Supreme Court of New Mexico

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MEMORANDUM

TO: Representative Patricia A. Lundstrom, Chair, Senator John Arthur Smith, Vice Chair, Members of the Legislative Finance Committee
FROM: Artie Pepin
DATE: September 29, 2017
RE: Managing Caseloads in the Judicial Branch

LFC invited Chief Judge Nash of the Second Judicial District Court, Chief Public Defender Bennett Bauer, Second Judicial District Attorney Raul Torrez, and me to present testimony on "Managing Caseloads in the Judicial Branch" with emphasis on "Case Management Order, Caseload and Workload, Prioritized Case Filing, Public Safety Outcomes, Pre-trial Release and Detention, and Intelligence Driven Public Safety." This memo outlines my testimony with reference to supporting historical records, reports, and data that can be found on Committee the website.

1. Case Management Order, Caseload and Workload, Prioritized Case Filing

The Legislature established the Bernalillo County Criminal Justice Review Commission by statute effective July 1, 2013 (HB 608; 2013). The Commission is now a Criminal Justice Coordinating Council, the BCCJCC. Between July 2013 and February 2015 the members of the BCCJCC, and specifically the courts, defense and prosecutors, implemented numerous measures that had the effect of significantly reducing the population at the Metropolitan Detention Center (MDC). The MDC population declined from more than 2,900 in July 2013 to 1,660 in February 2015. The decrease in jail population (-1,240) meant faster justice for defendants jailed on allegations of parole violations and those held pretrial, while costs to Bernalillo County declined by several million dollars annually. Details on the steps taken and their impact on justice and the county treasury are found in reports filed with the LFC in November 2014 and September 2015 at **Item A** and **Item B** on the Committee's website.

Many of the actions taken by the BCCJCC had long been suggested by a series of reports studying criminal justice in Bernalillo County. A 1999 national study of nine jurisdictions that included Albuquerque found Bernalillo County case processing to be in the middle of the pack but by the time the National Center for State Courts was retained to produce the 2009 report on how to improve case management in Bernalillo County case processing had declined to an unacceptably slow pace, with excessive continuances in cases and a long backlog of unresolved cases (**Item C**).

The situation had only worsened by the time the NCSC returned in 2013 to produce a report estimating what would be the impact of improved case management in Bernalillo County if the reports' recommendations were adopted (**Item D**). A report produced by the Institute for Law and Public Policy in January 2014 restated the earlier NCSC recommendations with even greater emphasis on the need to change the way criminal justice was done in Bernalillo County (**Item E**). All these reports recommended track assignments for cases to simple, medium and complex case tracks, strict time deadlines, end of continuances in cases, sharing case work among judges, and plea deadlines.

Members of the BCCJCC cooperated during 2013 and 2014 to implement many of these recommendations with the effect of **reducing the MDC population from 2,900 to 1,660, a decrease of 1,240, or -by 42.8% as of February 2015**. However, case processing still took far too long. In January 2014 the BCCJCC members began discussing a new way of operating that would follow best practices adopted in numerous courts that operated more efficiently and effectively. Throughout 2014 the BCCJCC worked on drafts of a "Case Management Order" or CMO. Twice the Supreme Court held public hearings with all members of the BCCJCC present to discuss directly with the Court various aspects of the proposed CMO. In **November 2014 the Court adopted the CMO to be effective February 2015 (Item F** is the CMO). The CMO adopted of most of the recommendations made in the 1999, 2009, 2013, and 2014 reports.

The CMO's basic time limits require that a case go to trial within 6, 9, or 12 months depending on whether the court, working with the parties, finds the case is of simple, medium or high complexity. The time runs from the determination of case complexity and the court's issuance of a case scheduling order. This occurs about 30 days after a finding of probable cause to proceed with the case. Albuquerque's CMO time limits are **longer** than national standards suggested by the American Bar Association (**Item G**), and the National Center for State Courts

(**Item H**). The CMO time limits are the **same or longer** than CMOs entered in federal (**Item I**) and state courts (**Item J**).

Upon implementation of the CMO more than 3,000 cases that had lingered without resolution for more than 18 months, many for much more than 18 months, were assigned to a special court calendar to be worked by four judges. The remaining six criminal judges at the court worked under the new calendar implementing the 6, 9, and 12 month scheduling of all incoming criminal cases. During 2015 and 2016 the jury trial rate in Bernalillo County increased by more than 250% as the special calendar judges worked with prosecutors and defense counsel through the backlogged cases. During very challenging times for all parties involved in criminal justice in Albuquerque and with a tremendous effort, the backlog was substantially eliminated so that in December 2016 the special calendar was retired and the judges were assigned to the regular "new" CMO calendar.

The CMO significantly changed how cases were managed in Albuquerque. The court enforced the CMO's firm deadlines for discovery, held to trial dates set months in advanced and not continued, and emphasized the need for all parties to conform to the new CMO requirements. The CMO demanded very different practices for courts, prosecutors, and defense counsel in order to bring Albuquerque criminal justice to a reasonable timeline for disposition of criminal cases. This required prosecutors to work with law enforcement agencies to provide timely discovery, required defense counsel to meet with clients and be ready to proceed within strict timelines, and required judges to substitute for other judges on motions and trials in order for the court to keep to a firm trial schedule. These practices all followed national best practice standards.

Some members of the BCCJCC, especially the District Attorney, felt the CMO was having a harsher impact than had been anticipated. They suggested modifications to the CMO. The Supreme Court held a public hearing with the BCCJCC members in November 2015 and adopted changes to the CMO effective February 2016. As reported in a newspaper account, the impact of the changes was to reduce the burden on the District Attorney and provide relief in those cases that required special consideration due to public safety concerns (**Item K**).

District Attorney Torrez took office in January this year (2017). At his urging, over the past several months the BCCJCC has again been discussing a number of modifications to the CMO. The BCCJCC expects to submit proposals to the Supreme Court in October 2017 for the Court's consideration. Again, the overall impact would be to ease some of the stricter deadlines that are said to particularly

burden the prosecution. The Supreme Court has not yet received those proposals and so has not yet had an opportunity to consider or act on them.

Along with other efforts, the CMO has contributed to the continued decrease of the MDC population which has settled at about 1,300 daily. This is a decline of 360, or -21.7%, since February 2015 when the CMO was implemented. Since the BCCJCC began its work in 2012, the total number of bookings at MDC has declined from 34,336 in FY12 to 24,461 in FY16, a decrease of 9,875 or -23.7% (**Item L**), while the MDC population decline has been -55%. However, most of the decline has been 6,711 fewer misdemeanor and petty misdemeanor arrests, a decline of -46.4%. **Felony arrests in FY12 (8,661) were only 403 higher, or +4.65%, than in FY17 (8,258) (Item L**). **There has been no significant increase in felony arrests and bookings into MDC since FY12.**

2. Pretrial Release and Detention, Public Safety Outcomes, Intelligence Driven Public Safety

In 2012, the Conference of State Court Administrators adopted a policy paper, *Evidence Based Pretrial Release*, that reviewed extensive research on pretrial practices and recommended state courts adopt such steps as use of a risk assessment instrument for setting pretrial release conditions, reduction of the practice of imposing a monetary bond on pretrial defendants, and seeking authorization for judges to hold dangerous defendants without release conditions (**Item M**). In December 2014 the New Mexico Supreme Court issued its opinion in *State v. Brown*, 2014-NMSC-038 (**Item N**), holding that it is unconstitutional to set a high money bond in order to detain a defendant and re-emphasizing that New Mexico court rules require release under the least restrictive conditions likely to assure the defendant appears in court and is not arrested for a new offense before his trial. The Court emphasized that the rules require a court to first consider a range of non-financial conditions and only if they are inadequate to consider a money bond to assure a defendant's appearance.

By law a money bond has no impact on public safety. The only duty on the bond company that issues the bond is to make sure the defendant appears in court. Only upon a failure to appear (FTA) can the bail bond be forfeited. The forfeiture statue in New Mexico, as in many states, is long, tedious, and filled with opportunities for any amount forfeited to be ultimately returned to the bond company, resulting in few actual bond forfeitures.

The *Brown* case required an end to setting money bond as a way to detain defendants believed to be dangerous. The Supreme Court also appointed a Pretrial Committee that included bond company employees, prosecutors, defense attorneys, and other interested groups. The Committee recognized that money bond cannot be the default pretrial release condition. Release conditions must be established for each defendant by the least restrictive means necessary to reasonably ensure the defendant will not FTA and will not get arrested for a new crime before disposition of the current charges. The Committee recommended and the Supreme Court supported a constitutional amendment to allow pretrial detention for dangerous defendants (**Item O** – handout from AOC in support of the constitutional amendment). After some modifications during the 2016 legislative session, the amendment passed the Legislature and 87% of New Mexico voters approved the amendment in November 2016 (**Item S** – the constitutional amendment as passed by the voters with other information from the AOC).

To implement the new authority to detain dangerous defendants, the Supreme Court adopted rules effective July 1, 2017. The district court rules are 5-401 to 5-409 (**Item P**). Rule 5-401 restates the previous rule for release on recognizance, followed by gradually more restrictive non-financial conditions, and finally a money bond if needed to assure a defendant's return to court. Rule 5-403 recognizes a court may make the conditions more restrictive or deny release at all if a defendant violates conditions previously set by the court. Rule 5-408 provides for automatic release from jail of persons arrested for most misdemeanors upon designation of a release authority, and Rule 5-409 establishes the process for detention without release conditions.

In setting the process for detention without release conditions in Rule 5-409, the Supreme Court followed the requirements of the constitutional amendment. This includes the requirement for a prosecutor to request detention with a written motion for detention, a requirement for proof by clear and convincing evidence that the defendant is a sufficient threat to public safety to justify detention, and speedy time limits if the prosecutor or a defendant appeals the detention decision. In Bernalillo county to date more than one-third of detention motions have been granted resulting in detention without release conditions of more than 100 dangerous defendants who would have been released on a money bond before the constitutional amendment authorizing detention.

For non-dangerous defendants, Rule 5-401 establishes the process for release on recognizance or on other conditions if necessary to assure appearance or mitigate the threat to the safety of a person or the public. The requirement that low-risk

defendants should be released on nonfinancial conditions has been a feature of New Mexico law since 1972 and was taken verbatim from federal statutes that have been in effect since 1966.

Compared to defendants that share the same criminal history, economic status, race, gender, and other factors, defendants detained pretrial are (**Item Q**):

- are four times more likely to be sentenced to jail than those promptly released
- three times more likely to be sentenced to prison
- receive jail sentences that are three times longer
- those defendants detained between 8 and 14 days have a 56% higher incidence of arrest for a new criminal offense before case disposition than similarly situated defendants who are promptly released pretrial
- defendants held 8 to 14 days have a two-year recidivism rate 51% higher than similarly situated defendant who are promptly released pretrial

To gauge dangerousness, courts may use a risk assessment instrument. In Bernalillo County the courts are using the Public Safety Assessment (PSA) developed by the John and Laura Arnold Foundation using data from 1.5 million cases from 300 jurisdictions across the United States. PSA uses evidence-based, neutral information to predict the likelihood a defendant will commit a new crime if released and the likelihood the defendant will FTA. Judges retain discretion to not follow the recommendations of the PSA. National data shows that about 70% of defendants score low risk (release without conditions), about 15% high risk (detain), and 15% medium risk (release with conditions appropriate to mitigate the risk).

When Lucas County (Toledo) Ohio adopted the PSA, the number of releases without the need for bail nearly doubled (from 14% to almost 28%), the percentage of pretrial defendants arrested for other crimes while out on release declined from 20% to 10%, the percentage of pretrial defendants arrested for violent crimes while out on release declined from 5% to 3%, and the percentage of pretrial defendants who skipped their court date declined from 41% to 29% (**Item R**).

The new rules also eliminated bond schedules in New Mexico. Numerous federal courts have held bond schedules unconstitutional because they base release on a defendant's financial resources rather than risk of FTA or risk of threat to safety. The most recent is in the federal court in Houston, *Odonnell v. Harris County*, https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf; http://www.houstonpress.com/news/judge-rips-harris-county-bail-system-in-historic-ruling-9399890.

Additional information about the constitutional amendment and the pretrial rules in New Mexico can be found in a series of Key Facts issued by the AOC (**Item S**).

Bernalillo County Criminal Justice Review Commission
Arthur W. Pepin, Chair

Report to Legislative Finance Committee

November 18, 2014

The Legislature passed and Governor Martinez signed HB 608 in the 2013 session. Sponsored by Representative Rick Miera, HB 608 creates the Bernalillo County Criminal Justice Review Commission (BCCJRC or "Commission") to exist July 1, 2013 to June 30, 2015.

I. Composition and Purpose of the BCCJRC

Members of the Commission are:

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

The Commission's charge is "reviewing the criminal justice system in Bernalillo county" to make written recommendations to revise or replace local and state laws and to "improve the delivery of criminal justice in Bernalillo county." The Commission is required to make various reports, including a report "**to the legislative finance committee**."

In addition to the statutory members, attendees at commission meetings have included a broad spectrum of interested parties, including Federal Magistrate Alan Torgerson who has overseen federal litigation over the jail population at the Metropolitan Detention Center (MDC) for more than ten years, Justices of the New Mexico Supreme Court, members of the New Mexico Sentencing Commission,

private defense attorneys including members of the New Mexico Criminal Defense Lawyers Association, members of the Institute for Public Law, and consultants from the National Center for State Courts provided by Bernalillo County under a grant from the State Justice Institute.

It is reasonable to state that for some time there have been insufficient resources throughout the county criminal justice system, including funding for the courts, district attorney, public defender, and police agencies. These resource constraints likely contributed to practices that extend the time for case disposition and result in a high population at MDC.

The MDC population has for many years been well above what might be expected on average for Albuquerque's population. Based on national averages, the expected MDC population for a city with Albuquerque's population would be 1,550, a figure MDC exceeded regularly by more than 1,000 before the reforms implemented in the past year. A significant contributing factor is pretrial detention. In August 2012, the New Mexico Sentencing Commission reported the average length of stay before adjudication in MDC at 222 days, but only 162 days in the other six New Mexico counties studied.

Delivering fair and speedy criminal justice is a critical goal for the courts, prosecutors, defendants and MDC. One product of failing to achieve that goal is excessive detention at MDC. The McClendon federal litigation, McClendon et al., v. City of Albuquerque, CIV 95-24 JAP/KBM, continues to apply pressure on Bernalillo County to limit the inmate population at MDC to 1,950 persons. By an order issued May 12, 2014, Bernalillo County is directed to "create an Emergency Management Plan in cooperation with Criminal Justice Review Commission (CJRC) to ensure that the population at MDC remains at or under 1,950."

The order imposed a deadline of August 11, 2014, on the parties to agree with the BCCJRC to such a plan. A subsequent order extended the deadline for 90 days. The BCCJRC is not a party to the McClendon litigation, but is working with the county and plaintiffs toward such an agreement. Along with the county, which has direct membership on the BCCJRC, two attorneys for McClendon plaintiffs and plaintiff-intervenors (Kirtan Khalsa and Peter Cubra) have attended BCCJRC

meetings. Members of the BCCJRC participated in drafting an emergency release order to take effect if the MDC population is not reduced to or below 1,950.

Participants in the criminal justice system in Bernalillo County, who are the members of the BCCJRC, faced the choice to revise the system in ways that significantly reduced the MDC population or have the county construct additional detention space and/or release inmates under federal order. One practice in place to relieve MDC overcrowding is for the county to transfer excess inmates out of the county. In 2013 the county budgeted $11.4 million for out-of-county transfers expected in FY 2014. Either constructing new jail space or transferring inmates out of the county imposed extraordinary costs on Bernalillo County. Changes needed in the criminal justice system required the committed determination of all BCCJRC members.

II. BCCJRC Activities, Progress, and Planned Reforms

The BCCJRC first met on June 26, 2013 and has met monthly since December 2013. Consultants met separately with each member and with the full Commission. The issues and challenges today were not different from those identified more than 15 years ago. Too many defendants were being held for too long in pretrial detention, often as the result of inability to post a money bond. Cases took too long to reach resolution by guilty plea (more than 95% of cases) or trial. Discovery was not exchanged with sufficient speed. The practice of indicting every felony by grand jury added unnecessary delay. Continuances were granted in criminal cases at about double the national average rate. It was not unusual for cases to be resolved much more than eighteen months after the alleged date of the crime.

The above statements are documented by an impressive catalogue of studies from different sources dating back to the previous century. The more contemporary studies are posted on the nmcourts.gov website under the tab for the BCCJRC. A few include: *Felony Caseflow Management in Bernalillo County, New Mexico*, November 2009 (Steelman, Griller, Farina, Macoubre, National Center for State Courts); *Length of Stay in Detention Facilities: A Profile of Seven*

New Mexico Counties, August 2012 (Freeman, New Mexico Sentencing Commission); *Estimating the Potential Impact of Better Criminal Caseflow Management on the Jail Population in Bernalillo County, New Mexico*, January 25, 2013 (Steelman, Kiem, NCSC); *A Call for the Truth: Findings and Recommendations on Ending the Jail Crowding and Ensuing Lawsuit in Bernalillo County, New Mexico*, January 20, 2014 (Kalmanoff, Delarosa, Institute for Law and Public Policy). These and other reports amply demonstrated that even if the jail capacity could accommodate more detainees, criminal case processing in Bernalillo County needed significant reform.

At the highest, in October 2013 Bernalillo County paid for out-of-county housing for 707 detainees at a cost of more than $1 million for the month. Although the "design capacity" at MDC is 2,236, that includes hospital treatment beds and other space not available to house the general population, resulting in the federal order's cap of 1,950. The population in 2013 averaged 2,418. Measures taken since the beginning of 2014 as a result of activities by members of the BCCJRC have contributed to reduced inmates detained under county control.

- On October 30, 2014, the population at MDC (including 67 out-of-county transfers) was 1,947.
- This is the first time since July 2003 the MDC population dropped below 1,950.
- On October 30, 2014, out-of-county transfers were down 17.9% from the October 2013 number.
- On October 30, 2014, the total MDC population was down 24.7% from October 2013.
- Bernalillo County reports that "since the implantation of court initiatives starting in March 2014 the County has saved $5 million in OOC [out-of-county] shipping costs"[1]

[1] All data from Bernalillo County MDC Monthly Report, October 2014, issued November 10, 2014.

Changes Implemented To Date

The Commission has focused on practices that can be changed. With the great assistance of the county-funded core working group headed by Lisa Simpson and Kelly Bradford, the Commission has done the following to date:

- The district and metropolitan courts executed MOUs presumptively granting good time sentence reductions for time served at MDC post-adjudication
- Bernalillo County funded a robust expansion of pretrial services at the district court
- a process to require early review of bond for defendants in pretrial detention is in place
- use of CCP (community placement; ankle bracelets, and other non-MDC alternatives) has been expanded from an average of less than 100 to more than 350 with a capacity for up to 500
- MDC now provides a printed copy of pretrial conditions to defendants upon MDC release
- a process to schedule early hearings for defendants arrested on FTA (failure-to-appear) warrants is in place
- judges are using a validated risk assessment instrument (RAI) in district court at arraignment with the goal of using the RAI at first appearance
- judges are adjusting pretrial practices to reduce or eliminate money bond in as many cases as possible with reliance on pretrial monitoring to reduce the risk to the community and increase the likelihood defendants will appear for scheduled court events
- the District Attorney is gradually transitioning to information and preliminary hearing for non-violent felonies; after implementing this as a pilot for some community crime cases, about 25% of those presented at preliminary hearing have resolved and the court has eliminated two days of grand jury panels
- expedite probation violation cases from 20 days after arrest instead of 40 days from the filing of the revocation, as well as 7-day hearings for technical violations

Other measures have been agreed to and are expected to be implemented in the next month or two months. These include:

- expand use of RAI in metropolitan court for setting pretrial release conditions
- expand early plea program especially for non-violent drug and property crimes
- automated electronic reminders to defendants for court appearances
- practices to improve address accuracy for notices
- expand mental health services both as an alternative to arrest and as an alternative to MDC incarceration; a transitional housing program funded by Bernalillo County and the City of Albuquerque will have a capacity of 100 participants beginning January 2015
- resolve misdemeanor cases at first appearance for in-custody defendants by assigning an ADA to these proceedings (previously there was no ADA at misdemeanor first appearances although the PD, defendant, and court are present)
- dismiss (nolle prosequi) cases at felony first appearance for cases that will not be indicted in 10 days

At the end of Fiscal Year 2014, the population at the Metropolitan Detention Center, including inmates housed out-of-county and in the Community Custody Program (CCP) (both of these categories are persons not actually housed at MDC) showed a decrease of 14% from June 2013 (population 2,852) to June 2014 (population 2,448). The MDC end-of-year report lists initiatives implemented with the support of the BCCJRC from January 2014 through July 2014. The report, issued September 15, 2014, states that these initiatives:

> impact the MDC population in a number of ways: the use of CCP, the timeliness of hearings, length of stay, the number of bookings, and the number of releases. It is difficult to estimate precisely when and to what extent a given court initiative has had or will have an impact due to the many contributing factors to population changes and the

limitations of data sources. However, the drop in population has coincided with implementation of these initiatives.

The MDC report for October 2014 (attached to this report) shows the decreased population trend continues. The total MDC custody count in October 2014 averaged 24.7% lower than in October 2013. Inmates moved out of Bernalillo County to be housed in other New Mexico and Texas counties peaked in October 2013 at 707. On October 31, 2014, the county housed just 67 inmates out-of-county (none in Texas) and the average number for October 2014 was just 128.

Data is difficult to assess for a number of reasons, but data reviewed in the MDC reports and in reporting on BCCJRC initiatives demonstrates the success in reducing the MDC population of actions such as pretrial services, preliminary hearings, and speedier probation violation hearings. Reports by Mike Gallagher in the *Albuquerque Journal* published on September 21, 2014, November 7, 2014, and November 13, 2014, highlighted some of the progress made to date, actions to comply with the requirements of the McClendon litigation to include the 1950 population limit, and the Supreme Court's issuance of changes to rules governing case management (discussed next).

Case Management Changes To Be Implemented

One remaining important step to achieve the goals of the BCCJRC is to adhere to time limits on case processing that have real consequences. Unless parties within the system expect there to be consequences for not preparing cases for earlier disposition, nothing will change. The Supreme Court issued new pilot rules, known as the Case Management Order (CMO), by order of November 6, 2014, to be implemented February 2, 2015, at the Second Judicial District Court. The CMO is expected to be the means to alter expectations and create a culture that achieves speedy resolution of most criminal matters in Bernalillo County. The CMO will build on the efforts that have already contributed to a reduction in the MDC and out-of-county detainees.

The CMO is intended to achieve the HB 608 goal of "identifying changes that will improve each member's agency or organization's ability to carry out its

duties in the criminal justice system and ensuring that criminal justice is indeed just." First proposed in December 2013, various CMO proposals were the subject of meetings between the New Mexico Supreme Court and members of the BCCJRC on June 19 and July 29, in addition to numerous meetings with BCCJRC members separately.

Under the CMO, three judges will be appointed to clear a backlog of felony cases that have been on the criminal dockets for many months and in some cases many years. Seven judges will be assigned to work under the new CMO rules with strict time deadlines for prosecutors and defense attorneys to exchange discovery, identify witnesses, obtain laboratory reports of testing of evidence, and file motions needed to prepare a case for trial or a plea agreement. The goal is to impose definite timelines in criminal cases to avoid delays and enforce fair processes and speedy trial deadlines required by the New Mexico Constitution.

In summary, the CMO requires cases be assigned to one of three tracks for resolution between 6 months and 1 year, imposes strict discovery and pretrial deadlines, requires plea agreements be reached not less than 10 days before a scheduled trial, and shares responsibility for compliance with time deadlines among all the criminal judges of the court. The CMO presents challenges to the court, prosecutors, and defense attorneys to change criminal justice case processing. The transition is expected to be difficult. The end result 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.

III. Legislative Action Required in the 2015 Legislative Session to Achieve the Goals Established for the BCCJRC by the Legislature

The Legislature gave the BCCJRC the responsibility to reform criminal justice in Bernalillo County. Much has been achieved. The funding for those efforts has been born largely by Bernalillo County, with many hours of dedicated work by

judges and staff at the courts as well as the Office of the Bernalillo County District Attorney, the Law Office of the Public Defender for Bernalillo County, and all members of the BCCJRC. Many hours of further effort will be required of the parties in the criminal justice system. In addition, decades of challenges that have left this system with large backlogs of old cases, an inefficient method of processing cases, and an unreasonably large jail population will require the dedication of some additional resources not available within the existing resources of these entities.

Bernalillo County has supported efforts that can arguably be recognized as state obligations in a state court system where the state funds the courts, prosecution of all cases and defense of most cases. Additional work is needed to refine what resources would be most effective to advance the reform of criminal justice in Bernalillo County as required by HB 608. At present, here are a few:

Second Judicial District Court

Additional resources at the court would assist in implementation of the CMO to be issued by the Supreme Court. An estimate of the cost of these resources is $745,000 as follows:

- 2 pro tempore judges (one for new calendar judges and one for the special calendar under the CMO), to hold hearings on matters such as status conferences, settlement conferences, discovery disputes, etc., and to preside over some arraignments; $180,000.

- 2 staff attorneys (one for new calendar judges and one for special calendar judges under the CMO) to draft orders on dispositional matters, such as speedy trial motions, *Foulenfont* motions, motions to dismiss, etc., and to help in the track assignment/scheduling order process; $150,000.

- 1 paralegal for judges in the CMO new calendar to help with scheduling issues, ensuring all hearings go forward, to operate as the calendaring "point person"; $65,000.

- Funds to build out the courtroom at MDC to be used to hear probation violations and possibly arraignments at MDC, freeing up another courtroom for criminal judges at the courthouse (judges currently share 8 courtrooms between 10 judges); $200,000.

- Funds for pro tem judges to increase the preliminary hearing program, as well as "cover" trials when all other criminal judges are otherwise engaged; $150,000.

Second Judicial District Attorney

The District Attorney anticipates increased caseloads for attorneys due to the Case Management Order (CMO) to be adopted by the Supreme Court for the Second Judicial District. To meet this need, the DA requests 8 additional Assistant District Attorneys and 8 paralegals, one each for each of the 8 adult felony Divisions in Bernalillo County: Community Crimes, Crimes Against Children, Domestic Violence, Felony DWI, Gang Violence, Grand Jury, Violent Crimes, and White Collar Crimes. This expansion request included salaries and benefits, as well as operating costs. The DA did not provide complete cost estimates, but my estimate is approximately $970,000 for the new employees.

Law Office of the Public Defender, Bernalillo County

The LOPD District Defender, Richard Pugh, indicates the need for additional staff to comply with the new CMO, especially investigators and legal support staff. A reasonable estimate for the PD is new funding at least equal that required for the DA, including authorization for new employees at a cost of $970,000.

County of Bernalillo

Bernalillo County supports appropriations and new employees to accomplish the new CMO. In addition, the County requests funding for several initiatives:

- The County pays for pro tem judges to handle the probation violation hearings and preliminary hearings. The state should fund additional pro tem judges through court budgets. The felony first appearance process also needs a funded pro tem judge.

- The majority of people in MDC have some degree of mental health issues. A big part of further reduction in the MDC population requires services for those individuals in an appropriate setting. The state should appropriate, or fund, through general behavioral health dollars or expanded Medicaid reimbursement, a crisis triage and stabilization center and supportive housing. The operation costs of the center would be about $3 million and the costs for supportive housing would be about $1.2 million for 75 units with a need for multiples of that.

- There is a need for a "data warehouse" to assist all stakeholders in working more effectively. At present the Bernalillo County criminal justice system frustrates efforts to rely on consistent data and there is no ability to run reports across systems so we are unable to get a complete picture of most issues. This might require a separate server and some IT work, with a preliminary cost estimate of $100,000.

- Provide funds to the county, but preferably to the court, for an automated court date reminder system. Such reminders have demonstrably improved appearance rates for criminal defendants in many settings. A preliminary estimate of cost is $25,000.

- More could be accomplished with pretrial services with additional funding. In many states, pretrial programs are state funded. One example is that many pretrial programs have dedicated staff to assist defendants in making calls or tracking down people that may be willing to post bonds for them. Just getting to the point of being able to do a risk assessment on everyone coming through the system is probably going to take additional resources. An appropriation of $100,000 would provide more robust pretrial services.

LFC is asked to endorse legislation to provide the resources indicated above, at a total cost of **$7,110,000**, as follows:

- $745,000 Second Judicial District Court
- $970,000 Bernalillo County District Attorney
- $970,000 Bernalillo County Law Office of the Public Defender
- $4,425,000 Bernalillo County.

Members of the BCCJRC have worked very hard to achieve reforms with improved processes, new approaches, and generous funding by Bernalillo County that cannot continue indefinitely into the future. Significant funding from the Legislature is crucial if the full purposes of HB 603 are to be achieved.

In addition to funding, the BCCJRC has discussed continuing the Commission or a similar entity when the BCCJRC expires on June 30, 2015. Many cities of the size of Albuquerque maintain a Criminal Justice Coordinating Council or similar body composed of members similar to the composition of the BCCJRC. Examples include the Criminal Justice Council of New Orleans and the Criminal Justice Advisory Council of Salt Lake County. Typical of the purpose of such Councils is the following statement of purpose for the Milwaukee Criminal Justice Council:

> The purpose of the CJC is to function as an independent entity governed by key justice system leaders that is empowered to define broad justice system goals, monitor/analyze justice system performance, facilitate collaboration among justice system performance, provide technical assistance and research, and act as a conduit between the justice system and the larger community without impacting in any way the autonomy or decision-making authority of any criminal justice system agency.

Elected by Council members, the Chair of the Milwaukee CJC is the Chief Judge of the district court. Vice Chair is the First Assistant Public Defender. Similarly, the Chair elected by members of the Baltimore City Criminal Justice Coordinating Council is the Chief Judge. The Coordinating Council's purpose is:

> The Criminal Justice Coordinating Council (CJCC) helps to identify, plan and coordinate solutions to issues facing the Baltimore City criminal justice system. In doing so, the Council fosters the participation of all stakeholders of the system while assisting the Judiciary and the member agencies in the planning and delivery of quality services.

The Legislature should extend the BCCJRC or create a similar commission as a permanent entity in Bernalillo County, directed by the members instead of continuing to have the AOC Director serve as Chair after June 30, 2015.

The LFC is asked to vote to endorse legislation to make permanent the "Bernalillo County Justice Council" (BCJC) composed of members of the BCCJRC but with a Chair designated by majority vote of the BCJC, and to provide funding in FY 2016 of $7,110,000, as detailed above.

Bernalillo County Criminal Justice Review Commission

Report to Legislative Finance Committee

Arthur W. Pepin, Chair

September 28, 2015

Table of Contents

Summary

In the 2013 session the Legislature created the Bernalillo County Criminal Justice Review Commission (BCCJRC) in HB 608 to exist July 1, 2013 to June 30, 2015. Composed of stakeholders at all levels of the criminal justice system in Albuquerque, the legislation charged the Commission with "reviewing the criminal justice system in Bernalillo county" to make written recommendations to revise or replace local and state laws and to "improve the delivery of criminal justice in Bernalillo county." The legislation required the Commission to report to the legislative finance committee. LFC received the first BCCJRC report on November 18, 2014. This report is for Commission actions from the time of that report through June 30, 2015.

The population at the Metropolitan Detention Center (MDC) had for many years been well above reasonable expectations and overcrowded. The many unwanted results of overpopulation at MDC included federal litigation pending since 1995, McClendon et al., v. City of Albuquerque, CIV 95-24 JAP/KBM. The federal court ordered that the maximum inmate population at MDC be 1,950. The county budgeted $11.4 million in 2013 for out-of-county transfers expected in FY 2014 because the MDC population regularly exceeded 1,950 by several hundred.

Members of the BCCJRC worked diligently over the two years of the Commission's existence to address the issues outlined in the legislation. The report of November 18, 2014, provided information about Commission activities up to that time. This report discusses Commission actions since late 2014, the outcomes, and how the work will be carried forward now that the statutory life of the Commission has expired as of July 1, 2015.

BCCJRC Activities, Progress, and Planned Reforms

As has been the case since December 2013, the BCCJRC continued to meet monthly through July 2015. Reductions in the MDC population realized through October 2014 continued through July 2015. For example, in October 2013 Bernalillo County sent 707 inmates to facilities out of county because of MDC overcrowding at a cost of more than $1 million that month. Out of county housing ended in December 2014. In a report issued on November 10, 2014, Bernalillo County reported that the implementation of BCCJRC initiatives since March 2014 saved $5 million in out-of-county shipping costs alone.

Bernalillo County issued its End of Fiscal Year 2015 Report to report on MDC issues on August 1, 2015. A copy of that report is attached. It is referred to hereafter as "MDC FY15 Report." Highlights from the MDC FY15 Report include:

- MDC population for June 20, 2015 was 30% lower than for June 20, 2014
- MDC population for June 20, 2015 was 38% lower than for June 20, 2013
- MDC population has been below the maximum 1,950 ordered by federal court for 231 consecutive days as of June 30, 2015
- Bernalillo County stopped housing inmates out of county in December 2014
- Average length of stay for MDC inmates decreased from 39 days in October 2014 to 28 days in June 2015, a decline of -28.2%.

The Bernalillo County MDC monthly Report issued in September 2015 (copy also attached) shows that the average population at MDC is now 1,605. This is more than 17% below the maximum population required by federal court order. The population maximum has not been reached for almost a full year.

The MDC FY15 Report lists 21 significant reforms and initiatives implemented through the work of the BCCJRC. The Case Management Order (CMO) implemented in February 2015 is discussed separately in this report. The CMO has had a dramatic impact on criminal justice cases in Bernalillo County and will continue to affect every criminal case in the future. In addition to the CMO, several initiatives implemented or expanded since the November 2014 report stand out.

> Assistant District Attorney at Misdemeanor First Appearances – The previous practice was for a judge to set release conditions and schedule a defendant's case for future proceedings during the defendant's first appearance at the Bernalillo County Metropolitan Court. No Assistant District Attorney (ADA) appeared. In Bernalillo County, police officers prosecuted cases without an ADA, requiring overtime scheduling for officers in addition to their regular duties. The BCCJRC facilitated an agreement for the City of Albuquerque

and Bernalillo County to fund an ADA hired by the District Attorney to be present at misdemeanor first appearances in Metro Court. From October 14, 2014, through June 30, 2015, the ADA resolved 1,787 cases involving 1,249 defendants. Resolution of these cases at the earliest stage of prosecution saved hundreds of hours of overtime pay for city and county law enforcement officers and kept these defendants from adding to the MDC population while awaiting the posting of a release bond or further developments in their cases.

Preliminary Hearings – The BCCJRC supported an initiative to reduce the number of grand jury settings by encouraging the prosecution's use of charging by accusation followed promptly by a preliminary hearing. Previous practice was to indict by grand jury in almost every case. In contrast to a preliminary hearing, at a grand jury a defendant does not present evidence or cross-examine witnesses. At preliminary hearings held in August 2015, 54% of the cases were resolved, removing them from pending cases that would have added defendants to the MDC population. Between June 23, 2014 and August 31, 2015, 1,015 preliminary hearings were scheduled for 611 cases, removing these cases from grand juries. In addition to the high rate of case resolution at an early stage of a case, expanded use of preliminary hearings resulted in reduction of grand jury settings from seven per week to five. Additional expansion of preliminary hearings is planned.

Expansion of the Early Plea Program – This initiative built on a successful but very limited existing program. Of 272 early plea hearings scheduled in August 2015, parties resolved 74% of the cases and referred an additional 7% to a drug court program. Resolution of cases in the expanded Early Plea Program avoids the cost of detaining many defendants at MDC and also removes these cases from the pending caseload of courts, prosecutors and defense attorneys at an early stage. The Early Plea Program also provides prompt resolution of cases for defendants.

These initiatives and others discussed in the MDC FY15 Report and other reports have contributed to the BCCJRC accomplishing the first goal set forth in the 2013 legislation of reducing the MDC population. The MDC population is at a stable level well below the population limit. The second goal set forth in the 2013 legislation is to improve the delivery of justice in the criminal justice system in

Bernalillo County. While that goal is also served by the other initiatives, no single initiative has an impact on criminal justice greater than the Case Management Order.

Case Management Order

At the time of the November 2014 report to the LFC, it was anticipated that a CMO would be implemented to achieve meaningful time limits on case processing. The New Mexico Supreme Court adopted the CMO by order of November 6, 2014, to be implemented February 2, 2015, at the Second Judicial District Court. The CMO was intended to alter expectations and create processes that would achieve speedy resolution of most criminal matters in Bernalillo County.

Discussion of the CMO by the BCCJRC began in December 2013. Various proposals were the subject of meetings between the New Mexico Supreme Court and members of the BCCJRC on June 19 and July 29, in addition to numerous meetings of the BCCJRC members separately.
The CMO adopted in November 2014 and effective beginning February 2, 2015, divided the pending criminal caseload into two categories. On the "Special Calendar" were cases already pending more than six months. On the "New Calendar" were cases pending less than six months and every new case filed on or after February 2, 2015. The ten judges of the Second Judicial District Court's Criminal Division ("Criminal Division") were assigned into two different groups, with four assigned to the Special Calendar to handle the oldest cases and six to the New Calendar to handle new cases. The Second's Chief Judge also agreed to help the Criminal Division by participating in arraignments and taking overflow criminal trials. In addition to implementing the CMO, the Criminal Division also continued with previous initiatives, including an expanded EPPS program and the use of *pro tempore* judges to help speed up probation violation matters and hold preliminary hearings.

Special Calendar Cases – The number of active special calendar cases totaled more than 3,000 when the CMO went into effect. These cases, many of which had been pending for substantially longer than six months, were assigned to the four Special Calendar judges. These four judges were tasked with reviewing each of more than 3,000 cases and entering a scheduling order to get them resolved. Many of the cases were complex and had legitimate challenges that had contributed to delays. Frequent continuances and the difficulty of scheduling a trial that might last several weeks had further contributed to these cases remaining unresolved for a very long time.

