REPORT ON THE IMPACT OF THE CASE MANAGEMENT ORDER ON THE BERNALILLO COUNTY CRIMINAL JUSTICE SYSTEM AND PROPOSED RULE AMENDMENTS

ISSUED JUNE 15, 2017

OFFICE OF THE DISTRICT ATTORNEY
SECOND JUDICIAL DISTRICT
STATE OF NEW MEXICO

Table of Contents

The Second Judicial District Attorney's Office and the other criminal justice system stakeholders in Bernalillo County have been investigating, prosecuting, defending, and adjudicating criminal cases under Second Judicial District Court Local Rule LR2-308, originally implemented as LR2-400 and referred to as the Case Management Order (CMO), since February 2015. Although the new CMO has been an important tool in accelerating criminal case processing in Bernalillo County, it unexpectedly has given rise to new challenges and negative outcomes that have thwarted the delivery of justice rather than promoted it. By this report the District Attorney's Office seeks to inform the Bernalillo County Criminal Justice Coordinating Council (BCCJCC) of those problematic challenges and outcomes and suggests specific amendments to the CMO to address these problems.

EXECUTIVE SUMMARY

The Bernalillo County Criminal Justice Review Commission (BCCJRC), the predecessor to the BCCJCC, designed the CMO to reduce the district court caseload and make more efficient and predictable the administration of criminal justice. The goal of the CMO was to promote speedy case resolution through uniform application, mandatory deadlines, and reduced judicial discretion. In reality, however, the rule's application has been arbitrary, unpredictable, and unjust, all at the expense of the State and public. The District Attorney's Office is routinely sanctioned—in the form of direct case dismissal or effective dismissal by exclusion of key evidence—for technical rule violations that do not affect the rights of the defendant, scheduling problems, and even for defendant transport issues outside of this Office's control. Neither prior rule amendments nor appellate court intervention have served to stem the flow of these outcomes, wholly unrelated to justice.

The CMO was intended to conserve stakeholder resources and promote efficiency, but this has not been the result. Hours upon hours of district court time are wasted as parties litigate issues related to administering the rule but unrelated to the merits of the charges against defendants. Strict timelines and discovery rules at the heart of the CMO have created an incentive for defense counsel not to resolve even the most routine criminal cases in an efficient manner. Instead, they demand extensive discovery that strains the State's resources, then wait for a chance to win by default when the District Attorney's Office cannot meet the CMO deadlines. Substantive resolution through plea bargaining is put off until case end, after the chances for a default win begin to decrease. This is, of course, a rational approach under a mechanical application of the CMO which makes no demands for a prima facie showing of materiality or prejudice before a case gets dismissed. It also makes sense to reject an early reasonable plea offer and instead demand extensive discovery on a CMO timeline that the District Attorney's Office is not currently resourced to accommodate.

These dynamics are most likely the reason that the court has seen a 250% increase in the number of trials since the implementation of the CMO but also a dramatic reduction in the total number of cases initiated and adjudicated over the same period. Following the dismissal and suppression of evidence in hundreds of cases, the prior administration of the District Attorney's Office made the decision not to initiate new felony cases until all conceivable discovery requirements under the CMO had been met. As a result, the District Attorney's Office has seen a 40% reduction in pending property crime cases and a 40% decrease in pending violent crime cases between 2014 and 2016. Over the same period, the Albuquerque area realized a 117% increase in vehicle thefts, a 42% increase in robberies, and a 103% increase in murders. Given

the extraordinary amount of crime in the community, the policy of deferring prosecution because of the CMO is no longer tenable and will no longer be applied inside this Office. One way or another, the District Attorney's Office is going to initiate thousands of cases that should have already been pursued during the past two years and is committed to doing so whether or not the BCCJCC amends the CMO to reflect the stark and inescapable reality of this community's public safety crisis.

CMO dismissals force the parties, the Grand Jurors, and all police and civilian witnesses to contribute their time and labor to redoing what they have already done once (or sometimes multiple times). Moreover, what used to be the district court's case backlog has not gone away—it has simply shifted to the District Attorney's Office. Without the proper resources, and with the threat of district court dismissal, the District Attorney's Office has had to hold off indicting thousands of felony cases in order to keep up with the existing caseload under the CMO's unrealistic administrative burdens.

The only beneficiaries of the CMO's elevation of technical compliance over justice have been criminal defendants. Case dismissals put defendants back on the street, not because their cases have been fairly decided but because the criminal justice system in the Second Judicial District simply is not equipped to do so under the CMO's constraints. In the meantime, Albuquerque is now the number one city in America for stolen vehicles, homicides are at a twenty year high and violent gun crimes, including carjacking, are now a common occurrence.

While district court docket numbers have indeed dropped under the CMO, and the population of the Metropolitan Detention Center (MDC) has decreased, these reductions have come at the expense of justice and public safety. With this report the District Attorney's Office

proposes specific amendments to the CMO that will allow the district court and parties to continue resolving cases in a timely manner but without sacrificing fair case adjudication in the process.

