal.com/947933/new-da-wants-to-get-system-back-on-track-after-thousands-of-cases-dismissed-by-predecessor.html>, last accessed 9-27-17.

Albuquerque, he proclaimed “I know it sounds like I’m blaming it all on the judges, because I am.”<sup>9</sup>

Simultaneously, APD embarked upon a dangerous “public awareness” campaign using Facebook and Twitter to keep the public informed of crimes and court decisions in the community. Unfortunately, in so doing, they admitted to purposefully presenting a biased, incomplete version of facts, then proclaiming that it was the responsibility of “the media” to inform the public of the full story.<sup>10</sup> Whether intentionally or not, the slanted stories told by APD created political pressure on judges through the outrage generated in the populace. “I would most definitely punch this judge in the face,”<sup>11</sup> one user commented, with another writing “I hope the next victim is a member of the judge’s family.”<sup>12</sup>

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<sup>9</sup> Ryan Boetel, *Facebook is APD’s Megaphone*, Albuquerque Journal, April 26, 2017.

<sup>10</sup> Id., (“That’s the role of the media,” [APD Spokesperson Celina] Espinoza said. “That’s why we put these things out there. You’ll see that the public will research, that people will look into these cases, reporters at your outlet look into these cases and are able to determine more information and look into it further.”).

<sup>11</sup> Id.

<sup>12</sup> Id.

## **V. CONTRARY TO THE DISTRICT ATTORNEY'S MEMORANDUM, FEW CASES ARE DISMISSED FOR TECHNICAL VIOLATIONS.**

When the District Attorney makes minor mistakes and fails to meet technical requirements of the CMO, the courts rarely impose a significant sanction. In its Memorandum, the District Attorney selected thirty eight cases to argue that the CMO requires substantial revision. These cases make up a small fraction of the thousands of cases adjudicated by the Second Judicial District Court each year. The District Attorney has presumably chosen the samples it believes best prove its point, rather than selecting via random sampling. We, of course, do not know because the District Attorney failed to indicate its methodology in its Memorandum. However, even among the cases hand-selected by the District Attorney to prove its point, most were not dismissed for minor violations of the CMO. In most of the cited cases, the violation which led to dismissal constituted a significant deprivation of the defendant's right to due process, and dismissal without prejudice was in fact a light sanction.

In its Memorandum, the District Attorney references *State v. Jonathan Bouldin*, D-202-CR-2016-01738 as an example of the failure to transport a defendant to court resulting in dismissal. However, the District Attorney failed to mention that Mr. Bouldin was not transported to his arraignment on three separate occasions and that the case was dismissed only after the District Attorney's third failure to transport Mr. Bouldin to his arraignment. Mr. Bouldin's indictment was filed on June 6, 2016. From there, he was given three arraignment settings, and despite being in the custody of the Department of Corrections, the state repeatedly failed to file a transport order until finally, on July 18, 2016 the arraigning judge dismissed the case for the state's indifference to its long-standing duty to transport – a duty which would have existed whether the CMO was in effect or not.

As in Mr. Bouldin's case, in *State v. Jason McElroy*, D-202-CR-2016-02343 the District Attorney again failed to transport a defendant to arraignment three times from the custody of the Corrections Department. The first arraignment setting was August 5, 2016. The second arraignment setting was August 26, 2016. The final arraignment setting was September 2, 2016. After the third failure to transport Mr. McElroy, the court dismissed the case.

Similar situations occurred in *State v. Reyesel Lopez-Ordonez*, D-202-CR-2016-04004, where the District Attorney failed to transport the defendant to two arraignment settings from federal custody; in *State v. Nakya Estrada*, D-202-CR-2017-00681, where the District Attorney failed to transport the defendant from Lea County Detention Facility for a scheduling conference; in *State v. Joyce Deschilly*, D-202-CR-2016-03433, where the District Attorney failed to transport the defendant from MDC to two arraignment settings; and in *State v. Justin Leverette*, D-202-CR-2017-01340, where the District Attorney again failed to transport the defendant to two arraignment settings.

In *State v. Jose Palacios*, D-202-CR-2017-00864 the District Attorney failed to transport the defendant to three arraignment settings and the case was dismissed. This last case, however, differs from the others, as the District Attorney later filed a Motion to Reconsider. The court held a hearing on the Motion, denied the State's request, and issued a detailed seventeen-page order memorializing all of the State's failures to follow the simple procedures for transportation of an in-custody defendant. The court summarized its decision:

The Court chose what it considered to be the most appropriate sanction given the circumstances. In making the determination to dismiss the case without prejudice, it took into account the liberty interests of Defendant, the significant period of delay in arraigning Defendant, the State's failure to include an arraignment date on the Presentment Order, the failure of the State to request an earlier arraignment date on the first arraignment setting, the failure of the State to submit a corrected transport order for the March 17, 2017,

arraignment, the failure of the State to submit a correct transport order on the second arraignment attempt, and the delay in securing a transport order resulting in the failure to transport Defendant on the third arraignment attempt. While the Court agrees the State's culpability is reduced on the third arraignment setting because it was Metropolitan Detention Center who failed to transport Defendant, the Court also notes that this appears to have been, in part, because of the State's late notice regarding transport. It also concludes it is ultimately the State's responsibility to ensure a defendant is transported and that the State failed to exercise due diligence throughout the arraignment process.

*State v. Jose Palacios*, D-202-CR-2017-00864 at 7-8 (2d Jud. D. Ct. May 3, 2017) (Order Denying State's Motion for Reconsideration).

The court's decision in *Palacios* provides a view of the extent to which the State must violate the CMO for a court to dismiss a case. At every turn in *Palacios*, the District Attorney failed to ensure that an in-custody defendant was transported to any of his three arraignment settings, until the court ultimately determined that it could not continue to accommodate the State's failures in the face of such indifference and at the expense of the defendant's right to be formally accused and informed of the charges against him. If the District Attorney had managed to bring Mr. Palacios to court for just one of the three settings, the case would not have been dismissed.

In marked contrast to the repeated chances given to the District Attorney to perform its CMO-independent duty to transport defendants, when a defendant fails to appear in court even a single time, the court typically issues a warrant for that defendant's arrest. The dismissals cited by the District Attorney's Memorandum for failure to transport do not illustrate a problem with the CMO; they illustrate the repeated failure of the District Attorney to comply with a simple duty which would exist independently of the CMO, even where more than one accommodation has been made for their errors.

The District Attorney also points to the cases of *State v. Julio Lopez*, D-202-CR-2015-01429, D-202-CR-2015-02385, D-202-CR-2015-02996, and D-202-CR-2016-00138, in an attempt to illustrate more problems with the CMO. However, what these cases actually show is that the District Attorney failed to recognize for nearly a year that a defendant who was being actively pursued in four separate cases was in the State's custody. On May 27, 2015, the District Attorney indicted Mr. Lopez in D-202-CR-2015-01429. On September 9, 2015, it indicted him in D-202-CR-2015-02385. On November 12, 2015, it indicted him in D-202-CR-2015-02996. Finally, on January 14, 2016, it indicted him in D-202-CR-2016-00138. The defendant had been in the Valencia County Detention Center since May 18, 2015—before he was even indicted on the first case. In the Indictment Presentation Orders drafted by the District Attorney and signed by the court, the District Attorney failed to indicate that Mr. Lopez was in custody.

Between the indictment of the first case on May 27, 2015 and April 8, 2016, nothing happened on the cases. Finally, on April 8, 2016—nearly a year after the first case was indicted— Mr. Lopez filed motions to dismiss in D-202-CR-2015-01429, D-202-CR-2015-02385, and D-202-CR-2015-02996. On April 12, 2016, Mr. Lopez filed a motion to dismiss in the remaining case, D-202-CR-2016-00138. Mr. Lopez's motions were based on the violation of the deadline for arraignment under the CMO. After Mr. Lopez filed his motions, the cases were finally set for arraignments. Ultimately, Mr. Lopez was arraigned after 305 days, 221 days, 158 days, and 92 days in each of his cases respectively. This was a severe violation of the CMO, directly caused by the District Attorney failing to notice that Mr. Lopez was in custody at the time of all four of his indictments. As the court wrote when dismissing the case in D-202-CR-2015-02385, the “state is charged with knowing defendant was in custody at the time of indictment.” This was not a novel principle of law created for the CMO. The idea that the state

is tasked with knowing who is in its custody at all times is the law throughout America, and has been the law of New Mexico for decades. The sanction of dismissal without prejudice was a relatively light sanction for such an egregious violation of the CMO.

The cases of *State v. Shannon Villegas*, D-202-CR-2015-01938, and *State v. Jaime Hernandez*, D-202-CR-2016-03193, were cited in the District Attorney's Memorandum as establishing that calendaring problems at the court "often combine with transport problems to create a CMO compliance impossibility."<sup>13</sup> However, these cases do not support this assertion at all. Instead, they are cases where, again, the State failed to recognize that the defendants were in State custody when they took the cases to grand jury. In *Villegas*, the defendant was indicted on July 23, 2015. However, even though Mr. Villegas had been sentenced in 2014 to four years in the Corrections Department (D-202-CR-2014-02885) and had been in State custody at the time of the indictment, an arraignment was not held until June 17, 2016. This resulted in a 330-day delay between indictment and arraignment. In its response to the defendant's motion to dismiss for failure to arraign in a timely fashion, the District Attorney rightly conceded that the "State should have been aware that the Defendant was incarcerated since the State sentenced the Defendant to the DOC on October 16, 2014 (in an unrelated matter)" and "[t]he State understands that the Defendant's right to a speedy trial may have been [compromised.]" Like *State v. Lopez*, this was an egregious violation of the CMO by the District Attorney, and the dismissal without prejudice was a relatively light sanction.