Today more than two thirds of those Special Calendar cases have been resolved. Most of the remainder will be resolved before the end of 2016. The four judges assigned to the Special Calendar will gradually transition to the New Calendar during 2016 and 2017. The resolution of Special Calendar cases is occurring faster than expected due to the dedication of all parties involved and with the help of the New Calendar Judges who have provided overflow coverage for the Special Calendar trials whenever available. This has greatly strained the resources of the court, prosecutors, law enforcement, and defense counsel. The challenges have included technology, space issues, scheduling, and many other matters but the stress has been greatest on the people involved almost constantly in trials. It would be difficult to overstate the extraordinary efforts undertaken by judges, court staff, attorneys, and law enforcement officers to catch up on cases that languished for years.

New Calendar Cases – This calendar is for cases less than six months old and newly filed cases. Six judges issued scheduling orders on all pending cases assigned to the New Calendar in February 2015 and all cases brought to the court thereafter. The six judges were relieved of the 3,000 pending cases that went to the Special Calendar and began with dockets of about 325 active cases with new cases added to their caseload at a rate of between 50 and 100 per week in total among the six judges, or between 10 and 20 new cases added each week to each judge's docket.

The CMO requires that New Calendar cases be scheduled within strict time deadlines for prosecutors and defense attorneys to exchange discovery, identify witnesses, obtain laboratory reports of testing of evidence, and file motions needed to prepare a case for trial or a plea agreement. More than 60% of the cases are assigned for trial within six months of entry of the scheduling order. The remaining cases are assigned for trial within nine months, with a few especially complex cases assigned for trial within one year. The goal was to impose definite timelines in criminal cases to avoid delays and enforce fair processes and speedy trial deadlines required by the New Mexico Constitution.
The CMO requires cases be assigned to one of the three tracks described above, for resolution between 6 months and 1 year, imposes strict discovery and pretrial deadlines, requires plea agreements be reached not less than 10 days before a scheduled trial, and shares responsibility for compliance with time deadlines among all the criminal judges of the court. In a radical shift from prior practice, any case can be assigned to any available judge on a given day if the case is

scheduled for a hearing or trial and the assigned judge is already in trial or otherwise unable to call the case.

The previous practice was to keep cases with the assigned judge at all times. This resulted in frequent continuances and delays when the judge or attorney could not be available on a given day, often because of a trailing docket. Judges have abandoned the old "silo" approach and now routinely hear motions and hold trials in cases assigned to another judge. The CMO requires a high degree of cooperation among the judges and each judge's staff. As intended, the effect has been that hearings and trials occur when scheduled and cases remain on track for resolution in a time consistent with the original scheduling order. The compaction of pending and new cases into the strict deadlines of the CMO has resulted in nearly constant trials throughout the summer months of cases scheduled for trial within six months.

The transition to the New Calendar from prior practice has been very stressful not only for judges and court staff, but for the attorneys and law enforcement officers in these cases. However, those involved in the criminal justice system now expect that events will occur as scheduled, even if the parties must move to a judge on a different floor of the courthouse than the judge originally assigned and even if a the case must go forward with a different attorney than the attorney who was originally assigned the case Adapting their offices to the deadlines in cases, especially for exchange of discovery, has been difficult for law enforcement agencies and prosecutors, resulting in a lower rate of new cases filed and dismissal without prejudice when discovery is not provided as required by the scheduling order.

Challenges remain as the nine-month and one-year cases begin to reach the trial schedule. However, the practices imposed by the CMO are becoming familiar to those involved in the criminal justice system. Judges and the parties know that events will occur as scheduled. Sanctions will be imposed for non-compliance with discovery and other deadlines in the scheduling order. The CMO is becoming the new normal and will become routine. Once the majority of Special Calendar cases have been resolved in 2016, the criminal justice system in Bernalillo County should never again develop a list of thousands of cases that have not been resolved for too many months and years and have little prospect of being resolved soon. Expectations will be that charges are brought when discovery can be provided and most cases will proceed toward resolution within six months and in almost no case beyond one year.

The pace of trials for both Special Calendar and New calendar cases over the past several months cannot be sustained. Transition to the timelines required by the CMO have challenged the court, prosecutors, law enforcement officers, and defense attorneys to change how they manage criminal cases. Incremental but badly needed adjustments to some of the requirements in the CMO are being proposed and will be considered by the New Mexico Supreme Court. If adopted by the Court, a number of these adjustments to the CMO should modify some of the most difficult challenges imposed by the CMO and further improve the efficient processing of criminal cases.

The end result of this difficult transition will benefit those charged with a crime by resolving cases within six months to one year, will benefit prosecutors and defense attorneys through known deadlines and expectations to which the court will adhere, will benefit the courts by helping to keep judges' dockets at manageable levels, and will benefit Bernalillo County through reduced costs for detaining inmates who in the past have waited years in some cases for their charges to be resolved.

The Future of the BCCJRC and Criminal Justice in Bernalillo County

Senator Mimi Stewart introduced SB 317 in the 2015 legislative session to extend the BCCJRC beyond June 30, 2015. The bill died in the House of Representatives late in the session. However, the New Mexico Supreme Court on June 17, 2015, issued Order No. 15-8110 to create the Bernalillo County Criminal Justice Review Committee and named all existing members of the BCCJRC to the new Committee. By this Order the BCCJRC will continue as a Committee of the Supreme Court until at least June 30, 2016. The Committee is required to report to the Court on its activities by December 30, 2015 and again by June 30, 2016. Without interruption the BCCJRC has continued to meet regularly, support ongoing and new initiatives to improve criminal justice in Bernalillo County, and work through the CMO with suggested amendments intended to advance the prompt and just resolution of criminal cases.

The November 2014 report to the LFC detailed resource needs at the district and metropolitan courts, office of the District Attorney, Albuquerque office of the Law Office of the Public Defender, and Bernalillo County. The criminal justice system in Bernalillo County has made significant progress without state funding. Bernalillo County has invested in pretrial services at the district court, mental health alternatives to incarceration, and other programs that demonstrate

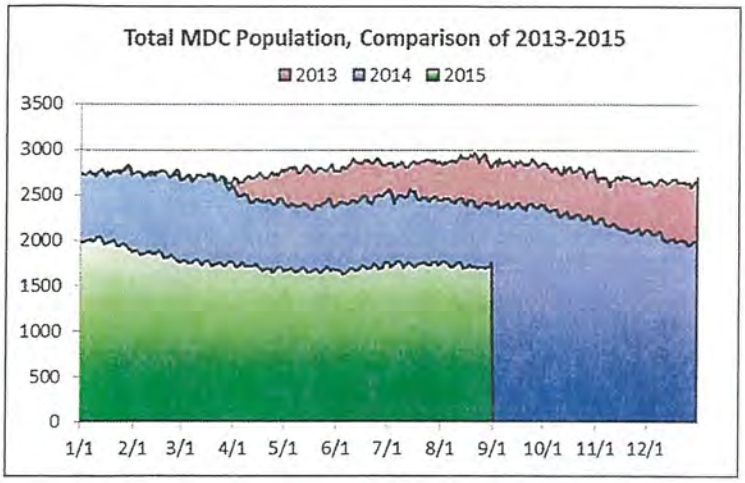
remarkable foresight to fund initiatives that benefit the criminal justice system and ultimately have the effect of reducing the MDC population. The funding needs discussed in the November report remain.

The Legislature's creation of the BCCJRC in 2013 has succeeded beyond expectations. There was little evidence in 2013 that the MDC population could be reduced and greater efficiencies could be accomplished among the very different and disparate members of the BCCJRC. The BCCJRC strongly encourages the LFC to demonstrate support for what has been accomplished by providing funding for requests by the courts and agencies involved in criminal justice in Bernalillo County.

MONTHLY REPORT FOR AUGUST 2015
REPORT DATE: SEPTEMBER 8, 2015

Bernalillo County Metropolitan Detention

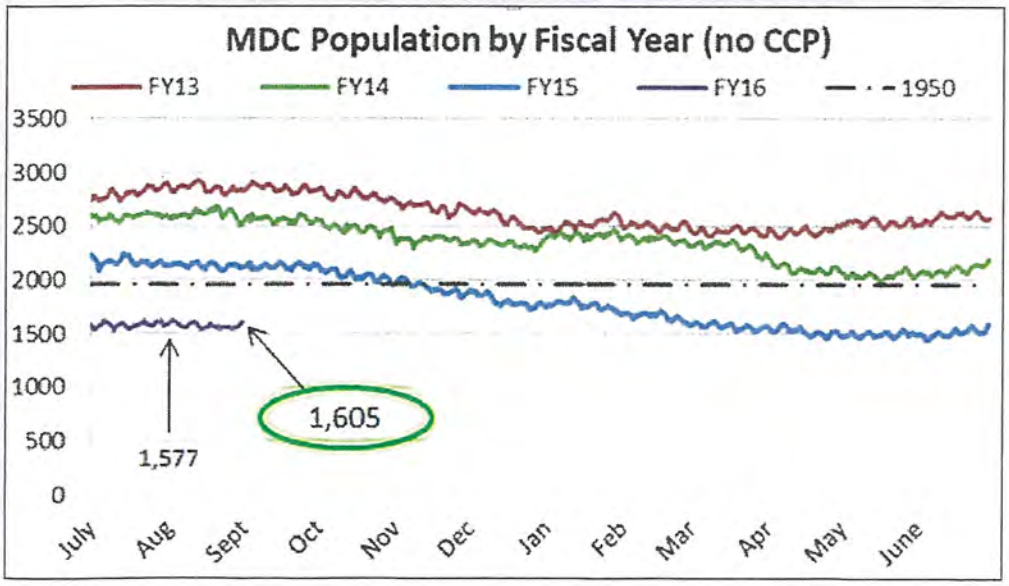
Since late March of 2014, the MDC population has decreased overall. As of August 31, 2015 the population has decreased approximately 38% or 1,075 inmates.



Quick Figures for August

	Average
On-Site Daily Population[1]:	1,572
On-Site Male Population:	1,267
On-Site Female Population:	305
Community Custody Program (CCP)[2]:	153
Total Average Jail Population (including OOC & CCP):	1,724
Total Consecutive Days 1,950 or less:	**293**

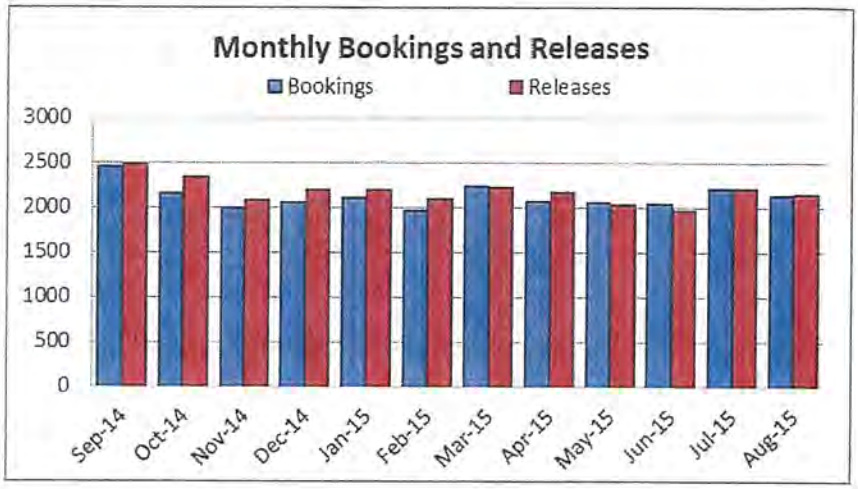
Criminal Justice Reforms Continue to Impact Jail Population



MDC actively collaborates with criminal justice partners to maintain the jail's population below 1,950[4]. Criminal justice reforms continue to impact the jail population. Recent increases are typical based on seasonal trends seen in recent years.

Bookings and Jail Turnover

Annual bookings by fiscal year have declined since FY08. This reduction does not correspond with the overall decreasing population trends in recent months. Overall, monthly bookings have decreased over the last year, although the number of releases tends fluctuate at a similar rate.



The jail population reduction cannot be explained by the decrease in bookings alone. Jail population is driven by both admissions into the jail as well as the average length of stay (ALOS).

Jail turnover—which is calculated based on bookings, releases, and the average daily population—helps to demonstrate how quickly individuals are cycling through the jail. The turnover rate has increased in recent months, reflecting the decreasing size of the jail population and a decreasing length of stay as compared to previous years. The average length of stay (ALOS) for August 2015 was 17.1% lower than for August 2014.

Criminal Justice Reform Initiatives

Since mid-March 2014, the County has partnered with the criminal justice family to design and implement numerous court initiatives aimed at creating efficiencies in the criminal justice system which have contributed to recent population reductions. The Criminal Justice collaborative continues to identify opportunities to realize additional efficiencies some of which will further impact the jail population.

Initiative Updates:

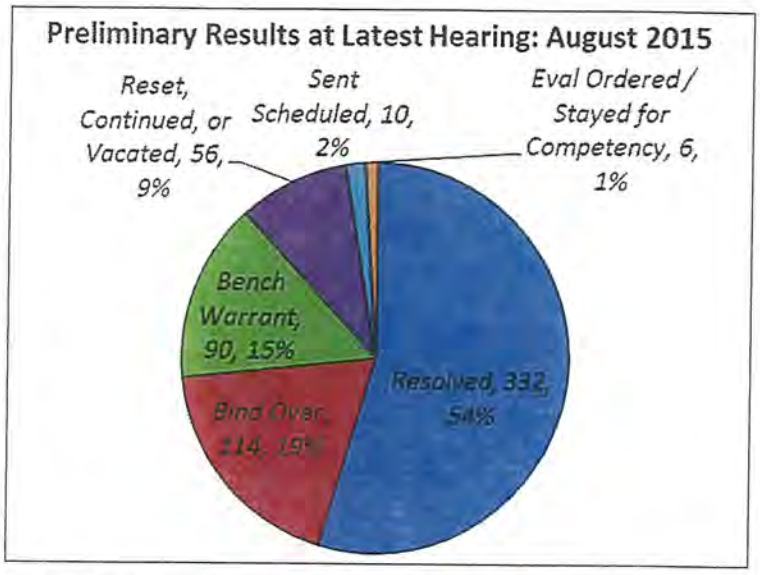
- Implementation in Metro Court and District Court of a pretrial release assessment instrument is set for September 2015.
- Bernalillo Country and City of Albuquerque Supportive Housing Program has received numerous referrals and continues to grow.
- Updated MDC Population study underway.
- District Court piloting felony arraignment court reminder calls.

ADA Case Resolution

- From October 14, 2014 through August 31, 2015, the new ADA has resolved approximately **2,267** cases for **1,546** people.
- 1 in 4 individuals with resolved cases had more than one case and these were often resolved on the same day.
- These resolutions were almost exclusively for criminal and traffic cases.
- A 16 week sample beginning April 2014 (one day per week) was previously collected for custody arraignments. For non-DV and DW cases, the resolution rate was 37.8%.
- Since the new ADA started, for non-DV and DW cases, the resolution rate was 53% AND there were 108 cases resolved not on the docket. **The ADA resolution rate is 15.2% higher than the 2014 sample of similar cases.**

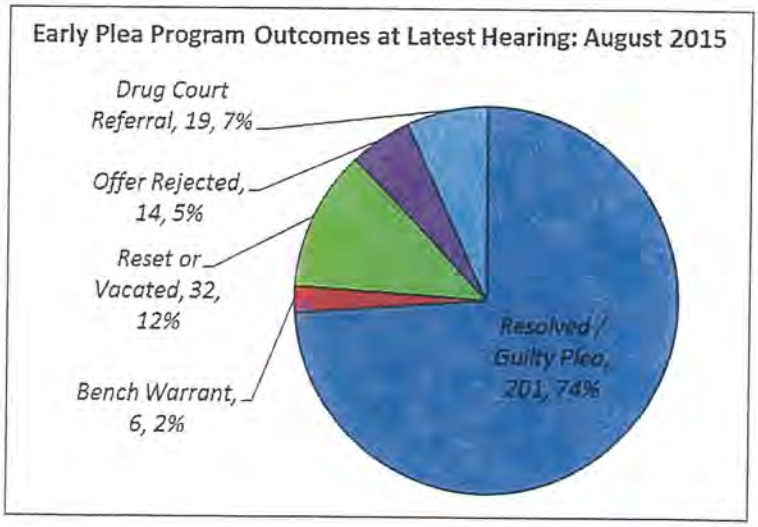
Preliminary Hearings

- Between June 23, 2014 and August 31, 2015, a total of 1,015 hearings were scheduled for 611 cases (cases were at times reset and hearings for the same case for a separate incident were considered unique).
- At the latest hearing for the cases, approximately **54%** were resolved at the preliminary hearing. Outcomes such as the scheduling of a sentencing hearing will likely result in an upcoming resolution.
- Of the **332 cases that have been resolved** to date, 83% were resolved within one or two hearings.
- Due to the successful resolution of cases at the preliminary hearings, beginning in September the number of grand jury panel hearings held was reduced by two per week. Preliminary hearings will soon take place for a full day rather that part of a day and in August, plans are in place to add another day of these hearings.



Early Plea Program

- While the Early Plea Program (EPP) was only recently expanded, early hearing results are promising. From March 23, 2015 and August 25, 2015, 294[5] hearings were scheduled for 272 cases.
- At the latest hearing for the cases, 74% of the cases were resolved (either sentenced or nolle pros) or the defendant had pled guilty.
- Of the 201 cases resolved to date, 95.5% were resolved at the first EPP hearing.



NOTES

1Total male and female added will not always equal the total onsite population. The headcounts include the infirmary, which includes males and females.

2 CCP has continued to decrease in recent months. On March 24, 2014, a new MOU was implemented that prohibits participation on CCP for individuals with certain charges.

3 The figure does include those who are housed Out of County (OOC) as the County's goal is to achieve the 1,950 without housing inmates out of county.

4 Some of the previous outcomes provided were for sentencing hearings for the cases in question. These were removed and are no longer included in the current tallies. In addition, resets after a guilty plea were not included, as a plea was already made but the sentencing was upcoming on the case.

For further information, contact the Bernalillo County Public Safety Division at 505-468-7008.

Metropolitan Detention Center

Report Date: August 1, 2015

Report Highlights:

- As of June 30th 2015, the overall population of MDC was 30% lower than the same day in 2014 and 38% lower than 2013.
- Due to the decreasing population, MDC was able to cease shipping inmates out of County during December 2014.
- The number of bookings, releases and the average length of stay at MDC decreased during FY15.
- In a three month time period, there were 162 hearings resolved as part of the Early Plea Program.
- The resolution rate at Preliminary Hearings was 59%.
- The ADA resolved 55.9% hearings at misdemeanor first appearances as well as 89 cases not on the docket.

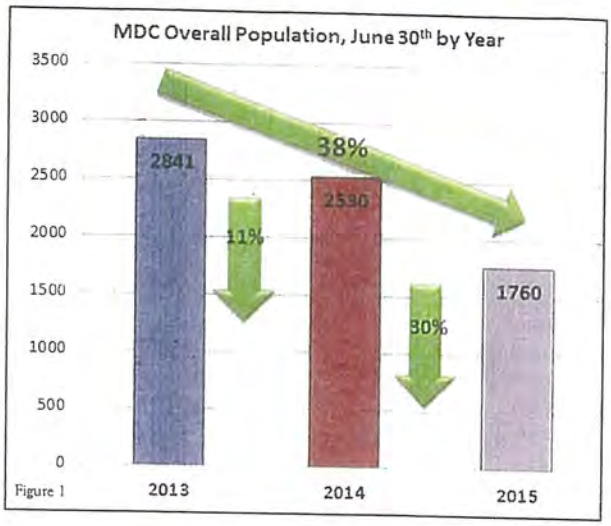


Figure 1

Criminal Justice Reforms Impact Jail Population

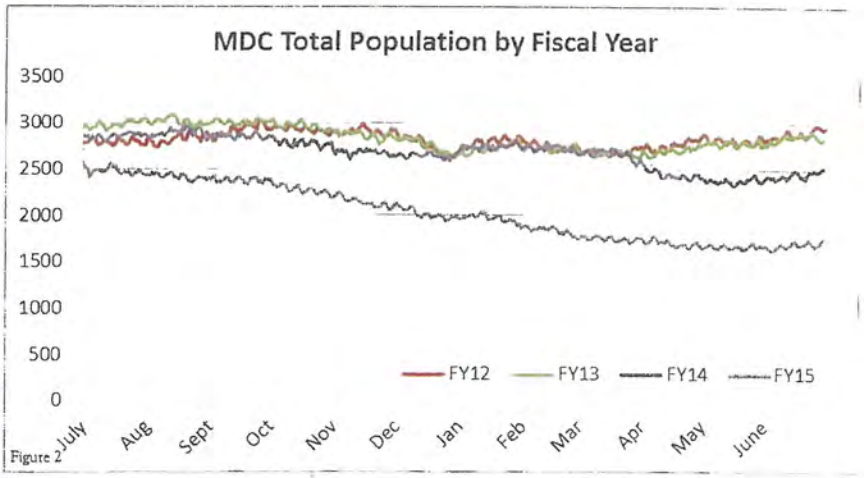


Figure 2

- The total MDC population[1] has decreased overall since the implementation of criminal justice reforms. The total population for June 20, 2015 was 30% lower than the same day in 2014 and 38% lower than 2013. (Figure 2)

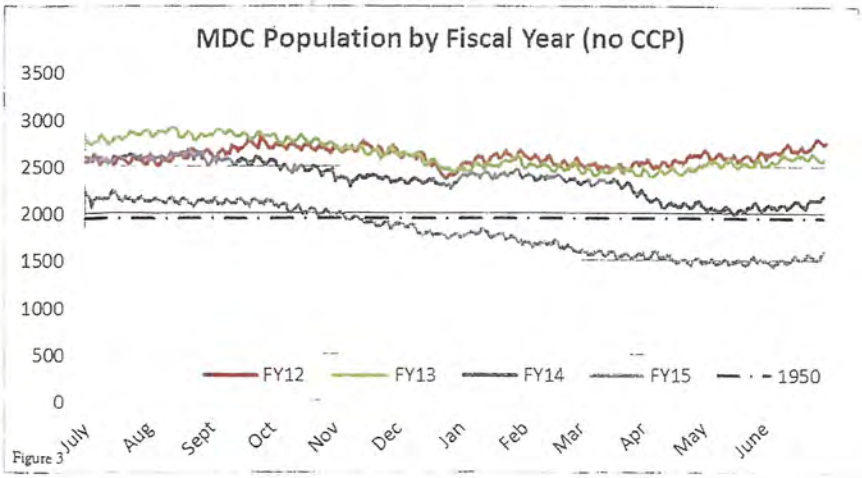


Figure 3

- In 2014 Bernalillo County elected to develop a population plan to keep the number of inmates below 1,950[2] (not including inmates on CCP). (Figure 3)
- MDC actively collaborates with criminal justice partners to maintain the jail's population below 1,950. Criminal justice reforms continue to impact the jail population. Despite the recent seasonal increase, typical of seasonal historic trends, . MDC has remained at or below 1,950 for 231 consecutive days.

Out of County Shipping

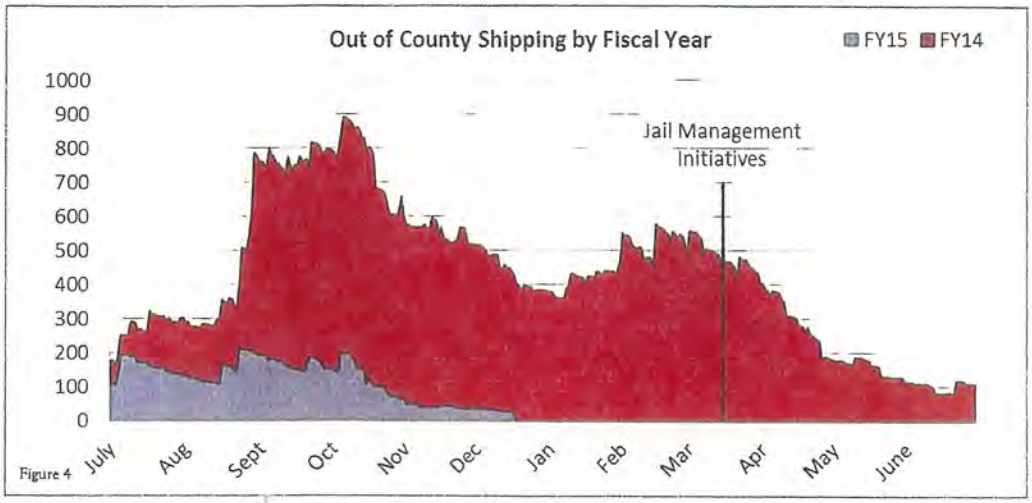


Figure 4

MDC ceased housing inmates out of county in December of 2014.

- Out of county shipping began June of 2013 in an effort to meet the operational capacity of MDC. Out of County shipping increased quickly as contracts for shipping were approved. In October of 2013, there were 707 inmates being shipped out of County.
- Due to the reduced jail population, MDC was able to cease shipping inmates out of county in December 2014.
- With MDC capacity capped at 1950, more shipping would have been necessary to meet the McClendon lawsuit mandates had the population management initiatives not been implemented.

Community Corrections Program

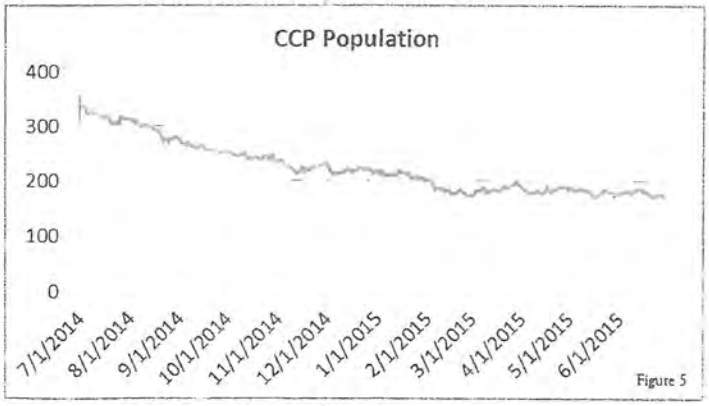


Figure 5

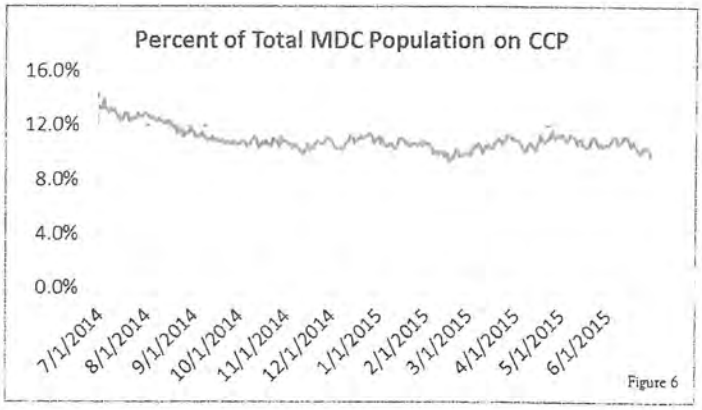


Figure 6

- The use of CCP decreased during FY15. At the beginning of the fiscal year there were 342 people on CCP and at the end of the fiscal year there were half as many people on CCP, a total of 170.
- While it is expected that the number of people on CCP would decrease as the jail population decreased, the percent of the population on CCP has decreased as well, from 13.3% at the beginning of the year to 9.7% at the end of the year.

Bookings, Releases, and Length of Stay

The population of a jail is driven by three factors: the number of individuals booked into the facility, the number of individuals released, and the length of stay in the jail.

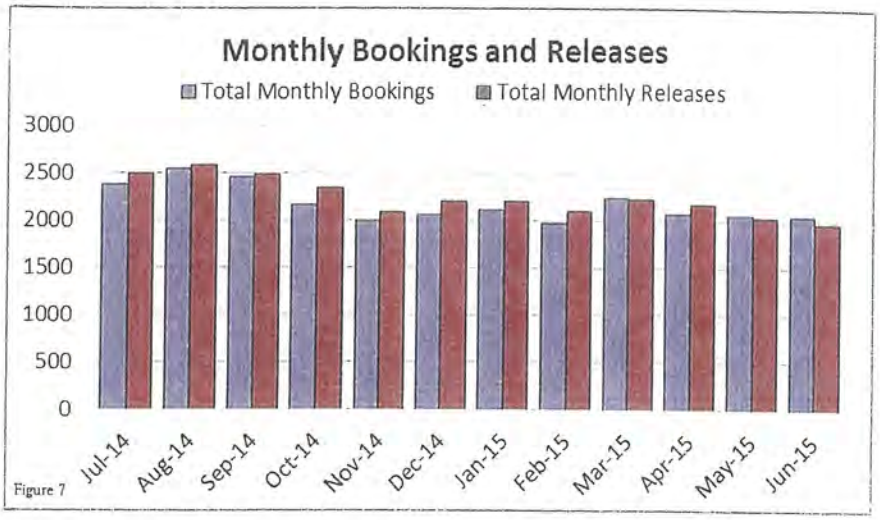


Figure 7

- Bookings and releases both decreased during FY15.
- In July of 2014 there were 2,379 bookings and 2,495 releases.
- In June of 2015 there were 2,047 bookings and 1,966 releases. This is a difference of approximately 14% in bookings and 21% in releases.

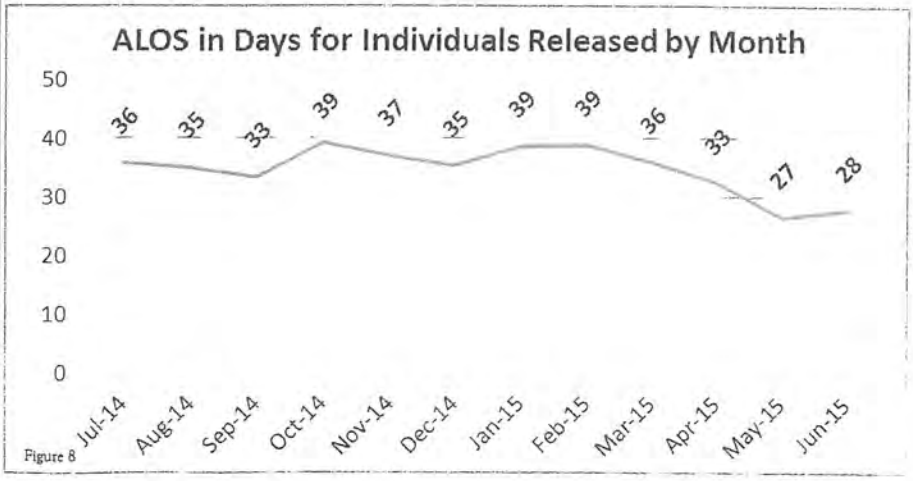


Figure 8

- The average length of stay (ALOS) by month decreased overall during FY15.
- In July of 2014 the ALOS was 36 days and in June of 2015 the ALOS was 28 days, a difference of approximately 22%.
- The ALOS is easily skewed by an increase in release of individuals with longer stays at MDC.

The decrease in bookings does not account for the entire decrease in the MDC population, particularly in conjunction with a similar decrease in releases. The average length of stay (ALOS), which has decreased, can fluctuate a great deal based on individuals who have been in MDC for extended periods of time. The changes in the population correspond with the implementation of criminal justice reform initiatives.

Highlights of Criminal Justice Reforms and Initiatives Implemented in FY2015

Since mid March 2014, the County has partnered with the criminal justice family to design and implement several court initiatives aimed at creating efficiencies in the criminal justice system which have contributed to recent population reductions. The Criminal Justice collaborative continues to identify opportunities to realize additional efficiencies some of which will further impact the jail pop-

- New Case Management Order (CMO) in District Court. CMO established deadlines and timelines for case adjudication moving cases more expeditiously.
- District Court assigned 3 judges to target pre-CMO cases to address the backlog of cases.
- National Institute of Corrections (NIC) Criminal Justice Pretrial Justice Summit occurred.
- State v. Brown-New Mexico Supreme Court reiterates law that pretrial defendants are entitled to release on own recognizance unless other release conditions are required to address identifiable risk.
- Pretrial Release Risk Assessment Instrument adopted (pending decision on Arnold Risk Assessment Instrument) to more accurately assess risk of pretrial defendants to assist judge in determining appropriate release conditions.
- MDC eliminated ICE holds.
- ADA in Metro Court– Metro Court ADA is able to resolve non-record misdemeanor cases quickly reducing the jail length of stay for this population
- Expanded Preliminary Hearings.
- Expanded Early Plea Program
- Increased Settlement Conferences
- Metro Court started processing all non-record cases more quickly
- Metro Court started new Homeless Court program.
- Supportive Housing Program began taking first clients.
- District Court Pretrial Services began telephone reminder calls for Felony Arraignment Hearings to reduce risk of failure to appear.
- Medicaid enrollment for Community Custody Program (CCP) and Pretrial Services (PTS) clients.
- Revision of the District Court Order setting conditions of release unlinking specific conditions and follow the orders of release considerations outlined in State v. Brown.
- District Court Probation Violation program began setting cases for the initial hearing 20 days earlier.
- District Attorney's Office began using nolles (type of dismissal) on some categories of 10 day indictment cases rather than ROR which continued conditions of release on individuals who were not indicted.
- Metro Court and District Court utilized Odyssey case management system to transfer bonds from one court to other increasing individuals ability to post bond.
- MDC instituted a process for individuals requiring medical exams before being released to community programs.
- District Court implemented process for setting FTA warrants for automatic hearings and to ensure notice of arrest to the Public Defender's Office.

Preliminary Hearings

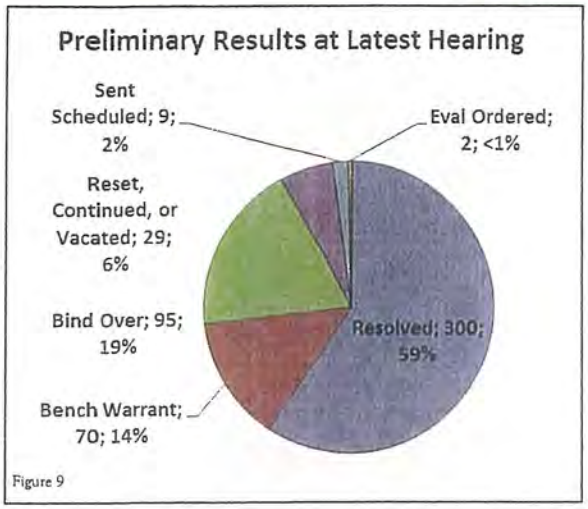


Figure 9

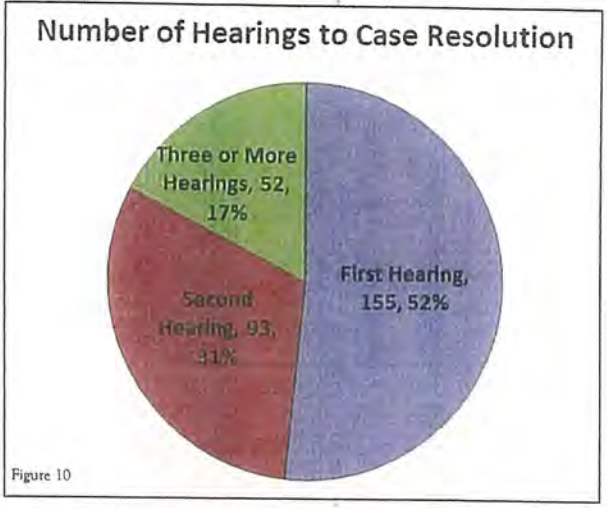


Figure 10

- Between June 23, 2015 and June 29, 2015, a total of 864 hearings were scheduled for 509 cases (cases were at times reset and hearings for the same case for a separate incident were considered unique).
- At the latest hearing for the cases, approximately 59% were resolved at the preliminary hearing. Outcomes such as the scheduling of a sentencing hearing will likely result in an upcoming resolution.
- Of the 300 cases that have been resolved to date, 83% were resolved within one or two hearings.
- Due to the success of the preliminary hearings at resolving cases, beginning in September the number of grand jury panel hearings held was reduced by two per week. Preliminary hearings will soon take place for a full day rather that part of a day and in August, plans are in place to add another day of these hearings.

ADA Case Resolution

- From October 14, 2014 to June 30, 2015, the new ADA has resolved approximately 1,787 cases for 1,249 people. In addition, offers were made but subsequently rejected in approximately 259 cases in addition to the 1,787.
- More than 1 in 3 individuals with resolved cases had more than one case. These were often resolved on the same day.
- These resolutions were almost exclusively for criminal and traffic cases.
- A 16 week sample beginning April 2014 (one day per week) was previously collected for custody arraignments. For non-DV and DW cases, the resolution rate was 37.8%.
- Since the new ADA started, for non-DV and DW cases, the resolution rate was 53.2% AND there were 96 cases resolved not on the docket. <u>The ADA resolution rate is 15.4% higher than the 2014 sample of similar cases.</u>

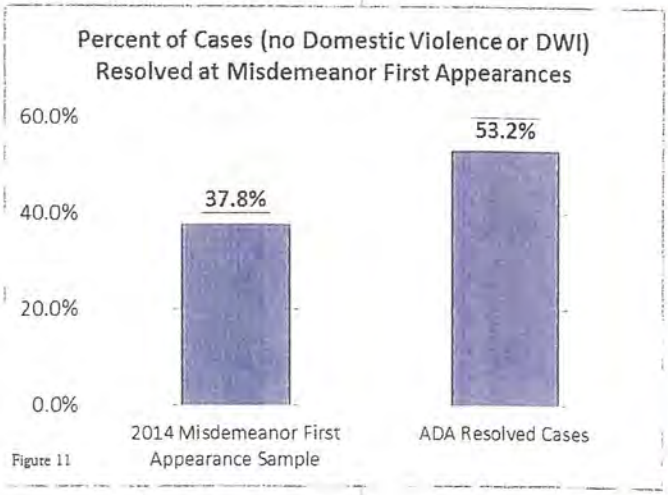


Figure 11

Early Plea Program

- While the Early Plea Program was only recently expanded, early hearing results are promising. From March 23, 2015 and June 30, 2015, 162 hearings were scheduled.
- At the latest hearing for the cases, 74% of the cases were resolved. (either the defendant had pled or nolle pros- type of dismissal)

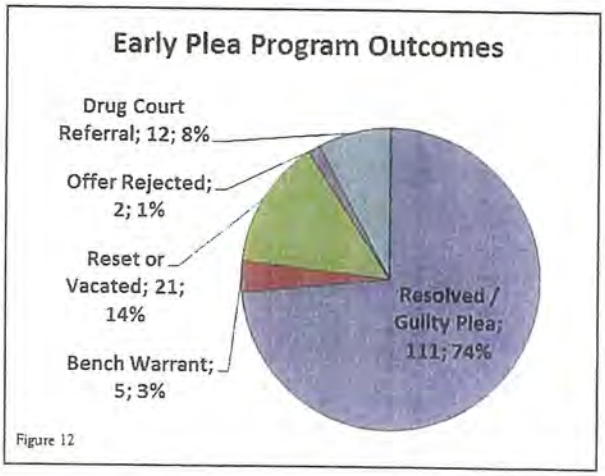


Figure 12

Probation Violations

Several initiatives have been implemented that impact the Length of Stay (LOS) for probation violators. Starting March 24, 2014 the scheduling of PV hearings was changed from 30 days from the filing of the motion to revoke probation to 20 days from arrest.