ORIGIN AND PURPOSE OF LR2-308

The CMO began as one of many measures recommended or implemented by the BCCJRC between July 1, 2013, and June 20, 2015. The BCCJRC itself was created in 2013 by the New Mexico Legislature, in HB 608, and was given the charge of "reviewing the criminal justice system in Bernalillo County ... for the purpose of identifying changes that will improve each members' agency or organization's ability to carry out its duties in the criminal justice system and ensuring that criminal justice is indeed just." The BCCJRC was composed of all of the stakeholders in the criminal justice system in the Second Judicial District, which comprises Bernalillo County:

- Chief Judges at the district and metropolitan courts
- District Attorney
- District Public Defender
- County Sheriff
- Chief of Albuquerque Police Department
- Chair of the Bernalillo County Commission
- Region 2 Manager of Adult Probation and Parole
- Executive Director of the New Mexico Association of Counties
- Director of the Administrative Office of the Courts as Chair

The BCCJRC identified and set out to design remedies for two specific and interrelated problems in the criminal justice system in Bernalillo County—overcrowding at the Metropolitan Detention Center (MDC), frequently resulting from *pretrial* detention of criminal defendants, and excessively slow resolution of criminal cases in the district court. The BCCJRC proposed

and the district court and other stakeholders have implemented a host of measures to lower the population of inmates at MDC who are awaiting trial. These measures included an expansion of and greater reliance on supervision of released defendants by the district court's Pretrial Services Division, early bond reviews for defendants in pretrial detention, use of the Community Custody Program, and faster and more consistent calendaring of pretrial settings.

To address delays in case resolution in district court the BCCJRC proposed changes to the rules of criminal procedure for the Second Judicial District Court. Specifically, the BCCJRC created the Case Management Pilot Program for Criminal Cases, which imposed shorter time deadlines and other procedures in order "to avoid delays and enforce fair criminal processes and speedy trial that are required by the New Mexico Constitution." (BCCJRC Preliminary Report, 9/24/2014). The BCCJRC believed that the new local procedure "will benefit those charged with a crime by resolving cases within one year of the charges being filed, will benefit prosecutors and defense attorneys through known deadlines and expectations to which the court will adhere, and will benefit Bernalillo County through reduced costs for detaining inmates who now wait years in some cases for their charges to be resolved." The Case Management Pilot Program was adopted by the New Mexico Supreme Court as LR2-400 NMRA in November 2014, and took effect in February 2015. This CMO was amended and recompiled as LR2-308 in November 2016.

THE CMO IS ROUTINELY USED TO DISMISS CASES ON GROUNDS THAT HAVE NOTHING TO DO WITH DEFENDANT GUILT OR INNOCENCE

The BCCJRC's mission was to propose solutions to the criminal justice system in Bernalillo County to ensure that "criminal justice is indeed just." Implementation of the CMO

was an effort to support this goal by speeding up case resolution in the district court. Unfortunately, however, the means of achieving this goal was the creation of a procedural framework that invites gamesmanship, imposes new administrative burdens without regard to available resources, and prioritizes bureaucratic compliance over questions of guilt or innocence. The district court and participants now spend hundreds of hours focusing on technical rule compliance instead of giving cases and victims the time and substantive attention they deserve in order to ensure that a just outcome is actually reached. So much time is consumed litigating under the CMO that nearly 8,000 felony cases are pending review and indictment at the District Attorney's Office.

The vast number of district court orders dismissing cases or suppressing key evidence highlights this departure from a justice-oriented system. The orders arise from the CMO's requirement that the district court sanction a party that violates any of the rule's provisions. Rather than address these violations or time conflicts with practical and proportionate solutions, however, thereby keeping the case on track for resolution at trial, the district court responds by simply dismissing the cases outright. The CMO encourages this outcome rather than encouraging a return to speedy and just adjudication of criminal cases in Bernalillo County.

The following sections illustrate the dismissal problem and where it most frequently arises in the life of a case. Example cases that are no longer active in district or any appellate court are included, but these are by no means exclusive—the district court has dismissed hundreds upon hundreds of cases for CMO violations and timing problems, and continues to do so to this day. The District Attorney's proposed amendments to the CMO seek to reduce these unjust outcomes.

The District Court Dismisses Cases When the Defendant is Not Transported to a Court Hearing

The CMO sets out deadlines for the major court settings of arraignment, scheduling conference, pretrial motions hearing, plea hearing, docket call, and trial. All of these settings require the defendant to be present in court. Many defendants are in custody at the time of the setting, whether in the Metropolitan Detention Center (MDC), the Department of Corrections (DOC), another county detention center, the state hospital, or a federal facility. Defendants in custody must be transported to settings. If the defendant is in custody anywhere except MDC, this transport can only be accomplished by the issuance of a court order. The timeline required by the transport process routinely creates an automatic, irreconcilable conflict with CMO deadlines.[1]

In light of that conflict it is not uncommon for some part of the defendant transport system to fail and for the defendant therefore not to be present at a setting. Arraignments must occur within seven days of indictment for defendants in custody, and the district court may schedule the actual arraignment on five or fewer days' notice. If the defendant is in custody anywhere but MDC, following the complete transport procedure to get the defendant to

[1] LR2-111. Transportation of incarcerated and in-custody persons for hearings and trial; dress.

A. Submission of transportation orders. A court order is required for the transportation for trial, hearing, or other proceeding of any person under the jurisdiction of the second judicial district and incarcerated or in custody at the New Mexico State Penitentiary, state hospital, or other such institution except the Bernalillo County Detention Center. In criminal cases, the prosecutor shall submit a proposed transportation order for all proceedings and shall serve an endorsed copy of the transportation order on the institution in such a manner that the copy is received at least twenty-one (21) days prior to the date of the requested transport.