In *Hernandez*, the defendant was indicted on September 28, 2016, but because the State did not recognize that the defendant was in custody, the arraignment was not scheduled until December 5, 2016. Additionally, the defendant was not transported to the arraignment. The court dismissed the case without prejudice, because the defendant had been in the State's custody

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<sup>13</sup> *Memorandum*, p. 11.

since September 16, 2015, the arraignment should have occurred within seven days of indictment, and the defendant was not even transported to the delayed arraignment.

The District Attorney's Memorandum blames the court for dismissing cases "when it does not set the case for scheduling conference within 30 days of arraignment[.]"<sup>14</sup> However, *State v. Maria Andrade-Pena*, D-202-CR-2015-00479, and *State v. Gaylan Crayton*, D-202-CR-2016-02503, indicate that the blame rests on the District Attorney itself. In *Andrade-Pena*, the arraignment was held on March 2, 2015, and thereafter nothing happened in the case until the District Attorney filed a substitution of counsel five months later on August 5, 2015. Another two and a half months later, on October 20, 2015, the District Attorney filed a request for a scheduling conference. The State then filed another request for a scheduling conference on December 10, 2015. On December 21, 2015, the defendant filed a motion to dismiss with prejudice for failure to timely conduct a scheduling conference. The District Attorney responded, stipulating to most of the defendant's motion, and requested that the case be dismissed without prejudice for the State's failure to request a scheduling conference until October 20, 2015. The court followed the request of the District Attorney and dismissed the case.

In *Crayton*, the defendant was indicted on August 10, 2016 and filed a waiver of arraignment on August 25, 2016. Nothing happened in the case until February 2, 2017, when the court *sua sponte* issued a notice of scheduling conference for February 14, 2017. On February 9, 2017, the defendant filed a motion to dismiss for failure to timely hold the scheduling conference. At no point between August 25, 2016 and February 2, 2017 did the District Attorney request a scheduling conference. In fact, the District Attorney failed to even respond to

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<sup>14</sup> *Memorandum*, p. 12.

the defendant's motion as required by the rules. The court dismissed the case without prejudice for the failure to conduct a timely scheduling conference.

Ultimately, the responsibility for ensuring that cases are properly and timely adjudicated rests on the District Attorney. This is not a novel creation of the CMO. The United States Supreme Court acknowledged decades ago that “[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.” *Barker v. Wingo*, 407 U.S. 514, 527 (1972). The State is responsible for ensuring that deadlines and CMO requirements are met, and when it fails to do so, there must be consequences.

The District Attorney's Memorandum alleges that the court routinely dismisses cases “for even inconsequential violations”<sup>15</sup> of discovery rules and that “the gathering and production of discovery is often time-consuming and cannot always be accomplished all at once.”<sup>16</sup> The reason for strict discovery deadlines is because the defense must have all available time under the quick track assignments of the CMO. The State alone controls the timing of the initiation of the case—through indictment or preliminary hearing—and if it has not yet fully gathered the materials necessary to comply with the CMO, it should simply postpone case initiation until after it is prepared to comply with its responsibilities. The CMO requires that the District Attorney file a certification that it has provided the existing discovery to defense counsel at or prior to the arraignment. At the initiation of every case, the District Attorney files this certification, assuring the court that “the information required to be produced pursuant to Rule 5-501 and CMO LR2-400 has been produced.” This is not intended to be a meaningless exercise; it is expected that the District Attorney has thoroughly reviewed its case, determined what evidence exists, and taken

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<sup>15</sup> *Memorandum*, p. 13.

<sup>16</sup> *Id.*

the necessary steps to ensure that the required discovery has been turned over to the defense. The District Attorney should not be surprised that sanctions are imposed when it is shown that, contrary to their certification, such materials have not been provided. In *State v. Joseph Garcia*, D-202-CR-2015-00061, and *State v. Theodore Koziatek*, D-202-CR-2015-01046, both cited by the State, the State failed to disclose materials clearly required under the CMO, and the court appropriately sanctioned the District Attorney for its failings.

In *State v. Lisa Garber*, D-202-CR-2015-03119, the defendant was arraigned on December 4, 2015. On the day of the arraignment, the District Attorney certified that all evidence had been disclosed to the defense. However, the defendant informed the court that the State had not provided notes written by the alleged victim and a photograph used to allegedly confirm the defendant's identity. Rather than dismiss, as requested by the defense, the court gave the District Attorney additional time, ordering the State to produce these materials by the scheduling conference, which was set for December 21, 2015. Despite being given over two additional weeks to provide the materials, the District Attorney failed to comply with the court's order, and the case was dismissed. Similarly, in *State v. Terri Eagleman*, D-202-CR-2014-02553, the District Attorney was given additional time to provide required materials, and when they failed to do so, the court ordered a sanction.

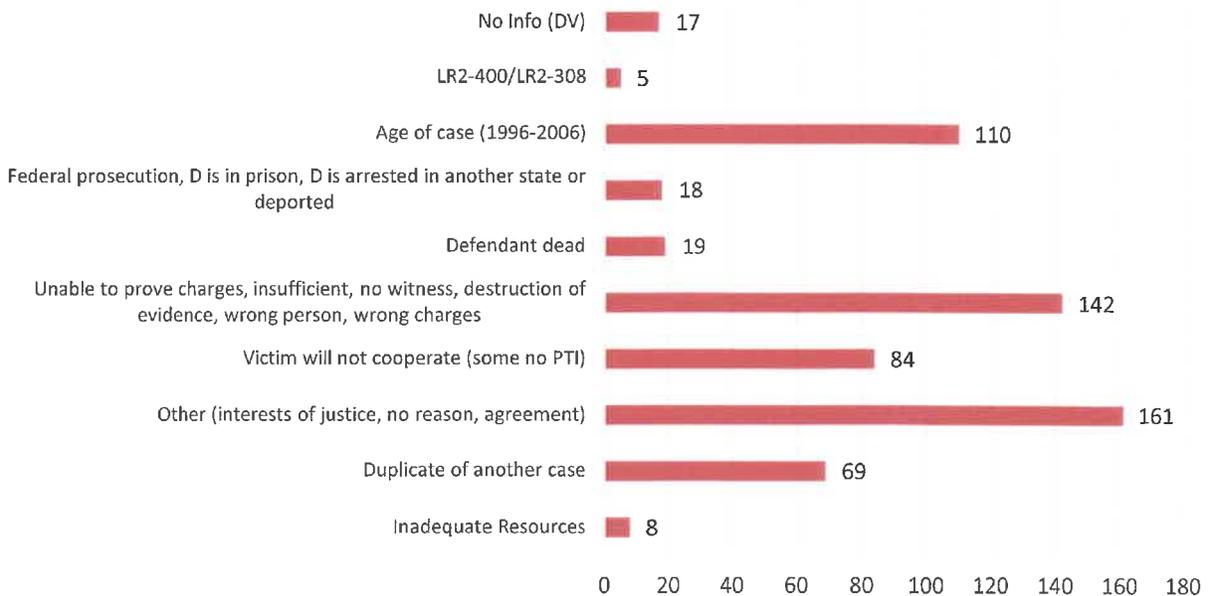
The cases cited by the District Attorney are a good example of how the State repeatedly fails to take advantage of the additional opportunities the courts provide for them to comply with the CMO until, ultimately, the courts are left with no choice but to impose a sanction. The District Attorney's request that the rules be changed to require even greater accommodations than are already being made is absurd. When the court orders that a party do something, the party must expect to face sanctions if it fails to do so. This is exactly how an efficient and

effective court system must function. Anything less will not ensure compliance with court orders, and the system will devolve into the situation seen prior to implementation of the CMO.

Further, CMO-related dismissals are not nearly as prevalent as the District Attorney attempts to assert. In preparing this response, LOPD obtained statistics from the Second Judicial District Court regarding case dispositions in 2017. These statistics, which include data for cases disposed through May 31, 2017, have been compiled into the following charts and shed light on the true nature of sanctions under the CMO.

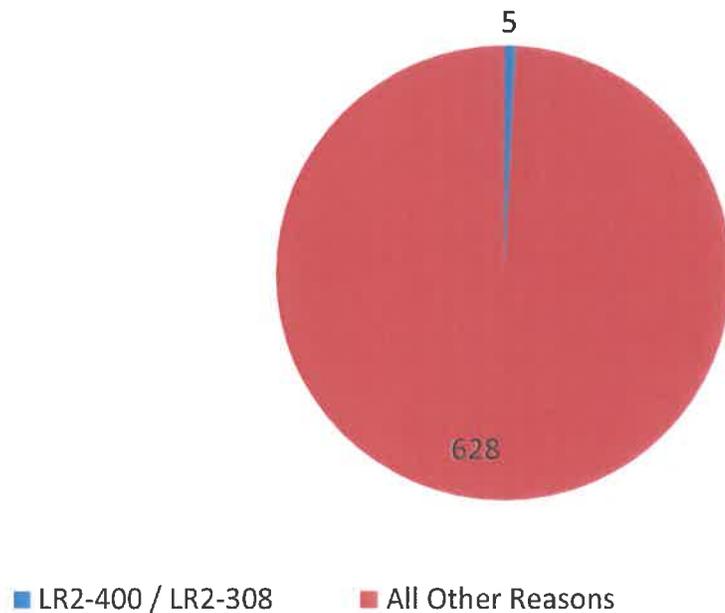
As of May 31, 2017, the District Attorney had voluntarily dismissed 633 felony cases in 2017. The reasons given for these dismissals are summarized in the following chart.