- In early samples of PV hearings, the time from arrest to disposition was typically around 30 days.
- In both the April 2014 sample and the June 2014 through June 2015 sample the median time from arrest to disposition was significantly faster at 21 and 24 days.
- Over the last several months the number of hearings reset or vacated has increased—51% of hearings in April, 46% in May, and 51% in June. This has resulted in longer case processing times and is steadily increasing the median time from arrest to disposition, resulting in longer stays at MDC. Criminal Justice partners are working to understand why this is occurring and implement solutions.

Study	Study Dates	Primary Source Data	Valid Cases	Days Arrest to Disposition - Median
Pro-Tem Sample 1	1/2013-2/2013	PPD Arrest Orders	155	32
Pro-Tem Sample 2	07/2013	PPD Arrest Orders	59	33
PV Comparison Group Sample	9/2009-12-2009	DA PV Reopen Files	178	30
Pro-Tem April Hearings Sample	4/7/14–4/24/2014	Docket Sample	127	21
2014 to 2015 PV Hearings	06/2014-06/2015	PV Dockets	5,185	24

Table 1

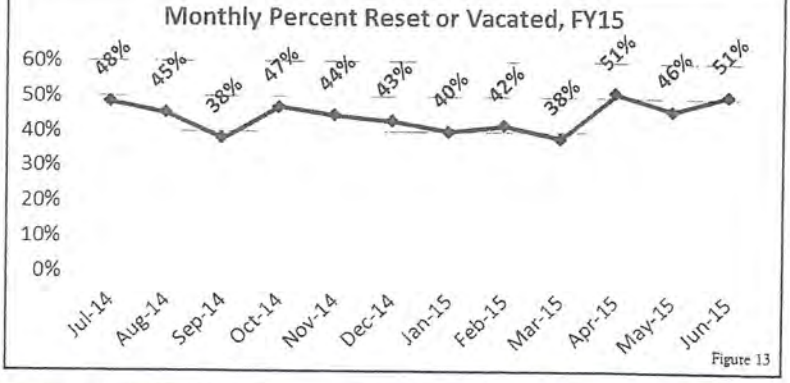


Figure 13

NOTES

1. The overall population of MDC includes all individuals in custody at the facility with the exception of individuals in RDT, out of the facility at the hospital, or on furlough. Inmates in CCP and those housed OOC are included in the overall population.
2. The figure does include those who are housed Out of County (OOC) as the County's goal is to achieve the 1,950 without housing inmates out of county.

For further information, contact the Bernalillo County Public Safety Division at 505-468-7008.

Felony Caseflow Management in Bernalillo County, New Mexico

November 2009

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Felony Caseflow Management in Bernalillo County, New Mexico

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PREFACE

This report was prepared under a February 2009 agreement between the National Center for State Courts (NCSC) and the Bernalillo County for a study of felony case processing in the Second Judicial District Court of New Mexico. The findings are based on interviews, observations, published reports, and felony case processing data provided by the District Court and the Bernalillo County District Attorney's Office. Limitations of time and budget prevented NCSC from inspecting individual case files on which such data were based. Moreover, the case processing data reflect a "snapshot in time" of criminal justice practices, which can and should change in response to economic and social factors, changes in statutes and court rules, and adoption of best practices as recommended here.

The members of the NCSC project team wish to express their gratitude and appreciation for all of the assistance and gracious hospitality we received from everyone that they worked with in Bernalillo County. In particular, we want to express thanks for the advice and guidance given us by Second Judicial District Court Chief Judges William Lang and Ted Baca, Criminal Division Presiding Judge Albert "Pat" Murdoch, Bernalillo County Manager Thaddeus Lucero, and other members of the executive leadership team for this project; and Juanita Duran and Mark Pickle of the Second District Court and Destry Hunt of Bernalillo County Government for assistance with the myriad details of completing the project.

HIGHLIGHTS OF FINDINGS AND RECOMMENDATIONS

Chapter I. What the Numbers Show about Felony Case Processing Times

Highlights of Findings:

- District Court's pending inventory was about 20% higher on 2/28/09 than on 6/30/04.
- For felony cases with indictments, elapsed time from arrest to indictment averages about 4 months.*
- Since fiscal year 2004-05, the District Court has disposed of more than half its criminal cases in less time than the statewide average.
- District Court elapsed time from filing to nontrial disposition averages almost 6 months.*
- District Court elapsed time from filing to jury trial disposition averages almost 20 months.*
- About 60-70% of cases have failures to appear and bench warrants.

Highlights of Recommendations:

- District Court monitoring of felony case processing times should begin at arrest and should include the date of initial appearance and determination of probable cause. Scheduled court events and continuances should routinely be made available from judges' chambers to the District Court's central case information system. The Court should continue monitoring felony clearance rates and should routinely monitor how many cases were older than applicable time standards at disposition; how many active pending cases are currently approaching or older than applicable time standards; and how frequently does the trial in a case actually commence on the first-scheduled trial date.

Chapter II. Understanding the Numbers

Highlights of Findings:

- Average length of stay in pretrial detention for serious felons is about 8-9 months.
- Even with electronic records, exchange of information between Metro Center, District Court and other criminal justice partners is largely by paper.
- Initial arrest reports from APD routinely take 30-90 days to be transmitted, and there is a dramatic difference of perspective between APD and other criminal justice partners.
- APD has increased its sworn officers, but it has a shortage of non-sworn staff.
- Sixty-four percent of those booked at MDC are released from jail shortly after initial appearance in Metro Court. Most are charged with minor violations.
- Virtually all felony cases in Bernalillo County are prosecuted by indictment.
- Cases are assigned to individual judges at or soon after arraignment. The exercise of peremptory removal supports at least an appearance of "judge shopping," and some judges may have significantly fewer active assigned cases, with their approach to dealing with cases being seen as a burden on their colleagues.
- Rule 5-501 provides that unless the Court orders a shorter time, the DA must disclose discoverable evidence to the defendant within 10 days after arraignment or waiver of arraignment. The DA's Office understands this to mean that there is no entitlement to discovery before indictment.
- Continuing problems in the transmission of police reports and other discoverable information from the APD to the DA's Office are seen as a source of discovery delay.
- Rule 5-604 provides that a trial must typically commence within six months after arraignment, providing that a case can be dismissed with prejudice if trial is not started within time limits. It appears that this sanction is seldom applied, however. Since almost two-thirds of all cases had at least one bench warrant, it is likely that time extensions are often granted because a defendant had failed to appear.

* Limitations of time and budget prevented NCSC from inspecting individual case files on which the data from the Bernalillo County District Attorney's Office and Second Judicial District Court were based to determine the reasons for elapsed times in specific cases.

Chapter II. Understanding the Numbers (continued)

Highlights of Recommendations:

- There should be a coordinated, sustained effort toward integrating and sharing electronic data among the various digitized case management systems in the county.
- The District Court should explore the possibility of assuming responsibility for felony inmate jail monitoring from the County.
- The APD Records Department should be reorganized and staffed more appropriately. Electronic field automation incident reporting should be integrated with Records Department business practices and paper records from other sources.
- Compatibility between BCSO and APD electronic computer report writing systems should be sought. The DA's Office and the Public Defender's Office should adjust business processes and introduce software as necessary to promote efficient electronic receipt of law enforcement reports and discoverable information.
- Serious consideration should be given to ways that more cases can be resolved before indictment.
- A probation violation calendar should be established by the District Court and overseen by a specially-assigned PV judge, who need not be the sentencing judge.
- The DA's Office should consider having many more felonies prosecuted by information rather than by indictment. An ad hoc committee led by the Chief Judge and composed of knowledgeable and high-level prosecutors and defense lawyers should be created to explore earlier discovery exchange geared toward prosecutions by information and early pleas at or before District Court arraignment.
- Consistent with its authority under Rule 5-501 to order earlier discovery, the District Court should encourage the DA's Office to disclose discoverable information before indictment to allow an experienced attorney from the Public Defender's Office to review a case before indictment and engage in discussions with a prosecutor about a possible plea or the most suitable way to proceed on felony charges.
- After communication with the District Attorney's Office and the Public Defender's Office, the District Court should consider the introduction of a plea cutoff policy to promote earlier pleas and greater certainty of trial dates. (See Appendix E for more details.)
- The Criminal Division should adopt a policy limiting unnecessary continuances, reflecting best practices for the management of criminal cases and the need to provide credible trial dates. (See Appendix D for a model continuance policy.) This policy should be applied with reasonable consistency by all the judges of the Criminal Division.

Chapter III. Comprehensive Caseflow Management Improvement Program

Based on their assessment of felony case-processing situation in Bernalillo County, the NCSC project team members offer an overall program for felony caseflow management improvement with the following features:

- There should be consensus and commitment to caseflow management among Criminal Division judges.
- The DA's Office should work with law enforcement on early provision of reports and early discovery exchange.
- Defense counsel must have early contact with clients and be conversant with cases at the first pretrial conference.
- There should be established criteria for success in timely case processing.
- Information technology improvements are needed to provide efficient information exchange and effective case status monitoring.
- The District Court and each of its criminal justice partners should take steps to exercise active caseflow management.
- There should be consensus about priorities and implementation steps.

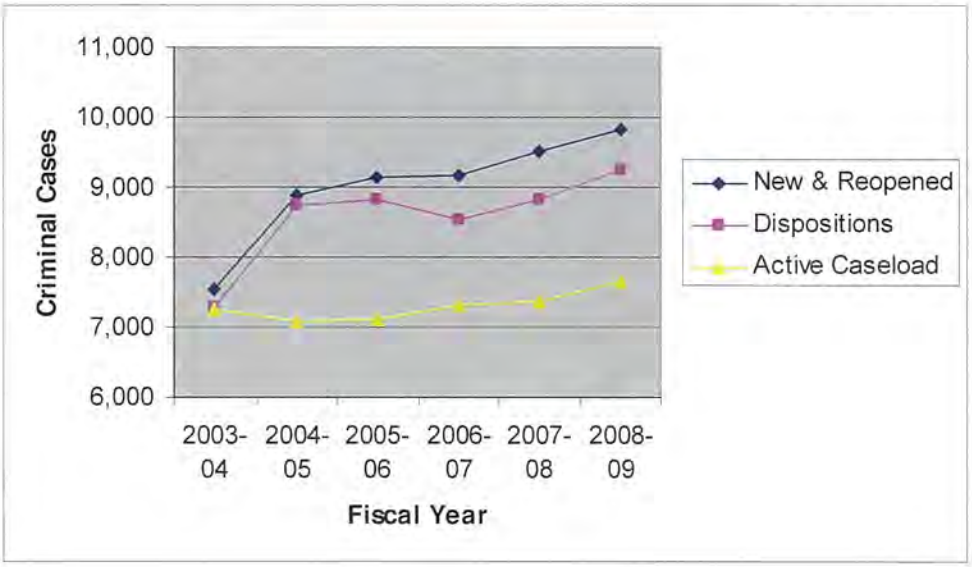
Chapter I.
What the Numbers Show about Felony Case Processing Times in Bernalillo County

A. Introduction

Primary responsibility for felony case processing in Albuquerque and Bernalillo County is in the Criminal Division of the Second Judicial District Court. The Criminal Division has ten judges, including the Presiding Judge. The criminal caseload of the Court far exceeds that of the other 12 judicial districts in New Mexico, amounting to more than one-third of the statewide total.

1. Filings and Dispositions. From fiscal year 2003-04 to fiscal year 2004-05, the number of new criminal cases filed or reopened increased by almost 18%. Yet the Court was able to increase its dispositions by 20%, so that the active pending caseload at the end of June 2005 was actually lower than it had been a year before. For fiscal years 2005-06 and 2006-07, the growth in new or reopened cases was slower, as Figure 1 illustrates, and the Court was able to prevent any substantial growth in its active pending caseload.

Figure 1. Second District Court Trends in Criminal Cases Filed or Reopened versus Cases Disposed, FY 2003-04 through FY 2008-09



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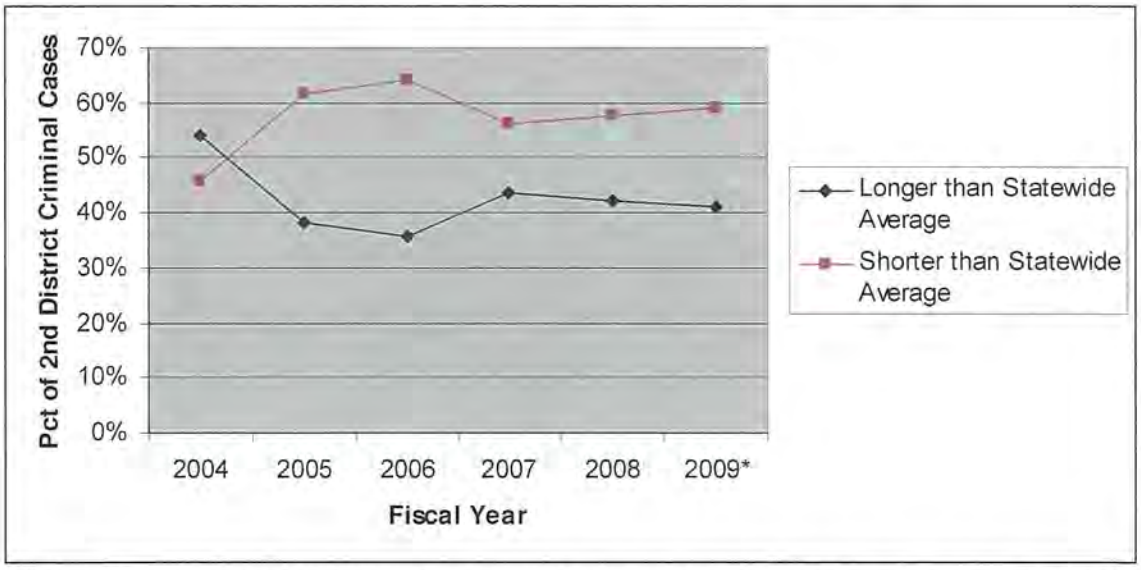
In fiscal years 2007-08 and 2008-09, however, increases in the number of new filings and reopened cases were more substantial, by 22% over fiscal year 2007-08. The criminal division judges were again able to increase the number of cases that they disposed. As a result, despite the greater effort by the Court, the active pending caseload was larger at the end of June 2009 than it had been just a year or two earlier.

2. Comparison with Statewide Averages. It is informative to compare criminal case data for Bernalillo County with statewide data for all district courts in New Mexico. The court administrator in the Second Judicial District maintains such a comparison for times from the filing of new cases in District Court to disposition, that time for reopened cases, and for the age of pending criminal cases.

a. Disposition Time for New Cases. In fiscal year 2003-04, the average time from District Court filing to disposition for new cases in Bernalillo County was nine months (271 days), compared to a statewide average of about seven months (207 days). As Figure 2 shows, more than half (54%) of all Bernalillo County cases disposed that year took longer than the statewide average.

Figure 2. Time from District Court Filing to Disposition (in Days) for New Criminal Cases with One Judge: Percent of Second Judicial District Cases Longer and Shorter than Statewide Average[1]



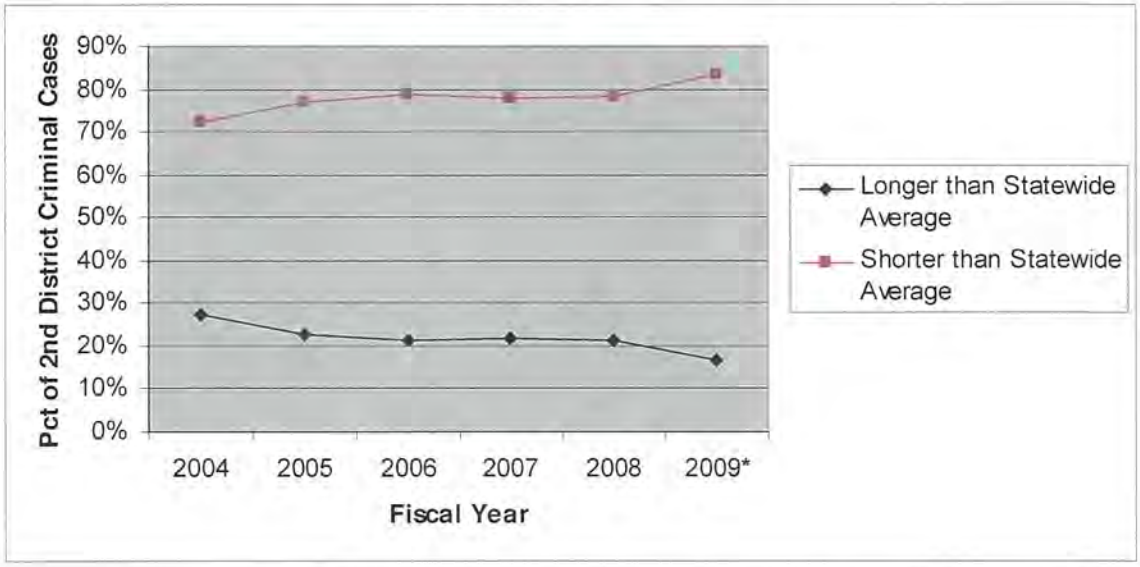
* Note: Percentages for FY 2009 are for the period only from July 1, 2008, through February 28, 2009.

[1] Source: Court Administrator, Second Judicial District.

In fiscal years 2004-05 and 2005-06, the Court's timeliness for criminal cases improved, so that over 60% of disposed cases each year took less than the statewide average. In subsequent fiscal years, the Court has continued to dispose of more than half its criminal cases in less time than the statewide average, although it has not been able to sustain the results it achieved in fiscal years 2004-05 and 2005-06. See Table A-1 in Appendix A for more details.

b. Disposition Time for Reopened Cases. If cases have been inactive and are reopened, their overall time to disposition is not as long as it is for newly-filed cases. From fiscal year 2003-04 to fiscal year 2008-09, the Court's average time to disposition for such cases has been shorted from over four months (127 days) to less than two-and-one-half months (71 days). As Figure 3 illustrates, the percentage of cases disposed in a shorter time than the statewide average (99 days) has grown from about 73% to just over 83%. See Table A-2 in Appendix A for more details.

Figure 3. Time from District Court Filing to Disposition (in Days) for Reopened Criminal Cases with One Judge: Percent of Second Judicial District Cases Longer and Shorter than Statewide Average[2]



* Note: Percentages for FY 2009 are for the period only from July 1, 2008, through February 28, 2009.

[2] Source: Court Administrator, Second Judicial District.

c. Age of Active Pending Cases. As Figure 1 above indicates, the Court's criminal case dispositions since fiscal year 2004-05 have lagged behind new filings and reopened cases. Table 1 shows the predictable results: even though the total number of pending cases dropped in fiscal year 2007-08 to a level lower than fiscal year 2003-04, the total at the end of February 2009 was 19.7% higher than it was at the end of fiscal year 2003-04.

Table 1. Trends in Total Pending Criminal Cases with One Judge, Second Judicial District and Statewide[3]

Fiscal Year	Total Pending Cases
2004	5,581
2005	6,296
2006	5,898
2007	6,035
2008	5,462
2009*	6,683

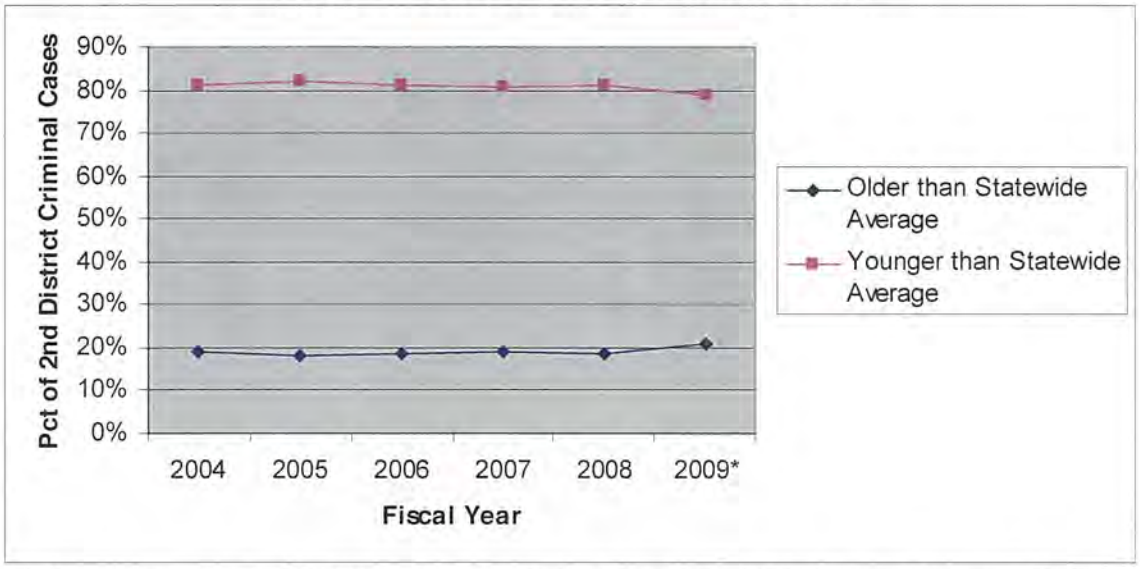
* Note: The total for FY 2009 is as of February 28, 2009.

The average age of criminal cases pending in Bernalillo has remained stable. For fiscal year 2003-2004, it was about eight months (243 days), compared to a statewide average of ten months (305 days). In subsequent years the average age has gone as high as 248 days (FY 2005-06) and as low as 225 days (FY 2006-07); and as of the end of February 2009 it was 242 days. See Table A-3 in Appendix A.

Figure 4 shows the percent of Bernalillo County pending criminal cases older than the statewide average and younger than the statewide average. Throughout the period from fiscal year 2003-04 through February 2009 in fiscal year 2008-09, about 80% of the active criminal cases in Bernalillo County have been pending for a period of time shorter than the statewide average. Although the percent older than the statewide average hovered between 18% and 19% through the end of fiscal year 2007-08, it was up to 21% as of the end of February 2009. See Table A-3. It is too soon to determine if this is part of any trend toward having a larger and older pool of active pending cases.

[3] Source: Court Administrator, Second Judicial District.

Figure 4. Average Age from District Court Filing to Disposition (in Days) for Active Pending Criminal Cases with One Judge: Percent of Second Judicial District Cases Longer and Shorter than Statewide Average[4]



* Note: Percentages for FY 2009 are for the period only from July 1, 2008, through February 28, 2009.

Faced with demand far exceeding current capacity, the Court is concerned that steps must be taken to streamline criminal case processing. Working with the District Attorney's Office, the Public Defender's Office, law enforcement, and its other criminal justice partners, the Court must explore the extent to which improvements in criminal caseflow management can help to control the size and age of active cases pending adjudication.

As part of the effort to determine what steps are desirable to improve criminal caseflow management, it is important to learn more about the current movement of criminal cases, and how that compares to the New Mexico time expectations for felony cases presented in section B. In the sections after that, data are shown for

- Booking trends in the Metro Detention Center (section C);
- Time from initial appearance in Metro Court to District Court filing (section D);
- Time from District Court filing to disposition for a sample of criminal cases disposed (a) by plea or other nontrial means, and (b) by jury trial, in the time period from July1, 2008, through June 30, 2009 (section E).

[4] Source: Ibid.

B. New Mexico Case Processing Time Expectations

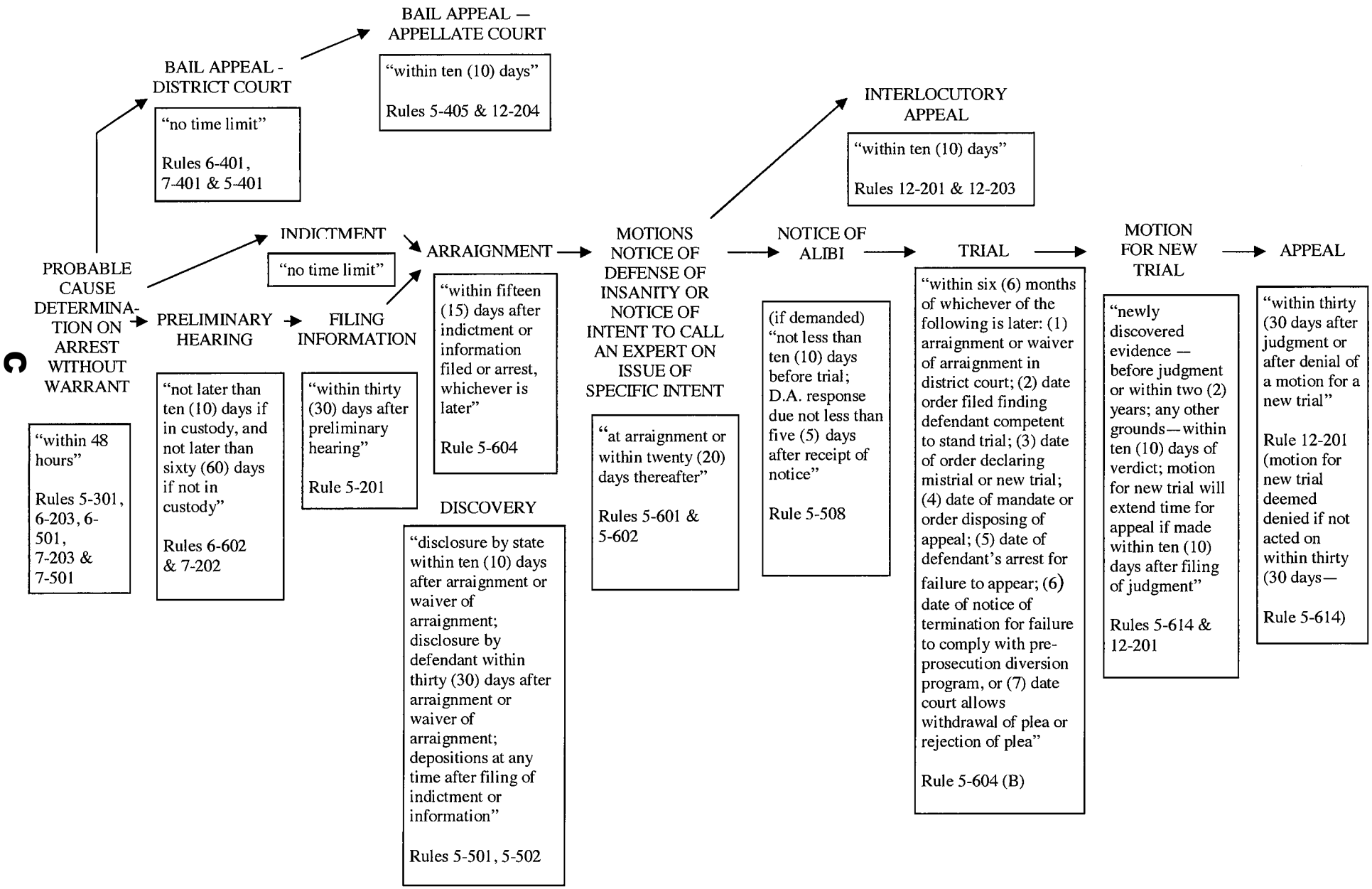
New Mexico Rules of Criminal Procedure provide incrementally for the length of time that a felony criminal case should typically take from arrest and initial appearance in a limited-jurisdiction court (the Metropolitan Court in Bernalillo County) through filing and disposition in district court (in Bernalillo County, the Second Judicial District Court). Based on Criminal Rule 5-901, Figure 5 shows the general time sequence for a typical felony case in New Mexico, showing a total expected elapsed time of seven to nine months. This is not inconsistent with the New Mexico statewide average elapsed time (207 days) from district-court filing to disposition. See Table A-1 in Appendix A.

If a defendant is not in custody following initial appearance, a preliminary hearing must be held within 60 days if not waived, and a district attorney prosecuting by information must then file it within 30 days after a finding of probable cause. As Figure 5 indicates, however, the rules provide no time limit on the filing of an indictment if a district attorney's office chooses to use such a charging document for a defendant who is not in custody. This allows for a great deal of potential elasticity in the total amount of time from arrest and initial appearance to the return of an indictment by a grand jury, and then to the filing of that indictment by a district attorney's office. Upon the filing of an indictment, a district court then has fifteen days within which to arraign the defendant.

What Figure 5 does not show is the potential impact of extensions of time that are allowed under the rules. Rule 5-604 (B) provides, with specific exceptions, that trial is to commence within six months after district court arraignment is held or waived. Subsequent sections of Rule 5-604 provide as follows for extension of time to trial:

> **C. Extensions of time in district court.** For good cause shown, the time for commencement of trial may be extended by the district court provided that the aggregate of all extensions granted by the district court may not exceed six (6) months.
>
> **D. Extension of time by Supreme Court.** For good cause shown, the time for commencement of trial may be extended by the Supreme Court or a justice thereof.

Figure 5. Time Sequence for Typical Felony Case in New Mexico (N.M. Criminal Procedure Rule 5-901)



For all practical purposes, the effect of these criminal rule provisions relating to extensions of time is to provide an 18-month time standard, commencing at district court filing, for felony cases in New Mexico.[5]

C. Time from Initial Appearance to District Court Filing

The Second Judicial District Court's case information system does not collect information on elapsed times from arrest and first appearance to felony filing in the District Court. In April 2009, the NCSC project team consequently asked the Bernalillo County District Attorney's Office for data on times from arrest to indictment for the first 500 cases opened in fiscal year 2008-09. For more detailed attention to aspects of felony case processing before filing in the District Court, see Chapter II.

1. Types of Cases in Sample. The District Attorney's Office provided data for 512 cases that it opened from July 1, 2008, through July 21, 2008.[6] Table 2 shows the kinds of cases that were opened. About 4% were very serious cases – those involving charges of capital murder, other criminal homicide, or rape and other violent sex offenses. Two-thirds were other violent felonies, felony property offenses, and felony drug offenses.

Table 2. Charge Types in Felony Case Sample from DA's Office (N = 512)

Number of Cases and Frequency by Charge Type								
Capital Offense	Criminal Homicide	Rape/ Sexual Offense	Other Violent Felony	Felony Property Offense	Felony Drug Offense	Other Miscellaneous Felony	Felony DWI	Total
4	1	16	118	107	117	133	16	512
1%	0%	3%	23%	21%	23%	26%	3%	100%

2. Days between Law Enforcement Arrest and Opening of Case by District Attorney's Office. A typical criminal case is initiated by law enforcement officers who may bring an arrested defendant to the Bernalillo County Metropolitan Detention Center

[5] See the outline of New Mexico case processing time standards in National Center for State Courts, Knowledge and Information Services, "Case Processing Time Standards in State Courts, 2007" (February 2009), Appendix B (available online at http://www.ncsc.org), which reports that a mandatory New Mexico time standard under a Supreme Court rule with a 1990 effective date calls for 100% of all cases to be tried within 18 months.

[6] Limitations of time and budget prevented NCSC from inspecting individual case files on which the data from the DA's Office were based to determine the reasons for elapsed times in specific cases.

before filing a complaint and associated documents with the Office of the District Attorney (DA). When the DA's Office receives the complaint, it opens a file and creates a "case" for criminal prosecution.

Table 3 indicates that the average (mean) elapsed time from arrest to the opening of a sample case was three days, and that at least half of the cases were opened in two days or fewer. Only 14 cases in the sample (3.7%) took longer than five days, and the longest elapsed time was 50 days.

Table 3. Days from Arrest to Opening of Case by DA's Office, for Sample Cases Opened after Arrest (N = 372)

Mean	Median	Longest
3	2	50

In a handful of sample cases, a defendant was not arrest until *after* a case had been opened by the DA's office. As Table 4 shows, as much as four months might elapse before an arrest was made.

Table 4. Days from Arrest to Opening of Case by DA's Office, for Sample Cases Opened before Arrest (N = 5)

Mean	Median	Longest
73	82	120

3. Elapsed Times after Cases were opened by the DA's Office. Of the 512 sample cases opened by the DA's Office in early July 2008, there were 112 for which an indictment had been returned by April 2009, and for which records showed an indictment date. As Table 5 shows, the average (mean) time from case opening to indictment was about four months (121 days), and one case took almost nine months for the filing of an indictment.

Table 5. Days from Date Opened to Indictment Date, for Cases with Indictments and a Reported Indictment Date (N = 112)

Mean	Median	Longest
121	129	264

While 408 of the sample cases went to indictment, the balance (104 cases, or 20.2% of the total) were closed without indictment. Times to closure for these cases were almost identical to those for cases in which there were indictments. The average (mean) time to non-indictment disposition for these cases was also about four months (123 days) as Table 6 shows; and the longest time was just short of nine months (263 days). The close similarity of the elapsed times for cases with indictment dates and those closed without indictment suggests that cases were often not disposed until they went to the grand jury unit of the DA's Office.

Table 6. Days from Date Opened to Date Closed, for Cases Closed with No Indictment (N = 104)

Mean	Median	Longest
123	124	263

By April 2009, only a small number of the July 2008 cases (37, or 7.2% of the total) had been closed by April 2009 *after* indictment. Table 7 shows that the average time from indictment to disposition was 120 days, with the longest time being 230 days.

Table 7. Days from Indictment Date to Date Closed, for Cases Closed after Indictment (N = 37)

Mean	Median	Longest
120	128	230

The remaining cases opened by the DA's Office in the first half of July 2008 had indictments but were as yet not disposed. Not surprisingly, all of these cases were between eight and nine months old, as Table 8 illustrates.

Table 8. Days from Date Opened by DA's Office to Current Date, for Indicted Cases without Date Closed (N = 371)

Mean	Median	Longest
262	263	272

4. Manner and Reasons for Dispositions. There was only one case in the sample for which the report of the DA's Office showed that a grand jury had returned a "no bill." The most common reasons for disposition, as Table 9 shows, were that the DA's Office declined to prosecute (70 cases); that pleas were negotiated (40 cases with guilty pleas and 15 cases dismissed as part of a plea agreement); and that the DA's office entered a nolle prosequi (20 cases).

Table 9. Manner of Dispositions for Closed Cases (N = 154)

Court Dismissed	Dismissed per Plea Agreement	Guilty Plea	No Contest	Nolle Pros	Pled Guilty to Lesser Charge	Prosecution Declined	No Bill	None Given or Nor Closed
3	15	40	2	20	3	70	1	358

The sample case report from in the DA's Office also gave reasons in some cases for why they had been dismissed. Table 10 shows that insufficient evidence (33%) and uncooperative victims (17%) accounted for half of the sample case dismissals.

Table 10. Disposition Reasons Given for Dismissals (N = 94)

Conduct Not Criminal	Convicted in Another Case	Essential Witness Unavai-- lable	Insuffi- cient Evidence	Law Enforcement Agency Uncooperative	Unlawful Search and Seizure	Victim Uncoo- perative	Other Reasons
1	1	3	31	5	2	16	35
1%	1%	3%	33%	5%	2%	17%	37%

D. Time from District Court Filing to Disposition

If a grand jury returns an indictment in a case, then the DA's Office files the case in the District Court. New Mexico rules provide that the Court must then arraign the defendant within 15 days. The NCSC project team requested data from the District Court on elapsed times to disposition in the Criminal Division. (See Appendix B.) The data provided by the Court for cases disposed between March 1, 2008, and April 30, 2009, are analyzed here.[7]

[7] Limitations of time and budget prevented NCSC from inspecting individual case files on which the data from the District Court were based to determine the reasons for elapsed times in specific cases.

1. Overall Days to Nontrial and Jury Trial Disposition. From the data provided by the Court, overall times to disposition were calculated for cases disposed by guilty plea or other nontrial means and for cases disposed by jury trial. Table 11 presents the overall results.

Table 11. Days from District Court Filing to Nontrial Disposition (N = 1,586 cases) and to Jury Trial Disposition (N = 124 cases)

Description	Nontrial Dispositions	Jury Trial Dispositions
Mean	174.4	595.7
Median	170	542
90th Percentile	303	1,061.5
Maximum	884	1,639

As the table shows, the average (mean) time from filing in District Court to nontrial disposition was just under six months. Yet, as the 90th percentile figure indicates, 10% of the cases took 10 months (303 days) or more, and the longest nontrial disposition in the sample took 29 months (884 days).

Cases that actually went to jury trial took much longer. The average time was 19 ½ months (596 days). Although half the jury trial cases were disposed in less than 18 months (median of 542 days), 10% took 35 months (1,061.5 days) or more. The longest time to disposition by jury trial was almost 4 ½ years (1,639 days).

Table 12 shows the distribution of nontrial disposition times by case type. Of the total, 56.5% were disposed in 180 days or less after filing in District Court, and 85.4% were disposed within 270 days. Together, felony property cases and felony drug cases made up 1,418 (90%) of all the sample cases with nontrial dispositions.

