



New Mexico
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Sept. 29, 2017

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Response by NMCDLA to District Attorney's Report on CMO

Secretary
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The Office of the District Attorney for the Second Judicial District issued a "Report On The Impact of the Case Management Order On The Bernalillo County Criminal Justice System and Proposed Rule Amendments" on June 15, 2017. This report is intended to support changes to the case management order (CMO) sought by the District Attorney.

Treasurer
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The New Mexico Criminal Defense Lawyers Association is an organization of New Mexico attorneys who defend individuals against prosecution by their government. The NMCDLA is dedicated to improving the administration of the criminal justice system in this state. As participants in the Bernalillo County criminal justice system, the members of the NMCDLA bring a perspective that is driven neither by expediency nor political ambition. Some of us are public defenders, and some of us are in the private practice of law. The NMCDLA has reviewed the report by the district attorney and now shares some concerns about the accuracy of that document, the soundness of its reasoning, and the changes it proposes. We also concur in the analysis and argument presented by the Law Office of the Public Defender in regards to the proposed changes to the CMO.

Legislative Coordinator
Rikki-Lee Chavez

Accuracy of Statistical Claims

When advocating for changes in law or public policy, the proponent of those changes will often rely on statistics to identify the problems to be solved and justify

the remedies proposed. The accuracy of these statistics is critical. The District Attorney offers some stark statistical claims: between 2014 and 2016 there was a 117% increase in vehicle theft, a 42% increase in robbery, and a 103% increase in murder. Report at 2. “[V]iolent gun crimes, including carjacking, are now a common occurrence.” Report at 3. The CMO “simply is a windfall for criminal defendants at the State’s and the public’s expense at a time when Bernalillo County has witnessed an explosion of both property and violent crime.” Report at 13.

“[S]trict application of the CMO resulted in the suppression of evidence and/or the dismissal of hundreds of felony cases, including a number involving serious violent offenses.” Report at 22. The District Attorney, however, cites no sources for these claims. It is therefore impossible for any interested party to evaluate the accuracy of these statistics. If the District Attorney would provide any support for its claims in this regard, the NMCDLA would be able to respond. Until then, substantive response on these claims is impossible, with the exception of the specific cases cited by the State in the report.

Accuracy of Anecdotal Claims

The Law Office of the Public Defendant has cited in its response to the report the numerous inaccuracies made by the District Attorney regarding the circumstances under which cited cases were dismissed. One in particular is that of Terri Eagleman, D-202-CR-2014-2553. Ms. Eagleman was indicted on charges of felony shoplifting at JC Penney. The State in that case waived the responsibility for scheduling pretrial interviews, and so they were scheduled at the office of defense counsel, with notice to the State. The law enforcement officer who had investigated the matter did not appear despite being subpoenaed and the loss prevention officers who did appear disclosed that there were significant items of discovery which were generated at JC Penney as part of the investigation but which defense counsel did not have. These items included surveillance video and signed statements by the indicted defendants. The State chose not to attend these interviews and so did not investigate the undisclosed evidence until ordered to do so by the Court. Indeed, a phone call to either of the civilian loss prevention officers, the investigating officer, or the attendance of the prosecuting attorney at the pretrial interviews would have resulted in the

State's attorney becoming aware of the deficiencies in their case in time to remedy them. A motion to dismiss for discovery violations was filed, along with a motion to exclude the officer who failed to appear, and a motion to dismiss for speedy trial violations. Following a hearing, the State acknowledged that it was unable to proceed with the prosecution of the case and the Court dismissed with prejudice. Of note, the District Attorney cites this case among others as evidence that the Courts are dismissing matters for discovery violations absent a showing of prejudice, yet the District Attorney did not avail itself of the appellate process in regards to this dismissal.