Voluntary Dismissals by DA's Office in 2017 by Reason for Dismissal



Of the 633 voluntary dismissals, the District Attorney only noted in five of them that the dismissal was related to the CMO.

Voluntary Dismissals by State Where  
LR2-308/LR2-400 Was Cited As Reason For Dismissal



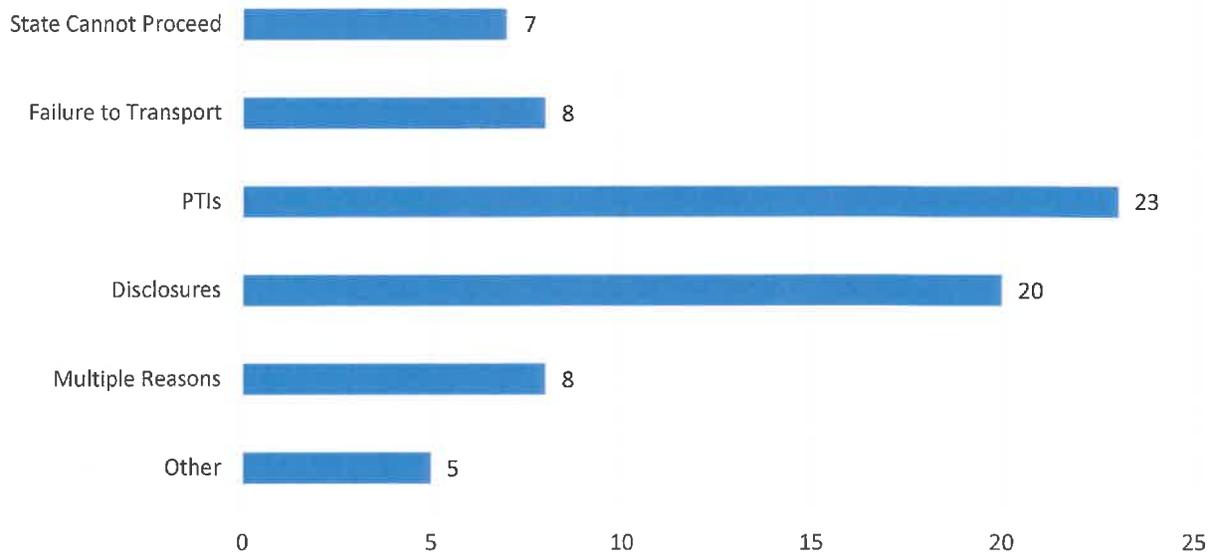
The CMO was cited as a factor in less than one-percent of cases dismissed by the District Attorney. This does not signal that the CMO has caused the “large-scale, unanticipated problem”<sup>17</sup> of dismissals the District Attorney claims in its Memorandum.

LOPD has also obtained data from the court detailing the number of criminal cases dismissed in 2017 by the court through May 31, 2017. These statistics show that only seventy-one cases have been dismissed this year for violations of the CMO or another procedural rule. The following chart, compiled from the data obtained from the court, shows the number of dismissals of post-indictment or post-bindover cases broken down by the type of CMO violation by the District Attorney.

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<sup>17</sup> *Memorandum*, p. 19.

## Dismissals by the Court for Violations of the CMO in 2017



Of the thousands of criminal cases pending before the court this year, only seventy-one post-indictment or post-bindover cases were dismissed for violations of the CMO. This is a far cry from the calamity depicted by the District Attorney. Furthermore, only five of these seventy-one cases were dismissed with prejudice, meaning that the District Attorney could refile any of the other sixty-six cases as soon as it resolved the issue that led to dismissal.

The District Attorney's Memorandum proposes a solution for a non-existent problem. Few cases are dismissed for technical or minor violations of the CMO. When faced with an alleged violation by the prosecution the court weighs the circumstances of the case, the District Attorney's conduct or lack thereof, and the severity of the violation to come to a sensible and fair sanction that will most appropriately remedy the violation and ensure future compliance. The CMO has significantly improved the criminal justice system in Bernalillo County, and the numbers demonstrate that it is an effective, functional case processing system that has achieved its goals without compromising public safety or the rights of the parties, despite the District Attorney's allegations.

## **VI. THE DISTRICT ATTORNEY'S PROPOSALS ARE CONTRARY TO ESTABLISHED LAW AND WOULD RENDER THE CMO MEANINGLESS.**

The District Attorney's Memorandum and Proposal suggests extensive changes to the CMO. LOPD believes these changes are unwarranted, as they are a solution to a non-existent problem. Many of the proposed changes are also contrary to established law and would render the CMO meaningless.

The District Attorney wants to strip the court of its ability to sanction the State for any conduct that is not the directly the failure of the District Attorney's Office itself. Under LR2-308(I)(1), the District Attorney proposes to add, "The court shall not impose sanctions for a violation of these rules that result from the failure of the court or any government entity other than the District Attorney's Office to exercise its administrative or ministerial responsibilities." This would mean that if APD or another law enforcement agency failed to provide discovery to the District Attorney, the court would be unable to impose any sanction on the State for its failure to provide discovery in a timely fashion.

This proposal is contrary to long-established law. For purposes of criminal prosecutions, "the State" in New Mexico has historically included both the District Attorney and all members of the prosecutorial team, including police authorities. *State v. Wisniewski*, 1985-NMSC-079, ¶ 21, 103 N.M. 430. The proposed language would gut the CMO, allowing the District Attorney to evade sanctions so long as it could find a scapegoat. Indeed, the District Attorney would be incentivized to become even more passive in its collection of discovery, so that it could always deflect blame onto another agency and avoid sanctions. The purpose of the CMO was to encourage greater collaboration and cooperation between the arms of the State. This proposal by the District Attorney would encourage the opposite.

In a similar vein, the District Attorney proposes a modification to LR2-308(I)(4) that would only allow the sanctions of dismissal or exclusion of evidence when the harmed party can demonstrate prejudice, bad-faith/willful non-compliance, and that no lesser sanction will remedy the rule violation. In effect, the District Attorney moves to codify our Supreme Court's holding in *State v. Harper*, 2011-NMSC-044, 266 P.3d 25, as part of the CMO.

In so doing, the District Attorney neglects to consider that our Supreme Court recently comprehensively revisited *Harper* in *State v. LeMier*, 2017-NMSC-017, 304 P.3d 959. In *LeMier* the Supreme Court drew back on the virtual impossibility of dismissal as a sanction for the state's noncompliance with rules of court by stressing that district judges should exercise their discretion to determine whether prosecutorial intransigence has harmed a defendant's due process rights, or the court system's interests in judicial economy. Although retaining the analytical framework of *Harper*, the *LeMier* Court attempted to fix the unintended circumscription of a court's ability to manage its own docket. Rather than recognizing that *LeMier* is the law applicable throughout the State of New Mexico, the District Attorney chooses to ignore its existence and pretend that it is subject to a higher burden than other district attorneys throughout the State.

The District Attorney's Proposal as to this subsection seeks to prevent a court from imposing dismissal or exclusion as a sanction if 1) the defendant is a danger to the community, 2) the State failed to transport an in-custody defendant, or 3) the non-compliance was caused by any circumstances outside the control of the parties. This would mean that a defendant who has been detained pursuant to a Constitutional finding of dangerousness could *never* obtain a sanction of dismissal or exclusion, no matter the severity and gravity of the violation and even

though such individuals are still presumed innocent. It would also allow the District Attorney to avoid sanctions any time it can make a scapegoat of another state entity.

These proposed changes are unacceptable. It is critical that courts have sufficient sanctions available to remedy violations of the CMO. As the Court held in *LeMier*, “[t]rial courts possess broad discretionary authority to decide what sanction to impose when a discovery order is violated.” 2017-NMSC-017, ¶ 22. The *LeMier* Court cited approvingly to the Tenth Circuit’s holding that “[o]n occasion the district court may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced.” *Id.* (quoting *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988)). The District Attorney’s Proposal in this area is contrary to *LeMier* and would encourage prosecutorial negligence and opacity in the discovery process. As stated in *LeMier*, “No one is well-served—not defendants, not victims, not prosecutors, not courts, and certainly not the citizens of New Mexico—by a system of justice where cases needlessly languish in some obscure netherworld because one or both of the parties lack the will or capacity to comply with basic discovery deadlines, and courts are either reluctant to impose meaningful sanctions because they fear the prospect of reversal on appeal or have not taken sufficient responsibility for ensuring the swift and efficient administration of justice.” The CMO reflects a commitment to these principles and should not be modified to allow the District Attorney to shirk its responsibilities to the judicial system and the citizens of New Mexico. Enactment of the District Attorney’s “Reforms” would serve nothing more than to create an environment wherein basic foundations of the American criminal justice system’s notions of fairness, expediency, efficiency, and above all, prosecutorial accountability are sacrificed to the specter of the “crime problem.”

## **VII. SOME CHANGES ARE NEEDED TO STRENGTHEN THE CMO AND IMPROVE DUE PROCESS**

As noted above, it is the position of LOPD that the CMO is working as intended. However, that is not to say that the CMO is working to its full potential. While some problems like overcrowding at MDC and years-long delays between indictment and trial are largely a thing of the past, other issues like non-provision and detrimentally-late provision of discovery are still a feature of the Bernalillo County judicial landscape. Tellingly, while most of the complaints made against the CMO by the District Attorney occurred, if at all, during the first year after institution of the CMO, the problems identified below have been increasing in both frequency and severity recently.