Table 12. Days from District Court Filing to Nontrial Disposition, by Case Type (N = 1,573)

Case Type	90 Days or Less	91-180 Days	181-270 Days	271-365 Days	366-730 Days	Over 731 Days	Totals
Felony undesignated	0	1	0	0	0	0	1
Felony drug	80	205	152	65	23	2	527
Felony first degree	1	2	0	3	0	0	6
Felony homicide	1	1	0	0	0	0	2
Felony miscellaneous	9	9	3	0	0	0	21
Felony property	140	341	268	118	23	1	891
Felony sexual offense	4	13	12	6	3	0	38
Felony vehicular homicide	0	1	0	0	0	0	1
Misdemeanor DWI	3	0	0	0	0	0	3
Misdemeanor	70	7	4	1	1	0	83
Totals	**308**	**580**	**439**	**193**	**50**	**3**	**1,573**
Percent	**19.6%**	**36.9%**	**27.9%**	**12.3%**	**3.2%**	**0.2%**	**100.0%**

The distribution of elapsed times from filing in District Court to jury trial disposition in sample cases is shown in Table 13. None were tried in less than three months, and only 25% were tried within twelve months. Most common were felony crimes against the person; felony crimes against property; and felony sexual offenses. Cases with charges of felony sexual offenses were the most likely of all case types to take more than two years to go to trial.

Table 13. Days from District Court Filing to Jury Trial Disposition, by Case Type

Case Type	91-180 Days	181-270 Days	271-365 Days	366-730 Days	Over 731 Days	Totals
Felony drug	0	1	5	11	1	18
Felony domestic violence	0	2	1	1	0	4
Felony DWI	0	1	1	4	2	8
Felony first degree	0	0	1	8	7	16
Felony miscellaneous	0	0	0	1	0	1
Felony crimes against person	1	0	6	16	5	28
Felony crimes against property	1	2	5	13	4	25
Felony public safety	0	1	0	1	0	2
Felony sexual offenses	0	0	2	8	11	21
Misdemeanor	0	1	0	0	0	1
Totals	**2**	**8**	**21**	**63**	**30**	**124**
Percent	**1.6%**	**6.5%**	**16.9%**	**50.8%**	**24.2%**	**100.0%**

2. Impact of Failures to Appear. During the interviews by NCSC project team members with the judges of the Criminal Division, several observed that defendants' failures to appear often led to court issuance of bench warrants and were a common reason for longer times from District Court filing to disposition. Sample data from the Court bear out this observation. Among the sample cases, two-thirds (1,072 of 1,601 with nontrial dispositions, and 83 of 124 disposed by jury trial) had at least one bench warrant issued.

Table 14 shows how soon after filing the District Court issued a bench warrant for defendants with an initial failure to appear. Nine out of ten failures to appear in cases with nontrial dispositions came within 17 days after filing, indicating that most bench warrants were issued at the time of arraignment in the District Court. Although the average (mean) time for nontrial cases was a week, it was three weeks in cases that ultimately went to jury trial. In ten percent of the jury cases with failures to appear, the issuance of a bench warrant came 48 days or more after filing in District Court.

Table 14. Days from District Court Filing to First Bench Warrant in Cases with Nontrial Dispositions (N = 1,072 cases) and in Cases with Jury Trial Dispositions (N = 83 cases)

Description	Nontrial Disposition	Jury Trial Disposition
Mean	6.83	21.57
Median	0	0
90th Percentile	17	48
Maximum	726	314

E. Conclusion

If one were to measure elapsed time from felony arrest in Bernalillo County to felony disposition in the District Court, it is currently necessary to inspect data from both the DA's Office and the Court. For the typical elapsed time, the most reliable estimates can be derived by adding the following together:

- Mean time from arrest to the opening of a case in the DA's Office;
- Mean time from case opening in the DA's Office to indictment; and
- Mean time from filing to disposition in District Court.

Table 15 presents an estimate of typical overall times to nontrial disposition and jury trial disposition. For cases with nontrial dispositions, it is about 9.8 months (298 days). For jury trial cases, it is just under two years (720 days).

Table 15. Average (Mean) Days from Arrest to District Court Nontrial Disposition and from Arrest to Disposition in Cases with Jury Trial Dispositions

Description	Nontrial Disposition	Jury Trial Disposition
Arrest to DA Opening	3	3
DA Opening to Indictment	121	121
District Court Filing to Disposition	174	596
Totals	298	720

Specific Recommendations on Criminal Case Information. For a citizen – whether it is the victim in a criminal case, the defendant, a witness, or a person reading a newspaper, criminal proceedings begin at arrest and are believed to be under the control of the courts. Citizens in Bernalillo County may not necessarily understand why there may be any lack of continuity from first appearance in Metropolitan Court and proceedings in District Court; that matters may be outside court control; or that the courts may not have means to quickly determine the status of any given case. Management of felony case progress in Bernalillo County can benefit from the availability of improved case information.

To provide data for this report, it was necessary for the NCSC project team to request information from the DA's Office and the Court about case processing times. Monitoring and management of felony case progress calls for there to be better information routinely available to court leaders.

Recommendation 1: *District Court monitoring of felony case processing times in Bernalillo County should begin at arrest and should include the date of initial appearance and determination of probable cause.*

Recommendation 2: *Such case information as scheduled pretrial court events, scheduled trial dates, and continuances should routinely be made available from individual Criminal Division judges' chambers to the District Court's central case information system to support monitoring and management of criminal caseflow by the District Court Chief Judge, Criminal Division Presiding Judge, and Court Administrator.*

Recommendation 3: *Among any other measures of court performance[8] that the District Court may employ, the Criminal Division should continue monitoring clearance rates (dispositions as a percentage of new filings and reopened cases) and should routinely monitor how many cases were older than applicable time standards at disposition; how many active pending cases are currently approaching or older than applicable time standards; and how frequently does the trial in a case actually commence on the first-scheduled trial date.*

[8] See the ten core court performance measures developed by NCSC and court leaders and presented as "CourTools – Trial Court Performance Measures" (© NCSC 2005), available on line at http://www.ncsc.org/D_Research/CourTools/temp_courttools.htm. The four measures of caseflow management court performance recommended here are CourTools Measures 2-5.

Chapter II.
Understanding the Numbers: Felony Case Processing in Bernalillo County

A. Introduction

When a person is arrested on felony charges in Bernalillo County, he or she is booked in the county detention center before being presented in the limited-jurisdiction trial court for consideration of pretrial release and determination of probable cause. If probable cause is found to hold the defendant for felony prosecution, then prosecutors prepare the case for presentation to a grand jury. If the grand jury returns an indictment, prosecutors then file charges in the general-jurisdiction trial court. In this chapter, the NCSC project team describes felony case processing before and after indictment and offers recommendations for specific improvements. The specific recommendations in this chapter contribute to the comprehensive felony caseflow management improvement program suggested in Chapter IV.

B. Arrest, Incarceration, and Police Reports

Arrests in Bernalillo County (population 640,000) are generated principally by the two largest law enforcement agencies serving the community; the Albuquerque Police Department (APD) which accounts for roughly 60 percent, and the Bernalillo County Sheriff (BCS) generating an additional 20-25 percent. Other smaller law enforcement agencies (i.e. state police, state probation and parole department) account for the remainder. See Table 16.

1. Arrest and Booking. Over 40,000 adults are booked annually in the County's newly constructed Metropolitan Detention Center (MDC) located 18 miles from the center of Albuquerque. [9] It is ranked 39th in size in the US; it is considered a mega-jail

[9] The MDC has been operated by Bernalillo County Government since 2007. Prior to 2007, it was managed under a joint powers agreement between the City of Albuquerque and the County.

Table 16. Defendants Booked at Bernalillo County Metropolitan Detention Center, FY 2006-FY 2009 [a]

FY 2006	Defendants Booked	Bookings by Law Enforcement Agency [b]							
		APD	BSO	NSP	FED	BND	PRO/PAR	UNMPD	OTH
Total	38,823	22,647	9,387	774	62	184	1,827	297	3,645
Avg/Month	3,235	1,887	782	65	5	15	152	25	304
	Pct by Agency	58.3%	24.2%	2.0%	0.2%	0.5%	4.7%	0.8%	9.4%

FY 2007	Defendants Booked	Bookings by Law Enforcement Agency [b]							
		APD	BSO	NSP	FED	BND	PRO/PAR	UNMPD	OTH
Total	41,255	24,883	9,492	816	89	276	2,160	215	3,324
Avg/Month	3,438	2,074	791	68	7	23	180	18	277
	Pct by Agency	60.3%	23.0%	2.0%	0.2%	0.7%	5.2%	0.5%	8.1%

FY 2008	Defendants Booked	Bookings by Law Enforcement Agency [b]							
		APD	BSO	NSP	FED	BND	PRO/PAR	UNMPD	OTH
Total	41,597	24,865	10,624	829	39	196	2,385	246	2,413
Avg/Month	3,466	2,072	885	69	3	16	199	21	201
	Pct by Agency	59.8%	25.5%	2.0%	0.1%	0.5%	5.7%	0.6%	5.8%

FY 2009 (thru Feb 2009)	Defendants Booked	Bookings by Law Enforcement Agency [b]							
		APD	BSO	NSP	FED	BND	PRO/PAR	UNMPD	OTH
Total	26,488	16,191	6,476	596	40	57	1,461	140	1,527
Avg/Month	3,311	2,024	810	75	5	7	183	18	191
	Pct by Agency	61.1%	24.4%	2.3%	0.2%	0.2%	5.5%	0.5%	5.8%

[a] Source: Bernalillo County Metropolitan Detention Center.

[b] **KEY:** **APD** = Albuquerque Police Department **BSO** = Sheriff's Office **NSP** = State Police **FED** = Federal agencies
BND = Bonding Agencies **PRO/PAR** = Probation & Parole **UNMPD** = University of NM Police Department
OTH = Other agencies, such as American Indian Tribal Police, Airport Police, Albuquerque Public School Security, New Mexico Open Space Rangers, Forest Service, and Department of Transportation/Public Safety.

among the 3,300 jails in the United States; and it is staffed by 546 security and civilian employees.[10] Roughly 60 percent of the arrestees are brought immediately to the MDC, and 40 percent are transported in groups from law enforcement sub-stations or holding facilities. Although the MDC is modern and professionally operated by County Corrections, it has encountered a series of capacity and overcrowding problems since its opening in 2003. The Detention Center houses adults arrested on misdemeanor and/or felony charges who are awaiting case disposition (pretrial status), and those who have been sentenced (post-trial). Over the years, the number of felons in each category has risen significantly. Among those incarcerated, more than 50 per cent are pretrial felony detainees. In January 2009, this amounted to 1,391 out of 2,675 inmates. The average length of stay for non-released felons held on serious original charges before final disposition is 240-280 days.[11]

While internal booking and jail management systems are digitized and state-of-the-art, there is little electronic records interchange with the courts. Stand-alone, separate electronic case management systems exist in law enforcement,[12] District Court, Metro Court, and the state run Probation and Parole Department. Consequently, paper records and files are the medium of exchange and there is significant redundant data entry.

One of the common consequences of disparate electronic criminal justice case management systems National Center studies have found is a propensity for confusion regarding in-custody jail inmate status. The result can be an inmate who becomes "lost"

[10] Some criticisms of MDC operations are that the MDC is understaffed; temporary or part-time employees who fill permanent positions lack the training and skills necessary for their jobs, especially regarding records management (turnover in staff positions is alleged to be high due to the remote location of the MDC and low salaries); responses to inquires for information from private citizens and bail bonding companies do not get prompt attention as do requests from court officials; too many inmates are sitting in jail on open cases, bench warrants or indictments without a next appearance date (a more effective monitoring system to promote timely court action should be developed); and MDC managers and higher level officials are much more helpful and responsive than rank and file employees ("considerate attitude does not filter down").

[11] A federal court consent decree resulting from a class action lawsuit on behalf of the inmates (McClendon vs. Bernalillo County) commenced in 1995 over conditions at a downtown Albuquerque jail owned by the County governs pretrial overcrowding, mental health and disability treatment and housing conditions at the new Detention Center as well. A continual concern by County officials pertains to managing the MDC to avoid violating the consent decree. (The original design capacity for the MDC is 2200 inmates). When MDC reaches limits close to the consent decree, inmates are transported by MDC to Santa Fe holding facilities. A series of programs have been instituted by the County to limit jail overcrowding.

[12] APD and BCS share a new Tiburon (proprietary law enforcement case management system). Although the BCS has hardware and licenses for the system, there is no funding for data transfer from their old system and interfaces with the APD database.

in the system or may be held longer than necessary. Since trial courts are ultimately responsible for prompt and timely adjudication processes, some courts have developed protocols to monitor the status of jail inmates, especially those incarcerated beyond normal time periods. An example is the Superior Court of Georgia in Fulton County (Atlanta), which confronts a variety of separate criminal justice computer systems and serving a community of 700,000 residents similar in size to Bernalillo County.[13] It has found it necessary to create a four-person jail monitoring group (Judicial Administrative Expedition Unit) to track and audit criminal caseflow for defendants in custody at the Fulton County Jail, including those awaiting indictment and other court hearings. The unit also collaborates and coordinates with various local and state criminal justice agencies to promote the overall expeditious movement of cases for jail inmates.

The number of felons moving from pretrial to sentenced status average 300 inmates per month. However, significant delays appear to exist in processing judgment and sentencing orders and their arrival at the MDC. It routinely takes 30 days from the time of sentencing to the delivery of an order. A pilot electronic sentencing order project is now underway.

Specific Recommendations on Arrest and Booking. Based in the NCSC project team's assessment of case processing at this stage, the following three recommendations are offered.

Recommendation 4: *A coordinated, sustained effort toward integrating and sharing electronic data among the various digitized case management systems would considerably reduce delay and redundant data entry among criminal justice agencies in the county.*[14] *It is understood that city, county and state agencies have worked to do so in the past without noticeable success. A confounding factor certainly has been the fact that law enforcement and justice entities in the county are funded by different governments. However, separate funding authorities at the local level are not usual occurrences*

[13] Comparisons between Fulton and Bernalillo counties are limited at best. Population density, geographic size, crime patterns, court structure/jurisdiction, and ethnic and racial backgrounds of residents differ dramatically. Population size and independent computer systems tracking the same in-custody inmates, however, are somewhat analogous.

[14] Reducing redundancy would have a direct and positive impact on productivity, accuracy (data entry errors) and efficiency in the overall justice system within the county. Entering the same data at multiple entry points by different criminal justice agencies often slows the caseflow process and populates criminal history records with incomplete, inaccurate and inconsistent information.

throughout the United States. It certainly makes coordination and cooperation more difficult, but not impossible.[15]

Recommendation 5: *MDC management should review their training processes for MDC rank and file staff, especially those entering data and those responsible for monitoring the length of stay of inmates to improve data entry accuracy and ensure no inmates "get lost in the system." Information on inmates languishing in jail should have established, clearly defined action plan protocols triggering high-level court and judicial intercession together with remedies. All pretrial in-custody cases should have a next appearance date, nothing should be "off calendar."*

Recommendation 6: *The Court should explore the possibility of assuming responsibility and staffing, along with the funding, for felony inmate jail monitoring from the County. Direct involvement by the Court in auditing and overseeing the movement of in-custody felons through the adjudication process would likely have a greater affect on promoting streamlined system change as well as prompting more timely disposition for languishing cases than continuing to locate that function with County Corrections. This suggestion is not based upon reducing jail overcrowding, but on reducing trial court delay.*

2. Police Reports. Another continual, troublesome delay point in the felony caseflow process is the time lag in getting police reports to the prosecutor's office. Initial arrest reports routinely take 30 to 90 days from the time of submittal to APD Records until completion. Numerous criminal justice officials interviewed assessed these delays to be both serious and prolonged, so much so that the NCSC project team expressly revisited the Albuquerque Police Department (APD) to talk with the Chief of Police and upper-level management to gather more specific information regarding possible causes and remedies.[16] Since the 1980's, under a joint agreement with the Bernalillo County Sheriff's Office (BCSO), APD has processed all arrest and investigative records for both

[15] It was noted that some 10 years ago a Metro Justice Information Coordinating Council was created and funded out of the County Manager's Office, but was disbanded.

[16] This two-day visit by NCSC team member Gordy Griller with Janet Cornell took place in August 2009.

departments. In exchange, the Sheriff's Office oversees and processes all outstanding warrants.[17]

There appear to be multiple reasons for the delays. One likely source is the dramatic staff reductions and hiring freezes occurring over the past few years in non-sworn personnel at the APD Records Department. These reductions are largely attributed to unprecedented City budget cuts occasioned by the continuing national recession and, concurrently, a forcefully pursued APD policy to increase the number of sworn officers to 1100 by the end of CY2008 which has diverted money for civilian employees to officer positions.[18] Resultantly, a severe 50 percent decrease in the number of records processing personnel has taken place. Complicating this staff shortage is a high turnover rate among civilian data entry operators in the Records Department; exacerbated further by the use of temporary employees as a stopgap, inexpensive coverage mechanism.[19]

A second underlying factor contributing to the delay in police reports, NCSC consultants conclude, is APD's heavy concentration toward upgrading front-end information systems directed at apprehension and crime prevention necessary to support large-scale increases in patrol officers. Over the last several years, APD developed a Technology Strategic Plan that called for widespread enhancement of all electronic information systems within the Department. Tiburon, a well-respected law enforcement private software vendor, was selected as the contractor. Among the priority systems upgraded were those supporting patrol and field services to assist the growth in sworn officers, namely a mobile reporting system (digitized data flow from patrol cars) called *Copperfire®* that is compatible with Tiburon and a new computer-aided dispatch system. Simultaneously, a widespread hardware upgrade took place modernizing all in-car hardware, including over 450 laptops and 150 police vehicle printers. Internet services were enhanced, too, allowing the public to request or file a police report online and to

[17] Currently, BCSO has 72,000 outstanding misdemeanor warrants and 150,000 outstanding felony warrants.

[18] The national average of sworn police officers to population in cities 250,000 people or greater is 2.8 per 1000 residents (International Chiefs of Police). APD reached 1146 personnel in training and/or patrolling city streets in late 2008; a ratio of 2.2 sworn officers per 1000 residents. Albuquerque population is estimated to be 518,271.

[19] Where there is little staff permanency, numerous small problems ranging from such things as re-training confusions to uncertainty and delays in fixing equipment breakdowns can easily compound and enlarge creating more delay in producing reports.

access neighborhood crime information in real time through a nationwide software service dubbed, "*Crimereports.com*." As a result, police report processing suffered.

APD is banking on *Copperfire®* to modernize and revamp their arrest report processing. There is no doubt that *Copperfire®* is one of the better client / SQL server approaches available in the public safety marketplace today. It is a customized report writing and forms generation solution for first responders – both police and fire. It is also capable of generating statistics and records management protocols when programmed effectively. A critical issue, however, is that the specific forms and their designs used by a police agency must be specially programmed; essentially written uniquely for each contracting law enforcement agency. This development cycle is time consuming and should a form or process be added or changed, it requires further systems work.

Another problem inherent in automating incident field reports is the numerous follow-up reports and data, much of it in paper format that must be appended either manually or electronically to the initial digitized document. Also, it is important that prosecution and defense agencies have compatible software and systems to fully utilize *Copperfire®* generated data. This, unfortunately, may not be currently the case in Bernalillo County.

Third, incompatible computer systems between BCSO and APD have resulted in time consuming, manual conversion procedures. Specifically, BCSO deputies and detectives complete police reports in electronic form on the current BCSO system, print them out and give them to the APD Records Department to be re-entered into the APD electronic system.[20] Data transfer and interface software is not currently available between BCSO and APD electronic police report writing systems.

Fourth, re-engineering of APD's police report procedures and processes is needed. Based on interviews and observations, there appears to be widespread misunderstanding beginning at the police officer level regarding the importance of thorough and timely report writing and submission. Some of it may stem from the fact that supervisory officers or Records Department personnel often must contact arresting or

[20] If there is an error in the paper copy to be corrected or additional information be added, the initiating BCSO officer must physically go to APD Records and change it on the original paper copy so it can be keyed in by Records. Missing or erroneous data could be as simple as a missing or erroneous beat number, social security number or case number.

investigating officers for supplemental information to augment or correct erroneous reports, officers feeling that along the process someone else will catch mistakes or ferret out needed details. Some may originate with inadequate training regarding the essential elements of report writing. Some could be occasioned by continued reliance on manual report writing, redundant data entry in re-keying arrest reports, and detailed Records Department approvals to ensure report completeness and accuracy. Some is connected to the difficulty in locating primary and secondary officers who may be reassigned and have lingering data problems in old reports.

Fifth, all criminal investigative work for the District Attorney must be done by law enforcement occasioning some miscommunications, delays and confusion. The DA has no investigative unit within her office. There are numerous situations where an assistant DA or DA bureau chief will send a report back to law enforcement because of missing or conflicting information, all taking additional time. An example cited was the need by some assistant DA's for handwritten statements from victims.

Recently, APD administration has taken steps to improve the police report processing. A Deputy Police Chief meets monthly with the District Attorney's Office to streamline arrest report information flow between the two offices. Arrest reports have been simplified, some being computerized to ease completion. A new approach established recently is the electronic transfer of domestic violence taped statements to assigned prosecutors. Regarding delayed or inadequate reports from officers and detectives, a procedure has been introduced to enlist the chain of command in prompting problem officers to complete reports by emailing notices to higher level supervisors when an officer is recalcitrant.

All of these steps certainly help. The problem, however, is systemic and needs a broader-scoped solution, namely business process reengineering. Business process reengineering (BPR) is the analysis and redesign of workflow. The technique gained notoriety in the 1990s as businesses began revisiting the need for speed, service and quality over control and efficiency and ran into unanticipated problems as they attempted to use technology to mechanize old, antiquated ways of doing business. Various governments, including law enforcement agencies, followed suit in the public sector, but

often fell short because the common focus was too often on quick fixes rather than breaking cleanly away from old rules about organizing and conducting business.

Specific Recommendations on Police Reports. One of the major tenets of process reengineering in the computer age is to organize work around outcomes, not tasks. Ideally, when followed to the extreme, the principle encourages one person to perform all the steps in a process by designing the person's job around an objective or outcome instead of a single duty or step in a process. Other principles that are helpful in process reengineering that law enforcement leaders may wish to keep in mind as they attempt to simplify and streamline workflow in police report writing include...

- Work backwards by having those who use the output of a work process engage in the reengineering analysis itself. Ad hoc, inter-agency committees or task forces often work well provided they are effectively led.
- Concentrate only on a few prioritized, urgent work redesign efforts at a time otherwise details can become overwhelming.
- Put the decision point where the work is performed and build control into the process. There is an assumption in many organizations today, police agencies included, that people doing the work have neither the time nor the inclination to monitor and control it and therefore lack the knowledge and skill to make decisions about it. Proven, modern day reengineering principles, however, argue that those who perform the work should make the decisions and that the process itself can have built in controls. The ultimate objective is for the doers to be self-managing and self-controlling. This direction is certainly in line with empowering employees and strengthening middle management capabilities.
- Capture information once and at its source. As the criminal justice system continues to move toward computerization and electronic databases, leaders need to promote the elimination of as much redundant data entry as possible. NCSC project consultants conclude there is a strong predisposition by criminal justice agencies in Bernalillo County to operate autonomously causing an excessive amount of duplicative work processing. Consequently, system-wide approaches toward reengineering solutions and integrating work are very important goals to embrace in moving forward.

Recommendation 7: APD should locate its Court Services Unit (liaison group with the District Attorney's Office) at the DA's Office. BCSO maintains staff at the DA's Office to coordinate data and interaction with prosecutors, which promotes faster problem-solving regarding police report difficulties.[21]

[21] NCSC consultants were advised that in the past the APD Court Services Unit was co-located with the DA, but was moved to the Public Safety Building. It is not known why this move separating the Unit from the DA occurred.

Recommendation 8: *The APD Records Department should be reorganized and staffed more appropriately with the priority goal of promoting improved, reengineered police report processes. A priority challenge will be integrating the Copperfire® electronic field automation incident reporting suite with Records Department business practices and paper records from other sources (i.e. crime lab, other evidence reports, etc.)*[22]

Recommendation 9: *Compatibility between BCSO and APD electronic computer report writing systems should be sought. BCSO, courtesy of the City of Albuquerque, has licenses and hardware consistent with Tiburon, but the data transfer and interface software must be purchased and installed.*[23]

Recommendation 10: *The systemic significance of police reports for the felony discovery process should be reflected in efforts by the DA's Office and the Public Defender's Office to adjust business processes and introduce software as necessary to promote efficient electronic receipt of law enforcement reports and discoverable information.*[24]

C. Pretrial Release and Probable Cause Determination in Metro Court

Within 48 hours of arrest, all defendants are scheduled for an Initial Appearance (IA) at the MDC to determine whether probable cause exists for release (bail, bond, released to pretrial services or on their own recognizance), to determine the suspect's true name and address, entitlement to a public defender, and to advise them of their rights and the charges against them.[25] A Metropolitan Court Judge (limited jurisdiction) conducts all IA's. During weekdays, a judge and prosecutor at the Metropolitan Courthouse in downtown Albuquerque appear by video conference transmitted to a specially structured, video-equipped MDC courtroom where a public defender physically appears with the defendants. During weekends no video appearances are conducted; Metro judges rotate sitting as an IA judge at the MDC. On Saturdays, Sundays and holidays, no district attorneys are present. When a defendant is represented by private counsel, the lawyer

[22] NCSC consultants were advised that on-site supervision of the Records Department was transferred from a sworn officer to a civilian supervisor. Given the culture of most law enforcement agencies, it is often easier to obtain compliance from officers and detectives in amending and supplementing arrest data when supervision of records processing is overseen by a sworn officer.

[23] The cost of this software is roughly $150,000. County officials appear to be favorably disposed although budget difficulties have delayed the purchase.

[24] For a parallel recommendation, see Recommendation 20 in Section E, "District Court Felony Case Processing."

[25] Defendants booked from 5:00 AM to 5:00 PM are set over to the next day to permit data collection.

often attends the hearing at the Metro Courthouse while his/her client remains at the MDC.

Sixty-four percent of those booked are released from jail shortly after the Initial Appearance. Most are charged with minor violations.

Prior to an IA, pretrial staff at the MDC interview the defendant, principally gathering information regarding offense, whether he/she is a flight risk or a danger to themselves or the community, and criminal history background. Data is shared with the District Attorney's Office.

At felony IA sessions, the reading of the criminal complaint is routinely waived, the defense attorney normally having a copy. The district attorney presents the charges, outlines the known criminal history and recommends release conditions or continued incarceration. A common complaint by defense attorneys and some District Court officials is that Metro judges have a propensity to set high bonds.[26] This does occasion a series of bond reduction motions before the District Court Criminal Department Presiding Judge.

Persons arrested on District Court probation violations, after an Initial Appearance, must appear before the sentencing judge according to local rule. These cases may be delayed numerous times – the defendant generally remaining in custody – waiting for the assigned district attorney, public defender and defendant to coordinate an appearance before the sentencing judge.[27] This is true even though new statewide court rules require a probation violation report be completed within 5 days of arrest[28] and a hearing to be conducted within 30 days. Technical violations are processed more quickly than new charges. A pilot experimental program permitting guilty pleas regarding

[26] Metro judges conclude it is a matter of perspective since they customarily preside over misdemeanor cases and are reluctant to set low bonds on felony matters, the province of the general jurisdiction court. Some time ago, the District Court channeled funds and responsibility for hearing felony IA's to the Metro Court. There is an ongoing offer by the Metro Court to return responsibility to the District Court, although no mention of any additional funding which is a condition upon which the District Court would entertain the proposition.

[27] Each party – prosecutor, defense lawyer and defendant – may continue an appearance on a probation violation for 30 days. The result is often a 90-day delay.

[28] In New Mexico, the Probation and Parole Department is a state executive branch agency. They operate a separate CMS case management computer system, preparing probation violation reports using a pre-designed, electronic template. Reports are generally 3-4 pages long and require 4 to 5 days to prepare accurately. The Department has an officer stationed at the MDC to coordinate interaction with the jail.

probation violations to be heard quickly by a special appearance judge rather than the sentencing judge is now underway.

Two separate, court-operated Pretrial Service Agencies conduct the interviews. The Metro Court PSA staff offices full-time at the MDC and interviews everyone booked in the jail. The District Court PSA staff is present at the MDC during weekdays and concentrates primarily on diverting appropriately classified defendants to pretrial release. District Court PSA maintains a large pretrial release program with up to 1300 defendants monitored by 5 staff who office at the downtown Bernalillo County Courthouse. Clients are ordered into the program by District Judges after IA. The Agency recommends a release plan to the Court, develops behavior/treatment/reporting contracts with defendants administered through graduated levels of supervision. For crisis intervention and field services, the Agency relies on the state's Adult Probation and Parole Department. Defendants are supervised until they enter a plea or are sentenced.

Many defendants booked in jail have severe mental illnesses, often exhibiting co-occurring disorders including addictions, learning disabilities, and personality problems. For those who don't have the ability to bond or bail out of custody, District Court PSA works closely with a jail-based County Psychiatric Services Unit (PSU) to facilitate and divert them to counseling and medical services. There is a special Mental Health Court option run by the District Court allowing defendants with low-level, non-violent felonies who have a mental illness to enter a plea agreement and submit to a pretrial diversion program modeled on a three-phase drug court regimen. The capacity of the program is 200 clients; its recidivism rate is a low 2 percent. Metro Court PSA also works to assist those charged with misdemeanors who are diagnosed with mental illness, often channeling them to a special competency docket they conduct.

District Court PSA also maintains a three-person investigations unit at the County Courthouse which conducts criminal background inquiries for all in-custody and out-of-custody defendants to assist the Court further regarding release and case scheduling conditions. Data acquired is entered into the court's case management database.

Specific Recommendations on Pretrial Release and Probable Cause Determination. Based on the description presented here, the NCSC project team offers the following three recommendations.

Recommendation 11: Serious consideration should be given to ways more cases can be resolved at Initial Appearance or shortly thereafter without the scramble that now takes place to get cases to the Grand Jury. The culture of indictment is not only delaying resolution of lower-level matters, but likely causing much extra work in case processing for public lawyers and the court. Many general jurisdiction urban trial courts target early disposition of such matters, often setting up plea calendars either at or within a few days of initial appearance.

Recommendation 12: A probation violation calendar should be established by the District Court overseen by a specially-assigned PV judge, not necessarily the sentencing judge.

Recommendation 13: Inordinate and avoidable delays regarding continuances of probation violation hearings should be reduced through tight scheduling and date certain to the extent possible within due process requirements.

D. District Attorney Case Presentation to the Grand Jury

Statewide criminal rules of procedure permit a probable cause hearing before a Grand Jury for in-custody defendants charged with a felony within 10 business days of Initial Appearance. Out-of-custody cases must be indicted within 60 business days. Although the rules permit prosecution by information with a preliminary hearing before a judge, it is the customary practice in Bernalillo County for 80 percent of the 10,000 felony cases to be taken to the Grand Jury.[29]

The presentation of cases to the Grand Jury is a hectic process due to the high volume and the fact there is only one Grand Jury is empanelled to hear matters. Generally, 25 cases per day are scheduled for indictment. Evidence of this overload is a 5 to 6 month lag on Grand Jury indictments for non-10 day, out-of-custody cases. A District Attorney policy does not allow defense lawyer access to discovery prior to indictment.

Critical problems in processing cases appear to reside with law enforcement. Often there are delays in getting data from police agencies. Also, officers frequently fail

[29] On commencement of prosecution by complaint, information or indictment, see Rule 5-201. On preliminary hearings, see Rule 5-302.

to appear (FTA) to testify at the Grand Jury. The FTA rate is 10 to 20 percent in spite of aggressive subpoena, telephone reminder and email efforts by the DA's Office.

Criminal complaints are filed in 20 percent of the cases, principally on low-level property and economic crimes. Many of these cases are channeled through a pre-indictment / pre-plea program (PIPP) where early pleas on first offender felony cases are encouraged; most pleading to misdemeanors and sentenced to treatment programs. Generally, a plea offer is made by the DA's Office a few days after Initial Appearance, the defendant given two weeks to reply.

Currently at the DA's Office there are three prosecutors and 28 support staff assigned to manage the Grand Jury process and 2 attorneys working with the PIPP program. To effectively manage the workload in a more methodical fashion, should the caseflow culture remain primarily an indictment one, there most certainly should be an increase in the number of DA personnel assigned to the Grand Jury and the empanelment of a second Jury. However, in the opinion of the NCSC consultants, a less costly, swifter alternative would be a widespread preliminary hearing process taking the form of a modified Early Plea Program (EPP) where the complaint and police report are the same thing.

Specific Recommendations on District Attorney Case Presentation to Grand Jury. The NCSC project team offers the following three recommendations for improvement of this phase of case processing.

Recommendation 14: The District Attorney's Office should consider having many more felonies prosecuted by information rather than by indictment. The District Court can provide a setting for decisions on this issue by holding a preliminary hearing or other pre-indictment "triage event" (see Chapter III), at which prosecution and defense attorneys can identify cases suitable for early pleas and determine if there is probable cause for others are suitable for felony prosecution on an information rather than an indictment. If the majority of felony cases not resolved by plea at this stage are prosecuted by information, then the judge who is presiding can immediately arraign the defendant on those charges, thereby shortening elapsed time from arrest to commencement of District Court felony prosecutions.

Recommendation 15: An ad hoc committee led by the Chief Judge and composed of knowledgeable and high-level prosecutors and defense lawyers should be created to explore earlier discovery exchange geared toward prosecutions by information and early pleas.

Recommendation 16: Arrangements should be promoted to locate the APD Court Services Unit with the District Attorney's Office (the BCSO Unit is currently co-located with the DA). The Units should have clear formal authority, in addition to expediting arrest records, to coordinate officer appearance at Grand Jury and preliminary hearing proceedings. Statistics should be kept regarding officer failures-to-appear and those who exhibit consistent and habitual absences without good cause showing should be disciplined up to and including termination.

E. District Court Felony Case Processing

At the return of an indictment under current practices, the DA's Office files the case in the District Court. Matters are then assigned to judges and proceed to arraignment and completion of discovery, with the possibility of motions or other pretrial hearings before plea or trial and, if a defendant is convicted, sentencing. If probation is part of a sentence, there may be further hearings on any violation of probation.

1. Arraignment and Assignment of Cases to Individual Judges. Under Rule 5-604 (A), a defendant must be arraigned by the Court within 15 days after the filing of an indictment or information or the date of arrest, whichever is later. Under a master schedule for all judges in the Criminal Division, judges hold arraignments in rotation every Friday.

Except for arraignments, which are heard one day each week under a master schedule for the Criminal Division, each judge has individual responsibility for all other court events in the cases assigned to him or her, so that cases are scheduled in chambers by their judicial assistants (TCAA's).

Cases are assigned to individual judges at or soon after arraignment. If a defendant with a pending matter in the Criminal Division has a new case filed, the NCSC project team understands from interviews that the new matter is not sent to the judge with the prior pending matter. This appears in part to be a consequence of the manner in which the District Attorney's Office is organized, with different units handling different

kinds of matters. As a result, a single defendant may have cases pending before different judges at the same time.

New Mexico law permits a party to file a petition once per case for peremptory removal of the judge to which a case has been assigned. Any assigned case for that judge must then be reassigned to one of the other Criminal Division judges. The exercise of peremptory removal supports at least an appearance of "judge shopping," under which an attorney can seek to avoid a judge that he or she believes may be too harsh, too lenient, or too demanding. As a consequence, some judges may have significantly fewer active assigned cases, and their approach to dealing with cases may be seen as a burden on their colleagues.

Specific Recommendations on Arraignment and Case Assignments. Based on these observations, NCSC offers the following recommendations.

Recommendation 17: In the absence of exceptional factors under which justice would be served by severance of charges, the District Court in coordination with the District Attorney's Office should introduce a practice of having all pending matters with the same defendant consolidated before one judge.

Recommendation 18: Individual assignment of cases to judges can have the effect of fixing accountability and avoiding having judges pass case problems on to other judges. Yet it can also provide opportunities in New Mexico for lawyers to exploit differences in practices among individual judges by way of peremptory removal petitions. Rather than allowing this prospect to cause judges to be uniformly easy on attorneys as a way to avoid peremptory removal, the judges of the Criminal Division should seek consensus by committing to the consistent application of best practices in caseflow management. Except in unusual circumstances providing good cause in individual cases, judges should consistently hold themselves and attorneys accountable to comply with such best practices as those recommended in this report.

2. Discovery and Pretrial Motions. Rule 5-501 provides that unless the Court orders a shorter time, the DA must disclose discoverable evidence to the defendant within 10 days after arraignment or waiver of arraignment. The DA's Office understands this to mean that there is no entitlement to discovery before indictment.

In addition, problems in the transmission of police reports and other discoverable information from the Albuquerque Police Department (APD) to the District Attorney's Office have been seen as a source of discovery delay. APD's introduction of a new "Copperfire" electronic police report writing and forms generation system (see part 2 in Section B, "Arrest, Incarceration, and Police Reports") offers promise to address some elements of this problem, especially if there is coordination with any necessary software and work-process adjustments in the DA's Office and the Public Defender's Office.

At least 10 days before trial, the DA must file a certificate that all required discovery has been produced. Should the DA fail to comply, the Court may impose sanctions. Unless a shorter time is ordered by the Court, Rule 5-502 requires the defense to provide all discoverable information within 30 days after arraignment or its waiver, or 10 days before trial, whichever is earlier.

Rule 5-212 provides that any motion to suppress evidence must be filed within 20 days after the entry of a plea unless the Court waives time for good cause shown. There is no time requirement for when a hearing must be held on a suppression motion. Rule 5-601 (D) provides that all pretrial motions must be made at arraignment or within 90 days thereafter, unless the Court orders otherwise or waives the time requirement on good cause shown. The Court must rule on motions within a reasonable time after filing.

