NEW MEXICO LAW OFFICES OF THE PUBLIC DEFENDER

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To: New Mexico Supreme Court
From: Bennett Baur, Chief Public Defender;
Jonathan L. Ibarra, Assistant Public Defender (LOPD designee)
Re: Second ad hoc Pretrial Detention Committee –
LOPD Supplemental Report

Hon. Justices,

This is the supplemental report of the Law Office of the Public Defender ("LOPD") to the reports by Justice Chavez regarding the ad hoc pretrial detention committee's recommendations. LOPD has also shared the report with the New Mexico Criminal Defense Lawyer's Association, who join in this report. The committee, in limited meeting time, worked very diligently in coming to recommendations for the Court. The work of those court employees who assisted Justice Chavez was very important, and they should be commended.

The speed with which this committee worked has advantages and disadvantages. The last pretrial release committee had many long meetings, which was very taxing for the members, and was difficult to arrange. However, every single word in the rules and the proposals was looked at carefully, and nothing went undiscussed, which is a good thing. In this committee, LOPD believes that most of the decisions made would have been essentially the same with more meetings, so brevity was generally worthwhile. However, not everything was carefully evaluated, and some individual things might not have gone forward in the same way with more time.

As Justice Chavez did in his report, we address topics by general style of requested change. We will also follow the order used by Justice Chavez.

Peremptory Excusals. No supplement. While in theory excusals would be nice to have, in practice it would cause huge disruptions to the courts and LOPD.

First Appearance. No supplement. This should be explained at the first appearance.

Judge Scheduled Hearings. The committee properly rejected a proposal that a court shall schedule a detention hearing if the defendant is charged with certain crimes if a PSA flags potential new violent criminal activity. LOPD agrees that there are issues, especially in more rural jurisdictions, where prosecutors are not present for first appearances, and magistrate judges are placed in a position where people may be dangerous but the judges are not allowed to hold them on their own. While this is absolutely an issue, LOPD's concern is that the Constitution clearly requires that prosecutors, not judges, make the decision as to whether to seek detention in a particular case.

Further, the data provided by Justice Chavez to the committee did not seem to support that such changes were necessary or even appropriate. The Institute for Social Research found a safety rating of over 80% for defendants who had initially been charged with violent crimes. Such a low re-offense rate does not justify the vast expansion of the judges' power despite the clear strictures of the Constitution.

Ultimately, the committee voted to allow (but not require) district court judges to schedule detention hearings *sua sponte*, and to allow magistrate judges to delay setting conditions of release for 24 hours, under certain circumstances. The changes to the permitted circumstances from the initial proposal are much clearer, and better. The same issues exist generally, however.

Perhaps the biggest problem with the proposal is the change to the role of the court. Judges should never be placed into a position where they are expected to be adversarial to defendants. However, this proposal does exactly that – a judge essentially is telling a defendant that the judge believes that the defendant should be considered dangerous and therefore must be held for long enough for the prosecutor to file such a motion. Further, such finding (as that is really what it is) of dangerousness by the court makes it more difficult for the prosecutor to decide not to file such a motion, for risk of essentially publicly saying that they believe the judge was wrong. Thus, any change to allow for a judge to unilaterally hold defendants for additional time for the prosecutor to file such motions is problematic and should not be approved by the Court.

LOPD also notes that this proposal essentially encourages prosecutors to not work to file motions to detain at or before first appearances, and to depend on the judges (again, who should not be put in this adversarial position) to delay release

of a defendant and give the State the opportunity to file detention motions later – delaying the whole process.

In regard to the district court being permitted to order such hearings, it is not clear in the proposed rule when this new procedure may be used. That is, can the district court do that in every case where an Indictment or Information after bind-over has been filed? If so, this is extremely problematic. LOPD believes that the intention of the committee was to allow for this procedure in cases which were filed in the first instance in the district court, which is uncommon, but does happen. But the proposal does not say that – it allows for the judge to make that decision on every felony case filed in district court. That should certainly not happen, as it is ripe for abuse.

"Use" of a firearm is vague. It is easy to see when a gun is fired, certainly. It should likely apply to pointing a gun at another person. But what about a Trafficking case where the person otherwise lawfully possessed a firearm? Or Receiving Stolen Property where the property that is possessed is a firearm? Such an important rule should not be able to be interpreted significantly different ways by different judges.

Use of a deadly weapon resulting in great bodily harm or death is generally simple. However, again, sometimes whether great bodily harm occurred is a difficult question. And, of course, since Aggravated Battery is a third degree felony regardless of whether it was with a deadly weapon or resulting in great bodily harm, often complaints do not have much discussion of the type of harm done, making these decisions based on those complaints by judges problematic at best.

A sentence of life in prison without the possibility of parole is an extremely small subset of cases in New Mexico – essentially, what used to be death penalty cases. That is often not clear from the complaint, but otherwise, should this entire section be approved, this section makes sense.