An examination of the anecdotal examples provided by the DA's office of various cases that they claim were dismissed unreasonably only serve to confirm the collective experience of the LOPD felony attorneys in court: that the courts have come to tolerate violation after violation of the CMO requirements by the prosecution, even in the same case, in an attempt to avoid issuing any sort of meaningful sanction against the State. Throughout this Report, the LOPD has striven to avoid directly naming present or past clients for fear of retribution against those clients, whose cases may be re-indicted at any time. We are also mindful of Rule of Professional Conduct 16-306(A)(2).<sup>18</sup> Yet, we cannot help but note, generally, that a frequent complaint made by public and private defense bar directly to the individual district court judges revolves around their failures to impose meaningful sanctions against egregious District Attorney conduct.

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<sup>18</sup> "A lawyer shall not make any extrajudicial or out-of-forum statement in a proceeding that may be tried to a jury that the lawyer knows or reasonably should know; ... creates a clear and present danger of prejudicing the proceeding."

Some judges will routinely issue an “unofficial verbal reprimand” to a District Attorney for egregious discovery violations which make it impossible for defense counsel to adequately investigate a case, to the point where assistant district attorneys will joke about the issue privately. Others refuse to consider discovery violations until well after the “motions deadline” has passed in a case, then forgive any sanction where an assistant district attorney provides the violative items on the eve of trial. Those same judges will routinely, harshly sanction defense attorneys by excluding witnesses for even *de minimis* violations of the CMO, all but eliminating a defendant’s ability to present a meaningful defense.

The sort of repeated and flagrant violation the rules that is demonstrated by the prosecution, with a fair amount of regularity, would never be tolerated in civil court. Yet, our courts have come to tolerate such blatant disregard for rules by the District Attorney’s office in criminal cases, where what is at stake is the most fundamental of rights – the right to one’s liberty. This degree of tolerance amounts to nothing short of acquiescence. What the District Attorney’s Memorandum has made exceedingly clear is that, rather than gutting the very mechanisms of enforcement of the CMO’s deadlines, the courts need to be empowered and even required to impose sanctions that send a message to prosecution that this will not be tolerated.

The next problem, discussed in Section III, above, is reflected in the high number of *nolle prosequis* being filed by the District Attorney in the period immediately prior to a scheduled trial, long after significant defense and court resources have been expended preparing to try a case. Although a small number of late dismissals is not inappropriate, and is easily explicable as the result of a suddenly-uncooperative key witness or valid exercise of prosecutorial discretion as a case unfolds, the high number being experienced in the Second Judicial District in recent

months appears to be symptomatic of inadequate case preparation and compliance with the requirements of subsection (C)(2).

An additional problem emanates from recently-seen difficulties in obtaining pretrial witness interviews upon valid and reasonable requests of defense counsel. Specific problems seen in the last months include: (1) prosecutors withholding all contact information as to witnesses and then refusing to accept service of a subpoena for those witnesses' statements; (2) prosecutors scheduling pretrial interviews at times which defense counsel has previously indicated their unavailability, then claiming that defendant has "waived" their right to interview witnesses; (3) prosecutors filing witness lists after docket call, then seeking and securing trial delays for "good cause;" and (4) prosecutors conducting recorded interviews with witnesses, then refusing to provide the recordings to defense counsel upon request.

It should be noted, LOPD has not seen these problem with all individual prosecutors. Many prosecutors still uphold the ethical duties of their office to the best of their ability. However, the District Attorney's Office as a whole, has begun exhibiting a degree of tactical hostility to defendant's discovery rights which is both abnormal and alarming.

Finally, the last area in need of revision – not due to a problem, but rather a change in law – is the inapplicability of the present "track-based" system to account for the heightened right to an expedited trial possessed by defendants detained pursuant to the recently-amended Article II, Section 14 and the ability of district court judges to, upon motion and sufficient proof, detain a defendant with no possibility of release pending trial upon a finding of dangerousness.

With the above considerations in mind, attached to this Official Report, please find LOPD's proposed revisions to the CMO.

## CONCLUSION

*“It’s about time law enforcement got as organized as organized crime.”*  
-- Mayor Rudolph Giuliani

This work is drafted by a group of attorneys who are deeply offended by the District Attorney’s assertion that the defense bar is engaged in “gamesmanship”<sup>19</sup> and that the District Court judges’ application of Supreme Court rules is “absurd.”<sup>20</sup> In drafting LOPD’s official report, we hope to assist our criminal justice partners in opening a dialogue based on statistics and law, rather than on anecdotes and alarmism.

The recent rise in crime *throughout the state of New Mexico* is, to the extent that anyone can ever truly know what causes crime, likely a result of the complex interactions of poverty, mental health, and substance abuse found in a state that habitually ranks near the bottom of nationwide guides to economic, educational and childhood welfare metrics. As such, we implore the Bernalillo County Criminal Justice Coordinating Council to open debate on a host of topics which potentially could produce broad consensus among criminal-justice stakeholders and policy-makers to promote genuine reform in our community. As a potential point of agreement, the elected District Attorney has already signaled his support for an issue with which the Law Offices of the Public Defender wholeheartedly agrees: reforming our current bail system to ensure that money is never used to deny freedom to the accused.<sup>21</sup>

Further areas of potential agreement include, but are not limited, to the following:

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<sup>19</sup> *Memorandum*, p. 22.

<sup>20</sup> *Memorandum*, p. 9.

<sup>21</sup> See *O’Donnell, et. al. v. Harris County, TX*, Amicus Brief of Current and Former State’s Attorneys, State Attorneys General, United States Attorneys, Assistant United States Attorneys, and Department of Justice Officials, p. iv.

1. Improving rehabilitative diversions and expanding treatment options for individuals suffering from mental illness within our community, including an emphasis on post-confinement treatment and care.
2. Increasing funding to the District Court's diversionary programs, which provide a mechanism of rules and sanctions to attempt to improve the lives of post-adolescent offenders, the mentally ill, substance abusers, veterans, and other members of the community in need of targeted and specific aid;
3. Implementing a program which would allow for formal rehabilitative justice sessions, further reducing the harm to society and victims from the criminal acts of offenders;
4. Reforming our state's habitual offender statutes, which too often punish individuals with substance-abuse and mental-health issues committing minor, nonviolent offenses more seriously than individuals who purposefully engage in extremely violent conduct;
5. Broadening the support and supervision provided by our pretrial services program;
6. Volunteering time with work with law enforcement to ensure appropriate training on conductive constitutionally-valid, effective investigations.
7. And, we should all acknowledge that Albuquerque, New Mexico has an opioid and methamphetamine crisis. The U.S. Attorney has secured Albuquerque as a pilot city in the DEA 360 Strategy, a program with a goal of "strengthening community organizations best positioned to provide long-term help and support for building drug free communities."<sup>22</sup> While understanding that every stakeholder has a role within the criminal justice system, we may use our Criminal Justice Coordinating Council (CJCC) to support those proactive efforts to combat these twin crises.

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<sup>22</sup> <https://www.dea.gov/prevention/360-strategy/360-strategy.shtml>

The District Attorney has filed and successfully prosecuted thousands of cases since the CMO's inception. While it is true that some cases were brought into the system prematurely and had to be removed until they were ready to be prosecuted, there were substantially more cases that were brought into the system without an appreciation of the District Attorney's need to conduct a full and complete investigation *before* charging someone with a crime which will appear, even after an exoneration, on their police record for the rest of their lives. The District Attorney is re-organizing the ways in which its office is staffed and cases are prosecuted. The Albuquerque Police Department will be getting a new police chief in the coming months and will hopefully soon focus on proposing solutions, instead of proposing blame.<sup>23</sup>

LOPD takes seriously its duty to defend the constitutional protections guaranteed to all New Mexicans. With the help of our law enforcement partners in APD and the District Attorney's Office, LOPD is optimistic that the reforms started, but hopefully far from concluded, in the most-recent draft of the CMO will see greater success in Bernalillo County and the entire State of New Mexico in the years to come. We hope that the above information helps promote an informed dialogue about the real impact of the CMO so that constructive, just, and efficient consensus can be reached.

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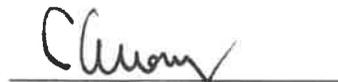
<sup>23</sup> Ryan Boetel, *Facebook is APD's Megaphone*, Albuquerque Journal, April 26, 2017 "I know it sounds like I'm blaming it all on the judges," [Chief Gorden Eden] said about crime in the city, "because I am."

For these reasons, the attorneys of the Law Offices of the Public Defender strongly encourage the members of the Bernalillo County Criminal Justice Coordinating Council to vote against the District Attorney's proposed changes to the Case Management Order, and consider the proposals of the LOPD.