Specific Recommendation on Discovery and Motions. On the basis of the above discussion, NCSC offers the following two recommendations.

Recommendation 19: The District Attorney's Office should reconsider its interpretation of Rule 5-501 in order to disclose discoverable information before indictment sufficient to allow an experienced attorney from the Public Defender's Office to review a case before indictment and engage in discussions with a prosecutor about a possible plea or the most suitable way to proceed on felony charges. Such reconsideration should be encouraged by the District Court, which Rule 5-501 allows to order such disclosure earlier in a case.

Recommendation 20: To reflect the systemic significance of police reports for the felony discovery process, the DA's Office and the Public Defender's Office should make any necessary changes in business processes and software to promote efficient electronic receipt of law enforcement reports and discoverable information.[30]

[30] This suggestion parallels Recommendation 10 in Section B, "Arrest, Incarceration, and Police Reports."

Recommendation 21: The District Court should provide at arraignment for any motion to suppress evidence to be made and heard well in advance of trial, with appropriate arrangements for discovery to be completed.

3. Disposition by Plea or Trial. Rule 5-304 provides that, absent good cause shown, the District Court may fixed the time at which notification must be given to the Court of a plea agreement.

New Mexico's criminal procedure rules allow a court to hold a pretrial hearing in the nature of a trial management conference[31] if one is deemed appropriate. Under Rule 5-603, the District Court may order the attorneys to appear for pretrial hearing at any time after the filing of an information or indictment. Such a hearing may be held to consider (a) simplification of issues; (b) the possibility of admissions of fact and documents to avoid unnecessary proofs at trial; (c) the number of expert and other witnesses; and (d) any other matters to aid trial disposition. Such a hearing is probably not needed for most criminal trials, though it would be helpful for more complex matters. The NCSC project team did not determine how frequently pretrial hearings are held for this purpose in Bernalillo County.

As has been noted in Chapter II, Rule 5-604 provides that a trial must typically commence within six months after arraignment. For good cause shown, a trial start can be extended up to six months by the District Court, and then again by the Supreme Court. As Table 12 in Chapter II indicates, half of all Bernalillo County cases sampled by NCSC took 18 months or more (median 542 days) from District Court filing to jury trial disposition.

The rule provides that a case can be dismissed with prejudice if trial is not started within time limits. It appears that this sanction is seldom applied, however. The average time in the sample was about 20 months (596 days mean time), and 10% took 35 months (1,061.5 days) or more. It was thus common for jury trial cases to have more than two time extensions. Since about two-thirds of all cases had at least one bench warrant, it is possible that such time extensions were often granted because a defendant had failed to appear.

[31] See Ernest Friesen, "The Trial Management Conference," 29 *Judges' Journal* (No. 4, Fall 1990) 4.

Specific Recommendations on Plea or Trial. NCSC offers the following two recommendations for this stage of proceedings.

Recommendation 22: After communication with the District Attorney's Office and the Public Defender's Office, the District Court should consider the introduction of a plea cutoff policy to promote earlier pleas and greater certainty of trial dates. (See Appendix E for more details.) Such a policy appears to be permissible under Rule 5-304, which permits the Court to fix the time at which notification must be given of any plea agreement.

Recommendation 23: The Criminal Division should adopt a policy limiting unnecessary continuances, reflecting best practices for the management of criminal cases and the need to provide credible trial dates. (See Appendix D for a model continuance policy.) This policy should be applied with reasonable consistency by all the judges of the Criminal Division.

4. Sentencing and Probation. Under Rule 5-703, a presentence report must be available at least 10 days before a sentencing hearing. Rule 5-701 requires, absent good cause shown, that a sentencing hearing must begin within 90 days after trial conclusion or entry of a guilty plea. Sentence must then be imposed within 30 days after the end of the sentencing hearing.[32] Any motion to modify a sentence must under Rule 5-801 be filed within 90 days after sentence has been imposed or an appeal has been dismissed or conviction affirmed.

Under Rule 5-805, the initial hearing on a probation violation must begin within 30 days after the filing of a petition to revoke probation, or later if the defendant has been found incompetent, if a case is on appeal, or if a defendant fails to appear. The adjudicatory hearing on a probation violation must be held within 60 days after the initial hearing. Hearings on probation violations are held by the judges under a master schedule on a rotating basis every Friday.

[32] The rule permitting at least 120 days (and perhaps longer if a sentencing hearing ends on a date later than when it was begun) from conviction to imposition of sentence in New Mexico appears to allow a longer time than is provided by rule or statute in some other states. For example, sentence must be imposed within 40 days after conviction in the State of Washington; within 45 days in Tennessee; within 60 days in West Virginia; within 90 days in Wisconsin and Pennsylvania; and "without unreasonable delay" in Kentucky and New Jersey.

Specific Recommendation on Probation Violations. NCSC offers the following suggestions for management of probation violation hearings.

Recommendation 24: To improve timeliness in probation violation hearings and promote better use of time for judges and other criminal case participants, the judges of the Criminal Division should revisit the prospect of having a single judge hear all probation violation hearings for a week on a rotating basis. The risk of having a party exercise the right to peremptory removal of a judge at this stage should be addressed through the development and reasonably consistent application of Criminal Division policies and practices.

F. Conclusion

In the different sections of this chapter, a set of specific recommendations for improvement have been offered. It is important to make two points about these recommendations. First, it is critical that adoption of such improvements as those recommended here be a matter of division-wide policies among the judges, and that all or almost all of the judges be committed to following the policies most of the time in most circumstances. Second, the Court must avoid viewing "improvement" as little more than the adoption and application of one or two simple, discrete changes. Instead, attention must be given to the systemic nature of the criminal justice process and the need for a systematic approach to improvement.

Recommendation 25: To limit judge shopping and any potential for having individual judges criticized at retention, the judges of the Criminal Division should adopt and consistently apply best practices in the management of cases during all phases of case processing. To the extent possible, the Criminal Division should have published policies for the management of criminal cases, and the judges should follow them with sufficient consistency to give predictability and consistency to attorneys in the handling of criminal cases.

Recommendation26: Bernalillo County officials and District Court leaders should not view the recommendations offered in this report as a "cafeteria menu" from which they may simply pick some and reject others. Nor should the problems and potential solutions be viewed as the responsibility of just one or two organizations for piecemeal implementation. Instead, improvement of felony caseflow

management in Bernalillo County should be viewed as a matter requiring systemic effort under the leadership of the District Court and involving all its criminal justice partners and stakeholders. To that end, the Court and the County should adopt and implement a comprehensive improvement plan such as that offered in Chapter III of this report.

Chapter III. Comprehensive Felony Caseflow Management Improvement Program for Bernalillo County

Although specific numbered recommendations for improvement are offered throughout Chapter II, it is not enough simply to "fix" a defined set of specific problems. Instead, the District Court and the other court-related and general government stakeholders in Bernalillo County must take a broader and more comprehensive approach. It is critical to change the mindset of the criminal justice community in Bernalillo County.

Based on their assessment of felony case-processing situation in Bernalillo County, the NCSC project team members offer the following overall program for felony caseflow management improvement in Bernalillo County. This program follows Recommendation 26, and it builds on the other specific numbered recommendations offered in Chapter II for particular phases of felony case processing.

A. Criminal Division Judge Commitment and Policies

- Currently, there is little communication among the judges about what works and what doesn't regarding calendar settings, continuances, pretrial processes, and trial management. Judges meetings should be structured to discuss these basics and move toward agreement on Division policies. Lawyers and staff are confused, on the one hand, and game the judges, on the other hand, since there is no consistency among the judges.
- Learning the basic principles and best practices of criminal caseflow management by the judges and key court staff must be an announced, agreed upon objective. Either county or grant funds should be sought to run a one to two-day session specifically targeting these principles.
- Pretrials and criminal settlement conferences should be consistently set 30-45 days after arraignment, lawyers must be expected to be prepared, and a judge with authority to accept a plea must be present.

B. District Attorney and Law Enforcement

- The DA should develop a plan and process for preliminary hearings instead of channeling the vast majority of cases through Grand Jury indictment. Delays can be reduced, pleas enhanced, and excessive work on the part of many justice system agencies lessened.

- Law Enforcement arrest records processing must be improved; accurate and timely data needs to be transmitted to the DA's Office without the current delays experienced. There should be a commitment and action plan to reengineer the workflow procedures with special attention to remedying the widespread delays in APD's Records Department.
- DA plea policies should be widely understood by the defense bar, including a strong plea cut-off policy widely known to the defense bar.
- The DA should explore assigning lawyers to cases as soon as practical after a decision is made to charge. The delays occasioned in not assigning a lawyer to a case until after Grand Jury indictment work against early pleas and disposition of the case.

C. Public Defender and Private Defense Counsel

- Discovery needs to be exchanged as early as possible.
- Pretrial conferences must to be meaningful; defense lawyers must be conversant with their case at the first pretrial. The system should operate on the presumption there will be only one pretrial unless the case is highly unusual, complex, or there has been a change in counsel. Settlement conference orders (trial management orders) should be developed at the pretrial for any case that is not pled.

D. Criteria for Success in Timely Case Processing

- Bernalillo County case processing standards commencing at arrest or initial appearance should be developed and applied, including time to district court indictment, and phasing in the movement toward agreed-upon best practices using such goals as those recommended by the American Bar Association as a guide.
- Perhaps building upon the Bernalillo County experience in this effort, the Supreme Court of New Mexico should revisit its current implied 18-month time guideline running from district court arraignment, having research done on statewide standards in other jurisdictions. See National Center for State Courts, Knowledge and Information Services, "Case Processing Time Standards in State Courts, 2007" (February 2009), available online at http://www.ncsc.org.

E. Information Technology and Effective Capacity to Monitor Case Status

- The new Tyler electronic case management software must be able to clearly measure the time between major events in the criminal caseflow, producing understandable statistics. All those entering data, especially judicial assistants to judges, must dependably and uniformly log data into the system. Training programs and error rates, including omissions, delays and inaccuracies, must be strictly monitored by court administration and reported to the employing judge. Enhancing the current system may be difficult and take needed time away from instituting other necessary caseflow reforms.

- TCAA's in judges' chambers should be required to attend periodic special training programs on their key role in case processing and provided opportunities to enhance their skills and understandings.
- To address the systemic significance of police reports for the felony discovery process, the DA's Office and the Public Defender's Office should coordinate with APD and BCSO to make any necessary changes in business processes and software to promote efficient electronic receipt of law enforcement reports and discoverable information.

F. Recommended Steps to Exercise Active Caseflow Management

- Law enforcement: See case processing recommendations in "Arrest to Indictment" Section of Chapter II.

- District Attorney: By moving more cases away from prosecuting virtually all cases by indictment to one focusing more on prosecution by information, earlier exchange of discovery should be easier to accomplish for those matters. For cases that continue to proceed to indictment, exchange of discovery should take place prior to indictment as should the assignment of an assistant DA responsible for the case up to and through trial.

- Indigent Defense: Currently, a public defender is not assigned to the case until after Grand Jury indictment. An ad hoc task force chaired by a leadership judge should help the DA and PD develop a mutually acceptable early discovery experimental project. Once perfected, the new approach should be expanded to the entire court.

- Triage Event: Although this might be achieved through an expansion of the "Pre-Indictment Plea Program (PIPP)" or of the "Early Plea Program (EPP)," it would be more effective in a pre-indictment preliminary hearing conducted by the District Court. Should the justice system move a majority of cases to preliminary hearing, this can serve as a pre-indictment triage event, provided there is a simultaneous commitment to exchange discovery and assign defense and prosecution counsel prior to indictment. The great majority of cases not resolved by plea at this stage should be prosecuted by information and arraigned at preliminary hearing by the District Court judge immediately upon filing of the information.

- Case Preparation: Preparation of a case from arraignment requires a written continuance policy that is consistently enforced by

Criminal Division judges; agreement about standard time periods from arraignment to pretrial; and Division-wide consistency in conducting pretrial conferences (i.e., what is expected, routine settlement and trial management orders, and expectations that lawyers will be prepared). (See Appendix D.)

- Pretrial Conferences: See the best practices described in Appendix C.

- Plea Cutoff: The Criminal Division and the District Attorney's Office should consider the possibility of introducing a plea cutoff policy, which would require commitment and consistency from both the Court and the District Attorney. (See Appendix E.)

- Credible Trial Dates: The Criminal Division should have a written and published policy to limit unnecessary continuances. (See Appendix D.) Most of the time, most of the Criminal Division judges should follow the policy, granting continuances for good cause and only when absolutely necessary.

  In addition, a clear, workable, agreeable back-up judge plan must be developed. It should be widely understood and clearly demonstrated by trial date that no one will be turned away on a trial date for lack of a judge. This may require that civil judges cover for Criminal Division judges when they are all in trial and are overset.

- Trial Management: Pursuant to Rule 5-603, the District Court should hold a pretrial hearing for purposes of trial management in cases where streamlining the order of proof would be aided by such a hearing. If the judge and the attorneys are able to shorten the typical trial duration by reducing any unnecessary redundancies, it has the effect of making more judge, prosecutor and defense attorney time available for other matters, in effect expanding the amount of available resources.[33]

- The PV Calendar: A separate probation violation calendar should be structured. To date, the Court has allowed the lawyers to control whether such a calendar is structured or not. In developing such a calendar, most courts in other jurisdictions listen to suggestions from numerous parties,

[33] See Dale Sipes and Mary Oram, *On Trial: The Length of Civil and Criminal Trials* (Williamsburg, VA: National Center for State Courts, 1988).

and then proceed with a solution decided upon by the Court taking into account the suggestions. The decision should rest with the Criminal Division.

G. Priorities and Consensus for Implementation

- Needed Priorities: Leadership; Criminal Division-wide training on the principles of criminal caseflow management; an agreed upon action plan; experimental / pilot programs; timely and accurate information.

- Court Consensus: Criminal Division judges need a retreat for training and consensus-building in caseflow management.

- DA/PD Consensus: These two offices and their top-level leaders do not appear to get along institutionally. Perhaps some sort of one-on-one meeting with a facilitator would help. It is to their mutual advantage to work effectively together and promote early resolution of cases, especially given the continued poor economy and likely constricted budgets and staff. Is there an icon in the community that could encourage cooperation? A current or former judge or chief justice, a mediator, a respected attorney?

- City/County Consensus: A candid assessment is that trust levels appear low among the County and City stakeholders. There seems to be suspicion of ulterior motives. A respected public official or a retired professional or other community leader who is well-respected might champion the effort to build inter-governmental consensus.

- Assuring Success: There must be continued attention to corrective initiatives. Data should be published, public commitments offered, and reports issued. This would be a big step in the culture of the local justice system which is currently based on autonomously operated agencies. The ultimate issue is this: How can the Court and affiliated criminal justice agencies operate together as a system?

APPENDICES

APPENDIX A.

AVERAGE AGE OF DISPOSED AND PENDING BERNALILLO COUNTY FELONY CASES, FY 2004-FY 2009, COMPARED TO NEW MEXICO STATEWIDE DISTRICT COURT AVERAGES

Table A-1. Average Time to Disposition (in Days), New Felony Cases with One Judge, Second Judicial District and Statewide [a]

Fiscal Year	Total Cases	2d Dist Ct Average	Statewide Average	Over Statewide Average	Under Statewide Average
2004	3,324	271	207	54.1%	45.9%
2005	4,014	202	207	38.2%	61.8%
2006	3,891	200	207	35.9%	64.1%
2007	3,559	232	207	43.7%	56.3%
2008	3,396	225	207	42.3%	57.7%
2009 [b]	1,996	222	207	41.0%	59.0%

Table A-2. Average Time to Disposition (in Days), Reopened Felony Cases with One Judge, Second Judicial District and Statewide [a]

Fiscal Year	Total Cases	2d Dist Ct Average	Statewide Average	Over Statewide Average	Under Statewide Average
2004	1,606	127	99	27.4%	72.6%
2005	1,768	123	99	22.9%	77.1%
2006	1,965	110	99	21.2%	78.8%
2007	1,705	98	99	22.0%	78.0%
2008	1,663	106	99	21.5%	78.5%
2009 [b]	860	71	99	16.6%	83.4%

Table A-3. Average Age (in Days), Pending Felony Cases with One Judge, Second Judicial District and Statewide [a]

Fiscal Year	Total Cases	2d Dist Ct Average	Statewide Average	Over Statewide Average	Under Statewide Average
2004	5,581	243	305	19.0%	81.0%
2005	6,296	240	305	18.1%	81.9%
2006	5,898	248	305	18.7%	81.3%
2007	6,035	225	305	19.1%	80.9%
2008	5,462	232	305	18.7%	81.3%
2009 [b]	6,683	242	305	21.0%	79.0%

[a] Source: Court Administrator, Second Judicial District.
[b] FY 2009 data are for the period from July 1, 2008, through February 28, 2009, only.

APPENDIX B.

NCSC REQUEST FOR SAMPLE ELAPSED TIME FELONY CASE DATA FROM DISTRICT COURT

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Memo

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From: David Steelman

CC: Judge William Lang
Judge "Pat" Murdoch
Juanita Duran
Mark Pickle
Jane Macoubrie
Gordy Griller

Date: April 14, 2009

Re: Request for sample case data

This request comes after my discussions with Juanita Duran and my receipt of information from you. NCSC would like data from three representative samples -- one consisting of 100 criminal cases recently disposed by each criminal division judge; a second consisting of all criminal cases recently disposed by jury trial; and the third consisting of 100 cases per criminal division judge that were still open on a recent date. A "case" is a single defendant and all the charges involved in a single incident.

By "disposed" cases I mean those in which there has been a conviction by plea or trial or an acquittal or other non-conviction event ending a prosecution (such a dismissal or nolle prosequi). A case "disposed by jury trial" is one in which a disposition is reached after a trial jury has been impaneled. An "open" case is one that has not yet been disposed by any such means.

A sample consisting of 100 cases per judge will have a ± 10% margin of sampling error, and NCSC will not report on individual judges. The sample results will be reported in the aggregate for the entire division, and the aggregate sample will have a margin of error of less than ± 5%, which is considered an

acceptable level of sampling error. Of course, there will be no margin of error for jury trial dispositions.

To identify the specific cases in the sample of "disposed" cases for each judge in the criminal division, please determine how many cases each judge disposed in the most recent 12-month period (for example, between April 1, 2008, and March 31, 2009), and then divide that total by 100. If Judge A had 1,500 disposed cases, example, begin the sample with the first disposed case during that period, and then pick every (1,500 ÷ 100 =) 15th case until you have a total of 100 sample cases. (If there are multiple defendants prosecuted together at the same time, please pick just one of those defendants -- for example, the one first named in the indictment.)

To identify the "jury trial dispositions," determine how many cases had a jury impaneled in the most recent 12-month period (for example, between April 1, 2008, and March 31, 2009). Then provide the information we need for all of those cases.

To identify the specific cases in the sample of "open" cases for each judge in the criminal division, determine how many cases each judge had pending as of the last day of the one-year period for disposed cases (e.g., March 31, 2009), and then divide that total by 100. Begin the sample with the oldest pending case, and then pick every "nth" (for example, "n" could equal 1,500 ÷ 100) until you have a total of 100 sample cases, being careful to pick just one defendant in a multiple-defendant prosecution.

In each sample, here is the information that NCSC requests:

Date of arraignment on indictment;
Date of first entry of appearance by a public defender or first entry of appearance by private defense counsel;
Date of entry of appearance by any conflict counsel;
Date of last recorded discovery event;
Date of hearing on any suppression motion;
Date of last pretrial hearing;
Number of times a bench warrant was issued;
Number of times any event before trial was not held and was rescheduled;
Date of trial commencement or disposition by non-trial means;
Number of times that trial start was scheduled but was not held and had to be rescheduled; and
In conviction cases, date of sentencing.

Our analysis will involve the calculation of elapsed times from date of arraignment to subsequent court event. This will enable us not only to determine how well the Court does by comparison to relevant generally-accepted time standards, but also to see where things typically get bogged down.

APPENDIX C.

BEST PRACTICE LESSONS FOR FELONY PRETRIAL SETTLEMENT CONFERENCES

Appendix C.
Best Practice Lessons for Felony Pretrial Settlement Conferences

A. Introduction

In 2009, the Supreme Court of New Mexico approved the use of settlement conferences (often known as criminal pretrial conferences) in the District Court for the Second Judicial District in Bernalillo County. To aid the development and implementation of such settlement/pretrial conferences for felony cases in Bernalillo County, the National Center for State Courts (NCSC) has been asked to provide a "white paper." This chapter is based on that white paper. It outlines best practices from urban trial courts around the country, with particular reference to experience in the Maricopa County Superior Court in Phoenix, Arizona. The overall theme for this chapter is that successful use of criminal pretrial settlement conferences requires that they be part of a broader effort by the court and its justice partners to see that justice is done in a prompt manner that serves the interests of both case participants and taxpayers.

B. Lessons from Urban Trial Courts Generally

A trial court's use of settlement/pretrial conferences in felony matters can be an important part of a caseflow management effort.[34] In order for criminal pretrial conferences to work successfully, the following are critical:

- Court commitment to achieving justice promptly;
- A strong commitment by the prosecutor's office to speedy case processing; and
- Commitment by public defenders and others representing criminal defendants not only to providing effective assistance of counsel, but also to resolving cases expeditiously in recognition of speedy trial requirements.

In view of the fact that about 95% of all criminal cases in American trial courts are disposed by plea or other nontrial means, criminal caseflow management should focus on ways to provide for meaningful plea discussions between prosecution and defense counsel, beginning at an early stage of proceedings. This includes the following:

- Early determination of defendant eligibility for counsel at public expense, so that defendants can be represented by counsel as soon as possible after arrest and initial appearance in Bernalillo Metropolitan Court;
- Early opportunities for defense counsel to meet with their clients;
- Prompt provision of arrest reports, recorded statements and other police information by law enforcement officers to the prosecutor's office;[35]

[34] See Barry Mahoney and Dale Sipes, "Toward Better Management of Criminal Litigation," 72 *Judicature* (No. 1, June/July 1988) 29.

[35] To avoid problems that may arise *after* cases have been filed in court, it may be necessary for the district court in Bernalillo County to work with prosecutors and law enforcement officials to address *pre-filing* issues associated with police and prosecutor activities immediately after arrest.

- Prosecution provision of an early "discovery package" to defense counsel to promote meaningful early discussion of disposition options between prosecution and defense counsel;[36]
- Realistic plea offers by the prosecution as early as possible;[37]
- Defense counsel preparation to negotiate, balancing the best interests and constitutional rights of their clients, and including meetings with their clients;
- Court insistence that counsel meet deadlines for case preparation and monitoring of the scheduling of pretrial settlement conferences to identify and resolve reasons for unnecessary continuances and rescheduling; [38]
- Early court decisions (preferably before pretrial settlement conferences) on admissibility of evidence, most notably regarding defense motions to suppress evidence;
- Court and prosecution commitment to enforcing a "plea cutoff date" policy (see Appendix E); [39]
- To help prosecution and defense counsel be focused on achievement of negotiated pleas as part of the pretrial settlement conference process, court provision of firm and credible trial dates.

C. Lessons from Maricopa County Superior Court

National-scope studies of delay in urban trial courts show that the judges, court staff and justice partners of the Arizona Superior Court for Maricopa County in Phoenix have for decades sought to assure that justice is done promptly in the felony and civil matters that come before it.[40] As a result, it has long been recognized as a court with a long and successful history of managing delay.[41] Presented here are best practices from the successful operation of criminal pretrial conferences in the Maricopa County Superior Court.

[36] Unless and until the prosecution has provided suitable discovery to the defense attorney, there can be no meaningful opportunity for plea discussions. To avoid unnecessary multiple rescheduling of criminal pretrial settlement conferences, it is critical for this to be addressed as early as possible in the felony process.

[37] A realistic plea offer is one that can be seen by defense counsel and the defendant as being sound on the specific evidence in the case and reflects a reasonable prediction of the likely outcome in the case. Unless a prosecutor is willing to make such offers, defense counsel will maintain that "justice delayed is justice achieved," and criminal pretrial settlement conferences will fail to achieve early case dispositions.

[38] For a model continuance policy, see Appendix D.

[39] For the elements of a successful plea cutoff policy, see Appendix C.

[40] See, for example, Thomas Church, et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (NCSC, 1978); Larry Sipes, et al., *Managing to Reduce Delay* (NCSC, 1980); Barry Mahoney, et al, *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts* (NCSC, 1988); and John Goerdt, et al., *Reexamining the Pace of Litigation in 39 Urban Trial Courts* (NCSC, 1991).

[41] See William Hewitt, et al., *Courts That Succeed: Six Profiles of Successful Courts* (NCSC, 1990).

Prior to the Conference

- The **pretrial should be thought of as a process** rather than a conference, because the progression of narrowing the issues, clearly identifying the options, and assessing the arguments culminates in negotiated pleas.
- It is **critical for the court to promote preparation by the lawyers prior to the conference**. The oft mentioned caseflow adage that prepared lawyers settle cases is based on hard evidence and documented fact. The earlier a case is prepared for trial, the earlier it can be resolved by the parties. Counsel preparation is the single most important factor in settlement.
- Since lawyers are more prone to prepare for meaningful events; the **conference must be seen by all as an important significant event**. Not a mere status conference which many meaningless pretrials essentially are where the judge inquires of the parties what they have done, the lawyers explain why things are not moving along as they should, the judge admonishes the lawyers and then another pretrial conference date is set.
- The **conference must be realistically set**; far enough in advance (e.g., 2 weeks prior to the trial date is a common point) to permit preparation, but short enough to stimulate preparation.
- An effective trial management conference **requires that the lawyers be substantially ready for trial**.
- The **lawyers who will try the case and the defendant must be present**.
- Normally, in a criminal management conference, the **assigned trial judge is not the trial conference judge** unless the parties so stipulate.
- Under the NM Supreme Court permitted criminal trial management conference pilot project, the **trial conference judge takes a more active role in presenting information to the defendant**. This requires that the judge be relatively familiar with the nature of the offense, the prosecutor's plea offer, the defendant's criminal history, and defense arguments.
- To ensure the trial management conference is successful, **it would be wise that the court require counsel to prepare certain documents in advance of the pretrial**. Discussion and agreement among public lawyers and the court regarding the exact requirements and documents should be decided in establishing the pilot. The Maricopa Superior Court model, although discretionary, often requires a settlement memorandum be filed.

At the Conference

- **Strict adherence to a plea cut-off date**. Normally, the plea offer should expire no later than 24 hours after the trial management conference. Negotiated dispositions are based on an early, realistic offer that is unlikely to improve substantially with the passage of time. (See Appendix E.)
- **Conference should last no longer than 45 minutes**.
- **Level-headed discussion of major discovery elements, but not in an adversarial manner**. The pretrial is not intended to engender arguments, but to present data and options.
- **Informal setting** at a counsel table in the courtroom, a conference room or jury room, generally with the judge robed.
- Judge explains the **three-fold purpose** of the conference: give information to the defendant, advise the defendant of the evidence, and examine the plea offer.
- Judge reviews the **context in which the pretrial or trial management conference is offered**...it is non-coercive (not trying to force the defendant to enter a plea), it examines the role of the jury regarding conviction and acquittal and it relates the settlement statistics for like criminal cases, indicating that most arrive at a negotiated plea.

APPENDIX D.

MODEL CONTINUANCE POLICY

Appendix D.
Model Continuance Policy[42]

It is the policy of this Court to provide justice for citizens without unnecessary delay and without undue waste of the time and other resources of the Court, the litigants, and other case participants. For all of its case types and dockets, and in all of its courtrooms, the Court looks with strong disfavor on motions or requests to continue court events. To protect the credibility of scheduled trial dates, trial-date continuances are especially disfavored.

Except in unusual circumstances, any continuance motion or request must be in writing and filed not later than [48 hours] before the court event for which rescheduling is requested. Each continuance motion or request must state reasons and be signed by both the attorney and the party making the request.

The Court will grant a continuance only for good cause shown. On a case-by-case basis, the Court will evaluate whether sufficient cause justifies a continuance. As a guide to practitioners, the following will generally *not* be considered sufficient cause to grant a continuance:

- Counsel or the parties agree to a continuance;
- The case has not previously been continued;
- The case probably will settle if a continuance is granted;
- Discovery has not been completed;
- New counsel has entered an appearance in the case or a party wants to retain new counsel;
- Unavailability of a witness who has not been subpoenaed;
- Plaintiff has not yet fully recovered from injuries when there is no competent evidence available as to when plaintiff will be fully recovered;
- A party or counsel is unprepared to try the case for reasons including, but not limited to, the party's failure to maintain necessary contact with counsel;
- The failure to schedule the hearing on a suppression motion on a timely basis unless the prosecution failed to comply with a discovery order;
- A police officer or other witness is either in training or is scheduled to be on vacation, unless the Court is advised of the conflict soon after the case is scheduled and sufficiently in advance of the trial date;

[42] This model policy was originally developed by David C. Steelman, Principal Court Management Consultant, National Center for State Courts, at the request of the Presiding Judge of the Yamhill County Circuit Court in McMinnville, OR, in 2006, as part of a caseflow management technical assistance program with the Oregon Judicial Department. It has been revised in 2009 as part of a technical assistance project with the Alaska Judicial Department and the Alaska Superior Court for Anchorage, incorporating examples of grounds on which continuances would generally be granted or not granted in substantial reliance on the continuance policy published by the Circuit Court of Petersburg, VA (11th Judicial Circuit)(© Supreme Court of Virginia 2009) (see http://www.courts.state.va.us/courts/circuit/Petersburg/continuance.html, as downloaded on June 23, 2009).

- Any continuance of trial beyond a second trial date setting.

The following *will* generally be considered sufficient cause to grant a continuance:

- Sudden medical emergency (not elective medical care) or death of a party, counsel, or material witness who has been subpoenaed;
- A party did not receive notice of the setting of the trial date through no fault of that party or that party's counsel;
- Facts or circumstances arising or becoming apparent too late in the proceedings to be fully corrected and which, in the view of the Court, would likely cause undue hardship or possibly miscarriage of justice if the trial is required to proceed as scheduled;
- Unanticipated absence of a material witness for either party;
- Illness or family emergency of counsel.

Any grant of a continuance motion or request by the Court shall be made on the record, with an indication of who requested it and the reasons for granting it. Whenever possible, the Court shall hold the rescheduled court event not later than [7 days] after the date from which it was continued.

Information about the source of each continuance motion or request in a case and the reason for any continuance granted by the Court shall be entered for that case in the Court's computerized case management information system. At least once a quarter, the chief judge and other judges of the Court shall promote the consistent application of this continuance policy by reviewing and discussing a computer report by major case type on the number of continuances requested and granted during the previous period, especially as they relate to the incidence and duration of trial-date continuances. As necessary, the Court shall work with bar representatives and court-related agencies to seek resolution of any organizational or systemic problems that cause cases to be rescheduled, but which go beyond the unique circumstances of individual cases.

APPENDIX E.

ELEMENTS OF A SUCCESSFUL "PLEA CUT-OFF" POLICY FOR CRIMINAL CASES

Appendix E.
Elements of a Successful "Plea Cut-Off" Policy for Criminal Cases[43]

Introduction[44]

In view of the fact that about 95% of all criminal cases are disposed by plea or other non-trial means, criminal caseflow management should focus on ways to provide for meaningful plea discussions between prosecution and defense counsel, beginning at an early stage of proceedings. Prosecutors should be prepared to make realistic plea offers as early as possible. Defense counsel, in turn, should be prepared to negotiate, balancing the best interests and constitutional rights of their clients.

The court should establish and be prepared to enforce a "plea cut-off" policy. Under such a policy, the court in a scheduling order might establish a date for prosecution and defense counsel to meet to discuss the possibility of a plea, at which the prosecutor's office would be prepared to make its best offer to the defendant. A plea cut-off date, perhaps a week after that conference and one or two weeks before the scheduled trial date, would be the last date on which the defendant could accept the prosecution's best offer. If the defendant sought to plead guilty after that date, he or she would have to plead to the original charge filed by the prosecutor. There would be no benefit for the defendant to wait, since the prosecutor's offer would not "get better" from a defense perspective.

Necessary Features

In order for a plea cut-off policy to be successful, there are certain features that must be present. They are the following:

- The court and the prosecutor's office must both be committed to making the program work.
- The program must provide an opportunity for a "best-and-final" prosecution plea offer after defense counsel has (a) received sufficient discoverable evidence to assess the strength of the prosecution's case, and (b) met the defendant enough to have attorney-client credibility in discussion of the prosecution offer.
- The prosecutor's office must make a best-and-final plea offer that is really a "good offer" – that is, one that is credible based on the evidence and what a reasonable defense attorney would expect to happen if the case went to trial.
- There should be a plea cut-off date after which the prosecution's best-and-final plea offer is no longer available.
- Even though the court cannot be expected to reject a defendant's guilty plea, even on the day of trial, the court must be firm in its enforcement of the plea cut-off

[43] This document was originally prepared by David Steelman, Principal Court Management Consultant, National Center for State Courts, on September 13, 2008, in response to a technical-assistance request from Suzanne H. James, Court Administrator for the Circuit Court for Howard County in Ellicott City, Maryland.

[44] David Steelman, with John Goerdt and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (NCSC, 2004 edition), p. 33.

date. This means that in almost all circumstances, absent unforeseen developments, most or all of the criminal judges must require the defendant to "plead straight up" or "make a naked plea," without the benefit of the best offer made by the prosecutor.

Other Features Promoting Success

The success of a plea cut-off policy requires that the above features be present. There are other features that can enhance the likelihood of success. These include the following:

- Court capacity to provide credible trial dates.
- Early prosecution screening of cases to assure that charges fit the evidence.
- Early determination of defendant's eligibility for representation by the public defender or otherwise at public expense.
- Early defense counsel contact with the client to develop a working attorney-client relationship.
- Early prosecution provision of a "discovery package" to defense counsel, with sufficient information to allow defense counsel (a) to identify any potential suppression issues, and (b) otherwise to assess the strength of the prosecution case.
- Timing of the final prosecution-defense plea discussion close enough to the trial date for the defendant to take the prosecution's best-and-final offer seriously, but enough in advance of the trial date to allow the court scheduling flexibility if the defendant decides to accept the prosecution offer and plead guilty on or before the plea cut-off date.

NCSC Est. 1971
National Center for State Courts

Providing Trusted Leadership and Proven Solutions to Courts

ESTIMATING THE POTENTIAL IMPACT OF BETTER CRIMINAL CASEFLOW MANAGEMENT ON THE JAIL POPULATION IN BERNALILLO COUNTY, NEW MEXICO

Report to Ramon Rustin, Chief of Corrections, Bernalillo County

January 25, 2013

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ESTIMATING THE POTENTIAL IMPACT OF BETTER CRIMINAL CASEFLOW MANAGEMENT ON THE JAIL POPULATION IN BERNALILLO COUNTY, NEW MEXICO

Table of Contents

I. Introduction and Overview

In 2006, the design capacity of the Bernalillo County Metropolitan Detention Center (MDC) – the county jail – was increased to 2,236 inmates. By 2010, the average daily population of the MDC was 2,483, or 111% of its rated capacity. At times the daily MDC population would reach 118% of capacity. In a 2012 strategic plan, criminal justice officials wrote the following: [1]

> This level of jail crowding at the MDC affects every aspect of institutional life, from the provision of basic services such as food and bathroom access to programming, recreation, and education. It stretches existing medical and mental health resources and, at the same time, produces more mental health and medical crises.

Despite many efforts in recent years to address jail crowding, Bernalillo County is now being sued in the US District Court for the District of New Mexico to force a reduction in the jail population. This report has been prepared by the National Center for State Courts (NCSC) at the request of the Bernalillo County Chief of Corrections.

The central theme of this report is that Bernalillo County, the 2nd Judicial District Court of New Mexico, and their criminal justice partners can help to address jail crowding through management steps that reduce and avoid unnecessary delay. Model Time Standards for criminal cases suggest that felony cases should be disposed more quickly than they now are in Bernalillo County. While few courts actually reach the model standards, national data for trial courts in large urban counties show that they can and do process felony cases faster than is done in Bernalillo County.

Improvements in the management of criminal case progress from initiation to conclusion by the District Court and its criminal justice partners would reduce times to disposition and would consequently reduce the average length of stay for criminal defendants detained pending adjudication. As Section IV of this report shows, NCSC estimates that improvements in felony caseflow management before adjudication and in management of probation violations after sentencing might reduce the average MDC jail population in Bernalillo County by as much as about 210-250 inmates.

Whether improvements can be made in criminal caseflow management in Bernalillo County depends in part on personnel resources in the District Court's Criminal Division, the Bernalillo County District Attorney's Office, and the 2nd District Public Defender's Office, including how

[1] *New Mexico 2nd Judicial District Criminal Justice Strategic Plan* (January 2012), p. 2, http://www.bernco.gov/upload/images/commission/dist5/Bernalillo%20County%20Criminal%20Justice%20Strategic%20Plan.pdf.

well current staff resources are used. As Section V of this report indicates, NCSC estimates that improving criminal caseflow management in the 2nd Judicial District might have the same effect as if there were at least one more judge, as well as two or three more prosecutors, two or three more public defenders, and a comparable number of additional support staff members, available in these organizations to work on criminal cases.

II. NCSC 2009 Report on Criminal Caseflow Management

In 2009, Bernalillo County engaged NCSC to study criminal felony case processing, with particular attention to felony cases in the Second Judicial District Court of New Mexico, which is the general-jurisdiction trial court serving the County. In a report dated November 2009,[2] NCSC presented its findings on what available data show about felony case processing times from arrest and incarceration through pretrial release and probable cause determination in the limited-jurisdiction Metropolitan Court and District Attorney case presentation to a grand jury to the initiation and conclusion of District Court case processing. Based on those findings, the NCSC report then offered recommendations for improvement in the form of a "Comprehensive Felony Caseflow Management Improvement Program."