...

C. Notice to Bernalillo County Detention Center. The criminal clerk shall notify the Bernalillo County Detention Center ("BCDC") of criminal trials and other hearings for defendants in custody or incarcerated at BCDC. BCDC personnel shall transport such defendants to such hearings.

...

arraignment is often impossible. In other cases there may be time enough to transport the defendant for the scheduled setting but still some part of the transport network fails to do its required part and the defendant winds up staying wherever he is. Failure to transport defendants for scheduling conferences, another common occurrence, also stem from scheduling problems and other transport system failures.

Prior to the CMO in the Second Judicial District (*and currently in all other judicial districts in New Mexico*), failures to transport were remedied by simply resetting the hearing for a later time so that the full transport process could play out. Now, under the CMO's strict time requirements, the district court more often than not feels compelled simply to dismiss all charges against the defendant if he is not transported to the hearing. Some judges will reset the hearing if the CMO deadline has not passed, then dismiss at the second setting if transport still has not happened. Others will dismiss on the first instance of a failure to transport. Either way, the district court is remedying failures to transport with case dismissals, allowing defendants to avoid facing the charges against them simply because they already are incarcerated or facing charges in another jurisdiction:

- State v. Martinez CR 2016-03281 (Dismissed at arraignment. Defendant in Sandoval County on separate charges);
- State v. Bouldin CR 2016-01738 (Dismissed at arraignment. Defendant in Santa Fe County on separate charges);
- State v. McElroy CR 2016-02343 (Dismissed at arraignment. Defendant in DOC);
- State v. Lopez-Ordone CR 2016-04004 (Dismissed at arraignment. Defendant in federal custody);
- State v. Estrada CR-2017-00681 (Dismissed at scheduling conference; Defendant in DOC).

The District Attorney's Office has no control and no inherent authority over the transport of defendants. The District Attorney's Office may prepare and ultimately deliver the district court-signed transport order, but at that point this office can only wait and see if the transporting or custodial entities actually cooperate. If they do not, the State's case very likely will be dismissed, and the State has no recourse.

Perhaps even more absurdly, dismissal has been the district court's frequent answer even when the District Attorney's Office has no duty or ability to act whatsoever in the transport effort. When the defendant is in MDC, or at least ostensibly in MDC according to MDC records, coordinating transport is the district court's responsibility (*see* LR2-111). Yet, as the following examples illustrate, the district court will hold the District Attorney's Office responsible even the Court fails to coordinate transportation of defendants from MDC.

- State v. Mace CR 2015-00473 (Dismissed at arraignment; district court failed to transport defendant from MDC);
- State v. Arreola CR 2015-02714 (Dismissed at arraignment; district court failed to transport defendant from MDC);
- State v. Deschilly CR 2016-03433 (Dismissed at arraignment; district court failed twice to transport defendant from MDC);
- State v. Palacios CR 2017-00864 (Dismissed at arraignment; district court failed three times to transport defendant from MDC);
- State v. Leverette CR 2017-01340 (Dismissed at arraignment; district court failed twice to transport defendant from MDC).

The district court's ready willingness to dismiss cases for defendant transport issues is among the most maddening and enduring denials of justice brought about by the CMO. As with all CMO-related dismissals, the only winner here is the criminal defendant. In a particularly bitter irony, the defendant who may be in jail or prison for another crime has his new charges

dismissed because he is not transported to court for some part of the new adjudication. The District Attorney's Office's proposed changes to the CMO will eliminate the district court's ability to dismiss cases for failures to transport, regardless of the impact of the failure on the CMO deadlines. This will ensure that charges against defendants are actually resolved on their merits and not by windfall to the multiple-offender defendants who deserve the most judicial scrutiny.

The District Court Dismisses Cases Whenever Its Own Calendaring Does Not Comply with the CMO

As set forth above, the in-custody prisoner transport process is largely out of the District Attorney's Office's control, and yet it is always this office and the public at large that must suffer the sanction of case dismissal. A related problem is the district court's willingness to dismiss cases when the court itself calendars settings in such a way that makes CMO compliance impossible. As with the transport problems described above, the calendaring problem most frequently relates to the timing of the defendant's arraignment. The CMO requires that the defendant be arraigned within 7 days of indictment if he is in custody and within 10 days if he is not. Once the State files the bind-over order, indictment, or information, the district court is solely responsible for scheduling the arraignment. Despite these tight deadlines and their ready willingness to dismiss cases for administrative reasons, the district court often fails to calendar cases for arraignment within the time limits imposed under the CMO. When a case is set for arraignment after the deadline, some district judges will go forward with the setting while others will simply dismiss the case at hand.