Respectfully,

Albuquerque Felony Attorneys  
The Law Offices of the Public Defender  
505 Marquette Avenue NW, Suite 120  
Albuquerque, NM 87102

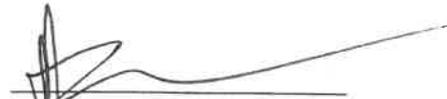
  
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Courtney Aronowsky

  
Britt Baca-Miller

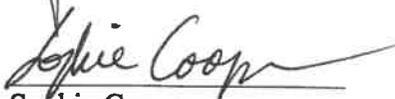
  
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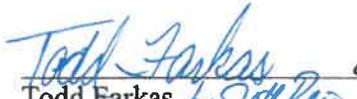
  
Mark Bierdz

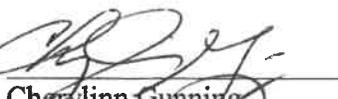
  
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Hadley Brown

  
Judi Caruso

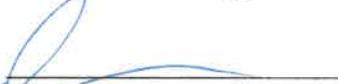
  
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Todd Farkas

  
Cherylinn Gunning

  
Leanne Hamilton

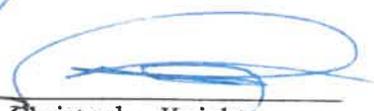
  
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Elizabeth Holmes

  
Jonathan Ibarra

  
Martin Juárez

  
Anne Keener

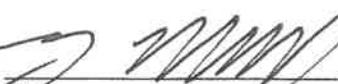
  
Christopher Knight

  
Heather LeBlanc

  
Raymond Maestas

  
Brittany Malott

  
Robert Martin

  
Tyler McCormick

  
Matthew O'Gorman

*Rose Osborne*

Rose Osborne

*Sarah Pepin*

Sarah Pepin

*Maxwell Pines*

Maxwell Pines

*Sarah Plazola*

Sarah Plazola

*Richard Pugh*

Richard Pugh

*Jeff Rein*

Jeff Rein

*Michael Rosenfield*

Michael Rosenfield

*Daniel Snyder*

Daniel Snyder

*Jasmine Solomon*

Jasmine Solomon

*Chris Sturgess*

Chris Sturgess

*Mark Swanson*

Mark Swanson

*Matthias Swonger*

Matthias Swonger

*Stephen Taylor*

Stephen Taylor

*Erik Tranberg*

Erik Tranberg

*Alan Wagman*

Alan Wagman

*Douglas Wilber*

Douglas Wilber

*Scott Wisniewski*

Scott Wisniewski

*Robert Work*

Robert Work

*George Yu*

George Yu

*Jonathan See*

Jonathan See

## **LR2-308. CASE MANAGEMENT PILOT PROGRAM FOR CRIMINAL CASES**

**A. Scope; application.** This is a special pilot rule governing time limits for criminal proceedings in the Second Judicial District Court. This rule applies in all criminal proceedings in the Second Judicial District Court but does not apply to probation violations, which are heard as expedited matters separately from cases awaiting a determination of guilt, nor to any other special proceedings in Article 8 of the Rules of Criminal Procedure for the District Courts. The Rules of Criminal Procedure for the District Courts and existing case law on criminal procedure continue to apply to cases filed in the Second Judicial District Court, but only to the extent they do not conflict with this pilot rule. The Second Judicial District Court may adopt forms to facilitate compliance with this rule, including the data tracking requirements in Paragraph N.

### **~~B. Assignment of cases to case management calendars; special calendar; new calendar.~~**

~~(1) *Special calendar and new calendar judges.* Criminal cases filed before July 1, 2014, will be assigned and scheduled as provided for “special calendar” judges under Paragraph M of this rule, except that, where appropriate, the chief judge may designate cases coming off warrant status to be placed in the new calendar. Criminal cases filed on or after July 1, 2014, shall be assigned or reassigned to a “new calendar” judge. The district court judges assigned as new calendar judges shall be determined by separate order of the chief judge, who is authorized to reassign any district judge to be a new calendar judge. Time limits and rules for disposition of cases assigned or reassigned to new calendar judges shall be governed by this rule.~~

~~(2) *Assignment of cases to new calendar judges.* For cases filed between July 1, 2014, and the effective date of this rule, a new calendar judge will continue to be assigned to any case previously assigned to that judge. Cases filed on or after July 1, 2014, that were previously assigned to a special calendar judge, shall be reassigned to a new calendar judge. Cases that require reassignment shall be reassigned by order of the chief judge of the district court in the manner best designed to foster expeditious resolution of the cases. Notwithstanding the reassignments provided in this rule, the chief judge of the district court may continue the assignment of a case to the original judge in the interest of expeditious resolution of the case.~~

~~(3) *Deadline for initial scheduling hearing by new calendar judges in pending cases.* Beginning on the effective date of this rule, new calendar judges assigned to cases filed before the effective date of the rule shall hold a scheduling hearing within sixty (60) days of the effective date of this rule. The scheduling hearing for pending cases shall comply with Paragraph G of this rule and shall result in assignment of all pending cases to the appropriate track. Thereafter the provisions of this rule shall apply, except that the time limits for disclosures and the commencement of trial in Paragraph G shall start from the effective date of this rule.~~

~~(4) *Reassignment to new calendar judges; peremptory excusals.* Upon reassignment of a pending case to a new calendar judge, any party who has not previously exercised a peremptory excusal of a district judge under Rule 5-106 NMRA may exercise a peremptory excusal within ten (10) days in the manner provided in Paragraph F of this rule.~~

~~(5) Rule governs case administration. For cases assigned to a new calendar judge after the effective date of this rule, the provisions of this rule govern case administration until this rule is withdrawn or amended.~~

### **CB. Arraignment.**

(1) *Deadline for arraignment.* The defendant shall be arraigned on the information or indictment within ten (10) days after the date of the filing of the bind-over order, indictment, or the date of the arrest, whichever is later, if the defendant is not in custody and not later than seven (7) days if the defendant is in custody.

(2) *Certification by prosecution required; matters certified.* At ~~or~~ least forty eight (48) hours before arraignment or waiver of arraignment, or upon the filing of a bind-over order, the state shall certify that ~~at the present time before obtaining an indictment or filing an information the case has been investigated sufficiently to be reasonably certain that~~ (a) the case has been investigated sufficiently to ensure that the prosecution will comply with will reach a timely disposition by plea or trial within the case processing time limits set forth in this rule; (b) the court will have sufficient information upon which to rely in assigning a case to an appropriate track at the status hearing provided for in Paragraph ~~GE~~; (c) all discovery in the possession of the state or relied upon in the investigation leading to the bind-over order, indictment or information has been provided to the defendant; (d) the state has updated and correct contact information for all witnesses necessary to proceed to trial, as well as any victims of crime as defined at § 31-26-3(F), if applicable; and (de) the state understands that, absent extraordinary circumstances, the state's failure to comply with the case processing time lines set forth in this rule will result in sanctions as set forth in Paragraph I.

(3) *Certification form.* The court may adopt a form and require use of the form to fulfill the certification and acknowledgment required by this paragraph.

### **DC. Discovery; disclosure by the state; requirement to provide contact information; continuing duty; failure to comply.**

(1) *Initial disclosures; deadline.* The state shall disclose or make available to the defendant all information described in Rule 5-501(A)(1)-(6) NMRA at least forty-eight (48) hours prior to the arraignment or within five (5) days of when a written waiver of arraignment is filed under Rule 5-303(J), NMRA. In addition to the disclosures required in Rule 5-501(A) NMRA, at the same time the state shall provide addresses, and also phone numbers and email addresses if available, for its witnesses that are current as of the date of disclosure, copies of documentary evidence, and audio, video, and audio-video recordings made by law enforcement officers or otherwise in possession of the state, and a “speed letter” authorizing the defendant to examine physical evidence in the possession of the state. For cases which have not been indicted or bound over within 60 days of the felony first appearance, the state shall provide all mandated disclosures it intends to rely upon at trial, including all scientific evidence.

(2) Remedies for failure to disclose; procedure. The defendant may, at arraignment, orally move for sanctions against the state for failure to comply with the disclosure requirements of LR

2-308(C)(1). The state's certification filed pursuant to LR 2-308(B)(2) shall be deemed, for purposes of deciding this motion, a written response. The state shall be allowed the opportunity to make additional oral argument to supplement its written response. The presiding arraignment judge shall determine whether a violation of the state's disclosure requirements has occurred and, if one has occurred, shall impose a sanction as set forth in Paragraph I.

(3) Audio, video, and audio-video recordings, presumption. If, upon oral or written motion of the defendant, a court finds that audio, video, or audio-video recordings were made or gathered by law enforcement officers or are otherwise in possession of the state, and have not been disclosed to the defendant as required by this paragraph, a rebuttable presumption shall arise that the evidence is currently in the possession of the state, subject to information disclosed in the state's filing of an LR 2-308(B)(2) certification. A court may, by written order detailing the evidence relied upon, find that the audio, video, or audio-video recording made by law enforcement or otherwise in possession of the state has been lost or destroyed. Upon such written order, the defendant may move for further relief before the assigned trial judge.

**(24) Motion to withhold contact information for safety reasons.** A party may seek relief from the court by motion, for good cause shown, to withhold specific contact information if necessary to protect a victim or a witness. Privacy interests alone, absent a finding that a safety risk exists, shall not ordinarily establish good cause for withholding contact information. If the address of a witness is not disclosed pursuant to court order, the party seeking the order shall arrange for a witness interview or accept at its business offices a subpoena for purposes of deposition under Paragraph (F) of this Order ~~Rule 5-503 NMRA~~.

**(35) Continuing duty.** The state shall have a continuing duty to disclose additional information to the defendant within five (5) days of receipt of such information, including current contact information for witnesses.

**(46) Evidence deemed in the possession of the state.** Evidence is deemed to be in possession of the state for purposes of this rule if such evidence is in the possession or control of any person or entity who has participated in the investigation or evaluation of the case.

**(57) Providing copies; electronic or paper; e-mail addresses for district attorney and public defender required.** Notwithstanding Rule 5-501(B) NMRA or any other rule, the state shall provide to the defendant electronic or printed copies of electronic or printed information subject to disclosure by the state. The Second Judicial District Attorney's Office and the Law Offices of the Public Defender shall provide to each other a single e-mail address for delivery of discovery electronically. In addition to delivering discovery to the given general address for the Law Offices of the Public Defender, the state shall copy such delivery to any attorney for the Law Offices of the Public Defender who has entered an appearance in the case at the time discovery is sent electronically.