A. Caseflow Management and Jail Crowding. The recommendations offered in the 2009 NCSC report are based on the work of many court leaders, consultants and researchers since the 1970's to understand delay in criminal and civil court proceedings and develop demonstrably successful ways to reduce and avoid unnecessary delay. Among the best practices for criminal cases that are reflected in the 2009 NCSC recommendations are the following:[3]

- Court system measurement of case processing against statewide time expectations running from arrest or initial court appearance;
- Expeditious transmission of digital and other evidence by law enforcement to the prosecutor;
- Early prosecutor screening of cases and provision of an early "discovery package" to defense counsel at or soon after initial appearance;

[2] David Steelman, Gordon Griller, Joseph Farina, and Jane Macoubrie, *Felony Caseflow Management in Bernalillo County, New Mexico* (Denver, CO: NCSC, Court Consulting Services Division, November 2009). For highlights of the findings and recommendations in that report, see Appendix A.

[3] See David Steelman, with John Goerdt and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2004 edition), especially pp. 1-19 and 32-38, available online at http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1498; also available at http://www.justpal.org/LinkClick.aspx?fileticket=K0zY2upe4OM%3D&tabid=103&mid=449; or http://www.yourhonor.com/pdfs/PDP10/Caseflow.pdf.

- Prompt determination of defendant eligibility for representation at public expense and early contact by and indigent defense attorney with the defendant;
- Early and continuous court control of case progress, beginning at the initial court appearance, including an early District Court event soon after initial appearance for experienced prosecutors and defenders to assess felony cases for referral to diversion programs, referral to problem-solving court programs, early negotiated disposition, referral for prosecution as misdemeanors, or immediate felony arraignment on prosecutor charges by information rather than indictment;
- Early exchange of discoverable information, and early hearing and ruling on suppression motions;
- Court provision of meaningful pretrial court events, allowing lawyers to avoid unnecessary wasted time, and at which lawyers are prepared and able to resolve cases by negotiation for which resolution by trial is not required;
- Court scheduling of cases for trial in a manner that assures the integrity and credibility of trial dates, so that lawyers are prompted to prepare their cases early; and
- Assuring the timely completion of court proceedings after disposition, most notably probation violations.

Successful implementation of such steps as these is not easy, since it involves ongoing leadership and commitment by the leaders of the court, the prosecution, the public and private defense bar, law enforcement, and corrections. All of these have direct relevance for the reduction of jail crowding in Bernalillo County. To the extent that the 2nd Judicial District Court and its criminal justice partners are able to reduce unnecessary delay in the criminal court process, a predictable and necessary byproduct is the reduction of the average length of stay at MDC for criminal defendants who are detained pending adjudication of felony prosecutions and probation violations.

B. Action to Date on NCSC Recommendations. Following the submission of the NCSC report, NCSC project team members attended a "shirtsleeves" session with 2nd District Court Criminal Division judges in March 2010 to consider the NCSC findings and recommendations. In that session, consensus was reached among the attending judges on steps to improve caseflow management in the Criminal Division:[4]

- Exercise District Court control over the pace of litigation from bind over (7 court initiatives identified).

[4] See Appendix B for minutes of that meeting prepared by NCSC and subsequently shared with the Court and the County.

- Have all judges operate in a united fashion as a Criminal Division to assure meaningful pretrial court events to promote prompt case preparation by lawyers (3 court initiatives identified).
- Reduce the number of times the court has to touch a case, by streamlining procedures, developing special/consolidated calendars, and developing a back-up judge program to avoid continuing numerous trials because individual calendars are overset (3 court initiatives identified).
- Limit the number of postponements in criminal cases (2 court initiatives identified).
- Continue and expand the use of settlement conferences in criminal cases, using both retired pro tempore judges and sitting Criminal Division judges (2 court initiatives identified).

After the conclusion of this session in 2010, the NCSC project team has had only intermittent communications with Court and County representatives about the possibility of assessing the cost impact of implementing the NCSC recommendations. We understand that the County provided funding for *pro tempore* ("pro tem") judges to sit in a part-time capacity to hold criminal settlement conferences and hear probation violations on dockets heard in courtrooms provided by the County at MDC. It is not clear to NCSC what further recommendations in the 2009 report may have been implemented by the Court acting either by itself or in collaboration with the District Attorney, the Public Defender, MDC, or law enforcement agencies.

III. Assessment of Bernalillo County Criminal Case Processing Based on Data Gathered after Completion of the 2009 NCSC Study

To go beyond the information available for the assessment reported in 2009, NCSC could do no more within the limited time available for the preparation of this short report than to conduct a very brief analysis of data about criminal case processing in Bernalillo County that had already been gathered by others after the NCSC study was completed in 2009:

- A sample of 2nd District Court criminal cases identified from MDC data for pretrial releases from MDC in 2009;
- A sample of 2nd District Court from a set of all felony cases identified by the New Mexico Administrative Office of the Courts (AOC) as having been disposed in 2010; and
- MDC records of 2nd Judicial District Court criminal cases with probation violation hearings held at MDC in 2012.

Results of the NCSC analysis are presented in the sections below. To help provide a context for thinking about what the NCSC analysis shows about criminal cases in Bernalillo County, it is helpful first to consider the most recent consensus about how long it should take for criminal cases to be disposed, as well as the most recent national information available about how long felony cases take to be disposed in large urban counties.

A. National Performance Criteria and Benchmarks. In 2011, "Model Time Standards" for cases in state trial courts were developed by a national committee of court leaders with the assistance of NCSC and approved by the Conference of Chief Justices (CCJ), the Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM), and the American Bar Association (ABA) House of Delegates. Table shows the model time standards for criminal cases, comparing them to prior national standards promulgated by the COSCA and ABA. As the table indicates, the standards suggest that virtually all felony cases should be disposed within one year after arrest, recognizing that a small percentage (such as murder cases) would often require more time.

Table 1. Model Time Standards for State Trial Court Criminal Cases[5]

Case Type	COSCA Standard 1983	ABA Standard 1992	Model Standard 2011
Felony	100% within 180 days	90% within 120 days	**75% within 90 days**
		98% within 180 days	**90% within 180 days**
		100% within 365 days	**98% within 365 days**
Misdemeanor	100% within 90 days	90% within 30 days	**75% within 60 days**
		100% within 90 days	**90% within 90 days**
			98% within 180 days

If these time standards reflect a consensus about what criminal times to disposition *should* be, what do we know about what trial courts are *actually* able to achieve? Since 1988, the US Justice Department's Bureau of Justice Statistics has reported on how long it takes for the cases of felony defendants to proceed from arrest to disposition in the 75 largest counties in the country. The most recent data, for felonies disposed in 2006, were published in 2010. As Table

[5] Source: Richard Van Duizend, David Steelman and Lee Suskin (Reporters), *Model Time Standards for State Trial Courts* (Williamsburg, VA: National Center for State Courts, 2011), p. 3, available online at http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1836. Like the earlier COSCA and ABA standards, the Model Time Standards measure case-processing time for criminal cases from the date of arrest.

2 shows, the longest times from arrest to disposition were for violent felony offenses (such as murder, rape, robbery and assault). Although the performance by courts in some large urban counties may have approached the national standards, the overall results were that 88% of all felonies were disposed within a year after arrest.

Table 2. Time from Arrest to Adjudication for Felony Defendants in Large Urban Counties, by Most Serious Charge, 2006[6]

Most Serious Arrest Charge	Median Time	Cumulative Percent of Cases Disposed Within -- 30 Days	90 Days	180 Days	365 Days
Violent Offense	139 days	16%	37%	60%	83%
Property Offense	85 days	26%	52%	74%	90%
Drug Offense	75 days	32%	55%	75%	90%
Public-Order Offense	92 days	24%	49%	72%	89%
All Offenses	**92 days**	**26%**	**49%**	**71%**	**88%**

B. Processing Times in 2009 Pretrial Release Cases and Felonies Disposed in 2010. In the preparation of this report, NCSC took two small random samples of criminal cases:

1. Cases from an MDC data set for 665 Bernalillo County criminal defendants granted pretrial release from the Detention Center in 2009;[7] and
2. Cases from an AOC data set of 6,335 felony cases disposed by the 2nd Judicial District Court in Fiscal Year 2010.[8]

For all the docket numbers in each set of sample cases, NCSC then recorded publically-available online data posted by the Judicial Information Division (JID) of the New Mexico Administrative

[6] Source: Thomas H. Cohen and Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006* (Washington, DC: Bureau of Justice Statistics, NCJ- 228944, Revised July 15, 2010), Table 10, http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf. Dr. Cohen has indicated to NCSC that comparable 2008 data should be available in a BJS report to be published in late 2013.

[7] The data set was provided by Destry Hunt, MDC Policy and Planning Administrator, to David Steelman, NCSC, in an electronic message dated January 11, 2013.

[8] This data set was provided by Steve Prisoc, New Mexico AOC Judicial Information Division Director, to David Steelman, NCSC, in an electronic message dated August 17, 2010.

Office of the Courts (AOC) on times to disposition and the number of specific court events per case.[9]

From our analysis of the data gathered for each sample, NCSC has calculated times from the date of initial charges against defendants to case filing in the District Court, as well as times from District Court filing to disposition.[10] Table 3 shows the results of the NCSC analysis.

Table 3. Elapsed Time in Days from Original Charge Date to Filing Date and from Filing Date to Disposition for 2nd District Court Sample Criminal Cases

Sample Description	Median	Average	75%	90%	98%
2009 MDC Releases (N = 158)[11]					
• Charge to Dist Ct Filing	25	89	115	266	471
• Dist Ct Filing to Disposition	275	360	493	774	996
• Charge to Dist Ct Disposition	352	441	594	873	1,207
2010 Felony Dispositions (N = 153)[12]					
• Charge to Dist Ct Filing	102	202	240	353	536
• Dist Ct Filing to Disposition	279	390	498	778	1,601
• Charge to Dist Ct Disposition	445	592	654	940	2,434

As a practical matter, the defendants in the sample of "2009 MDC release" cases were likely to have been charged with less serious offenses than those in the sample of "2010 Felony Disposition" cases. Also, as a matter of definition, they were not detained at MDC pending adjudication unless they failed to appear at a subsequent court event, had been arrested on a bench warrant, and then had not again been released from custody. The defendants in the "2010 Felony Dispositions" sample were typically charged with more serious offenses, and they

[9] See Judicial Branch of New Mexico, "Online Case Lookup," https://caselookup.nmcourts.gov/caselookup/app.

[10] For comparison with the data on which the findings and recommendations in the NCSC 2009 report were based, see *Felony Caseflow Management in Bernalillo County, New Mexico, supra* note 2, pp. 8-15.

[11] Source: NCSC analysis of criminal case random sample identified from a data set of 665 cases, as provided by Destry Hunt, MDC Policy and Planning Administrator, to David Steelman, NCSC, in an electronic message dated January 11, 2013, for a margin of error of ± 7% at a 95% confidence level. See Herbert Arkin and Raymond R. Colton, *Tables for Statisticians* (2nd edition) (New York: Barnes & Noble, 1963), pp. 22-23.

[12] Source: NCSC analysis of random sample of 6,335 Bernalillo County felony cases disposed in FY 2010, as provided by Steve Prisoc, New Mexico AOC Judicial Information Division Director, to David Steelman, NCSC, in an electronic message dated August 17, 2010, for a margin of error of ± 7.8% at a 95% confidence level. See Arkin and Colton, *supra*, pp. 22-23.

were less likely to have been initially released from MDC, although a number were subsequently released on bond.

To gain perspective on the results from analysis of these two samples, it is helpful to compare them to the Model Time Standards and to the 2006 times from arrest to adjudication for felony defendants in trial courts serving large urban counties. As Table 4 shows, the NCSC analysis of these sample cases suggests that criminal case processing performance in Bernalillo County is falls far short of the expectations reflected in the Model Time Standards, and that is also much poorer than the results achieved for felony cases by large urban trial courts in 2006.

Table 4. 2009 and 2010 Sample Case Times from Bernalillo County Initial Charge Date to 2nd District Court Disposition Date, as Compared to Model Time Standards and to 2006 Times from Arrest to Adjudication for Felony Defendants in Large Urban Counties[13]

		Cumulative Percent of Cases Disposed Within --		
Description	**Median Time**	**90 Days**	**180 Days**	**365 Days**
Comparable National Data				
Model Time Standards	--	75%	90%	98%
Large Urban Felonies, 2006	92 days	49%	71%	88%
Bernalillo County Data				
MDC Release Sample, 2009	352 days	5%	18%	53%
Felony Disposition Sample, 2010	445 days	2%	10%	39%

C. Court Events in 2009 Pretrial Release Cases and Felonies Disposed in 2010. For felony cases under the jurisdiction of the New Mexico District Courts, rules of procedure[14] provide that probable cause is determined by a limited-jurisdiction court (in Bernalillo County, the Metropolitan Court), after which a defendant is arraigned in District Court after the prosecution has filed an indictment or information. Before trial and sentencing, there may be one or more hearings on motions and a court-scheduled pretrial conference. In the simplest circumstances, the rules thus contemplate that a case may proceed in District Court from arraignment to trial and sentencing with no more than a total of 3-5 scheduled court events. Of course, there may

[13] Sources: see notes for Tables 1, 2 and 3 above.
[14] See NM Crim. Proc. Rule 5-901.

be more than one motion hearing in a case, and there may be other events such as hearings on whether a defendant is competent to stand trial.

Yet in New Mexico as in most American trial courts, fewer than five percent of all cases are disposed by trial. Moreover, the sentencing in a case disposed by a negotiated plea of guilty is most often done in the same hearing as when the Court receives the plea. As a result, cases with more than five scheduled court events often involve the scheduling, continuance, and rescheduling of those events.

In a court where the grant of continuances and the rescheduling of court events becomes the norm, more cases may be set for hearing on any given day than the Court can reach, and prosecutors or defenders with heavy caseloads may not have their cases prepared on the scheduled date for a court event. If the Court then resolves the immediate problem this presents by granting a continuance request and scheduling a case to a later date, the judge and the lawyers may make it through the day's dockets at the cost of having more hearings per case than are required.

The purpose of caseflow management practices like those recommended for Bernalillo County in the 2009 NCSC report is to address such problems as this. In courts that are successful in that they manage the progress of their cases well, attention is given to the reasons for such delays, so that negotiated outcomes are reached sooner in each case, with fewer scheduled court events per case, less wasted time for judges, lawyers and other case participants, and shorter times to disposition for defendants detained in county jail or released from jail pending adjudication.

To explore the extent to which criminal proceedings in the 2nd District Court may be subject to this problem, NCSC counted the number of court events per case in the "2009 Release" sample and "2010 Felony Disposition" sample. Table 5 shows that there was an average of a little over seven court events per case in each sample, with 20 or more in some cases.

Table 5. Court Events per Case in 2009 and 2010 Samples of Bernalillo County Criminal Cases[15]

Court Events per Case	2009 Release Cases (N=158)	2010 Felony Dispositions (N=153)
Maximum	32	26
Average	7.04	7.32
Median	6	6

[15] Sources: See notes for Table 3 above.

If one would expect from the rules of procedure that there would typically be a total of only 3-5 District Court events in a case, to what extent was the average number in the 2nd District Court so much higher because scheduled hearings were continued or rescheduled? Table 6 shows information on the frequency of different kinds of scheduled court events in the two samples.

Table 6. Incidence of Specific Court Events in 2009 and 2010 Samples of Bernalillo County Criminal Cases[16]

	2009 Release Sample (N = 158)			2010 Felony Disposition Sample (N = 153)		
Type of Court Hearing or Event	Pct of Cases That Have This Event	Average per Case with This Event	Max in One Case	Pct of Cases That Have This Event	Average per Case with This Event	Max in One Case
Arraignment (includes Amended or Repeated Arraignments)	93.0%	1.29	7	94.8%	1.44	6
Bond Forfeiture Hearing	5.7%	1.67	4	4.6%	1.00	1
Docket Call	17.1%	3.70	14	15.0%	3.09	10
Status Conference	11.4%	2.11	7	5.9%	1.89	5
Motion Hearing	53.2%	1.62	8	51.6%	1.77	9
Other Hearing	6.3%	2.10	5	10.5%	1.75	5
Pretrial Conference	74.7%	1.89	8	77.1%	2.51	14
Guilty Plea Hearing	74.7%	2.20	13	71.2%	1.92	9
Scheduled Date for Jury Trial	13.3%	1.76	6	22.9%	1.83	6
Sentencing Hearing	22.2%	2.26	6	29.4%	1.58	4
Continuance/Extension of Time	13.3%	1.86	5	43.1%	2.38	7
Post-Sentence Hearing*	38.6%	2.77	15	45.8%	2.39	8
-- Post-Sentence PV Hearing*	24.7%	2.10	6	21.6%	1.61	4

* Totals for "Post-Sentence Hearings" include all Probation Violation ("PV") Hearings as well as any others.

As the table indicates, the only event that was almost certain to occur was the arraignment of a defendant on an indictment or information. In fact, it was not unusual (16.5% of "2009 Release" sample cases and 26.8% of "2010 Felony Disposition" sample cases) for there to be an amended or otherwise repeated arraignment, and a defendant in one case was arraigned seven times.

[16] Sources: Ibid.

The most common other events before trial are pretrial conferences and guilty plea hearings, which occurred in about three-fourths of all cases in each NCSC sample. In fact, it was more likely than not in the sample cases that there would be more than one such event in a case, including 14 pretrial conferences in one of the 2010 sample disposed felony cases and 13 guilty plea hearings in one of the 2009 sample release cases.

Only a small portion of the cases were actually listed for jury trial (13.3% of the 2009 release sample and 22.9% of the 2010 disposed felony sample). If they were listed once for trial, however, they might often be listed for a second or subsequent date. Continuance motions and motions or petitions for extension of time happened in three times as many of the felony disposition sample as in the release sample. If such motions were filed in a case, they were typically filed more than once; and NCSC found no case in which any such motion was denied.

D. Cases on 2012 Probation Violation Dockets. Post-sentence events were not infrequent in either the 2009 release sample or the 2010 disposed felony sample, consisting largely of hearings on alleged probation violations. To look more closely at probation violations, NCSC studied MDC data on probation violation hearings held in 2012 by county-funded *pro tempore* judges in a courtroom at the MDC facility. NCSC analyzed the entire data set of 1,440 cases, looking at the number of days a defendant was in jail before the PV hearing in each case, the number of times that PV hearings had been reset (rescheduled to a subsequent date), and the kinds of dispositions in the PV hearings.

MDC records on over half (52%) of the cases with PV hearings do not show the basis for an alleged probation violation. Of those in which it was recorded, 89% were technical violations, 9% were based on new charges, and 3% were absconders.

The MDC records for PV cases are for those in which the alleged probation violators were arrested and jailed awaiting a court hearing. Table 7 below shows how long probationers charged with violations had to wait before a PV hearing was held. As the median figure in Table 7 indicates, at least half of the defendants were in custody for longer than a month before a PV hearing. In one extreme circumstance, MDC records suggest that one probationer originally convicted for DUI was held for longer than three years before the resolution of the alleged violation, having participated during that time in the "Casa de Amigos" Program.

Table 7. Defendant Days in Custody before Probation Violation ("PV") Hearing, 2012 (N=1,440)[17]

Description	Days
Maximum	1,225
Average	49.66
Median	31

The MDC records analyzed by NCSC also show that 42% of the PV hearings had previously been reset (continued and rescheduled to a later date). The number of PV hearings per case is shown in Table 8, which indicates that at least half of the cases had three or more PV hearings.

Table 8. PV Hearings per Case, 2012 (N=1,440)[18]

Description	Hearings/Case
Maximum	9
Average	1.77
Median	3

A final matter of note from the NCSC analysis of these records has to do with the outcomes of the PV hearings. As is shown in Table 9 below, about one in six probationers (17.5%) had their probation terms reinstated at the conclusion of 2012 PV hearings, while a small number (2.9%) were discharged from probation altogether. In more than a fourth of them (28.7%), on the other hand, probation was terminated and sentences to jail (MDC) or state prison (DOC) were put into effect. The most common outcome (42.4%), however, was for the matter to be reset to a later date.

[17] Source: NCSC analysis of Bernalillo County criminal cases heard at MDC on the 2nd Judicial District Court probation violation (PV) dockets in 2012, as provided by Destry Hunt, MDC Policy and Planning Administrator, to David Steelman, NCSC, in an electronic message dated January 11, 2013.
[18] Source: Ibid.

Table 9. Dispositions in PV Hearings, 2012 (N=1,440)[19]

Disposition	Percent
Discharged	2.9%
Reinstated	17.5%
Sentenced -- DOC	6.8%
Sentenced -- MDC	21.9%
Reset to Later Date	42.4%
Other	8.5%

E. Findings from NCSC Analysis. The analysis reported above in this section confirms the findings by NCSC in its 2009 report and reaffirms the relevance of the recommendations made there. NCSC is not unmindful of the real and very difficult operational concerns facing the 2nd District Court's Criminal Division and its criminal justice partners.

Yet there is ample evidence that many other trial courts have successfully addressed such difficult issues through the effective application of caseflow management principles and techniques.[20] For that reason, the successful adoption and consistent application of the comprehensive caseflow management improvement program recommended in the 2009 NCSC report (see Appendix A for a summary) can reasonably be expected to have a demonstrable positive impact by reducing unnecessary delay, reducing jail crowding, and reducing unnecessary wasted time for criminal case participants in Bernalillo County. The potential implications of this for both jail crowding and staffing needs are considered in Sections IV and V below.

[19] Source: Ibid.

[20] See, for example, William Hewitt, Geoff Gallas, and Barry Mahoney, *Courts That Succeed: Six Profiles of Successful Courts.* (Williamsburg, VA: National Center for State Courts, 1990), available online at http://cdm16501.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/10/rec/3.

IV. Estimating Potential Impact of Improved District Court Caseflow Management on County Jail Population

The recommendations offered by NCSC in the 2009 report were suggestions for addressing and managing the various problems, such as discovery exchange, identification of the need for conflict counsel, and prosecution plea offers that pose problems not only for the 2nd Judicial District, but also for general-jurisdiction trial courts hearing felony matters in any jurisdiction. Through the provision of ways for a trial court to exercise early and continuous control over the progress of felony cases from arrest to conclusion, they represent ways to alleviate the need for a court to hold multiple docket calls and status conferences, to reduce the need for a court to decide motions for continuance or extension of time, and to reduce the incidence of multiple pretrial conferences and guilty plea hearings.

A. Brief Statement of Foundation for Estimates. Consistent and aggressive application of management practices for criminal cases need not and should not be focused solely on cases with defendants in custody. By addressing these problems for the many cases with defendants on pretrial release pending adjudication, caseflow management frees up more time for judges and lawyers to deal with cases in which defendants are in custody pending either the initial adjudication of criminal charges or the resolution of alleged probation violations, thereby in both circumstances reducing jail crowding.

Application of proven caseflow management principles and techniques does not involve the expectation that all continuances or all multiple pretrial conferences must be eliminated. Obviously, this may not always be practical in the day-to-day world, nor would it serve the interests of justice in particular cases. Yet if most judges and lawyers apply those principles and techniques in most cases, the desired overall result of prompt and affordable justice can be achieved with much greater consistency.

The fact that it might be both impractical and potentially undesirable for *all* redundancy in scheduled court hearings and *all* continuance or extension requests to be eliminated does not mean that there can or should be no reduction of redundancy in scheduled court hearings and *no* reduction in continuance or extension requests. As the following calculations show,[21] NCSC concludes that reducing the average number of scheduled court events in the 2nd District Court by just one event could have a significant impact on the average jail population at MDC.

[21] These calculations are based on the analysis of data on (a) Bernalillo felony cases disposed in FY 2010, and (b) cases with PV hearings in 2012. By definition, defendants in the "2009 Release" cases were not detained pending adjudication, so that NCSC does not use that data set in estimating potential reductions in the MDC jail population, even if some defendants were arrested on bench warrants after their release from custody.

B. What If There Been Fewer Hearings in 2010 Disposed Felony Cases? As Table 5 above shows, NCSC found an average of 7.32 scheduled court events in our sample of Bernalillo County felony cases disposed in FY 2010. If improved caseflow management resulted in having the average number of scheduled court events reduced by one to 6.32, NCSC estimates that the average daily jail population at MDC would be reduced by ***185 inmates***. Table 10 shows the ten-step process by which NCSC has made this estimate.

Table 10. NCSC Calculations to Estimate Impact on MDC Jail Population of Having One Fewer Hearing per Case in Disposed Bernalillo County Felonies, FY 2010

Description	Number
1. Total 2nd Judicial District felony cases disposed, FY 2010[22]	6,335
2. Total elapsed days, District Court filing date to disposition date for disposed felony cases, 2010[22]	2,333,214
3. Average number of court hearings in NCSC sample (N=153 cases)	7.32
4. Average number of court hearings in NCSC sample minus one	6.32
5. Estimate of total hearings in all felony cases disposed, 2010, if average number of hearings per case were reduced by one[23]	40,037
6. Estimate of total elapsed days, District Court filing date to disposition date for disposed felony cases, 2010, if average number of hearings per case were reduced by one[24]	2,233,754
7. Estimate of total days saved (Item No. 2 minus Item No. 6)	99,460
8. Percent of all defendants booked at MDC and not granted pretrial release, FY 2010[25]	68%
9. Estimated total jail bed days if 68% of defendants booked at MDC in FY 2010 were held in jail pending adjudication (68% of Item No. 8 total days)	67,633
10. Estimate of FTE inmate reduction in MDC average daily jail population (Total days in Item No. 9 divided by 365)	**185.3**

[22] Source: Data provided by Steve Prisoc, New Mexico AOC Judicial Information Division Director, to David Steelman, NCSC, in an electronic message dated August 17, 2010.

[23] This figure is based on the estimated number of total hearings in the NCSC sample if the average per case were reduced by one, a total that was then used to estimate the total number of hearings for all 6,335 cases disposed in FY 2010.

[24] This figure is based on the estimated number of total elapsed days in the NCSC sample if the average number of hearings per case were reduced by one, a total that was then used to estimate the total number of hearings for all 6,335 cases disposed in FY 2010.

[25] Source: Bernalillo County, *Metro Detention Center Fiscal Year Report 2010* (January 2011), page 2.

C. What If There Been Fewer Rescheduled Hearings on the 2012 PV Dockets?

As we note in Section III. D above, MDC records show that 42% of the 2012 PV hearings had previously been reset, and that resets coincidentally made up 42% of the dispositions in PV hearings. As Table 8 above indicates, at least half of the cases had three or more PV hearings. Moreover, Table 7 shows that at least half of the PV defendants were in custody for a month or longer while a PV hearing was pending. Improved management of PV case processing, so that the number of PV resets might be reduced, thus presents a clear opportunity for reduction of jail crowding.

If improved caseflow management resulted in having fewer PV resets, NCSC estimates that the average daily jail population at MDC would be reduced. Table 11 shows the process by which NCSC has estimated that the average daily jail population would be reduced by ***67 inmates*** if the number of PV hearing resets were reduced to no more than one per case, or by ***28 inmates*** if the PV resets were reduced to no more than two per case.

If PV resets were reduced altogether, such calculations as those here in Table 11 would yield an estimate by NCSC that the average daily jail population at MDC would be reduced by the FTE equivalent of 109.3 inmates. Yet NCSC dismisses that option because any effort to eliminate resets altogether might be both impractical and not in the interest of justice.

NCSC is also mindful that a practice of allowing more than one PV hearing reset might undermine the integrity of PV hearing dates in terms of whether the lawyers in a case would be prepared enough to make the scheduled hearings meaningful. Yet NCSC also understands that the defendants involved in PV proceedings, while under custody, may be participating in court-ordered treatment programs during the pendency of PV proceedings. Table 11 thus includes the prospect that allowing a second PV reset might in appropriate cases serve the interests of justice.

Table 11. NCSC Calculations to Estimate Impact on MDC Jail Population of Having Fewer PV Hearings Reset per Case, 2012[26]

Description	Number
1. Grand total of days probationers were in custody awaiting PV hearings	71,505
2. Total custody days for cases with no more than one PV hearing reset	47,248
a. Days saved if there had been no more than one PV hearing reset per case (Days in Item No. 1 minus days in Item No. 3)	24,257
b. Estimated FTE inmate reduction in MDC average daily jail population (Days in Item No. 2a divided by 365)	**66.5**
3. Total custody days for cases with no more than two PV hearings reset	61,163
a. Days saved if there had been no more than two PV hearings reset per case (Days in Item No. 1 minus days in Item No. 2)	10,352
b. Estimated FTE inmate reduction in MDC average daily jail population (Days in Item No. 3a divided by 365)	**28.4**

V. Estimating Potential Impact of Improved Caseflow Management on Staffing Needs for the Court and Its Criminal Justice Partners

Whether improvements can be made in criminal caseflow management in Bernalillo County depends in part on the level and use of personnel resources in the District Court's Criminal Division, the Bernalillo County District Attorney's Office, and the 2nd District Public Defender's Office. NCSC understands that those organizations have been reluctant to adopt and implement the comprehensive caseflow management improvement program recommended in the 2009 NCSC report because they believe they do not have enough personnel to do so.

A. Adequacy of Current Staffing Levels in Bernalillo County. It has been reported to NCSC that this belief among the leaders of those local organizations is based on a statewide workload and staffing needs study completed in 2007 for courts, prosecutors and public defenders, which concluded that the levels of judges, lawyers and support personnel in those organizations were inadequate. In fact, that study was done by NCSC, with the participation of researchers from the National District Attorneys' Association (NDAA) for prosecutors, under the direction of the

[26] Source: NCSC analysis of Bernalillo County criminal cases heard at MDC on the 2nd Judicial District Court probation violation (PV) dockets in 2012, as provided by Destry Hunt, MDC Policy and Planning Administrator, to David Steelman, NCSC, in an electronic message dated January 11, 2013.

lead author of the report presented here.[27] It was done with the application of the best available workload assessment methodology at the time, at a cost to the State of New Mexico that would have been prohibitive if it had included an assessment of the efficiency and effectiveness of operations and caseflow management by courts, prosecutors and public defenders.

In fact, the very absence of that component in the 2007 New Mexico study has prompted NCSC since 2007 to explore ways that the methodology for conducting such studies could be enriched in a cost-effective way to include resource needs calculations based on a more credible analysis of the current state of operations and caseflow management. Since the 2007 New Mexico workload study, there has been a critical development that bears on the relationship between (a) how well (in terms of effectiveness and efficiency) courts and their justice partners currently manage and apply their available personnel and other resources, and (b) what further resources they may need to accomplish their mission.

This has been the development of case management information systems and related performance measures that provide a level of detailed information allowing for an assessment of operations and caseflow management with the aid of dramatically-improved automated case information. In New Mexico, the AOC's Judicial Information Division (JID) has worked with district courts to enhance their automation, providing tools for convenient access to accurate case information by court personnel and the public. Data analysis based on AOC's "online case lookup" program, such as that reflected in this report, could not have been done in 2007 without a level of labor-intensive manual case review so high that it may have more than doubled the $350,000 budget required for the 2007 NCSC workload assessment.

B. Efficiency, Timeliness and Quality. In the late 1990's, the 2nd Judicial District Court was one of nine state criminal trial courts participating in a national-scope study of felony case processing by researchers from NCSC and NDAA, funded by the National Institute of Justice and the State Justice Institute. The researchers found that timeliness and quality in felony case processing are not in conflict. Moreover, they found that prosecutors and defense attorneys in faster courts are able to make better use of their time than in slower courts:[28]

[27] See David Steelman, et al., *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices and New Mexico Public Defender Department* (Denver, CO: National Center for State Courts, Court Consulting Services Division, June 2007).

[28] Brian Ostrom and Roger Hanson, *Efficiency, Timeliness and Quality: A New Perspective from Nine State Criminal Trial Courts* (Williamsburg, VA: NCSC, 1999), p. 105, http://www.ncjrs.gov/pdffiles1/nij/181942.pdf, and http://www.ncsconline.org/WC/Publications/Res_CasMan_EfficiencyPub.pdf.

> The current research demonstrates that the relative importance of resources varies inversely with timeliness. The faster the system, the less the perceived importance of resources. Moreover, the faster courts do not necessarily have more resources than the slower courts, in accordance with the legal culture notion. Resources are important from the attorneys' perspective, but they are not that important in expeditious courts. We believe this relationship exists because in the expeditious courts, the attorneys have learned how to be more efficient.

What features were present in the courts in that study that were more expeditious? In each of the faster courts, there was greater court control of the progress of cases than in the slower courts. They found that the better-performing courts employ a set of policies and procedures including the following:[29]

- Judges are committed to early and continuous judicial control over case scheduling, including firm trial and hearing dates;
- The courts are serious about following case processing time standards or goals; and
- There is a regular process through which the court, prosecutors, and defense attorneys communicate and coordinate their activities to address case management issues and problems.

In other words, the researchers found that adoption and implementation of key caseflow management principles can have a clear effect on the level of resource concerns for courts and their justice partners.

Conversely, this study (in which judges, prosecutors and public defenders from Bernalillo County participated about 15 years ago) suggests that the current judges, prosecutors and public defenders from Bernalillo County may be wrong when they assert that they cannot implement the caseflow management improvement recommendations in the 2009 NCSC report because they have inadequate staff resources. Rather, their perceptions of the inadequacy of staffing levels may be magnified because the management of felony case progress in the 2nd Judicial District needs improvement. If felony caseflow management were improved, personnel resource needs would be a less salient consideration.

C. Caseflow Management and the Cost of Wasted Time. In the past decade, budget concerns for states have led to efforts by leaders of state and county government to consider ways with the leaders of courts and court-related agencies to seek better ways to deal with the cost of providing government services. In 2001, for example, the Board of County Commissioners of

[29] ibid., pp. 105-106.

Orange County, Florida, appointed a special Jail Oversight Commission (JOC) to investigate problems of jail crowding. When the County found that the implementation of JOC recommendations for the development of pre-booking diversion and other corrections-based solutions was not sufficient to achieve a full and lasting solution to the problem of jail crowding, the County and the 9th Judicial Circuit Court of Florida requested technical assistance from NCSC. In a 2003 report, the NCSC consultant wrote [30]

> While it is not the sole cause of Orange County's jail crowding, the "local legal culture" (the shared expectations of judges, prosecutors, and defense attorneys about the pace of litigation for felony criminal cases) in Orange County is now a key barrier to the effective implementation of any efforts to reduce jail crowding. Because of the local culture, it appears that criminal cases that might be disposed early in the process are not concluded until much later, which means that criminal defendants spend much more time in jail than necessary while they await the conclusion of their cases by trial or plea. Until the Judiciary, the State Attorney's Office, and the Public Defender's Office change their practices and expectations, it will not be possible to reduce or avoid growing operating costs for the Orange County Jail.

As part of the NCSC recommendations, the consultant urged that focus should be given to the critical problem of creating "meaningful pretrial conferences" – that is, pretrial conferences that would not be repeatedly rescheduled because of problems with discovery, prosecution plea offers that were not realistic in the eyes of the defense, and a lack of early engagement with cases by public defenders. For a variety of structural reasons, however, including ongoing antagonism between the elected State Attorney and the elected Public Defender, the judges, prosecutors and public defenders in the 9th Circuit did not put this and other NCSC recommendations into effect.

That led the Chief Judge of the 9th Circuit to request a second NCSC study of the continuing lack of meaningful pretrial conferences. The Chief Judge and the NCSC consultant agreed that it would be highly valuable to show that current criminal case processing practices not only caused delay and jail crowding, but that they also created demonstrable and measurable waste for the Court, the State Attorney's Office, the Public Defender's Office, County Corrections, and local law enforcement agencies. Using information on personnel costs and time demands of court events, NCSC showed in a 2010 report[31] that continual setting and resetting of pretrial conference and trial dates cost the Court and its justice partners about $4.2 million worth of

[30] David Steelman, *Improving Criminal Case Processing to Reduce Jail Crowding in Orange County, Florida* (Denver, CO: National Center for State Courts, Court Consulting Services Division, December 2003), iv.

[31] David Steelman and Jonathan Meadows, *Ten Steps to Achieve More Meaningful Criminal Pretrial Conferences in the Ninth Judicial Circuit of Florida* (Denver, CO: National Center for State Courts, Court Consulting Services Division, 2010).

wasted personnel time each year in Orange County, while in Osceola County (the other county served by the 9th Circuit), the wasted time cost about $3.1 million in personnel expenses each year. From its analysis, NCSC concluded that that having more meaningful court events, as reflected by the absence of any cases with any more than two scheduled pretrial conferences or trial dates, would save so much time for the judges, lawyers and others that it would be the same as having the full-time equivalent of about 60 additional judges, lawyers, police officers, corrections officers, and support people without adding anyone to the payrolls of the court or its justice partners. (For more details, see Appendix C.)

D. Caseflow Management and Staffing Levels in Bernalillo County. For the preparation of this report, it has not been possible for NCSC to replicate the methodology for the estimates of cost and personnel made in the 2010 NCSC report for the 9th Judicial Circuit of Florida. The statewide data from the 2007 NCSC workload assessment for New Mexico are no longer available for Bernalillo County, and they would be outdated if they were. The amount of time available for NCSC to prepare this report is not sufficient to allow the scope of information gathering that would be required on the time demands of court events, the personnel costs for key case participants, or such cost outlays as those for prisoner transport from MDC to a courtroom in downtown Albuquerque or for prosecutors and defenders from their downtown offices to MDC.

Yet the unavailability of such details cannot defeat an assertion based on simple arithmetic that caseflow management improvements resulting in earlier dispositions with fewer schedule court events would reduce wasted time for judges, lawyers, police, corrections, support staff and other case participants. The time constraints preventing NCSC from making a calculated estimate of the scope and magnitude of wasted time and its potential reduction simply means that we cannot paint as dramatic a picture for Bernalillo County as is shown in Appendix C for the 9th Circuit of Florida.

Instead, NCSC is forced by current circumstances to make a rougher estimate of the impact of improved felony case management on the available personnel resources of the Court, the District Attorney, the Public Defender, and other case participants. Such a rough estimate is presented below in Table 12. This estimate lacks the detail and specificity of an estimate like that displayed in Appendix C. Yet it does show how changes in caseflow management might affect case participants. On the basis of the calculations reflected in Table 12, NCSC estimates that improving criminal caseflow management in the 2nd Judicial District might have the same effect as if there were at least one more judge, as well as two or three more prosecutors, two or three more public defenders, and a comparable number of additional support staff members, available in these organizations to work on criminal cases.