The cases of State v. Lopez illustrate both the problem and inconsistent application of the CMO. In April and May of 2016, Julio Billy Lopez had four cases pending in the Second

Judicial District Court (CR 2015-01429, CR 2015-02385, CR 2015-02996, and CR 2016-00138). He was also being held for two cases in Valencia County. Defendant filed a Motion to Dismiss in all four cases, based on the failure of the State to arraign Defendant within seven days as required by the CMO. Although this issue applied to all four cases, three of the four pending cases were dismissed on this ground while in the fourth case the motion was denied and the case proceeded to trial. Similar example dismissals at arraignment abound:

- State v. Palafox CR2015-02898 (District court set arraignment for two weeks after indictment then dismissed for failure to arraign within 10 days);
- State v. Lopez CR2016-00138 (District court set arraignment for 3 months after indictment then dismissed for failure to arraign within 10 days);
- State v. Nieto CR2016-01655 (District court set arraignment for 8 days after indictment then dismissed for failure to arraign within 7 days);
- State v. Pluemer CR2016-2367 (District court set arraignment for a month after indictment and three weeks after Grand Jury bench warrant was cancelled then dismissed for failure to arraign within 10 days);
- State v. Tyner CR2016-04242 (District court initially set arraignment for 7 days after indictment, a day that the courthouse closed. Court reset arraignment for 14 days after indictment then dismissed for failure to arraign within 7 days).

Calendaring problems often combine with transport problems to create a CMO compliance impossibility. Cases are set for arraignment within the CMO deadline, but without allowing enough time for transport under LR2-211, and thus the defendant is not transported for the timely arraignment setting. If the district court does not dismiss the case at that point for failure to transport, it will reset the arraignment date, but that resetting almost invariably will be after the 7-10 day deadline. When the new setting comes the district court will dismiss the case for failure to timely arraign:

- State v. McElroy CR2016-02386 (Defendant in custody in Santa Fe on day of first arraignment setting. Dismissed at second setting for failure to timely arraign);

- State v. Martinez CR2016-03281 (Defendant transferred from MDC to Sandoval County jail on day of first arraignment setting. Dismissed at second setting for failure to timely arraign);

- State v. Ellsworth CR2014-2892 (Defendant in custody in McKinley County on day of first arraignment setting; Dismissed at second setting for failure to timely arraign);

- State v. Villegas CR2015-01938 (Defendant in DOC custody on day of first arraignment setting; defendant later arraigned, after the deadline, but district court waited until one month before docket call to dismiss for failure to timely arraign);

- State v. Hernandez CR2016-03193 (Initial arraignment setting already outside time limit. That setting cancelled because defendant in DOC custody. Dismissed at second setting for failure to timely arraign.

Finally, although not as frequent an occurrence as arraignment-related dismissals, the district court also will dismiss cases when it does not set the case for scheduling conference within 30 days of arraignment as required by the CMO:

- State v. Geebelein CR 2014-02959 (Dismissed for untimely scheduling conference);

- State v. Andrade-Pina CR 2015-00479 (Dismissed for untimely scheduling conference despite two requests filed by the State);

- State v. Crayton CR2016-02503 (Dismissed for untimely scheduling conference set for six months after waiver of arraignment);

Notably, not all Second Judicial District Court judges levy extreme sanctions against the State for the court's failure to schedule matters pursuant to the CMO. This inconsistency alone, however, illustrates how the CMO has thwarted rather than contributed to the efficient administration of criminal justice.

The District Attorney's Office is well aware that the Second Judicial District Court is also severely constrained in terms of staff and resources. This Office also recognizes that the court is charged with the impossible task of fairly adjudicating a case volume that exceeds the criminal justice system's capacity under the CMO's constraints. Dismissal of cases that cannot be timely scheduled, however, does nothing to serve criminal justice in this district. It 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. The District Attorney's Office's proposed changes to the CMO will alleviate some of the impossibility created by the CMO's deadlines and relieve the district court of the perceived necessity of dismissing cases that do not meet those deadlines.

The District Court Dismisses Cases for Even Inconsequential Violations of CMO Discovery Requirements

From the CMO's inception the district court has dismissed untold hundreds of cases, releasing defendants from all charges against them, not because those defendants were actually adjudicated not guilty but because the State did not or could not meet the strict discovery timelines within the CMO. The gathering and production of discovery is often time-consuming and cannot always be accomplished all at once. Prior to the CMO, delays in discovery production that did not genuinely affect case progress were worked out between the parties, often without the need for any court involvement. Now, more often than not, any hiccup in the discovery process, no matter how slight or temporary, results in either direct or effective dismissal of the case.

Dismissals Related to Arraignment Discovery

LR2-308(D)(1) requires the State at arraignment to give the defendant certain discovery information. The actual terms of the CMO and Rule 5-501 limit the types of information that must be produced at this very early stage. But the district court has ignored these limitations, and instead interpreted the CMO to require the State to produce, at arraignment, everything in the possession of any State entity that in any way relates to the investigation underlying the current charges against the defendant or to the State's prosecution of the defendant through trial. Thus, between arrest and arraignment, the law enforcement agencies and the District Attorney's Office have about 20-25 days to gather all of this information together so that all of it can be produced at arraignment.

Very little of this information is actually needed by or useful to the defendant at this very early stage of the case—that is, not having every piece of this information will in no way prejudice a defendant's ability to defend at this stage. Even so, when there is *any* missing information from this production, the district court frequently has dismissed the case outright rather than allowing any additional time for the State or law enforcement agencies to find and produce the missing pieces. The number of case dismissals related to arraignment discovery is staggering. The following few examples can only hint at the breadth of this problem, the impunity with which defense counsel seek dismissal, and the almost automatic dismissal response by the district court:

- State v. Garcia CR2015-00061 (Dismissed because not all lapel videos provided at arraignment);
- State v. Koziatek CR2015-01046 (Dismissed because CADS/911 tapes not provided at *beginning* of arraignment setting even though State secured and attempted to provide these to defense before arraignment setting was concluded);

- State v. Casias CR2016-01369 (Dismissed because defense counsel claimed lapel videos were not received. State later proved that they were received and case was reopened).