Subsection (d) reads "a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant." This, of course, essentially refers to the "flag" on the Arnold Tool. The data does not support the use of this flag as a reason for holding a person. We know this to be true from the Arnold Foundation, who do not have that as a separate score for a reason – there is no evidence that such information has anything to do with likelihood of future criminal activity. In Bernalillo

County, the numbers support that finding – the safety rate for cases with a red flag was actually slightly **lower** for people with a red flag than for people without (81.7% with vs 81.9% without). There was a finding that the new violent crime rate was higher for cases with a red flag, but both were still under 10%. There is simply no data to support that the red flag should be used as its own criterion. It is of assistance to judges in their ultimate determinations, of course, but not on its own. And, of course, we already require that judges specifically not defer to the PSAs.

Also of note, though, is that we may not always use the Arnold Tool. Not all public safety assessments have this type of flag. What if we convert to a system that has new violent criminal activity on a scale? Does anything higher than the lowest score count as "flags potential new violent criminal activity" for purposes of this rule? Even in the Arnold PSA people can get scores toward the "flag" without triggering the flag, but they are on the scale. Does that count? Thus, the actual language is problematic.

Most concerning to LOPD regarding the "flag" language is that the members of the committee were not given an opportunity to discuss this provision at all during the meeting. Had that opportunity been given, LOPD would have brought out these issues in order to have a robust discussion about them. Unfortunately, that opportunity was not presented here.

LOPD would also note that a change to the Metro Court rules to allow this procedure is unnecessary. Chief Judge Engel, during her comments in committee, said that they did not think this was necessary in Metro Court, as the District Attorney's office already had representatives present at First Appearances. While it is good for the Magistrate and Metropolitan Court rules to be generally the same, this is a circumstance where the needs of the Magistrate Courts and the Metro Court are simply different, and the rules should reflect such.

Essentially, while this proposal is submitted with good intentions, and to deal with a legitimate problem in rural areas, the actual proposal does not have data to support it, is vague, has language problems, is ripe for abuse, and actually puts our judges in a very problematic position. It should be rejected by this Court.

Expedited Trial Scheduling. The report by Justice Chavez is accurate, of course. However, it should be clear where in New Mexico the problem lies. Justice Chavez cites to the Second Judicial District's timelines. However, in the Second, because of Rule LR2-308, timelines are already expedited fairly

significantly compared to the rest of the State. In every other district, years can pass before a person goes to trial, and that often happens in some districts. This is exacerbated in Magistrate Courts, where many judges will refuse to move trials faster for people in custody on even petty misdemeanors. Rule 5-409, among others, requires an "expedited" trial setting for a person in custody, but there is no explanation as to what that means. It is a right with absolutely no teeth to it, because it is open to a great deal of interpretation. Some judges essentially find that it doesn't give anyone a right to a faster trial setting – just that when that trial docket comes, people in custody get the first setting (which has always been the practice). As we know, other jurisdictions require very fast trials when a person is detained on felony charges. Washington, D.C. requires trials within 100 days. New Jersey requires trials in 180 days. Vermont in almost every case requires trials in 60 days. Thus, the deadlines proposed by LOPD are not unreasonable or out of line with other places where pretrial detention is permitted. But essentially anything that defines "expedited" is necessary. Defendants detained around New Mexico should not have lesser rights to an expedited trial than those in Bernalillo County.

Issuance of Summons or Bench Warrant. No supplement necessary. The committee strongly rejected this proposal.

Status Hearings for Defendant in Custody. The barest majority approved this amendment. It is not, however, noted in the report that there was a great deal of discussion as to whether or not one year was the best amount of time to use. There was a great deal of discussion about a smaller number of months – some suggested nine months, others six months. Ultimately it was not clear to LOPD that the committee as a whole believed that one year was the right answer, just that a hearing of this nature should happen at some point. LOPD has no issue with such a hearing, of course. LOPD just believes that one year is far too long to wait to have a status conference be required when a person is being held. Six months is a better amount of time. Then perhaps every three months after that.

Transmission of District Court Order. No supplement necessary. This change is consistent with LOPD's view that timelines are better than vague terms.

Concurrent Motions under 5-409 and 5-403. No supplement necessary. This proposal, while sounding logical, is needlessly complex and was properly rejected.

Elimination of Specific Facts Requirement. No supplement necessary. This change would have been contrary to Rule 5-120, and is unnecessary.

Full Transfer of Jurisdiction to the District Court upon Filing of Pretrial Detention Motion. LOPD would note that for quite some time, this was already the practice in the Second Judicial District. The problems stated in the report by Justice Chavez are very real. LOPD notes that it regularly happens in the Second where a person who is detained is then not bound over at the preliminary hearing. When that happens, the Metro judge is unable to fully release the defendant from custody, because the defendant is still being held on the LR case number. Often that determination isn't made until it is too late to get an Order to the district court judge, and it has happened that such a finding was made late on a Friday, requiring the person to be inappropriately (perhaps illegally) held until the following Monday. It also regularly happens that a person is bound over only on lesser charges, or non-violent charges, or even that the parties agree to a misdemeanor plea. But the Metro judge is unable to release the defendant due to the LR hold. This happens in courtrooms all over New Mexico, but certainly especially in the Second.