The problem with this case, as with others cited in the report, is that careful review of the file, and perhaps a brief phone conversation with the case agent or investigating officer, would have revealed that there was additional discoverable material which should be obtained by the State and then disclosed to defense counsel. On page 21 of his report, the District Attorney notes as a goal a vertical prosecution model which will require prosecutors and law enforcement partners to spend time, prior to prosecution of a case, reviewing the investigation and presumably ensuring that all reports, recordings, photographs, etc. are in the completed file, ready to be disclosed to defense counsel as required by the rules of District Court and the CMO. With the new discovery disclosure rules contained in the CMO and the practice of the District Attorney to now hand over a sizable packet of discovery to defense counsel at District Court Arraignment, it was understood that such a screening process had already been implemented. Unfortunately, more two years after the implementation of the CMO, Assistant District Attorneys prosecuting felony matters still stand before the Judges of this District at motion hearings for discovery violations and admit that they have not reviewed the evidence in their file or watched the lapel videos. Since one of the main concerns raised in the report is that too many cases are being dismissed for discovery violations, either at arraignment or after, then perhaps the model system the District Attorney describes as his goal should be implemented first and then the District Attorney can accurately evaluate its ability to meet the requirements of the CMO as it is currently written.

The Presumption that Change to the CMO is Necessary

What is fundamentally at the core of the District Attorney's report is its claim that only through radical changes to the CMO can its office prosecute cases. The CMO was the result of countless hours of work, discussion, and collaboration among all partners of the criminal justice system. The prior District Attorney and her staff were heavily involved in the drafting of the CMO and no doubt considered the adjustments their staff would be required to make in order to meet its requirements. The defense bar has also had to adjust its practices in order to accommodate the swifter deadlines for witness disclosures, pretrial interviews and motions practice. The Courts have adjusted to very different scheduling and calendaring system, and to the increase in jury trials. All partners have an interest in not allowing this system to return to what it was prior to the CMO: a backlog of cases without trial dates, with defendants languishing in custody for years awaiting trial, and crime victims who were made to bear extraordinary delays in getting their matters before a judge or jury. Such a system did not serve the interests of the people of this District and were a source of frustration and disappointment for all parties involved.

The District Attorney's Office is the valve that controls the flow of cases into the criminal justice pipeline. What eventually happens to those cases is controlled by the proper functioning of prosecution, defense and judicial roles. It is undeniable that all participants in the criminal justice system are handicapped by limited resources. Still, it is only the District Attorney that has control over the volume flowing through the system. When the District Attorney is incapable or unwilling to prioritize and focus on the most serious cases that it introduces to this pipeline it risks the dismissal of cases where it has failed to meet its lawful obligations. Rather than take responsibility for meeting these lawful obligations, the District Attorney has chosen to place the blame for his failures on virtually every other participant in the criminal justice system.

The Court is tasked with enforcing the CMO on all parties, but the District Attorney has the singular responsibility to begin the prosecution of a person only when and if it can do so in compliance with the CMO and while safeguarding the due process rights of the accused. The CMO is not a bar to criminal prosecutions, it is a reasonable framework within which both the State and Defendant must operate, and it is working as intended. Incarceration rates are down, lengths of

stay at the Metropolitan Detention Center are down, and speedy trial violations are nearly non-existent. The District Attorney cites a 250% increase in criminal trials since the initiation of the CMO in 2015. Report at 2. While the DA seems to suggest that this is a *problem*, the NMCDLA respectfully suggests that it is, rather, evidence of a more vigorous and robust functioning of a system that was designed by the Framers of our Constitution to be fully adversarial and to put the State to its proper burden of proof in every criminal prosecution. The addition of deadlines for providing dates of availability for pretrial interviews may be a change on which the parties can reach consensus, the overwhelming area of concern noted in the DA report and in this response is sanctions based on violations of the CMO for discovery violations and the failure to provide witness interviews. NMCDLA joins with LOPD and the Court in refuting the District Attorney's contention that the CMO requires revision.

Proposed Changes to the Sanctions Provided under the CMO

One profound change that the District Attorney suggests is that the language of Section I be modified to gut the ability of the Court to impose sanctions for a violation of the CMO. The rule change proposed would bar the Court from imposing any sanction if the violation resulted from the failure of Court or any governmental agency other than the District Attorney to exercise its administrative or ministerial responsibilities. Furthermore, the District Attorney proposes that no sanction other than a fine or admonition shall be imposed if the defendant is preventatively detained, if the Defendant was not transported for a court setting, or if the failure to comply is the result of ordinary circumstances beyond the control of the parties. The District Attorney seeks to create a special class of reduced due process rights for those individuals who are preventatively detained prior to trial, which is clearly unconstitutional.