The dismissal problem does not stop at arraignment. Defense counsel have long since learned to wait for and seize any opportunity to move to dismiss because the arraignment discovery production was incomplete in some way. Although Rule 5-120 generally requires motions to be in writing, and always requires that the court give the responding party time for a response, Defense counsel frequently ask for dismissal orally, at court settings that have nothing to do with discovery, and the State is given little if any opportunity to meaningfully respond. And defense counsel are rarely required to demonstrate how missing discovery has actually prejudiced their ability to defend the case, even though New Mexico law requires this showing. See State v. Harper, 2011-NMSC-044, ¶ 16 ("Prejudice must be more than speculative; the party claiming prejudice must prove prejudice—it is not enough to simply assert prejudice."). Rather than actually examining the legitimacy of defense requests for dismissal, the district court more often than not will simply dismiss the case. Again, the following examples can hardly illustrate the enormity of this problem.

- State v. Eagleman CR2014-02553 (District court grants oral motion to dismiss when defense counsel says he cannot get surveillance video to play);

- State v. Garber CR2015-03119 (Defense moved to dismiss because State did not provide a copy of a bound notebook tagged into evidence, even though defense had speed letter and could have examined that notebook at any time);

- State v. O'Farrell CR2015-02748 (State provided all discovery to public defender representing defendant at start of case. PD did not pass on that discovery to private defense counsel who later took the case. District court granted private counsel's motion to dismiss even though State by that time had provided another copy of discovery);

- State v. Hirschfield CR2016-01504 (Dismissed on oral motion at scheduling conference because some lapel videos and police reports not disclosed at arraignment);

- State v. Sisneros CR2016-03564 (Dismissed because lapel video not disclosed, even though State demonstrated that video had never been tagged into evidence and had been deleted by officer).

Many of the discovery issues exemplified above could have been cured by a simple discussion between the parties and a reasonable amount of time. Rather than start there, though, the district court almost reflexively jump to the ultimate "cure" of simply dismissing the case. The District Attorney's Office has no hope that this practice will stop until and unless the CMO is changed.

Dismissals Related to Pretrial Interviews

In addition to the "requirement" of production at arraignment, the State has continuing discovery obligations and deadlines under the CMO. The most significant of these is the obligation to produce witnesses for pretrial interviews. The CMO itself does not create the pretrial interview obligation, but it requires the district court to include a deadline for these interviews in the case scheduling order. As with the production of written discovery, the scheduling and conducting of witness interviews have been a prolific source of contrived discovery motions and unfair case dismissals.

The CMO requires the district court to set a deadline for witness interviews prior to trial. In the interest moving cases forward, the State routinely offers to contact witnesses and set up these interviews if the defense so requests. The following illustrates how this scenario repeatedly backfires on the State and results in case dismissal.

In State v. Chavez, CR2016-03733, the State attempted to set up interviews in December but defense counsel said she was unavailable. The interviews eventually were set for late January, but defense counsel failed to appear. The interviews were rescheduled for a day in late February but only some of them could be completed. The State asked for further availability from defense counsel in order reset the interviews prior to the early March deadline, but defense counsel never responded. After the deadline, defense counsel moved to dismiss for failure to complete all interviews prior to the deadline and the district court willingly agreed.

Some iteration of this scenario repeats itself in an alarming number of cases. No provision in the CMO requires defense counsel to request pretrial interviews in advance of the deadline or cooperate in scheduling. Many defense counsel do cooperate in this effort, but few will pass up the opportunity to move to dismiss if some part of the interview process remains incomplete at the deadline. More importantly, the district court is all-too-willing to dismiss cases for pretrial interview-related issues, even when months remain before trial and the defense is not prejudiced by any lack of information. The District Attorney's Office's proposed changes to the CMO will help to eliminate these unjust outcomes.

Dismissals for Discovery Issues Are Not Criminal Justice System Reform

As the cases above, the only criminal justice stakeholder that consistently benefits from the district court's application of the CMO is the criminal defendant. Indeed, in a particularly perverse irony, repeat and multiple offenders often reap the greatest windfalls by district court decisions.

The case of Defendant Nicholas Tanner illustrates this well. Mr. Tanner went from having four pending felony cases to none in a matter of months, all because of district court

dismissals for discovery violations of the CMO: CR 2014-03784 (dismissed for "failure to provide discovery" in response to motion filed by Defendant on the date of Scheduling Conference), CR 2014-03976 (dismissed for "failure to provide discovery" in response to motion filed by Defendant on the date of Scheduling Conference), CR 2014-04374 (dismissed for failure to provide three videos in response to oral motion of Defendant on the date of Scheduling Conference), CR 2015-00491 (dismissed for "failure to provide discovery" in response to oral motion of Defendant on the date of Scheduling Conference). While there may have been technical violations of the CMO in all four instances, all four cases were dismissed early in the life of the case, without allowing the State the opportunity to remedy the minor violations and keep the cases on a trial track.