Table 12. Rough Estimate of Improved Caseflow Management Impact on the Personnel Resources of the 2nd District Court and Court-Related Agencies

Reduction in Scheduled Events for --	Impact on Time Demand per Case
2009 Release Cases[32]	
• Average of One Fewer Event per Case:	-14.21%
2010 Felony Dispositions[33]	
• Average of One Fewer Event per Case:	-13.66%
2012 PV Cases[34]	
• No More than Two PV Resets:	-18.4%
• No More than One PV Reset:	-34.1%

VI. Conclusion

Because criminal case processing practices in this and other trial courts have a direct impact on the number of defendants detained pending adjudication and their average length of stay in a county jail, changing the duration of the criminal case process from initiation to conclusion necessarily affects the county jail population. From the NCSC assessment of criminal case processing in the 2nd Judicial District Court, we conclude that the Court and its criminal justice partners not only ***should*** shorten times from arrest to disposition, but that there are demonstrably successful ways by which they ***can*** do so, and as a result that they ***must*** do so in order to accomplish their mission in service to the people of New Mexico.

NCSC acknowledges that there are many limitations to what is presented in this report. Not the least of these is that data from a small sample of past events has been used to estimate the potential future impact of adopting and applying such caseflow management principles and practices as those recommended for Bernalillo County in NCSC's 2009 report.

Yet this is not the first time that the analytical approach in this report has been applied to problems of felony case management and jail crowding in a jurisdiction served by a felony trial court and its criminal justice partners. There is ample evidence that successful management of felony cases results in the reduction of delay. Because the average length of stay for county jail

[32] Source: see note 11 above.
[33] Source: see note 12 above.
[34] Source: see note 17 above.

inmates not released from custody pending felony adjudication is a direct byproduct of times to felony disposition, one can hardly argue that the reduction of felony delay will not reduce time spent in custody pending adjudication.

Moreover, there is a growing body of evidence that improved felony case management provides for better use time by judges, lawyers and other case participants by reducing the incidence of multiple settings for pretrial conferences, trials, and probation violation hearings. To the extent that there are fewer court appearances required per case, the judges, lawyers and other felony case participants have more time to attend to other important out-of-the-courtroom work in cases. This in turn means that the need for more personnel or other resources, while still critical, is a less salient concern for all the participants in the felony court process.

NCSC stands ready to provide further assistance to Bernalillo County, the 2nd District Court, and other court-related agencies in the matter of felony case processing. NCSC is aware that the County has been awarded a grant from the State Justice Institute for an analysis of the cost consequences of implementing the recommendations in the 2009 NCSC report. In order for such a cost analysis to be done, it would be necessary to determine with specificity what changes have been made in criminal case practices since the submission of that NCSC report. This would undoubtedly require communications with and assistance from the New Mexico Administrative Office of the Courts, whose representatives have informed NCSC that they are ready and willing to assist with the provision of data on Bernalillo County cases. NCSC awaits further word from court and county officials on whether further steps of this nature should be undertaken.

APPENDIX A.

HIGHLIGHTS OF FINDINGS AND RECOMMENDATIONS IN NCSC 2009 REPORT ON FELONY CASE PROCESSING IN BERNALILLO COUNTY[35]

[35] Source: David Steelman, Gordon Griller, Joseph Farina, and Jane Macoubrie, *Felony Caseflow Management in Bernalillo County, New Mexico* (Denver, CO: NCSC, Court Consulting Services Division, November 2009).

Chapter I. What the Numbers Show about Felony Case Processing Times

Highlights of Findings:

- District Court's pending inventory was about 20% higher on 2/28/09 than on 6/30/04.
- For felony cases with indictments, elapsed time from arrest to indictment averages about 4 months.*
- Since fiscal year 2004-05, the District Court has disposed of more than half its criminal cases in less time than the statewide average.
- District Court elapsed time from filing to nontrial disposition averages almost 6 months.*
- District Court elapsed time from filing to jury trial disposition averages almost 20 months.*
- About 60-70% of cases have failures to appear and bench warrants.

Highlights of Recommendations:

- District Court monitoring of felony case processing times should begin at arrest and should include the date of initial appearance and determination of probable cause. Scheduled court events and continuances should routinely be made available from judges' chambers to the District Court's central case information system. The Court should continue monitoring felony clearance rates and should routinely monitor how many cases were older than applicable time standards at disposition; how many active pending cases are currently approaching or older than applicable time standards; and how frequently does the trial in a case actually commence on the first-scheduled trial date.

* Limitations of time and budget prevented NCSC from inspecting individual case files on which the data from the Bernalillo County District Attorney's Office and Second Judicial District Court were based to determine the reasons for elapsed times in specific cases.

Chapter II. Understanding the Numbers

Highlights of Findings:

- Average length of stay in pretrial detention for serious felons is about 8-9 months.
- Even with electronic records, exchange of information between Metro Center, District Court and other criminal justice partners is largely by paper.
- Initial arrest reports from APD routinely take 30-90 days to be transmitted, and there is a dramatic difference of perspective between APD and other criminal justice partners.
- APD has increased its sworn officers, but it has a shortage of non-sworn staff.
- Sixty-four percent of those booked at MDC are released from jail shortly after initial appearance in Metro Court. Most are charged with minor violations.
- Virtually all felony cases in Bernalillo County are prosecuted by indictment.
- Cases are assigned to individual judges at or soon after arraignment. The exercise of peremptory removal supports at least an appearance of "judge shopping," and some judges may have significantly fewer active assigned cases, with their approach to dealing with cases being seen as a burden on their colleagues.
- Rule 5-501 provides that unless the Court orders a shorter time, the DA must disclose discoverable evidence to the defendant within 10 days after arraignment or waiver of arraignment. The DA's Office understands this to mean that there is no entitlement to discovery before indictment.
- Continuing problems in the transmission of police reports and other discoverable information from the APD to the DA's Office are seen as a source of discovery delay.
- Rule 5-604 provides that a trial must typically commence within six months after arraignment, providing that a case can be dismissed with prejudice if trial is not started within time limits. It appears that this sanction is seldom applied, however. Since almost two-thirds of all cases had at least one bench warrant, it is likely that time extensions are often granted because a defendant had failed to appear.

Chapter II. Understanding the Numbers (continued)

Highlights of Recommendations:

- There should be a coordinated, sustained effort toward integrating and sharing electronic data among the various digitized case management systems in the county.
- The District Court should explore the possibility of assuming responsibility for felony inmate jail monitoring from the County.
- The APD Records Department should be reorganized and staffed more appropriately. Electronic field automation incident reporting should be integrated with Records Department business practices and paper records from other sources.
- Compatibility between BCSO and APD electronic computer report writing systems should be sought. The DA's Office and the Public Defender's Office should adjust business processes and introduce software as necessary to promote efficient electronic receipt of law enforcement reports and discoverable information.
- Serious consideration should be given to ways that more cases can be resolved before indictment.
- A probation violation calendar should be established by the District Court and overseen by a specially-assigned PV judge, who need not be the sentencing judge.
- The DA's Office should consider having many more felonies prosecuted by information rather than by indictment. An ad hoc committee led by the Chief Judge and composed of knowledgeable and high-level prosecutors and defense lawyers should be created to explore earlier discovery exchange geared toward prosecutions by information and early pleas at or before District Court arraignment.
- Consistent with its authority under Rule 5-501 to order earlier discovery, the District Court should encourage the DA's Office to disclose discoverable information before indictment to allow an experienced attorney from the Public Defender's Office to review a case before indictment and engage in discussions with a prosecutor about a possible plea or the most suitable way to proceed on felony charges.
- After communication with the District Attorney's Office and the Public Defender's Office, the District Court should consider the introduction of a plea cutoff policy to promote earlier pleas and greater certainty of trial dates. (See Appendix E for more details.)
- The Criminal Division should adopt a policy limiting unnecessary continuances, reflecting best practices for the management of criminal cases and the need to provide credible trial dates. (See Appendix D for a model continuance policy.) This policy should be applied with reasonable consistency by all the judges of the Criminal Division.

Chapter III. Comprehensive Caseflow Management Improvement Program

Based on their assessment of felony case-processing situation in Bernalillo County, the NCSC project team members offer an overall program for felony caseflow management improvement with the following features:

- There should be consensus and commitment to caseflow management among Criminal Division judges.
- The DA's Office should work with law enforcement on early provision of reports and early discovery exchange.
- Defense counsel must have early contact with clients and be conversant with cases at the first pretrial conference.
- There should be established criteria for success in timely case processing.
- Information technology improvements are needed to provide efficient information exchange and effective case status monitoring.
- The District Court and each of its criminal justice partners should take steps to exercise active caseflow management.
- There should be consensus about priorities and implementation steps.

APPENDIX B.

CONSENSUS REACHED BY CRIMINAL DIVISION JUDGES ATTENDING "SHIRTSLEEVES" SESSION IN MARCH 2010 TO DISCUSS NCSC 2009 REPORT ON FELONY CASE PROCESSING IN BERNALILLO COUNTY[36]

[36] Source: Second Judicial District Court, Bernalillo County, New Mexico, "Workshop on Reducing Felony Case Delay" (Friday, March 19, 2010), minutes prepared for the Court and the County by David Steelman and Gordon Griller, NCSC.

CONSENSUS REACHED BY CRIMINAL DIVISION JUDGES ATTENDING "SHIRTSLEEVES" SESSION IN MARCH 2010 TO DISCUSS NCSC 2009 REPORT ON FELONY CASE PROCESSING IN BERNALILLO COUNTY

Judges Present: Pat Murdoch, Charles Brown, Kenneth Martinez, Ross Sanchez, Denise Barela-Shepherd, and Reed Sheppard

NCSC Staff Present: David Steelman, Gordy Griller

A wide ranging discussion took place regarding the recommendations in the recent National Center for State Courts' Felony Caseflow Management Study of the Criminal Division. Three flip charts were developed during the workshop and left with Judge Murdoch for reference by the court's leadership and Criminal Division judges, including (a) a listing of proven principles of sound criminal caseflow management, (a) a "reverse telescope" diagram comparing common civil and criminal case disposition points,[37] and (c) a list of priorities regarding all NCSC recommendations ranked in terms of their impact (how significant each would be in reducing delay in criminal cases) and feasibility (how difficult or easy each would be to implement). Overall consensus and agreement among the workshop judges included the following desired initiatives and action plans under the general topics discussed.

1. Early and Continuous Control

Objective: Control the pace of litigation from bind over.

Initiatives:
- ✓Expand EPP program to include more cases;
- ✓Add a second EPP judge;
- ✓Process more cases through information / preliminary hearing;
- ✓Develop a duty judge to screen PD and DA cases early in the process;
- ✓Insure police report is provided to the defense with the target notice;
- ✓Promulgate local criteria (standards) for timely case processing;
- ✓Promote changes via Judge Murdoch and the justice system partners.

[37] The *reverse telescope* depicts major "fallout" or disposition points in the movement of cases from arrest (criminal) or filing (civil) to trial. Research substantiates that in every court, the vast majority of cases never reach trial. They are pled or settled somewhere along the process, usually at a court imposed meaningful event which requires the parties to prepare and discuss, in earnest, the merits of the case. Where these court created opportunities and incentives for early case resolution are significant and consequential, effective bargaining and admissions promote resolution. This is the *Doctrine of Judicial Responsibility*; essentially meaning that the overall pace of litigation and specific points for disposition must be left to a judge as an impartial decision-maker never to the adversaries who have vested interests in the case.

2. Prepared Lawyers Settle Cases; the Court Must Assure Preparation[38]

Objective: Prompt lawyer preparedness by developing meaningful events and operating in a united fashion as a Criminal Division.

Initiatives: ✓Draft new criminal rules using the Federal Rules as a guide;
✓Impose stricter discovery deadlines and exchanges by local rule;[39]
✓Develop a strong pretrial scheduling order used by all judges;[40]

3. Identify and Eliminate Inefficiencies in the Process

Objective: Reduce the number of times the court has to touch a case. This can be done by streamlining procedures, developing special/consolidated calendars, and developing a back-up judge program to avoid continuing numerous trials because individual calendars are overset.[41]

Initiatives: ✓Create a consolidated PV docket during motion weeks;[42]
✓Ensure all charges against a defendant are set before the same judge;[43]
✓Create a system of "back-up" judges that curtails disqualifications.[44]

4. Develop a Uniformly Applied Continuance Policy

Objective: Limit the number of postponements by being reasonably arbitrary.

Initiatives: ✓Adopt a firm, universally followed, written continuance policy;

[38] In criminal matters, lawyer preparation is a key element since over 95 percent of all cases settle prior to trial. It is important to remember the following truths: Lawyers settle cases, not judges. Lawyers settle cases when they are prepared. (Unprepared lawyers shouldn't settle cases). Lawyers prepare for significant events. Significant events are set and upheld by the court. By creating and maintaining expectations that events will occur when scheduled; a culture of predictability will result. Wasted resources are reduced and time is better spent by all.
[39] The Chief Judge should, under Rule 5-501, order early discovery before indictment.
[40] Use as a guide the pretrial scheduling order used by former Taos County District Judge Peggy Nelson.
[41] All courts must overset trial calendars since cases which languish in the system often settle immediately prior to trial. To promote settlement and "harden" the trial docket, trial date certainty must be a part of the local legal culture. Where a judge has more cases than he/she can try on a particular day, overflow cases must be placed as soon as possible (desirably the same day) with another available trial judge. When there is certainty of trial on the date scheduled, lawyer and defendant gamesmanship is reduced and increasing numbers of cases settle earlier.
[42] Develop a Hearing Officer position to be funded by Bernalillo County.
[43] Inefficiencies are caused under the current system when defendants with various charges arising out of different events at different times are assigned to different judges.
[44] Court and NCSC will encourage the New Mexico Supreme Court to adopt a rule that once a case is set for trial before a specific judge and that judge cannot try it, a reassignment to another judge for trial shall not be subject to a disqualification motion. Should a state rule be unattainable, the Criminal Division may wish to explore a "strike system" whereby lawyers are required to immediately exercise all disqualification motions at the time of reassignment.

✓Track and analyze continuances by reason, requesting party, and judge.

5. Continue and Expand Settlement Conferences

Objective: Use both pro tem (retired) judges and sitting Criminal Division judges.

Initiatives: ✓Request additional pro tem judge help and funding from the County;
✓Augment pro tem judges with Criminal Division judges.

APPENDIX C.

IMPACT OF CRIMINAL CASE PROCESSING PRACTICES ON RESOURCE AVAILABILITY IN THE NINTH JUDICIAL CIRCUIT OF FLORIDA[45]

[45] This is a summary of the report by David Steelman and Jonathan Meadows, *Ten Steps to Achieve More Meaningful Criminal Pretrial Conferences in the Ninth Judicial Circuit of Florida* (Denver, CO: NCSC, Court Consulting Services Division, 2010).

APPENDIX C.
IMPACT OF CRIMINAL CASE PROCESSING PRACTICES ON RESOURCE AVAILABILITY IN THE NINTH JUDICIAL CIRCUIT OF FLORIDA

With 65 judges, the Ninth Judicial Circuit Court of Florida is a trial court of general jurisdiction serving about 1.3 million residents of Orange and Osceola Counties in Central Florida. At the Orange County Courthouse in downtown Orlando and the Osceola County Courthouse in downtown Kissimmee, the judges hear criminal, civil, domestic and traffic cases. In Orlando, they hear juvenile dependency and delinquency cases at the Thomas S. Kirk Juvenile Justice Center. There are also three satellite courtrooms in Apopka, Ocoee and Winter Park, where judges hear misdemeanor and traffic cases. Three courtrooms are located at the Orange County Jail Booking and Release Center for first appearances, arraignments, and violation-of-probation hearings.

In November 2009, the Court engaged the National Center for State Courts (NCSC) to evaluate the processing of criminal and juvenile delinquency cases in both Orange and Osceola Counties. The evaluation was to give particular attention to how pretrial conferences in such cases might be made more meaningful. The NCSC review of case processing would include not only the Court, but also the State Attorney's Office and the Public Defender's Office, with an eye to determining how efficiencies might be achieved by streamlining the process.

Summary of Findings and Conclusions

Key stakeholders in the Ninth Judicial Circuit of Florida perceive that delays in criminal case processing result from pretrial conferences that are not as meaningful as they should be, so that pretrial conferences and trial dates must often be rescheduled. A court event is "meaningful" when the activities for which it was scheduled actually occur as planned, and when substantial progress is made toward the disposition of the matter before the court.

This is a time when there are severe budget problems for the State of Florida and for county governments. In such an environment, delay and rescheduling of court events are not just a burden on victims and other citizens participating in criminal cases. In fact, they also cause significant wasted time for judges, prosecutors, defense attorneys, law enforcement officers, support staff, and other organizations in the court process. In a time of tight resources for courts and other public agencies, such waste is costly.

A. Cost of Time Lost by Not Having Meaningful Court Events

Using information provided by the Court and court-related organizations, the cost of such wasted time has been estimated by the National Center for State Courts. In Orange County, not having meaningful court dates for pretrial conferences and trials in felony, misdemeanor, and juvenile delinquency cases costs the Court and its justice partners about $4.2 million worth of wasted personnel time each year. In Osceola County, the wasted time costs about $3.1 million

in personnel expenses each year. See Figures C.1 and C.2 below for summaries of the cost impact of wasted personnel time on the Court, the State Attorney's Office (SAO), the Office of the Public Defender (PD), the Clerk's Office, County Corrections, and law enforcement departments for felony and misdemeanor cases in each of the two counties. For a summary of wasted time in juvenile delinquency cases in each county, see Figure C.3.

Figure C.1. Estimated Total Annual Cost of Time Lost Because of Non-Meaningful Felony Pretrial Conference Dates and Trial Dates in Ninth Judicial Circuit

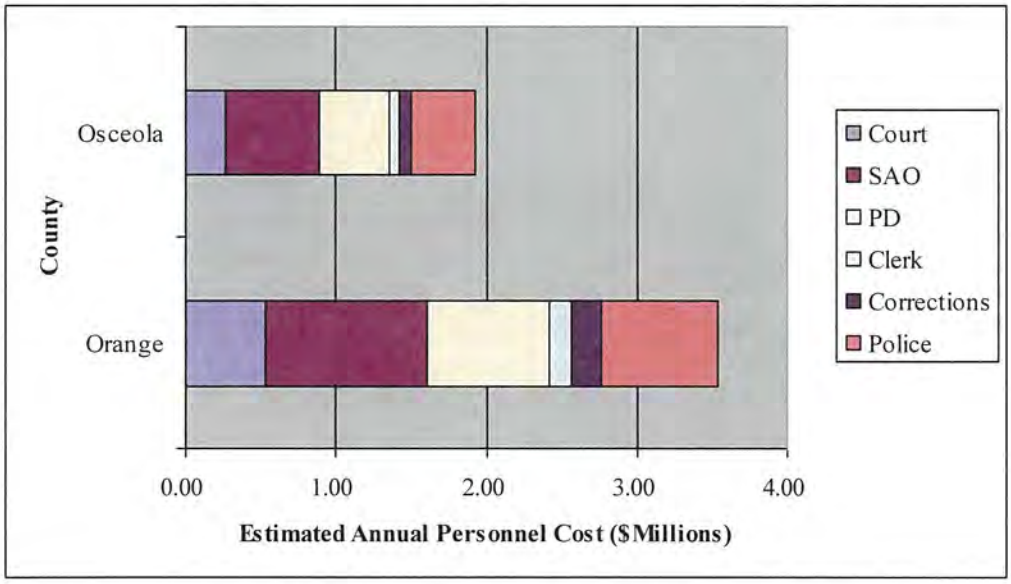


Figure C.2. Estimated Total Annual Cost of Time Lost Because of Non-Meaningful Misdemeanor Pretrial Conference Dates and Trial Dates in Ninth Judicial Circuit

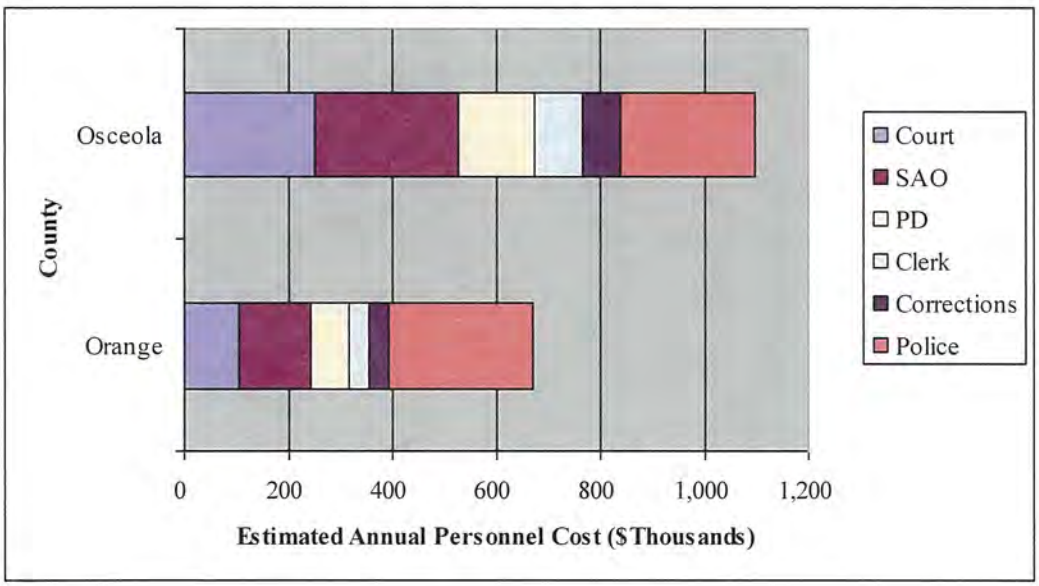
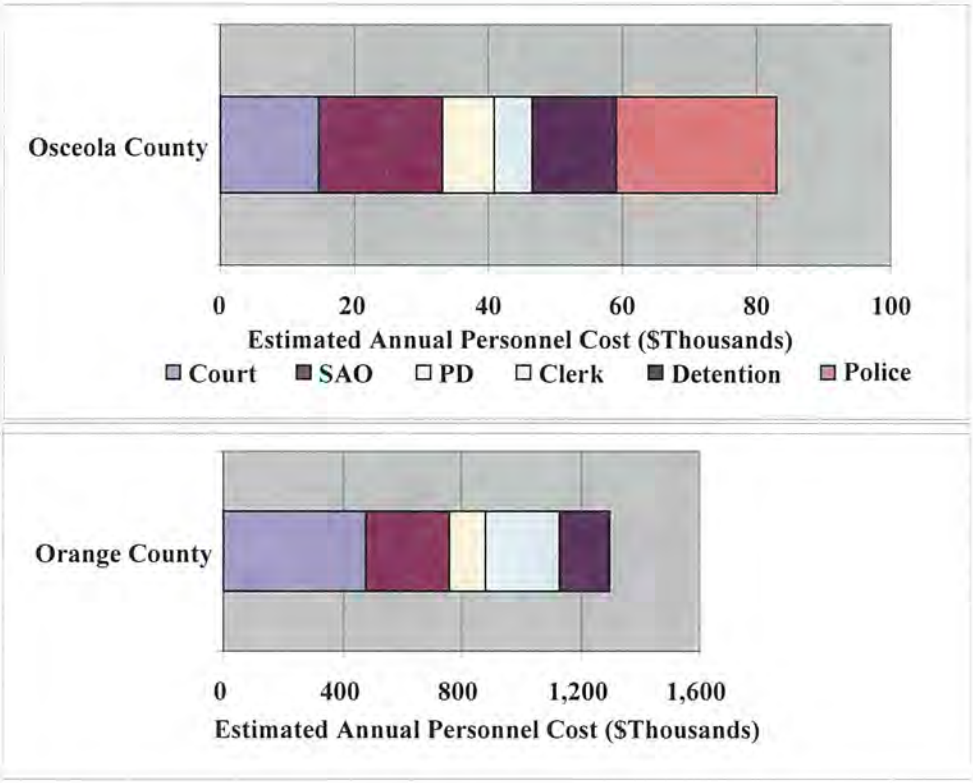


Figure C.3. Estimated Total Annual Cost of Time Lost Because of Non-Meaningful Delinquency Pretrial Conference Dates and Trial Dates in Ninth Judicial Circuit



B. Results of Having More Meaningful Court Events

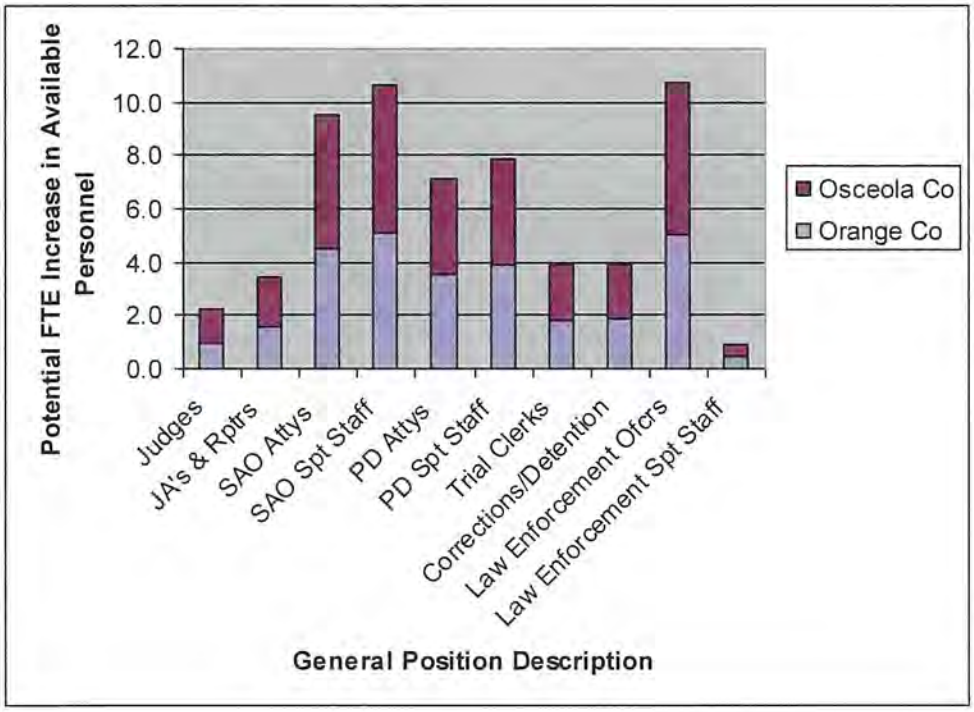
It is important to understand that it is neither possible nor desirable to eliminate all rescheduling of pretrial conference and trial dates. In individual cases, the grant of a continuance and the rescheduling of a court event is a necessary and appropriate step to assure that justice is done.

This is not to say, however, that any court event can be rescheduled without a negative impact on justice and cost to the public. To assure the provision of justice in a prompt and affordable manner, it is critical that pretrial conference dates and scheduled trial dates be credible and meaningful. This is accomplished by a court through the effective exercise of early and continuous control of case progress, so that unnecessary delays and wasted time can be minimized.

If scheduled pretrial conference dates and trial settings were more meaningful, so that there were fewer cases rescheduled, it is important to see what the results would be. The impact can be viewed most productively in terms of time savings for judges, lawyers and others. The data results in Chapter IV of the full NCSC report show that having more meaningful court events, as reflected by the absence of any cases with any more than two scheduled pretrial conferences

or trial dates, would save so much time for the judges, lawyers and others that it would be the same as having the full-time equivalent[46] of about 60 additional people without adding anyone to the payroll! For a summary of the impact of having more meaningful pretrial conference dates and trial dates, see Figure C.4.

Figure C.4. Potential Yearly Full-Time Equivalent (FTE)[47] Increase in Available Personnel from Having More Meaningful Court Events in Ninth Circuit Criminal and Delinquency Cases



As Figure C.4 illustrates, the reduction of wasted time would yield the equivalent of having two more judges, about ten more line prosecutors and ten more assistant public defenders, four more courtroom clerks, four more corrections and juvenile detention officers, ten more law enforcement officers, and more support staff for the Court, SAO, the PD and law enforcement agencies.

[46] "Full-time equivalent" ("FTE") is a measure of the number of employees that an organization may have or need, taking into account the possibility that it may have part-time employees. It can also be used, as it is in this report, to measure the extent of personnel time savings that would result from avoidance of wasted time from increases in productivity. FTE is determined by dividing working hours (excluding overtime) for all current or needed employees by the standard hours in a full-time work year. See http://ww.iaglimited.info/results/reports/archive/html06/glossary.shtml.

[47] Ibid.

Ten Steps to Promote More Meaningful Court Events

Based on the findings summarized above, NCSC offers ten recommendations for improvement. In brief, they are the following:

- *Actively apply a court management policy to avoid unnecessary delay and waste of personnel resources*
- *Consistently apply a criminal case management policy to reduce unnecessary continuances*
- *Expand pre-booking diversion opportunities*
- *Use differentiated case management (DCM) as a tool for early and continuous court control of case progress*
- *Give early and continuous case management attention to discovery requirements*
- *Consider early judicial settlement conferences*
- *Consider adoption of a plea cut-off policy*
- *Schedule criminal court events for more efficient use of law enforcement witnesses*
- *Provide additional judicial resources for felony cases in Osceola County*
- *Measure performance and include results in published annual reports*

APPENDIX D.

ABOUT THE PRINCIPAL AUTHOR OF THIS NCSC REPORT

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DAVID C. STEELMAN has been with the National Center for State Courts since 1974. In over 35 years with the National Center, he has worked with courts in about 40 states and a dozen foreign countries, in such areas as court organization; court performance measurement; trial and appellate court caseflow management; drug courts; family and juvenile courts; management of court reporting services; and management of traffic courts. He was a reporter for the *Model Time Standards for State Courts* (Approved August 2011 by Conference of Chief Justices, Conference of State Court Administrators, National Association of Court Management, and American Bar Association House of Delegates), which includes time standards that he drafted for involuntary civil commitment cases. His book entitled, *Caseflow Management: The Heart of Court Management in the New Millennium* (2000, 2004), was for years the National Center's most in-demand publication. He also wrote the *Court Business Process Enhancement Guide* (COSCA/NACM Joint Technology Committee, 2003), and he was co-author of *Traffic Court Procedure and Administration* (2d ed., American Bar Association, 1983).

Mr. Steelman has done prior work with the courts of New Mexico and Bernalillo County. He was the project director for a statewide workload assessment in 2006-2007 to determine the need for judgeships, prosecution lawyers and staff, and public defender lawyers and staff. After that, he was the project director for a 2009 assessment of felony case processing in the 2nd Judicial District.

In April-May 2004, Mr. Steelman was a visiting scholar at the Research Institute on Judicial Systems at the University of Bologna in Italy. From September 1987 through August 1992, he was the director of the National Center's Northeastern Regional Office. From 1977 through 1983, he was an adjunct professor in the Evening Division of Boston College. He graduated Phi Beta Kappa from the University of New Hampshire, being a Ford Foundation Teaching Fellow, earning both BA and MA degrees there. After being awarded a Bronze Star as a US Army officer in Vietnam, he received his law degree from the Boston University School of Law. He is admitted to the practice of law in Massachusetts and New Hampshire, having done legal work for the Maine Municipal Association and New Hampshire Legal Assistance before joining the National Center.

A CALL FOR THE TRUTH: FINDINGS AND RECOMMENDATIONS ON ENDING THE JAIL CROWDING AND ENSUING LAWSUIT IN BERNALILLO COUNTY, NEW MEXICO

Report to The Commissioners of Bernalillo County, and Interested Citizens

January 20, 2014

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Appendices

I. EXECUTIVE SUMMARY

Bernalillo County faces budget shortfalls. A 20 year lawsuit over a crowded jail contributes to this budget condition. The litigation threatens to become a near permanent part of the local landscape.

The intent of this report is to provide the County with the best advice about how the citizens, political leaders, and the Commission can end this crowding and lawsuit, so that vital resources can be better utilized for other County functions, instead of being diverted to finance continuous lawsuit related damage control. Identifying and understanding the extent to which each County Commission member, government official and other justice system "players" are responsible for and contribute to the problem is a necessary step in finally resolving this lawsuit. This report is a call for a clearer, honest review of the very sorry facts.

Bernalillo County's administration fails to manage the justice system, overall work and case flow, or discretion, yet it has chosen to supplement its budgets by $12 million[1] plus the large agency budgets. This failure to manage results in what should be easily preventable Jail crowding. The current jail system population consists of mostly non-dangerous inmates. Case processing delay accompanied by failure to screen and properly assess inmates according to the risk they pose has dire and clear consequences. This condition runs rampant throughout the entire system, from arrest, through pretrial detention, to probation. So long as the justice system agencies remain uncoordinated and so long as the lawsuit case can be manipulated by those who benefit, so long will jail beds be overused, the lawsuit be stagnant, and scarce public funds depleted from better public safety uses.

The system is in a state of injustice. Self-interested County management, lawyers, and bondsmen alike hold enormous sway over the litigation. Too many incentives exist to keep the litigation from being resolved; too few incentives exist to permit resolution. Too many public officials ignore the widely available and valid public data that speak to the lack of risk assessment and of excessive court delay. It is up to the Commission to unify the County behind a real Criminal Justice Advisory Board to bring about system improvements and new initiatives that cannot easily be achieved by a single agency.

II. INTRODUCTION AND OVERVIEW

I am a national criminal justice expert in jail overcrowding and best practice work in over 400 counties. In past experience, I was an expert for the Department of Justice, Bureau of Prisons, and National Institute of Corrections as well as the State of New

[1] Rounded from $11,907,307.87. Drug and Substance Abuse Program Statistics. McClendon.

Mexico, and I was appointed by a Federal Judge as Deputy Master over all 58 California prisons in their long-standing Federal crowding case. The County contracted with me in January 2013 on a short-term purchase order (8 months) to assist with the County's Jail crowding. Many prior client counties have recommended my expertise due to real success in reducing crowding and improving justice system coordination across the nation. (See attached resume[2] and letters of reference[3]).

I began work in Bernalillo in the late fall of 2012. I read the history of the jail, reviewed dozens of outside expert and organizations' reports, and virtually everything else available on the case. After several months of conducting wide-ranging interviews and seeking meaningful meetings and effective strategies to rally the parties and players to a common approach, I realized this cohesion would not be easy. What has worked everywhere else— what has become best practice— is to bring the parties to the table with data, organize them around assessing public safety risk and needs of arrested persons, implement appropriate assessment tools and practices, and then streamline the time it takes to process cases and people through the system. This will reduce jail crowding.

This strategy could not even begin in Bernalillo, as it surfaced that the Office of the Deputy County Manager over Public Safety had long been undermining such efforts. The Deputy County Manager would not meet with me meaningfully in spite of his County's contract with me and in spite of the Chief of Corrections' widely distributed recommendations. As such, the Chief of Corrections directed me to work directly with the two Federal Judges over the McClendon case, as the Chief of Corrections suggested that providing technical assistance and seeking to coordinate a settlement strategy with the Court would have the best chance.

I communicated with some of the County Commissioners and all the criminal justice agencies, and I spoke personally with many dozens of others, often with the Federal judges and at different times with individual justice system officials, (some openly, others in private). I spoke about how to end the financial hemorrhage of Bernalillo's jail crowding and ensuing litigation, using data and insight into the case's history.

The County Manager's office rebuffed my attempts to work with them. My work continued in spite of this pattern, however, for all but the final month of the eight-month purchase order at under $7,000 per month including all expenses of travel, etc. My payments ended a month early due to a termination of the contract by the Assistant County Manger. I learned the County Manager also rebuffed other similar efforts: he dismissed the Pretrial Justice Institute of Washington, DC, an agency that has been successful in introducing real pre-trial reform and lowering crowding throughout the nation; he removed his own data collection expert, whose work showed the failures of efforts to add programs and caseworkers to the system

[2] Appendix E
[3] Appendix F

rather than reduce the causes of crowding; and he refused to allow a final report from the National Center for State Courts, after their draft report demonstrated the tremendous court delay driving overcrowding and the means to remedy it. These are only a very few examples of how often the most recent Deputy County Manager found a means of keeping out those with real answers that could have changed the direction of this intractable lawsuit.

I write this final report with knowledge (but certainly not approval) of the above parties and the Federal Judges over this case. Despite my early termination by the Deputy County Manager, I continued for seven months on my own. I am too old and experienced to allow such a situation to gag me. And I believe I have an obligation to let the Commission and Bernalillo County citizens and taxpayers know that things are not as they ought to be. I aim to provide the County with the best advice about how the citizens, the political leaders, and the Commission can end this crowding and lawsuit and stop the advancing, enormous, and damaging drain on the County treasury and remaining fabric of a dilapidated criminal justice system.

The attached data[4] and widely available reports cited through out this report support my advice and demonstrate exactly how and why jail crowding, the lawsuit and the political culture in Bernalillo County are chronic and how they feed on each other.

III. Analysis

Bernalillo County greatly overuses its jail bed resource by failing to manage the justice system work and case flow. The source of jail crowding is not an increase in general or criminal population. It is not due to increases in crime, arrests, or bookings into the jail. Nor can it be traced to any factor related to public safety that has in the past and still crowds the jail. The decisions that are being made about people and cases as they move through the system are what are causing the crowding. It is the "system" of administration that crowds the jail: an ultimate failure of management, administration, and leadership to control what appears now to some to be deliberate malfeasance.[5]

Law enforcement brings too many to jail on minor charges; too many who hold no risk are held in pretrial detention and for far too long; too many filings result in dismissal, so that many are released without conviction after serving long periods of pretrial incarceration. The system has one of the worst records of delay in the

[4] The data is the most recent data available to me, as the Deputy County Manager does not allow access to newer data.