**(68) Service of subsequent pleadings.** Service of pleadings and papers between the parties shall be made to the attorney, or to the party if not represented by counsel, by emailing an electronic scan of the file-endorsed pleading or paper, attachments included, to the attorney or party. If the attachments are too voluminous for emailing, or otherwise cannot be sent by email, the email to

the attorney or party will recite this circumstance and certify that the attachments have been mailed or delivered to the attorney's or party's last known address. Service by email is complete upon transmission and, in case of attachments that cannot be emailed, upon mailing or delivery.

**ED. Disclosure by defendant; notice of alibi; entrapment defense; failure to comply.**

(1) *Initial disclosures; deadline; witness contact information.* Not less than five (5) days before the scheduled date of the status hearing described in Paragraph G, the defendant shall disclose or make available to the state all information described in Rule 5-502(A)(1)-(3) NMRA. At the same time, the defendant shall provide addresses, and also phone numbers and email addresses if available, for its witnesses that are current as of the date of disclosure.

(2) *Deadline for notice of alibi and entrapment defense.* Notwithstanding Rule 5-508 NMRA or any other rule, not less than ninety (90) days before the date scheduled for commencement of trial as provided in Paragraph G, the defendant shall serve upon the state a notice in writing of the defendant's intention to offer evidence of an alibi or entrapment as a defense.

(3) *Continuing duty.* The defendant shall have a continuing duty to disclose additional information to the state within five (5) days of receipt of such information.

(4) *Providing copies required; electronic or paper.* Notwithstanding [Rule 5-502\(B\) NMRA](#) or any other rule, the defendant shall provide to the state electronic or printed copies of electronic or printed information subject to disclosure by the defendant. The Second Judicial District Attorney's Office and the Law Offices of the Public Defender shall provide to each other a single e-mail address for delivery of discovery electronically. In addition to delivering discovery to the given general address for the Second Judicial District Attorney's Office, the defendant shall copy such delivery to any attorney for the Second Judicial District Attorney's Office who has entered an appearance in the case at the time discovery is sent electronically.

(5) *Service of subsequent pleadings.* Service of pleadings and papers between the parties shall be made to the attorney, or to the party if not represented by counsel, by emailing an electronic scan of the file-endorsed pleading or paper, attachments included, to the attorney or party. If the attachments are too voluminous for emailing, or otherwise cannot be sent by email, the email to the attorney or party will recite this circumstance and certify that the attachments have been mailed or delivered to the attorney's or party's last known address. Service by email is complete upon transmission and, in case of attachments that cannot be emailed, upon mailing or delivery.

**FE. Peremptory excusal of a district judge; limits on excusals; time limits; reassignment.**

A party on either side may file one (1) peremptory excusal of any judge in the Second Judicial District Court, regardless of which judge is currently assigned to the case, within ten (10) days of the arraignment or the filing of a waiver of arraignment. If necessary, the case may later be reassigned by the chief judge to any judge in the Second Judicial District Court not excused within ten (10) days of the arraignment or the filing of a waiver of arraignment of the defendant. The chief judge may also reassign the case to a judge pro tempore previously approved to preside over such matters by order of the Chief Justice, who shall not be subject to peremptory excusal.

**GE. Status hearing; witness disclosure; case track determination; scheduling order.**

(1) *Witness list disclosure requirements.* Within twenty-five (25) days after arraignment or waiver of arraignment each party shall, subject to Rule 5-501(F) NMRA and Rule 5-502(C) NMRA, file a list of names and contact information for known witnesses the party intends to call at trial and that the party has verified is current as of the date of disclosure required under this subparagraph, including a brief statement of the expected testimony for each witness, to assist the court in assigning the case to a track as provided in this rule. The continuing duty to make such disclosure to the other party continues at all times prior to trial, requiring such disclosure within five (5) days of when a party determines or should reasonably have determined the witness will be expected to testify at trial.

(2) *Status hearing; factors for case track assignment.* A status hearing, at which the defendant shall be present, shall be commenced within thirty (30) days of arraignment or the filing of a waiver of arraignment.

(3) *Case track assignment required; ~~factors.~~* At the status hearing, the court shall determine the appropriate assignment of the case to one of three tracks. Written findings are required to place a case on track 3 and such findings shall be entered by the court within five (5) days of assignment to track 3. ~~Any track assignment under this rule only shall be made after considering the following factors:~~

(a) *Case track assignment factors.* ~~the complexity of the case, starting with the assumption that~~ Most cases will qualify for assignment to track 1. A court may assign a case to track 2 or track 3 upon consideration of the number of witnesses, time needed reasonably to address any evidentiary issues, and any other factor the court finds appropriate. ~~and~~

(b) *Track 3, limitations.* ~~the number of witnesses, time needed reasonably to address any evidence issues, and other factors the court finds appropriate to distinguish track 1, track 2, and track 3 cases.~~ Where a defendant has been ordered detained without bail pending trial pursuant to Article II, Section 13 of the New Mexico Constitution, a case shall not be placed on track 3 over the defendant's objection.

(4) *Scheduling order required.* After hearing argument and weighing the above factors, the court shall, before the conclusion of the status hearing, issue a scheduling order that assigns the case to one of three tracks and identifies the dates when events required by that track shall be scheduled, which are as follows for tracks 1, 2, and 3:

(a) Track 1; deadlines for commencement of trial and other events. For track 1 cases, the scheduling order shall have trial commence within two hundred ten (210) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph H, whichever is the latest to occur. The scheduling order shall also set dates for other events according to the following requirements for track 1 cases:

(i) Track 1--deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date the pretrial conference. A request for the court to approve a plea agreement less than ten (10) days before the trial date after the date of the pretrial conference shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances good cause. A defendant may plead guilty, the state may dismiss charges, and the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 1--deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled fifteen (15) days before the trial date. ~~Each party shall file their final trial witness list on or before this date.~~ The defendant shall be present for the final pretrial conference;

(iii) Track 1--deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 1--deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than thirty-five (35) days before the trial date;

(v) Track 1--deadline for pretrial motions. Pretrial motions shall be filed not less than fifty (50) days before the trial date;

(vi) Track 1--deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than forty (40) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 1--deadline for witness interviews. Witness interviews shall be completed not less than sixty (60) days before the trial date; ~~and~~

(viii) Track 1--deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred twenty (120) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred twenty (120) days before the trial date. In no case shall the order provide for production of scientific evidence less than ninety (90) days before the trial date;

(b) Track 2; deadlines for commencement of trial and other events. For track 2 cases, the scheduling order shall have trial commence within three hundred (300) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph H, whichever is the latest to occur. The scheduling order shall also set dates for other events according to the following requirements for track 2 cases:

(i) Track 2--deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date the pretrial conference. A request for the court to approve a plea agreement less than ten (10) days before the trial date after the date of the pretrial conference shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances good cause. A defendant may plead guilty, the state may dismiss charges, and the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 2--deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled fifteen (15) days before the trial date. ~~Each party shall file their final trial witness list on or before this date.~~ The defendant shall be present for the final pretrial conference;

(iii) Track 2--deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 2--deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than thirty-five (35) days before the trial date;

(v) Track 2--deadline for pretrial motions. Pretrial motions shall be filed not less than sixty (60) days before the trial date;

(vi) Track 2--deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than forty-five (45) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 2--deadline for witness interviews. Witness interviews shall be completed not less than seventy-five (75) days before the trial date; and

(viii) Track 2--deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred twenty (120) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred twenty (120) days before the trial date. In no case shall the order provide for production of scientific evidence less than ninety (90) days before the trial date; and

(c) Track 3; deadlines for commencement of trial and other events. For track 3 cases, the scheduling order shall have trial commence within four hundred fifty-five (455) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph H, whichever is the latest to occur. The scheduling order shall also set dates for other events according to the following requirements for track 3 cases:

(i) Track 3--deadline for plea agreement. A plea agreement entered into between the defendant and the state shall be submitted to the court substantially in the form approved by the Supreme Court not later than ten (10) days before the trial date the pretrial conference. A request for the court to approve a plea agreement less than ten (10) days before the trial date after the date of the pretrial conference shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances good cause. A defendant may plead guilty, the state may dismiss charges, and the parties may recommend a sentence but the court shall not agree to comply with a plea agreement in this circumstance absent a written finding of extraordinary circumstances;

(ii) Track 3--deadline for pretrial conference. The final pretrial conference, including any hearing on any remaining pretrial motions if needed, shall be scheduled twenty (20) days before the trial date. ~~Each party shall file their final trial witness list on or before this date.~~ The defendant shall be present for the final pretrial conference;

(iii) Track 3--deadline for notice of need for court interpreter. All parties shall identify by filing notice with the court any requirement for language access services at trial by a party or witness fifteen (15) days before the trial date;

(iv) Track 3--deadline for pretrial motions hearing. A hearing for resolution of pretrial motions shall be set not less than forty-five (45) days before the trial date;

(v) Track 3--deadline for pretrial motions. Pretrial motions shall be filed not less than seventy (70) days before the trial date;

(vi) Track 3--deadline for responses to pretrial motions. Written responses to any pretrial motions shall be filed within ten (10) days of the filing of any pretrial motions and in any case not less than fifty-five (55) days before the trial date. Failure to file a written response shall be deemed, for purposes of deciding the motion, an admission of the facts stated in the motion;

(vii) Track 3--deadline for witness interviews. Witness interviews shall be completed not less than one hundred (100) days before the trial date; and

(viii) Track 3--deadline for disclosure of scientific evidence. All parties shall produce the results of any scientific evidence, if not already produced, not less than one hundred fifty (150) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred fifty (150) days before the trial date. In no case shall the order provide for production of scientific evidence less than one hundred twenty (120) days before the trial date.