The district court decisions put Mr. Tanner back on the streets of Albuquerque, ready to engage the system again. And, indeed, before the State even had an opportunity to re-indict any of the above cases, this defendant was arrested and indicted on three new cases, all still pending as of the date of this report. Now the process of bringing Mr. Tanner to justice must start over again, as the stakeholders expend their resources a fifth, sixth, and seventh time. Whether the criminal justice system will actually function to decide a just outcome for Mr. Tanner is yet to be seen.

Finally, that the district court sometimes dismisses cases *without* prejudice does not mitigate the harm to the State or justice as a whole. While the State can refile charges after a dismissal without prejudice, this simply starts a case over, demanding that the Grand Jury, the district court, the parties, and witnesses reinvest the time they already have spent for no good reason. Rather than reducing case resolution time, this result dramatically increases that time.

And rather than conserving court and State resources, starting cases over expends resources that are in especially short supply since the CMO took effect—officers are required to testify for the second time, making them unavailable to do work in the community; the twelve community members on a Grand Jury must spend their time re-evaluating a case that has already been reviewed and indicted, thus limiting their ability to hear new cases; and a district attorney, defense attorney, and grand jury judge have to be available to resolve pre-indictment issues for a case that has already proceeded beyond this stage once. Once this case is re-indicted all of the deadlines imposed by the CMO begin anew, meaning that a defendant could spend twice as long facing these charges as he would have had the case proceeded to trial the first time. In short, the district court's all-too-common sanction of case dismissal serves neither the interests of justice nor the original goal of the CMO.

THE CMO HAS UNDERMINED THE PROFESSIONAL WORKING RELATIONSHIP WITHIN THE CRIMINAL JUSTICE SYSTEM AND ONLY SHIFTED THE CASE BACKLOG TO THE DISTRICT ATTORNEY'S OFFICE

Dismissing instead of adjudicating charges against defendants is a large-scale, unanticipated problem brought about by the CMO. As it is currently written the CMO has given rise to other unexpected problems. It also has failed to reform the system in the ways it was intended.

The promise of a case dismissal—a win by default for the defense—has changed the working relationship between prosecutor and defense counsel. Defense counsel are effectively discouraged from working with the State towards an agreeable early resolution of cases because there is always a chance that the State will miss a deadline, or the district court will fail to transport the defendant, and the case will actually or effectively be dismissed. Moreover, case

resolution through the plea bargaining process, which has and should be the way that most cases are resolved, has been hindered in other ways by the CMO. Because plea deadlines are strictly enforced, the parties have no choice but to proceed to trial if no plea is reached before the deadline. As a result, the district court has seen a dramatic increase in the number of trials in the past two years even while fewer cases are actually in the system. Trials consume vastly more time and resources than plea bargaining, precisely the opposite effect than what was intended with the CMO's implementation.

The expected CMO benefit of reducing the overall case backlog in the system also has failed to materialize. The same number of cases must be processed by roughly the same number of district court, District Attorney, and defense counsel personnel, but now in less time under the CMO. While these constraints may have reduced the number of cases on the district court's docket at any one time, they have not actually changed the number of cases coming into the system from year to year. Thus, while the district court's backlog may appear to have been reduced, that backlog has simply been shifted back to the District Attorney's Office. This office does not have sufficient resources both to gather discoverable information in every new case in advance of indictment *and* continue to service the thousands of cases already moving forward in court under the extreme requirements of the CMO. Given the lack of resources, and because the State risks dismissal under the CMO if it indicts a case before this information is fully gathered and ready to be produced at arraignment, the State has been forced to delay indicting an ever increasing number of cases. In short, the backlog is still there, undiminished by the CMO; it simply now waits across the street in the District Attorney's Office.

Simply shifting the case bottleneck upstream to the District Attorney's Office does not "ensure that criminal justice is indeed just." Now cases that originally would have resulted in restitution for the victim or treatment for the defendant are simply being delayed. Instead of promoting efficiency in the judicial system, the CMO has slowed the resolution of cases by delaying indictment or causing the need for cases to be re-indicted before a resolution can be reached.

THE DISTRICT ATTORNEY'S OFFICE IS REFORMING ITS CASE SCREENING AND PROSECUTION PROCEDURES, BUT THESE PROCESSES WILL NOT CURE THE PROBLEMS CREATED BY THE CMO

The District Attorney's Office appreciates the historical context that resulted in the development of the CMO and recognizes that the failure of this office to properly prioritize, screen, prepare and marshal its limited resources played a significant role in the dysfunction which the CMO was intended to correct. The District Attorney's Office assures its criminal justice partners that it takes those issues seriously and 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 matter.

Among other things, the District Attorney's Office 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 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. In addition, the office has worked with law enforcement partners on

the need to prioritize the most dangerous defendants, gather essential reports, identify all potential witnesses and provide additional resources for early electronic discovery.

The District Attorney's Office is confident that these and other necessary reforms will have a dramatic impact on its ability to improve public safety and provide for the more efficient administration of justice in Bernalillo County. The concern remains, however, that the current application of the CMO is preventing this office from adjudicating a significant number of criminal cases on the merits and has unintentionally resulted in a system that rewards procedural gamesmanship and negatively impacts the already limited resources of the judiciary and parties.

While the Second Judicial District Court has a seen a dramatic decline in pending cases, those cases have not disappeared and they have not been resolved. Rather, they have simply been shifted across the street from the district court to the District Attorney's Office, resulting in a backlog of nearly 8,000 referred, uncharged felony cases now pending review and indictment. That backlog is the result of the prior administration's decision to delay case initiation after the strict 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.