The modified proposed rule goes on to outline the required burden of proof on a party seeking sanctions of exclusion of evidence or dismissal of charges, demanding that the moving party demonstrate that they were materially prejudiced, that the violation was made in bad faith or willful non-compliance with a court order and that no other sanction will remedy the rule violation.

One of the most common issues which has arisen, and continues to arise, in discovery violations is that items which are generated or collected by law enforcement are not timely provided to the State and thus are not then timely provided to defense counsel. Such instances are caused by inattentiveness and negligence, and rarely if ever can they be proven to have been done in bad faith. The requirements proposed by the District Attorney will be the exception that swallows the rule and would remove any incentive for the State to ensure the proper investigation and preparation of a case prior to filing.

The CMO requires the prosecution to certify in writing, at or before arraignment, that the case has been investigated sufficiently to be reasonably certain that the case can reach timely disposition and more importantly, that all discovery in the possession of the State has been provided to the defendant. Such a certification is not intended to be a pro forma filing. It is intended to be an assertion by the State that the case has been carefully screened and investigated prior to filing. Given the ongoing issues with discovery violations over the last two years, there is some reason to question whether the State's certifications are meaningful in every matter. Any such certification could then be undone at a motion for sanctions by the State simply arguing that since the failure to provide full discovery was not in bad faith, then no sanction beyond an admonishment or minimal fine is permitted. The CMO as presently written has consequences for the State's failure to comply, yet such failures are still occurring. Removing any real consequence for such violations will render the requirements of the rule meaningless.

The District Attorney's Office presently assumes responsibility for arranging interviews with its listed witnesses, and often the Court will set a deadline at the scheduling conference for the Defendant to provide dates of availability for those interviews. Defense counsel sometimes find their notices of availability being ignored for months and such conduct by the State does result in a motion being filed to either suppress the witnesses who were not made available for interviews, or for dismissal of the case without prejudice. More than two years after the implementation of the CMO, it is apparent that the Office of the District Attorney still has not instituted and applied internal systems necessary to ensure that the tasks required to prepare a case for trial are being

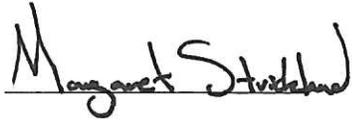
timely completed. Such failures will certainly not be cured by gutting the remedies available to the Court under the CMO, and they are not failures which Defense counsel or the Courts should be expected to ignore or accommodate.

The District Attorney complains that the CMO has been “a prolific source of contrived discovery motions and unfair case dismissals.” Report at 16. The report betrays a fundamental misunderstanding of the roles of defense counsel and the judiciary in the criminal justice system. The District Attorney complains about the “*impunity* with which defense counsel seek dismissal[.]” Report at 14. The NMCDLA wonders whether the District Attorney means to suggest that defense attorneys should have something other than “impunity” to advocate zealously on behalf of their clients? Further, the Report’s conflation of “justice” with prosecutorial expedience, and with securing convictions, shows little understanding of the judicial system’s core distinction between those accused and those convicted of criminal wrongdoing. As defense attorneys we are obligated by the United States and New Mexico Constitutions to be zealous advocates for the rights of our clients, utilizing every avenue available under the law to protect the due process rights of our clients and to hold the State to their burden of proof when the State brings its considerable resources to bear against the accused. It is not gamesmanship, it is competent representation and it is expected to be afforded to every criminal defendant. Name calling and blame placing have no place in this serious discussion and the District Attorney’s attempts to tear down the other partners in the justice system are counterproductive to the goal of a functioning criminal justice system.

NMCDLA believes that the CMO is functioning as intended and has brought dramatic improvements to the protection of our client’s due process and speedy trial rights, as well as to the rights of victims in their pursuit of more expedient justice. We therefore do not support the changes proposed by the Office of the District Attorney and wish to urge the members of the Bernalillo County Criminal Justice Coordinating Council to vote against the District Attorney’s proposed changes to the Case Management Order. We wish to instead continue to discuss the CMO and other criminal justice reforms in good faith and always towards the goal of a fairer and more just

system, and we look forward to continuing to have an open dialogue in pursuit of that goal.

Sincerely,

A handwritten signature in black ink that reads "Margaret Strickland". The signature is written in a cursive style with a horizontal line underneath the text.

Margaret Strickland

President NMCDLA