LOPD also believes that if a case and a defendant is so important that a detention motion is filed, it is important enough to have a district judge do the preliminary hearing. LOPD understands that this would take extra time and resources, but notes that Rule 5-409 currently allows for the State to request the preliminary hearing be set in district court (and extra time to be granted to allow for such), and does not seem to allow the district court to refuse such a request if made properly.

LOPD proposed a number of changes to the rules to make it clear that the jurisdiction of the lower courts ends and the case stays in district court. The rule regarding preliminary hearings in district court, Rule 5-302, would have to be changed to make it clear that the 10/60 day rule from first appearances continues to apply upon transfer of the case from the lower court to the district court in detention motions, but that is a small step.

LOPD is aware of concerns that the Information would have to be filed in the district court before the preliminary hearing took place. However, that isn't what happens in lower courts. Further, there is no reason why the hearing can't be scheduled in the LR case number and then, as with an FR case number, the information is required to be filed within a certain number of days after the preliminary hearing. In the Second, which is likely one of the few places doing

district court preliminary hearings, it is the custom to file an Information, which gets a CR number, and then hold the hearing in that case number. However, that system is not required. The Complaint has been filed (in the FR case), and the LR case relates to that FR case. Though LOPD does not believe it is necessary, Rule 5-201 could be changed to make clear that the filing of the complaint in the Magistrate/Metropolitan Court is sufficient, or that the filing of the detention motion in the district court counts as the filing of the Complaint.

Initial Hearing. LOPD, as the proponent, withdrew this proposal because the previous proposal passed through the committee. Should this Court not accept the proposal of full transfer to the district court, then LOPD would still want to pursue this proposal.

Ruling on the Merits. LOPD would not object to this provision if it was "should" rather than "shall." This, of course, is a big difference. If the district court "shall" make a decision on the merits, then prosecutors are able to violate any procedural rules essentially without consequence. A prosecutor could write a motion that simply says "Please hold the defendant." Then, despite the complete lack of notice (and, thus, due process), argue the motion in court and require either that the defendant extend the time he stays in custody asking for a continuance to prepare for what the actual arguments are, or argue the motion while unprepared. This should not be expected of criminal defendants. LOPD notes that when district attorneys have demonstrated a practice of violating Rule 5-409's provisions, typically the response from the district courts has been to initially disregard the issue, then admonish the prosecutors, then impose lesser sanctions. Only after taking all of these steps have judges dismissed detention motions. This change would allow such violations of the rules to go essentially unchecked. Of course, the district court should only dismiss on "technical violations," if one can call due process violations a technical violation, under very limited circumstances, and absolutely should endeavor to rule on the merits in every circumstance. However, if the State's behavior in a case is such that it warrants dismissal of the detention motion without prejudice, then the court should have the power to do so.

Evidence at Detention Hearings. No supplement needed. This is already expressed in the commentary, which comes from the relevant case law, and is unnecessary to add to an already lengthy rule.

Rebuttable Presumptions. This proposal was properly rejected by the committee. The report expresses the District Attorney's assertion that the proposal is not contrary to the Constitution. However, that argument does not hold up to

any scrutiny. The Constitution requires that the State prove facts by clear and convincing evidence. Under the proposal, the State could literally put forth no evidence other than probable cause that a type of crime was committed, and satisfy their burden. This is simply not permissible.

Further, the data does not support that people charged with these types of crimes are particularly more likely to violate conditions of release or to pick up new charges. This is, again, consistent with what other states have found. As Justice Chavez noted, the committee heard from national experts on pretrial release, both of whom spoke against rebuttable presumptions. One of them, Timothy Schnake, wrote:

> No rebuttable presumptions should be used in this model, for two reasons. First, the research (as well as various limitations of risk prediction) simply does not support any rebuttable presumption toward detention, and because of that, it is even more unfair to force defendants to attempt to prove they are not dangerous, that they will not do some unknown but forbidden act, and that they will not flee. Second, our country's history of using rebuttable presumptions has only led to their misuse, causing jurisdictions to treat them more like un-rebuttable presumptions. The only presumption should be a general presumption of release in all cases or more specific presumptions similarly guiding courts toward release that must be overcome by the government.
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> *Model Bail Laws*, page 184.

Rebuttable presumptions have no basis in the data, and are unconstitutional. The Committee properly rejected them.

Order remains in effect. No supplement necessary. The committee properly rejected the proposal as unnecessary and confusing.

Pro tem judges forbidden. No supplement necessary. The committee properly rejected the proposal.

LOPD believes that the committee worked hard, and overall did a very good job under the constraints – not just of time, but also the pandemic. However, as

noted above, some changes made by the committee are simply wrong. LOPD is more than happy to supplement this report in any manner requested by the Court, as expeditiously as possible.

LOPD asks that the Court:

1. Either eliminate or seriously restrict the proposal which would allow courts to start the detention hearing process.
2. Define "expedited" in regard to the requirements for trial settings, or shorten the time period for status hearings to six months and every subsequent three months.
3. Require that cases completely stay in the District Court after a detention motion is filed.
4. Change the proposal for rulings on the merits to be "should" rather than "shall."
5. Adopt the committee's rejection of rebuttable presumptions.

Thank you for your consideration.