Given the extraordinarily high rate of crime—particularly violent crime—in Bernalillo County, this policy is no longer tenable and the District Attorney's Office is preparing for the prompt initiation of all unindicted cases and the resolution of this pending backlog as soon as possible. Without significant modification of the CMO, this Office anticipates a significant number of these cases will be dismissed or key evidence suppressed, resulting in the release of violent, repeat offenders back in to the community. Nevertheless, this Office's criminal justice partners should understand that the District Attorney's Office will no longer defer charging

criminal defendants just because the mechanical and arbitrary application of the CMO has resulted in the suppression of key evidence or the outright dismissal of otherwise meritorious cases.

CONCLUSION AND REQUEST FOR CHANGE

The Second Judicial District has tried the experiment of the pilot CMO under its current language. For two years it has been unfairly and inconsistently implemented and has continually failed to help facilitate genuine criminal justice reform. The District Attorney's Office is hopeful that the BCCJCC will recognize the urgent need to reform the CMO to better serve the public safety needs of this community and build a criminal justice system that is fair to all participants. As such, the District Attorney's Office is submitting the attached proposed amendments to the CMO for the Council's consideration and looks forward to working with the other criminal justice stakeholders to bring about essential reform.

ATTACHMENT: SECOND JUDICIAL DISTRICT ATTORNEY'S PROPOSED REVISIONS TO LR2-308

Second Judicial District Attorney's Proposed Revisions to
Second Judicial District Local Rule LR2-308

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.

C. Arraignment.

(1) ***Deadline for arraignment***. Arraignments shall be governed by Rule 5-303 NMRA. ~~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 before arraignment or waiver of arraignment, or upon the filing of a bind-over order, the state shall certify that before obtaining an indictment or filing an information the case has been investigated sufficiently to be reasonably certain that (a) the case 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 G; (c) all discovery ~~in the possession of the state or~~ relied upon by the state ~~in the investigation leading~~ to secure the bind-over order, indictment or information has been provided to the defendant; and (d) 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.

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

(1) ***Disclosure by the state***. Discovery disclosure by the state shall be governed by Rule 5-501 NMRA. ~~***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 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.~~

(2) ***State witness disclosure; track assignment proposal***. To satisfy the disclosure requirement in Rule 5-501(A)(5) and to assist the court in assigning the case to a track as provided in this rule, within fifteen (15) days after arraignment the state shall, subject to Rule 5-501(F), file and serve a list of names for known witnesses the state intends to call at trial. The state will provide contact information for each witness that the state has verified is current as of the date of this disclosure. The state shall identify any expert witnesses known at the time of the disclosure and indicate the subject area in which they will testify.

As a part of its witness list the state also will propose a track assignment for the case, along with a brief statement supporting the track proposal, and indicate the number of days the state expects a trial of the case to take.

(3~~2~~) ***Motion to withhold contact information for safety reasons***. The state ~~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. If the address of a witness is not disclosed pursuant to court order, the state shall ~~party seeking the order shall~~ arrange for a witness interview or accept at its business offices a subpoena for purposes of deposition under Rule 5-503 NMRA.

(4~~3~~) ***Continuing duty.*** The state shall have a continuing duty to disclose additional information to the defendant, including the names and contact information for newly-discovered witnesses and updated contact information for witnesses already disclosed, within ~~five~~ ten (10~~5~~) days of receipt of such information, ~~including current contact information for witnesses~~.

(5~~4~~) ***Evidence deemed in the possession of the state***. Evidence is deemed to be in possession of the state for purposes of this rule and Rule 5-501A 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.

(6~~5~~) ***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.

(7~~6~~) ***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.

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

(1) ***Disclosure by the defense***. Discovery disclosure by the defense shall be governed by Rule 5-502 NMRA. ~~***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. In addition to the disclosures required by Rule 5-502(A) NMRA, 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) ***Defense witness disclosure; track assignment proposal***. To satisfy the disclosure requirement in Rule 5-502(3) and to assist the court in assigning the case to a track as provided in this rule, within fifteen (15) days after arraignment the defendant shall file and serve a list of names for known witnesses the defendant intends to call at trial. The defendant will provide contact information for each witness that the defendant has verified is current as of the date of this disclosure. The defendant shall identify any expert witnesses known at the time of disclosure and indicate the subject area in which they will testify.

As a part of its witness list the defendant also will propose a track assignment for the case, along with a brief statement supporting the track proposal, and indicate the number of days the defendant expects a trial of the case to take.

(3~~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.

(4~~3~~) ***Continuing duty***. The defendant shall have a continuing duty to disclose additional information to the state including the names and contact information for newly-discovered witnesses and updated contact information for witnesses already disclosed, within ten ~~five~~ (10~~5~~) days of receipt of such information~~.~~

(5~~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.

(6~~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.

F. Peremptory excusal of a district judge; limits on excusals; time limits; reassignment. Peremptory excusals shall be governed by Rule 5-106 NMRA. ~~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~~ a 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.~~

G. ~~Status hearing; witness disclosure; s~~Scheduling order; 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.~~

(1~~3~~) ***Scheduling order.~~~~Case track assignment required; factors~~***. No later than 30 days after arraignment the court shall 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. In setting the case for a particular track the court shall consider the track assignment proposals in the parties' witness lists. ~~At the status hearing, t~~

(2) ***Case track assignment required; factors.*** 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) the complexity of the case, starting with the assumption that most cases will qualify for assignment to track 1; and

(b) 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.