(5) *Form of scheduling order; additional requirements and shorter deadlines allowed.* The court may adopt upon order of the chief judge of the district court a form to be used to implement the time requirements of this rule. Additional requirements may be included in the scheduling order at the discretion of the assigned judge and the judge may alter any of the deadlines described in Subparagraph (G)(4) of this rule to allow for the case to come to trial sooner.

(6) *Extensions of time; cumulative limit.* The court may, for good cause, grant any party an extension of the time requirements imposed by an order entered in compliance with Paragraph E G of this rule, subject to the following restrictions. ~~In no case shall a party be given time extensions that in total exceed thirty (30) days.~~ Unless required by good cause, extensions of time ~~for up to a total of thirty (30) days~~ to any party shall not result in delay of the date scheduled for commencement of trial. Substitution of counsel alone ordinarily shall not constitute good cause for an extension of time.

(a) A party moving for an extension of time due to good cause shall be limited to cumulative extensions of time as follows:

(i) For track 1 cases, thirty (30) days;

(ii) For track 2 and 3 cases, sixty (60 days).

(b) Independent of the above cumulative extensions, upon written motion a party shall be given an extension of time of up to ninety (90) days to investigate, evaluate, and rebut any scientific or technical analysis which may form the basis of opinion testimony offered at trial by any party. This extension shall extend all applicable deadlines until no later than the date of the final pretrial conference or docket call, but only to the extent that the deadline pertains to the scientific or technical analysis. The time allotted for an extension based on this provision may be reduced by the amount of time prior to the expiration of the scientific evidence deadline that the information is disclosed to the moving party by the offering party.

F. *Pretrial Witness Interviews.* At the status hearing conducted pursuant to LR 2-308(E), the court shall inquire of each party whether they will accept responsibility for providing pretrial witness interviews with any or all witnesses each has listed and shall document the parties' positions on the scheduling order issued pursuant to LR 2-308(E)(4). The following provisions shall apply to the respective parties:

(1) *Opposing party interview responsibility; deadlines.* Unless the parties agree otherwise, it shall be the responsibility of the party requesting the interview to assume responsibility for arranging the interview.

(2) *Arranging pretrial witness interviews; subpoena required.* A party shall schedule a pretrial witness interview by furnishing upon the witness, not less than five (5) business days in advance, a written "notice of pretrial witness interview." The notice shall state the date, time and place for conducting the interview. This notice shall be accompanied by a subpoena.

(a) *Subpoena; filing and service requirements.* To effect service, a subpoena shall be hand-delivered to the subject of the subpoena, unless the subject has previously arranged for alternative service. Proof of service shall be by notarized affidavit for non-attorney service, or certificate signed and attested to by a licensed attorney for attorney service.

(b) *Pretrial witness interviews; scope; limitations.* Any person, other than the defendant, with information which is subject to discovery shall give a pretrial witness interview. Unless

otherwise limited by written order of court, parties may obtain discovery regarding any matter, not privileged, which is relevant to any claim or defense. It is not grounds for objection that the information sought will be inadmissible at trial if the information sought is reasonably calculated to lead to the discovery of admissible evidence.

(c) *Pretrial witness interviews; objections.* A witness may not refuse to answer a relevant question absent an assertion of privilege, or that an answer would violate the witness's right against self-incrimination. An attorney for a party shall not counsel a witness upon the propriety of any question posed unless on grounds of privilege or self-incrimination, in which case their advice shall be limited to that necessary to apprise the witness of their right to obtain legal counsel.

(d) *Listed witnesses; service requirement.* For all witnesses listed by a party pursuant to LR 2-308(E)(1), an opposing party shall only be required to attempt service at the most-recently listed address for that witness. If a party is unsuccessful in its attempt to serve a witness at the most recent address for that witness, the serving party shall notify opposing counsel. If opposing counsel does not provide an updated address within three (3) business days of being noticed, the serving party may move for judicial relief or sanctions.

(3) *Acceptance of pretrial witness interview responsibility; deadlines.* Subject to the stipulation of opposing counsel, a party may accept responsibility for arranging pretrial witness interviews with any or all witnesses it has listed pursuant to LR 2-308(E)(1). If this occurs, opposing counsel shall request interviews within thirty (30) days of the scheduling conference, and shall provide dates of availability to conduct the interviews.

(4) *Requests for Pretrial witness interviews; requirements.* A request for a pretrial witness interview must be made in writing by sending an e-mail to the attorney of record for the party arranging pretrial witness interviews, or by filing a "Notice of Request for Pretrial Witness Interview" with the court and serving copies upon all parties.

(5) *Exclusion of listed witnesses; rebuttable presumption.* A rebuttable presumption shall exist that the appropriate sanction is exclusion of a witness from being called by the listing party at trial or other hearing in the following circumstances:

(a) Where the moving party has twice attempted service in a manner that complies with paragraph (2)(d) of this section. A party moving for exclusion shall present evidence of service attempts through live witness testimony, or an affidavit signed by the person(s) who attempted service;

(b) Where the witness has been served a subpoena and does not appear at the time, place and location designated on the subpoena, unless the witness give at least two (2) business days advance notice that the witness would not be able to appear and requested accommodation;

(c) Where the listing party has accepted responsibility for setting up the interviews, the moving party made a request for interviews that comports with paragraph(4) of this rule and the pretrial interview deadline has passed without the witness having been provided for interview.

G. *Scheduling of cases in which a defendant has been preventatively detained.* Any case in which the defendant has been detained upon a finding of dangerousness pursuant to Article II, § 13 of the New Mexico Constitution shall be subject to an expedited trial track. Determination of the appropriate trial track shall be based on the same factors utilized by courts in determining non-expedited track assignments, except that no case in which the Defendant has been detained pursuant to Article II, § 13 of the New Mexico Constitution shall be assigned to Track 3 over Defendant's objection.

(1) With the exception of the deadline for commencement of trial, all pretrial deadlines shall be determined by the Court on a case by case basis at the scheduling conference conducted pursuant to Section (E)(2) of this Order.

(2) Unless the deadline is waived by the Defendant, trial shall commence no later than:

(a) Ninety (90) days from the date the order of detention was filed, where the case been assigned to Track 1;

(b) One hundred eighty (180) days from the date the order of detention was filed, where the case has been assigned to Track 2;

(c) Three hundred (300) days from the date the order of detention was filed, where the case has been assigned to Track 3.

(3) If a trial has not commenced within the specified timeframe, the defendant shall be released from custody without monetary conditions and the deadline for commencement of trial will revert to that which is applicable under the standard deadlines for the track to which the case has been assigned.

(4) *Expedited trial where a defendant has had conditions of release revoked.* Where a defendant, after having had conditions of release granted, has subsequently had said conditions revoked pursuant to Rule 5-403, NMRA, the defendant may file a "Notice of Readiness for Trial."

(5) *Effect of Notice.* Where the defendant files a Notice of Readiness for Trial, all outstanding pretrial motion shall be ruled upon within thirty (30) days. Within sixty (60) days of filing of the notice the defendant shall be brought to trial. To accomplish these time limits the defendant's case may be transferred to any district judge, including judges *pro tempore*, not previously excused.

**H. Time limits for commencement of trial.** The court may enter an amended scheduling order whenever one of the following triggering events occurs to extend the time limits for commencement of trial consistent with the deadlines in Paragraph **EG** as deemed necessary by the court:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order is filed in the court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the court disposing of the appeal;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of the arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;

(7) if the defendant has been referred to a preprosecution or court diversion program, the date a notice is filed in the court that the defendant has been deemed not eligible for, is terminated from, or is otherwise removed from the preprosecution or court diversion program;

(8) if the defendant's case is severed from a case to which it was previously joined, the date from which the cases are severed, except that the ~~non-moving defendant or at least one of the non-moving defendants shall continue on the same basis as previously established under these rules for track assignment and otherwise~~ court shall continue at least one of the previously-joined defendants on the original track assignment, which defendant shall be determined by the court upon consideration of the complexity of the now-severed cases;

(9) if a defendant's case is severed into multiple trials, the date from which the case is severed into multiple trials, except that at least one of the trials shall continue on the same basis as previously established under this rule for track assignment and otherwise;

(10) if a judge enters a recusal and the newly-assigned judge determines the change in judge assignment reasonably requires additional time to bring the case to trial, the date the recusal is entered;

(11) if the court grants a change of venue and the court determines the change in venue reasonably requires additional time to bring the case to trial; or

(12) if the court grants a motion to withdraw defendant's plea.

### **I. Failure to comply.**

(1) If a party fails to comply with any provision of this rule or the time limits imposed by a scheduling order entered under this rule, the court shall impose sanctions as the court may deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply.

(2) In considering the sanction to be applied the court shall not accept negligence or the usual press of business as sufficient excuse for failure to comply. If the case has been re-filed following an earlier dismissal, dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule, subject to the provisions in Subparagraph (4) of this paragraph.