(34) ~~*Scheduling order required*~~ ***Track deadlines***~~.~~ The deadlines and other dates identified in the scheduling order shall conform to the following ~~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. A request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. 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 parties to request witness interviews. Requests for interviews must be made no later than fourteen (14) days after the issuance of the scheduling order. The party requesting interviews must specify whom the party wants to interview from the other party's witness list and indicate how long the requesting party expects each interview to take. The parties will confer in good faith in scheduling interviews. If the party requesting interviews does not timely request interviews or does not act in good faith during scheduling, then the absence of an interview of that witness will not be considered as a basis to exclude evidence or that witness' testimony in the case; and

(~~viii~~ix) 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. A request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. 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 parties to request witness interviews. Requests for interviews must be made no later than twenty-one (21) days after the issuance of the scheduling order. The party requesting interviews must specify whom the party wants to interview from the other party's witness and indicate how long the requesting party expects each interview to take. The parties will confer in good faith in scheduling interviews. If the party requesting interviews does not timely request interviews or does not act in good faith during scheduling, then the absence of an interview of that witness will not be considered as a basis to exclude evidence or that witness' testimony in the case; and

(ix~~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. A

request for the court to approve a plea agreement less than ten (10) days before the trial date shall not be accepted by the court except upon a written finding by the assigned district judge of extraordinary circumstances. 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 parties to request witness interviews. Requests for interviews must be made no later than twenty-eight (28) days after the issuance of the scheduling order. The party requesting interviews must specify whom the party wants to interview from the other party's witness and indicate how long the requesting party expects each interview to take. The parties will confer in good faith in scheduling interviews. If the party requesting interviews does not timely request interviews or does not act in good faith during scheduling, then the absence of an interview of that witness will not be considered as a basis to exclude evidence or that witness' testimony in the case; and

(~~vii~~ix) 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.

(4~~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)(3~~4~~) of this rule to allow for the case to come to trial sooner.

(5~~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 G of this rule. In no case shall a party be given time extensions that in total exceed ~~thirty~~ sixty (3~~6~~0) days. Unless required by good cause, extensions of time for up to a total of sixty ~~thirty~~ (3~~6~~0) 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 request for extension of time in order to consolidate and resolve multiple cases against the same defendant under one plea agreement shall ordinarily be considered good cause for an extension of time.

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 G 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~~an active warrant or surrenders in this state for an active warrant ~~failure to appear~~, the date of the arrest or surrender of the defendant;

(6) if the defendant is arrested or surrenders in another state or country, ~~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;

(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~~ may impose sanctions as the court may deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply. 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.

(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 (5~~4~~) of this paragraph.

(3) A motion for sanctions for failure to comply with this rule or any of the Rules of Criminal Procedure must be made in writing and will be subject to Rule 5-120 NMRA. The court shall not hear any motion for sanctions without giving sufficient notice to allow compliance with LR2-111.

(4~~3~~) The sanctions the court may impose under this paragraph include, but are not limited to, the following:

(a) a reprimand by the judge;

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

(c) 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;

(d) civil or criminal contempt; and

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

(5~~4~~) The sanctions of dismissal~~,~~ with or without prejudice~~,~~ or prohibiting a party from calling a witness or introducing evidence shall not be imposed under the following circumstances:

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

(b) if an in-custody defendant was not at a court setting as a result of a failure to transport; or

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

Additionally, the court shall not impose the sanctions of dismissal with or without prejudice or prohibiting a party from calling a witness or introducing evidence unless the party moving for dismissal or other sanction has, by written motion as set forth in paragraph 3 of this subpart, can show each of the following:

(d) the moving party was materially prejudiced by the non-moving party's violation of this rule or other Rule of Criminal Procedure[1];

(e) the non-moving party's rule violation was in bad faith or in willful non-compliance with a previous court order in the case directing the non-moving party to cure the same or similar violation; and

(f) no lesser sanction will remedy the rule violation.

Any court order of dismissal with or without prejudice or prohibiting a party from calling a witness or introducing evidence shall be in writing and include findings of fact establishing the moving party's proof of factors (d), (e), and (f) above.

J. Certification of readiness ~~prior to~~at pretrial conference or docket call. At the pretrial conference or docket call ~~B~~both the prosecutor and defense counsel shall certify to the court orally ~~submit a certification of readiness form five (5) days before the final pretrial conference or docket call, indicating~~ that they have been unable to reach a plea agreement, that

[1] *State v. Harper*, 2011-NMSC-044, ¶ 16 ("Prejudice must be more than speculative; the party claiming prejudice must prove prejudice—it is not enough to simply assert prejudice.").

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~~ sixty (~~3~~60) 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~~ sixty (~~3~~60) 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~~ sixty (~~3~~60) 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)(~~5~~4). Without regard to which party requests any extension of the trial date, the court shall not extend the trial date more than ~~thirty~~ sixty (~~3~~60) 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) ***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.

(4) ***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 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.

N. 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. The chief judge shall also submit a monthly report to Supreme Court identifying how many sanctions have been issued pursuant to this Order by each district court judge and shall identify the nature of the violation and the specific sanction imposed.