(3) The sanctions the court may impose under this paragraph include, but are not limited to, the following:

~~(a) a reprimand by the judge;~~

~~(ab) prohibiting a party from calling a witness or introducing evidence;~~

~~(be) a monetary fine imposed upon a party's attorney or that attorney's employing office with appropriate notice to the office and an opportunity to be heard. A presumption shall exist that where an attorney is an employee of a government agency, any fine levied shall be imposed against the agency, rather than the individual attorney;~~

~~(cd) civil or criminal contempt; and~~

~~(de) dismissal of the case with or without prejudice, subject to the provisions in Subparagraph (4) of this paragraph.~~

(4) The sanction of dismissal, with or without prejudice, shall not be imposed under the following circumstances:

(a) the state proves by clear and convincing evidence that the defendant is a danger to the community; ~~and~~

(b) the failure to comply with this rule is caused by extraordinary circumstances beyond the control of the parties; ~~and;~~

~~(c) a failure to dismiss would not violate any of defendant's rights guaranteed by a state or federal constitutional provision.~~

**J. Certification of readiness ~~at prior to pretrial conference or docket call.~~ At pretrial conference or docket call, the Court shall inquire of both the prosecutor and defense counsel if (1) the case will proceed to trial, or resolve via plea agreement; (2) if all witnesses are available and ready to testify at trial; and (3) if any outstanding pretrial motions need resolution. ~~shall submit a certification of readiness form five (5) days before the final pretrial conference or docket call, indicating they have been unable to reach a plea agreement, that both parties have contacted their witnesses and the witnesses are available and ready to testify at trial, and that both parties are ready to proceed to trial. This certification may be by stipulation.~~ If either party is unable to proceed to trial, it shall submit a written request for extension of the trial date as outlined in Paragraph K of this rule. If the state is unable to certify the case is ready to proceed to trial and does not meet the requirements for an extension in Paragraph K of this rule, it shall**

prepare and submit notice to the court that the state is not ready for trial and the court shall dismiss the case.

**K. Extension of time for trial; reassignment; dismissal with prejudice; sanctions.**

(1) *Extending date for trial; good cause or exceptional circumstances; reassignment to available judge for trial permitted; sanctions.* The court may extend the trial date for up to thirty (30) days, upon showing of good cause ~~which is beyond the control of the parties or the court.~~ To grant an extension of up to thirty (30) days the court shall enter written findings of good cause. If on the date the case is set or re-set for trial the court is unable to hear a case for any reason, including a trailing docket, the case may be reassigned for immediate trial to any available judge or judge pro tempore, in the manner provided in Paragraph L of this rule. If the court is unable to proceed to trial and must grant an extension for up to thirty (30) days for reasons the court does not find meet the requirement of good cause, the court shall impose sanctions as provided in Paragraph I of this rule, which may include dismissal of the case with prejudice subject to the provisions in Subparagraph (I)(4). Without regard to which party requests any extension of the trial date, the court shall not extend the trial date more than thirty (30) days beyond the original date scheduled for commencement of trial without a written finding of exceptional circumstances approved in writing by the chief judge or a judge, including a judge pro tempore previously approved to preside over such matters by order of the Chief Justice, that the chief judge designates.

(2) *Requirements for extension of trial date for exceptional circumstances.* When the chief judge or the chief judge's designee accepts the finding by the trial judge of exceptional circumstances, the chief judge shall approve rescheduling of the trial to a date certain. The order granting an extension to a date certain for extraordinary circumstances may reassign the case to a different judge for trial or include any other relief necessary to bring the case to prompt resolution.

(3) *Definitions:* For purposes of this rule, the following definitions shall apply:

(a) *Good Cause:* An event, beyond the control of the parties or the court, which necessitates a delay in the trial setting and which does not prejudice the rights of the defendant. Either party's failure to properly gather, preserve, or prepare for presentation any item of evidence, including testimonial evidence offered through a witness, shall not constitute good cause:

(b) *Exceptional Circumstances:* An event, beyond the control of the parties, the court, law enforcement, or any witness, which necessitates a delay in the trial setting and which does not prejudice the rights of the defendant. Either party's failure to properly gather, preserve, or prepare for presentation any item of evidence, including testimonial evidence offered through a witness, shall not constitute good cause:

(34) *Requirements for multiple requests.* Any extension sought beyond the date certain in a previously granted extension will again require a finding by the trial judge of exceptional circumstances approved in writing by the chief judge or designee with an extension to a date certain.

(45) *Rejecting extension request for exceptional circumstances; dismissal required.* In the event the chief judge or designee rejects the trial judge's request for an extension based on exceptional circumstances, the case shall be tried within the previously ordered time limit or shall be dismissed with prejudice if it is not, subject to the provisions in Subparagraph (I)(4).

**L. Assignment calendar for ~~new calendar cases; assignments and reassignments to new calendar judges.~~**

(1) *Scheduling by event categories; trailing docket; functional overlap among ~~new-calendar~~ judges.* The presiding judge of the criminal division shall establish an assignment calendar for all ~~new-calendar~~ judges. The assignment calendar shall identify the weeks or other time periods when each ~~new-calendar~~ judge will schedule events in the following categories: trials; motions and sentencing; arraignments, pleas and miscellaneous matters. Each ~~new-calendar~~ judge may schedule an event in the week or other time period set aside for that event category, on a trailing docket. The assignment calendar shall include functional overlap so that more than one judge is always scheduled to hear matters in each event category on any given day. In the scheduled weeks or other time periods, the ~~new-calendar~~ judges shall schedule events within the time requirements of Paragraph ~~E G~~ of this rule. ~~The presiding judge of the criminal division may organize the new-calendar judges into teams of three (3) and four (4) judges or other appropriate groups to most efficiently accomplish case disposition within the requirements of this rule.~~

(2) *Reassignments permitted* If on or before the date of a scheduled event the assigned ~~new calendar~~ judge is or will be unable to preside over the scheduled event for any reason, including a trailing docket, vacation, or illness, the case may be reassigned by order of the presiding judge of the criminal division to another judge on the assignment calendar who is scheduled that day to hear that category of scheduled event and who is not subject to a previously exercised peremptory excusal, except that a judge who presided at trial shall conduct the sentencing. The court may adopt a form of order to expedite such reassignments.

(3) *Reassignment for scheduled event; case returns to original judge.* If another judge scheduled on the assignment calendar for the type of scheduled event is not available to immediately preside over the scheduled event, the assigned judge may designate any other new calendar judge, or a judge pro tempore previously approved by order of the Chief Justice and designated by the chief judge for this purpose, to preside over the scheduled hearing, trial, or other scheduled event. Upon conclusion of the hearing, trial, or other scheduled event, the case shall again be assigned to the original ~~new-calendar~~ judge without requirement of further order, except when the reassignment was for trial in which case the judge who presided over the trial shall also preside over sentencing.

~~**M. Special calendar; assignments and procedures; master calendar judge.** All criminal cases filed on or before June 30, 2014, shall by order of the chief judge be assigned or reassigned to a special calendar. District court judges shall be assigned as special calendar judges by separate order of the chief judge, who is authorized to reassign any district judge to be a special calendar judge. Among the special calendar judges, the chief judge shall designate a "master calendar" special calendar judge. Time limits and rules for disposition of cases assigned or reassigned to special calendar judges shall be governed by the following:~~

~~(1) The master calendar judge shall request that the Second Judicial District Attorney's Office and Law Offices of the Public Defender assign attorneys to only special calendar cases until the special calendar is concluded and any remaining special calendar cases are absorbed into the new calendar. The master calendar judge shall request that attorneys assigned by the Second Judicial District Attorney's Office and Law Offices of the Public Defender to the special calendar have authority to negotiate binding resolution of the special calendar cases assigned to them;~~

~~(2) In consultation with the special calendar judges, the master calendar judge shall assign all cases filed on or before June 30, 2014, among the special calendar judges as follows:~~

~~(a) After assignment of a case to a special calendar judge, the judge shall hold a status hearing as provided in Paragraph G of this rule. Before conclusion of the status hearing, the special calendar judge shall enter an order establishing dates by which events shall occur leading to resolution of the case. This order may, but is not required to, assign the case to track 1, 2, or 3 as provided in Paragraph G of this rule; and~~

~~(b) No party shall acquire any right of peremptory excusal for cases assigned to a special calendar judge. Unless a special calendar judge was excused prior to the effective date of this rule, any special calendar judge may act in any case on the special calendar; and~~

~~(3) The master calendar judge may establish, upon written approval of the chief judge, any process for case assignment or reassignment that will result in the efficient administration of cases on the special calendar. This may follow the process or a modification of the process provided for in Paragraph G of this rule, may be a process similar to that proposed to the Bernalillo County Criminal Justice Review Commission by the Law Offices of the Public Defender, or may be otherwise. The process shall be established in writing and approved by the chief judge as follows:~~

~~(a) The court shall provide reasonable notice of at least thirty (30) days to special calendar case parties of assignment of the parties' case to the special calendar and of the process to be applied to special calendar cases; and~~

~~(b) The chief judge shall monitor progress of special calendar cases to resolution. When in the determination of the chief judge there has been sufficient progress toward disposition of a sufficient number of cases assigned to the special calendar, the chief judge shall notify the Supreme Court and request modification of this rule. Modification shall include reassignment of special calendar judges to the new calendar schedule, and may include any changes to the new calendar process deemed appropriate based on the outcome of case processing under the new calendar and special calendar processes.~~

~~**MN. Data reporting to the Supreme Court required.** Until this paragraph is amended or withdrawn, the chief judge shall cause a monthly statistical report to be provided to the Supreme Court, in a form approved by the Supreme Court, for cases on the new and special calendars containing data as directed by the Supreme Court.~~