[5] This concept of the workload being largely determined by decision makers as cases and people flow through the system is best explained at: "Jail Crowding: Understanding Jail Population Dynamics, by Mark Cunniff, published by the Naitonal Institute of Corrections, U.S. Department of Justice, January 2002. NIC Accession Number 017209. This document can be accessed electronically at: http://static.nicic.gov/Library/017209.pdf

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nation, and that is a primary cause of jail crowding. The lack of coordinated management of the workflow by all the justice system partners, and with the tacit and sometimes direct support or involvement of local government, grow the system instead of manage it.

The current population in the jail manifests these facts. The majority of the inmates are non-dangerous and a third are truly "light-weights" (low-risk in comparison to jurisdiction averages elsewhere). Un-rationed arrests for minor, non-dangerous crimes abound; primitive and ineffective pre-trial practices do not protect the public, but greatly crowd the jail; case processing delays produce a bloated workload; poor management of probation violations increases the jail population by hundreds.

The dysfunctional pre-trial approach feeds the bail bond industry, which, according to most accounts, seems totally involved with local politicians and judges, and thus creates the food chain that sustains the system of players.[6] The pattern is too deep in the local fabric to simply label it "corruption"; it is the way of life, business, and livelihood for too many.

The attached comparison of the statistical profile of the County to the profiles of other counties set out these facts.[7] Additional information describes jail population measures for dangerousness and risk to public safety according to a best practice national standard risk assessment instrument. The Judges and other managers have been reluctant to implement this validated best practice of objective risk assessment, claiming that their subjective judgment about risk is "better" for public safety. This subjective approach is an untenable and indefensible position, especially in light of the national experience. Recently, the Chief of Corrections employed the Northpointe risk assessment, chosen based on national credentials and success in other settings of crowded jails. The system demonstrated that most of those in the jail were inappropriately incarcerated because of their lack of risk to public safety. In response, the Deputy County Manager, with help from others, undertook efforts to limit the impact of this new and best practice risk assessment system.

Attached are national comparisons of the inmate profile in a series of charts, tables, and spreadsheets.[8] The objective data shows the large proportion of inmates with low risk to public safety and leads to strong conclusions about current, uncoordinated justice system policy and practice.

Each time the inevitable new wave of growth in jail crowding occurs, the McClendon litigation is "roused." This repeated pattern, over nearly two decades, results in the

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[6] For general discussion of this condition, see : "Pretrial Criminal Justice Research", Research Summary, which can be accessed on line at:
http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf
[7] Appendix A
[8] Appendix B

County spending more millions to continue the system's failure to manage. The system bloats the population with the same pattern to accommodate, with more beds, more programs, more staff, and huge outlays, yet crowding is never really reduced.

The totality of these data and facts destroy the argument that the hundreds of non-dangerous persons currently in jail "should" be in jail at County expense. The data and national comparisons demonstrate that a great many non-dangerous people need not be detained for long pretrial periods and never convicted. The data in its national context confirms that the volume of cases and time it takes to process could readily be diminished. It reveals the lie that justice system agencies are independent of the County and cannot be required to manage together to focus the system's resources. These agencies (coordinated in a subtle way by the County Manager and allowed in an even less-subtle manner by the County Board) nonetheless continually call for (in an obviously coordinated manner) and obtain more County money to crowd the jail and fuel the lawsuit.

IV. THE RATIONALE

The lawsuit now has a life of its own; it has found a powerful niche in the local economy of the "courthouse gang" (the lawyers and especially the bondsmen), the public sector employees and private contractors, as well as the New Mexico culture of seeking government jobs as an employer for political supporters.

This institutionalizing of the lawsuit has developed to such a comprehensive degree that there is virtually no remaining constituency for ending the lawsuit. In fact, the Commission, the Chief of Corrections, and the Federal Judges are the only convincing figures on the horizon, who are clearly trying to put an end to crowding and the lawsuit. Sometimes, to a lesser degree, some Commission members join in. Still, the Commission has not acted decisively, the Chief of Corrections seems targeted, undermined, and limited by the Deputy County Manager, and the various experts involved in the settlement negotiations, seem at times "played" by the lawyers as an accompaniment to the lawsuit's music.

Almost everyone in the local circle of interests adjacent to the crowding issue directly or indirectly has an interest in holding on to substantial system inefficiencies to preserve their place in this order. Consequently, there is no one person who seems committed to ending the crowding and the lawsuit, except the Federal Judge.

For over 20 years, the jail has become more and more full, through two facilities, 90 lawyers, and 500-700 inmates who would for the most part never be in jail (or stay long in jail) almost anywhere else in the nation. The inmate classification and risk assessment tools risk have now been scientifically validated. It shows how the

pattern of jailing, mostly pre-trial, is unnecessary for public safety and fundamentally bad criminal justice and local government.

Public safety is worse the more this pattern grows, and it is growing. Misuse and crowding of the jail in this way is often said to cause crime by disrupting lives, breaking up families, leaving the incriminated jobless and homeless persons to turn to drugs or fall prey to mental illness, and promoting gangs rather than deterring criminality.

This dysfunctional system doesn't so much as "correct" as it reproduces the inmates— it punishes the poor local families and working taxpayers, each paying for the housing of non-convicted and non-dangerous persons, and suffering from the County's unjust use of resources; it punishes them with the breakup of their families rather than real rehabilitation service; it punishes them with the stigma of criminality without justice; and it punishes them by reinforcing their poverty.

V. THE ROLE OF THE ATTORNEYS

Some of the lawsuit's attorneys were with the City of Albuquerque two decades ago, at the start of the jail lawsuit. One of the attorneys, admittedly the best, is still in the litigation as a County Attorney. Various private firms have been involved. Most recently and importantly, the "Baker" firm, that is said to represent "the County's interests," and the "Cubra" firm, another lead firm on the plaintiffs' side that claims to represent the inmate's interests.

The lawyers representing the County maintain that they are protecting the County, although it is clear that the County has only "lost" from the onset of the litigation. The County has spent $10 million in legal fees alone, $20 million on a new, larger County jail without even escaping from the law suit's grasp, and millions upon millions more in increasing operations costs and also on programs, staff, experts, consultants, etc. All of these huge expenditures pale, of course, in comparison to the rapidly rising cost of running a very large jail and crowded system, regularly inflating the overall operations budget and now shipping inmates to nearby jails outside the County.

In addition, the plaintiffs' attorneys are always making the obvious point that the jail is overcrowded (which is hard to dismiss) and that the jail is dangerous (which, in comparison to other large urban jails, is far less clear). The jail, as most large metropolitan jails, is not an easy management challenge and is always beset by some violence and danger for inmates and staff, to a greater or lesser degree. This jail, however, has its professional operations interfered with on a regular basis by the highly political Deputy County Manager, according to various sources in and outside the jail. From the recent demise of the jail's honor program, to the undermining of the Chief of Corrections' position and his efforts at reform, the Deputy County Manager orchestrates the chaos necessary to keep the jail from

focusing on real control and safety and lowering the number of incidents. This chaos greatly fuels the lawsuit's apparent legitimacy, suggesting that the crowding is the cause of the danger to inmates, including disabled inmates.

From the view point of this writer (with forty years in the business of jail and prisons, including significant prior work in New Mexico), the jails are "average," not terribly dangerous, and not easily made safer without being left alone by County management and protected from the pressures of the lawsuit. The jail needs time and support to focus on problems of personnel and hiring, training and morale, and culture. All of these problems have long been impacted by past corruption, the County management's interference, and the lawsuit itself. The system and the cycle maintain levels of failure and indicators of violence/danger upon which so many interested parties can always stake their claims.

So, both groups of attorneys, all in the name of representing the "best interests" of their clients, have fallen upon a perpetual fee machine that shows no sign of abatement.

It is difficult, from a functional analysis, to see who the plaintiffs' lawyers really represent, and more so to believe that the jail is sufficiently crowded or dangerous today, such that when compared to when the suit was first brought, the jail would today be found to have unconstitutional conditions of confinement. From observation, the lawyers are all good lawyers and they are not trained to step out ahead of the County and make the County settle, or let the County settle. Individually they may well be committed to their clients, but as a whole, they are a powerful force for maintaining the status quo of the dilapidated system.

The only lawyers who truly have the right interests in seeing the suit settle is the senior Federal Judge in the case, and the Magistrate Judge. The rest of the lawyers hold on to arguments that maintain the suit and have no real interest in seeing the litigation come to an end, in spite of claims to the contrary.

Although the senior County Attorney is also clear on seeking an end, he is limited by his position and the irony of not being able to advise the County to stand up to the local justice agencies and refuse to take inmates into the jail over a reasonable level (A jail population "cap"). That is because the refusal of the County to take inmates sent by the Courts to the jail is contra local law, albeit the justice system agencies are acting in very extra-legal or unconstitutional ways as well, in the opinion of this expert.

Perhaps some of the individual County Commission members are invested in ending the crowding and lawsuit, but these individuals appear to be weakened by the powerhouse Deputy County Manager, or by the natural partisan infighting of a split Board, or perhaps by the fear of risk and change attributed to their political career.

The liability to the lawsuit is in its 20th year momentum, the County's mismanagement of continuously "trying" to comply, the enormous self-interest of all involved, and the law firms that somehow maintain hold over the litigation. There is a lack of a strong disinterested outsider, with some real interest in settling the suit. This is the kind of person who needs to be put in charge of so doing. Otherwise, the Commission will be continuously held hostage by local politics, local law firms, and a host of other political and economic interests, as well as the Deputy County Manager and the bondsmen who contribute to this overall litigation disaster.

VI. THE ROLE OF THE COUNTY COMMISSION

For as long as those many persons in and out of government who were interviewed can remember, the County Commission has delegated control over the jail and its crowding problems and the litigation to the County Manger's Office. For the past several years, this responsibility has been managed by the Deputy County Manager, who is also the Mayor of another City in the County and openly discusses seeking the Governor's Office. As such, when this Deputy County Manager works with the various criminal justice agencies, or with other nearby and far counties where rental beds might be sought for crowded County jail inmates, he does so with these political and economic interests in mind. Yet the Board placed him in that position and thus relied on him, which in many ways provides an explanation as to the longevity and enormous expenses of the jail crowding problems and court case.

The County has never exerted effective influence on the justice system partners. Instead, the County has accommodated by agreeing to expand the system rather than require better and more coordinated justice system agency management to control caseload growth. It has shown great support by approving far more than the minimal funds required to house the system agencies. For example, the County gives the Court $3 million to $4 million a year to deal with pre-trial release, but the outcome and product of that funding appears to be counterproductive, conveying a message to the Court and bondsmen that the resulting jail crowding is just business as usual. The Deputy County Manager seems more inclined to lobby to give more County funds to the Courts and other agencies than to threaten cuts if better management of the case flow is not instituted.

In feigned fear of releasing the inevitable minor offender, who might re-offend, the Courts will not acknowledge the widely available and valid public data that demonstrates enormous and unmatched court delay. The Courts will not admit that they are jailing persons who are not dangerous, who will not be convicted, and who do not belong in jail. The Courts are responsible for this dysfunctional administration in their effort to preserve their fiefdom and position of privilege and influence without accountability. They seem to love their privileged jobs more than justice. They also do not really promote any release efforts beyond jail and financial bond, although there are widely used programs elsewhere that ensure appearance with calls or postcards, etc. The Courts appear to be the captive of a very politically

powerful bail bond industry that has close connections to election campaigns and political fundraising, and this relationship appears to the outsider to have the total support of the Deputy County Manager, and thus, indirectly, the Commission.

Furthermore, the Prosecution will not readily consider the data that shows that the DA's office is not screening early and carefully enough to manage scarce public resources or jail resources. The DA seems unresponsive to published data, equally available to all, which shows an unusually high rate of dropped cases in the County. These cases were dropped long after incarceration, effectively demonstrating late and inadequate screening and a disregard for the constitutional niceties.

Lastly, the police will not readily change transporting persons to jail who should instead be cited in the field or diverted, because they pose risk of danger or failure to appear. They appear to transport arrestees to jail simply because it is easier for them to do so.

Overall, this County justice system has never stepped up to manage itself, individually, or its partner agencies. There are better and smarter ways to enforce the law for non-dangerous persons, which the vast majority of the nation's large counties have already recognized.

The only possible ending can come from those charged with the well being of the County and budget: the Commission. Once the Commission says no shipping, no new beds, and no more money to the agencies that refuse to cooperate and manage the case-flow, then and only then, can this extreme dysfunction end, and some reasonable justice system and normal jail population emerge. The time for that policy change is now.

VII. THE SOLUTION

The data supports the logical decision that the Commission must now take a stand in order to preserve the viability of local government, justice and the County treasury, or otherwise step towards fiscal collapse, a logical outcome of shipping inmates or waiting for a new harsh court order that requires both shipping and large fines.

The alternative is to unify behind a court-approved settlement and support the new order with the recently legislated but reconstituted Criminal Justice Advisory Board (CJAB). The goal of the CJAB is to get the gatekeepers around a table with the same data, to manage crowding and satisfy the lawsuit. That has worked almost everywhere. [9]

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[9] See: "Guidelines for Establishing a Criminal Justice Coordinating Committee"by Robert Cushman, published by the National Institute of Corrections, U.S. Department of Justice, 2002, accession # 017232. Access an online copy of this publication at: http://nicic.gov/library/017232

The Deputy County Manager's recent visit to legislature to pass a deliberately flawed CJAB bill explains the CJAB's useless performance thus far.

The County Commissioners should require the new CJAB management and a jail population cap, driven by risk assessment instruments, to manage the crowding. If these fundamental and widely employed means are not instituted, then the Commission should seek to settle the lawsuit in any event "ordering" those initiatives, putting forth and agreeing to a cap and requesting the release matrix, and not worry about about the legal challenges. The Commission can let the self-interested defenders of maintaining this law suit and shipping inmates to other counties appeal and try to stop them— which, in this expert's opinion, they cannot and will not be able to accomplish, as the next or current lawsuit would include those who tried to block these means.

VIII. RECOMMENDATIONS

1. Cap the jail at 2236, and do not ship any inmates, regardless.

2. Use the Northpointe risk assessment system, administered by the Jail, to manage the cap with a release matrix. In this way, the least dangerous, most ready to be released inmate is released when a new one arrives over the cap. Stick with the Northpointe system as it's been used and do not allow manipulation of "cut points" and risk scales.

3. Employ the two already agreed-upon experts to monitor and report on progress towards a more constitutional jail operation, which should occur easily under the existing Chief of Corrections, if only the manager, administrative and legal distractions and instability of crowding and the lawsuit ends.

4. Use the County's budget as tool for compliance, withdrawing from or providing funds to law enforcement, prosecution, probation, courts and related agencies to comply with this overall approach. The courts need to release pre-trial inmates on OR via a validated risk assessment instrument, as most other courts do; probation needs the same assessments to be accountable to the need for jail beds for serious offenders; the prosecution should benefit from staffing and resources to screen tighter and earlier, down-charging and diverting based on the same kind of risk assessment; and police field citations for arrests, rather than custody, should be required based on the law and a reasonable risk assessment of existing options for diversion, or the County should seek booking fees.

Additional resources can be viewed at the Criminal Justice Management Institute, at: http://www.jmijustice.org/current-projects/criminal-justice-coordinating-councils

5. Support the new CJAB with County Commission (not Manager) staff to manage this settlement and all the changes; provide strong outside Facilitator support to operate the CJAB, and avoid any more buildings, space, programs or new staffing. The outside Facilitator, with "no dog in the fight," is necessary to make CJAB work, especially at the onset. The idea of a Supreme Court Judge to play this role is only a fair idea, as the Facilitator should represent a "sea change" and have no political or financial interest in any aspect of any issue before CJAB, and thus be a Facilitator that has done the CJAB job elsewhere; there are many to chose amongst.

6. If the partner agencies cannot work together with a revised structure for the recently established CJAB, to manage their system, and they refuse to comply with the settlement you authorize per the above points, then hold fast, let them sue for your refusal to fund the justice agencies beyond their budget, as now occurs, and cut the $12 million you currently provide, and fight the adverse results as far as you can. That will be a much cheaper battle and you will win.

7. The Court should establish and enforce a Continuance Policy that strongly disfavors motions or requests to continue court events with the exception of unusual circumstances. Any continuance motion or request must be in writing and filed no later than 48 hours before the court event for which rescheduling is requested. The Court should grant a continuance only for good cause shown. Refer to Principal Court Management Consultant for the NCSC David C. Steelman's Model Continuance Policy.

8. The Court should establish and enforce a Plea Cut-Off Policy whereby the court would establish a date for prosecution and defense counsel to meet to discuss the possibility of a plea, at which the prosecutor's office would be prepared to make its best offer to the defendant. A week after that conference would be the last date on which the defendant could accept the prosecution's best offer. If the defendant sought to plead guilty after that date, he or she would have to plead to the original charge filed by the prosecutor. There would be no benefit for the defendant to wait, since the prosecutor's offer would not "get better" from a defense perspective. Refer to Principal Court Management Consultant for the NCSC David C. Steelman's Elements of a Successful "Plea Cut-Off" Policy for Criminal Cases.

9. Implement status conferences within 7 days after arrest.

10. Implement settlement conferences for those cases not resolved with status conference, to occur shortly after indictment.

11. Set up a small fund, public or private, to provide bail to low-level offenders who can't meet bail. This concept was recently implemented in New York

through The Bronx Freedom Fund. For-profit bail bond companies frequently refuse to write bonds in cases where they see little profit in providing small amounts of bail, leaving those at the very bottom of the economic heap without any recourse. The central mission of the Fund is to try to post bail for those least able to afford it and most likely to return to court. The Fund posted bail of up to $1,500 for defendants charged with misdemeanors or nonviolent felonies and who were considered to have a low risk of fleeing while their cases were pending. From 2007-2009, the Fund reported a 93% appearance rate for participating defendants and helped release 160 defendants, who on average would have spent 16 days each in jail awaiting trial.[10]

12. In summary, if you stand strong now, it is highly likely that, with CJAB in place with a strong outside facilitator, a refusal to ship, and your combined direct power outside of the Manager's Office, you will get the system to manage itself and comply with the settlement as outlined herein, without major conflict or even more millions lost.

[10] From a Memorandum: "The cost for posting a $500.00 bond for 750 inmates would be $375,000.00... On the other hand, if these inmates are kept in custody, it costs the County $63 per day, per inmate... According to [Lisa Simpson], the average length of stay of an inmate at Bernalillo County Detention Center is 180 days... it would cost the County... a total of $4,231,500.00 for just 90 days to house 750 inmates."

APPENDIX A.

LENGTH OF STAY IN DETENTION FACILITIES

NEW MEXICO SENTENCING COMMISSION

LINDA FREEMAN, MA

AUGUST 2012

Length of Stay in Detention Facilities: *A Profile of Seven New Mexico Counties*

Looking only at arrestees charged with at least one felony from 2003 to 2010:

- Median length of stay increased 31% for arrestees who spent their entire stay in an unsentenced status (from 112 to 147 days).
- Not accounting for sentence status, total median length of stay increased 2.8% (from 176 to 181 days).
- Median length of stay varied by location.
- Curry and San Miguel counties' total median length of stay decreased by 25%.
- Dona Ana county's total median length of stay decreased by 11%.
- Total median length of stay increased by nearly 13% for Bernalillo, and 3% for Eddy and San Juan.

Looking only at arrestees charged with new charges in District court from 2003 to 2010:

- Median unsentenced length of stay increased 16% (from 167 to 193 days).

Major Findings from 2010 Study

- Arrestees charged only with misdemeanors spent a median of 80 days in detention facilities.
- Arrestees booked on probation violation in district court spent a median of 70 days in an unsentenced status.
- Arrestees booked on warrant in district court spent a median of 114 days in an unsentenced status.
- 4.3% of arrestees had an I-247 Immigrations Customs Enforcement Detainer.
- 3.1% of arrestees had a mental health competency proceeding filed during the course of their stay. A supplemental report will be written detailing the outcomes of these arrestees.
- 123 arrestees were still in custody on June 30, 2012. Their median length of stay up to that point was 761 days.

In 2004, the New Mexico Association of Counties (NMAC) contracted with the New Mexico Sentencing Commission (NMSC) to conduct a study to estimate the cost of housing arrestees charged with felonies in New Mexico detention facilities. Fiscal impact was the primary focus of the study; however, a second report *Length of Stay for Arrestees Held on Felony Charges: A Profile of Six New Mexico Detention Facilities* was published that analyzed the amount of time arrestees charged with felonies spent in jail. In subsequent years, the cost estimate has been updated annually (funding provided by the County Detention Facility Reimbursement Act, see Section 33-3B-1 NMSA 1978).

The length of stay study had not been updated since 2005. In June 2011, NMAC contracted with NMSC to update the length of stay study. Rather than just look at arrestees with felony charges, the update includes arrestees charged with misdemeanor charges as well as collection of other data elements.

Research Design

The original sample of county detention centers (Bernalillo, Curry, Dona Ana, Eddy, San Juan and San Miguel) were included in the update along with the addition of Cibola county. Data was collected from each facility to create a snapshot for June 30, 2010. The number of arrestees in the study sample comprised just over 70% of all arrestees held in New Mexico detention centers on that date. Automated information was used for Bernalillo and Dona Ana counties. Information for all other counties was collected from files maintained by the detention centers. The New Mexico Administrative Office of the Courts provided additional information.

This study does not measure daily turnover, how many arrestees are booked and released each day. Rather this study looks at a single day to determine how long each arrestee was in custody from booking to release. Arrestees were categorized as either *unsentenced*, meaning charged but awaiting trial, or *sentenced*, meaning convicted and sentenced. The median length of stay for both the unsentenced and sentenced proportions as well as the total length of stay for each arrestee were calculated. Arrestees were further categorized by court jurisdiction and type of charge.

Since there was considerable variation in the length of stay data, we used the median to report the length of stay instead of an average (mean). The median statistic is best because it represents the middle score in the data: half the scores are greater than the median and half are less than the median. In situations where there is a large dispersion (standard deviation) in the data the median is a more accurate measure. Cases that yielded suspicious estimates were excluded from the analysis.

Results

Among the 5,109 arrestees in our sample, 24.4% were younger than 25 years of age, 34.5% were between 25 and 34 years of age, and 41.1% were 35 years or older. Men comprised 83.7% of the sample.

Of the 5,109 arrestees in the sample, 98.2% were booked prior to June 30, 2010. Of the 93 arrestees booked on June 30, 2010, their median length of stay was 8 days. Over a quarter (28%) were released within a day,

Table 1 - Median Length of Stay for Arrestees with Felony Charges

	2010		2003	
	Median	Number	Median	Number
Bernalillo	206	2,131	183	1,446
Cibola	167	106		
Curry	146	218	196	170
Dona Ana	149	444	168	332
Eddy	169	119	164	108
San Juan	149	298	144	415
San Miguel	109	78	147	52
Total	181	3,394	176	2,523

For the 5,016 booked prior to June 30, 2010, 66.7% had already been in the detention center for 30 days or more.

Length of Stay Arrestees Charged with Felonies

Over 66% of arrestees were charged with at least one felony, down from 2003 (68.9%). It is important to note that one possible explanation for the decline is the increase in dollar threshold amounts for property crimes. In 2006, the legislature addressed the effects of inflation on penalties for property crimes in House Bill 80 (Chapter 29) by increasing the dollar amounts for property offenses that would trigger sanctions. Consequently, some property offenses that had previously been 4th degree felonies became misdemeanor offenses. Table 1 describes the number of arrestees charged with a felony by detention facilities and their median length of stay for arrestees.

The median length of stay for 2010 increased by 2.8%. For Curry and San Miguel the total length of stay decreased by 25%, and length of stay also decreased 11% for Dona Ana. Length of stay increased by nearly 13% for Bernalillo, and 3% for Eddy and San Juan.

Nearly half of arrestees charged with felonies will spend only time unsentenced or awaiting outcome on their case, while only a small portion will spend time only sentenced, meaning they are completing a court ordered sentence (6%). 44% of arrestees will spend a portion of stay both unsentenced and sentenced. Table 2 again focuses only on arrestees charged with felonies. Arrestees in the both category spent a median of 7.5 months in a detention center (228 days up nearly 2% from 2003). The median amount of time for an arrestee charged with a felony who was unsentenced their whole stay was 147 days, up 31% from 2003. For arrestees who only spent time sentenced, their median stay was up 8% to 163 days from 149.

Table 2 - Total Length of Stay by Sentence Status for Arrestees with Felony Charges

Category	2010		2003	
	Median	Number	Median	Number
Arrestees who spent time both Unsentenced & Sentenced	228	1,495	224	1,256
Arrestees who only spent time unsentenced	147	1,686	112	1,152
Arrestees who only spent time Sentenced	163	213	151	96

Length of Stay Arrestees Charged with Misdemeanors

Median length of stay for arrestees with misdemeanor charges is considerably shorter (80 days). Table 3 lists the total length of stay for arrestees charged with misdemeanors by county.

Table 3 - Median Length of Stay for Arrestees with Misdemeanor Charges

	2010	
	Median	Number
Bernalillo	84	1,076
Cibola	21	15
Curry	77	103
Dona Ana	32	69
Eddy	106	80
San Juan	87	302
San Miguel	41	25
Total	80	1,670

A higher portion of arrestees charged with misdemeanors are booked to only serve a sentence (13% compared to 6% of arrestees charged with a felony).

The median length of stay for a sentenced arrestee charged with a misdemeanor was 88 days.

Interestingly, the portion of arrestees who spend a portion of stay both unsentenced and sentenced is the same for arrestees charged for misdemeanors as it was for arrestees charged with felonies (44%). The median length of stay for an arrestee who spent time both sentenced and unsentenced was 97 days.

For arrestees charged with misdemeanors who only spent time unsentenced, their

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Table 4 - Total Length of Stay by Sentence Status for Arrestees with Misdemeanor Charges

Category	2010 Median	2010 Number
Arrestees who spent time both Unsentenced & Sentenced	97	730
Arrestees who only spent time Unsentenced	55	718
Arrestees who only spent time Sentenced	88	222

median length of stay was 55 days. Table 4 contains the median length of stay by sentence status for arrestees charged with misdemeanors.

Booking Categories

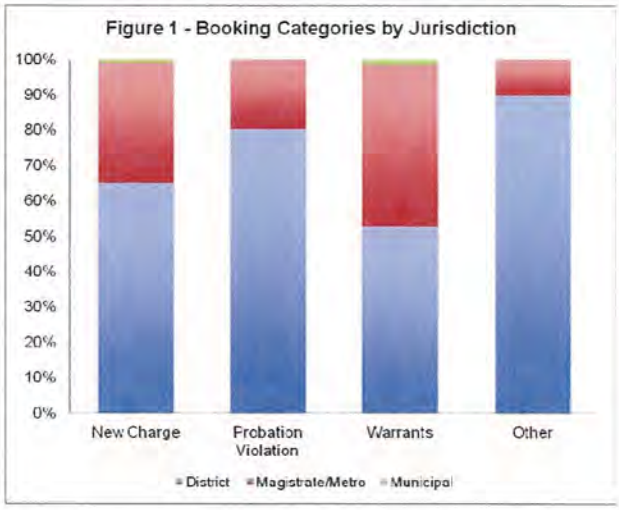
Nearly 62% of arrestees were booked on a new charge. Probation violations were the second most common category (18.1%), followed by warrants (17.1%). Table 5 lists booking categories.

Booking categories are presented graphically in Figure 1 to show the relative percentage of bookings by court jurisdiction. There are very few cases where arrestees' most serious booking is a case in municipal court. Arrestees with new charges, probation violations, and other bookings are more likely to have cases in district court. Warrants are almost evenly split between district and magistrate/metropolitan courts. Failure to appear is the most common warrant type (53%), followed by failure to comply (31%).

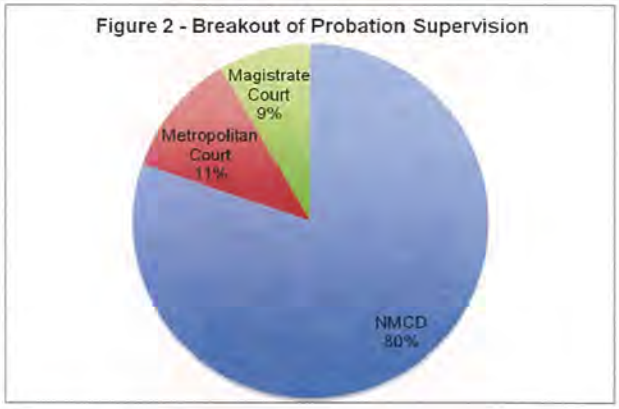
Probation can be supervised by different agencies. New Mexico Correction Department (NMCD) Probation Parole Division (PPD) supervises offenders who are sentenced to probation by district court. Typically these offenders are convicted of felonies; however in jurisdictions that do not have magistrate court probation it can include individuals who are convicted of misdemeanors. Bernalillo County Metropolitan

Table 5 - Booking Categories

Booking Categories	2010 Count	2010 Percent
New Charge	3,164	61.9%
Probation Violation	924	18.1%
Warrants	875	17.1%
Other: Court Commitments/ Here For Court / Protective Custody	106	2.1%
Parole	40	0.8%
Total	5,109	100.0%



Court and some magistrate courts also supervise probationers. In metropolitan court, judges sentence the offender to probation and court-employed probation officers supervise them. In magistrate court, county-employed compliance officers supervise offenders sentenced to probation. The vast majority of arrestees booked on probation violations are supervised by NMCD (80%). Figure 2 shows the breakout by supervising agency.



Most Serious Charge

Looking only at arrestees booked on new charges, the most serious charges at arrest were categorized. DWI was the most frequent charge (20.1%), followed by property (16.2%), and assault/battery (9.8%). Table 6 lists the charge categories in order by frequency.

The top 10 most serious charge categories are presented graphically in Figure 3 to illustrate the relative percentage by court jurisdiction. DWI and public order are more common in magistrate/ metropolitan court, while domestic violence is nearly evenly split between magistrate/metropolitan and district courts.

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Table 6 - Most Serious Charge for Arrestees Booked on a New Charge

Charge	Count	Percent
DWI	635	20.1%
Property	513	16.2%
Assault/Battery	310	9.8%
Violent	275	8.7%
Domestic Violence	231	7.3%
Possession	214	6.8%
Public Order	209	6.6%
Criminal Justice Interference	179	5.7%
Trafficking	175	5.5%
Sexual Offense	137	4.3%
Traffic	83	2.6%
Other	81	2.6%
Murder	71	2.2%
Robbery	51	1.6%
Total	3,164	100.0%

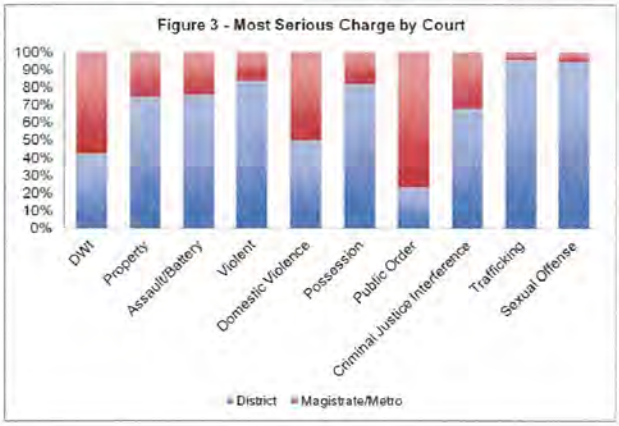
Unsentenced Length of Stay

Using booking category (was the arrestee booked on a new charge, a warrant, a probation violation, or a parole violation), Table 7 looks at the unsentenced length of stay by court jurisdiction and county for arrestees that spent time in the detention center in an unsentenced status.

District Court

Looking at cases in district court, the median number of days unsentenced for an arrestee charged with a new charge was up 16% from 2003 (2003 - 167 days 2010 - 193 days). Bernalillo County had the longest length of stay in this category (222 days) and Curry County had the shortest (135 days).

From 2003, the median number of unsentenced days for an arrestee charged with a probation violation was up 6% (2003 - 66 days 2010 - 70 days). In 2003 parole violations were not separated from probation violation.



Subsequently to the 2005 publication, parole violation information was separated. In 2010, arrestees booked on a parole violation spent a median number of 28 days.

Data from warrants is not directly comparable with the 2003 data. In 2010, all warrants in Bernalillo county were manually reviewed so all arrest and grand jury warrants could be categorized by the underlying charge as they were in all the other counties. In 2010 all warrants were for court compliance issues: the arrestee failed to appear, comply, pay, etc.

The legal culture, law enforcement investigation routines, and court scheduling policies may have an effect on the amount of time arrestees on new charges spend in jail. Rule 5-604 the "six-month rule," which allowed for 182 days before the defendant must be tried was eliminated in March 2011, when many of these cases were not yet adjudicated. The practical effect of the elimination is probably minor as in the past the rule required that extensions be requested and they were typically granted.

Additionally due to fiscal conditions in New Mexico, the courts, the district attorneys, and public defenders had significant vacancies during the time period. It is interesting to note that despite these staffing conditions, Curry County reduced its median unsentenced length of stay for arrestees with new charges by 31%, and 61% for arrestees with probation violations.

Magistrate/Metropolitan Court

Looking at cases in magistrate/metropolitan court, the median number of unsentenced days for an arrestee charged with a new charge was 55. The median number of unsentenced days was similar for an arrestee charged with a probation violation (53 days). Arrestees arrested on a warrant spent a median number of 37 days unsentenced.

Sentenced Length of Stay

Using booking category, Table 8 looks at the sentenced length of stay by court jurisdiction and county for arrestees who spent time in the detention center in a sentenced status.

District Court

Arrestees with new charges in district court spent a median number of 36 days, while arrestees booked on a warrant spent a median number of 32 days. This was half of the 2003 median, and most likely in part related to the increase in median unsentenced length of stay. The median sentenced length of stay was down 15% for probation violators from 92 to 78 days.

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Table 7 - Unsentenced Length of Stay By County, Court Jurisdiction and Charge Type*

	District							
	New Charge		Warrant		Probation		Parole	
	Median	Number	Median	Number	Median	Number	Median	Number
Bernalillo	222	1,255	158	267	74	465	27	26
Cibola	215	54	112	24	152	22		
Curry	135	133	76	27	71	44	124	5
Dona Ana	178	258	91	25	61	114	49	4
Eddy	183	61	35	27	49	12	25	1
San Juan	140	182	39	47	51	45	25	4
San Miguel	150	35	93	31	75	11		
Total	**193**	**1,978**	**114**	**448**	**70**	**713**	**28**	**40**
	Magistrate/Metropolitan							
Bernalillo	54	549	47	244	64	124		
Cibola	23	13	21	1	1	1		
Curry	51	72	57	15	24	12		
Dona Ana	59	28	25	31				
Eddy	48	37	5	20	8	4		
San Juan	67	193	17	55	22	24		
San Miguel	46	20	24	5				
Total	**55**	**912**	**37**	**371**	**53**	**165**		

** For arrestees who spent time unsentenced and sentenced, both sentenced and unsetenced length of stay was calculated resulting in duplicated counts in tables 7, 8, and 9.*

Magistrate/Metropolitan Court

Arrestees sentenced on new charges in magistrate/ metropolitan court spent a median number of 50 days in jail. Arrestees sentenced on a warrant had the lowest median sentenced length of stay (32 days), while arrestees sentenced on a probation violation had the longest sentenced length of stay (87 days).

From Sentencing to Transport for Arrestees Sentenced to Prison

Among arrestees charged with felonies, the percentage who were ultimately sentenced to the New Mexico Corrections Department (NMCD) was higher in the 2010 sample (19.7% compared to 18.2% in 2003). The median number of days from the time the arrestee was

Table 8 - Sentenced Length of Stay By County, Court Jurisdiction and Charge Type*

	District					
	New Charge		Warrant		Probation	
	Median	Number	Median	Number	Median	Number
Bernalillo	43	598	26	71	118	232
Cibola	16	36	1	13	3	11
Curry	31	90	3	13	46	25
Dona Ana	55	147	13	10	42	68
Eddy	32	64	70	25	87	11
San Juan	24	160	41	48	55	49
San Miguel	12	11	7	7	11	3
Total	**36**	**1,106**	**32**	**187**	**77**	**399**
	Magistrate/Metropolitan					
Bernalillo	71	396	28	67	84	87
Cibola	4	2				
Curry	8	39	3	4	113	10
Dona Ana	15	12	13	14		
Eddy	37	35	70	27	88	7
San Juan	20	159	41	64	97	24
San Miguel	25	2	7	2		
Total	**50**	**645**	**32**	**178**	**87**	**128**

** For arrestees who spent time unsentenced and sentenced, both sentenced and unsetenced length of stay was calculated resulting in duplicated counts in tables 7, 8, and 9.*

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Table 9 - From Date of Sentence to Date of Transport

	Median	Number
Bernalillo	20	333
Cibola	27	15
Curry	21	57
Dona Ana	18	140
Eddy	34	38
San Juan	17	67
San Miguel	13	17
Total	20	667

sentenced to time that they were transported to NMCD was very similar (20 days - 2010 and 19 days - 2003). We were not able to track the time from sentencing hearing to signed judgment and sentence or the time from signed judgment and sentence to transport for all cases. Table 9 lists the median number of days from date of sentence to date of transport.

Conclusion

Much of the conclusions from the 2005 report are still relevant. Jail population is a consequence of two factors: the number of jail admissions and the length of stay. Robert Cushman observes in a 2002 NIJ publication, *Preventing Jail Crowding: A Practical Guide*, that often times jail management is reactive rather than proactive. Many communities leave the jail population to seek its own level. Jail managers do not control how people get in or out so little is done to analyze the jail composition. However, an examination of the type and duration of the length of stay and the sources of admission can give jail managers the information to formulate policy and improve public protection. Variations exist in the length of stay by county. Efforts need to continue to be made to:

- Analyze the detention process in each county to determine efficiencies and positive externalities.
- Determine how county detention centers, courts, district attorneys, public defenders, and private attorneys can work together to reduce unsentenced length of stay.
- Work with county detention centers and sheriffs to reduce the delay in transferring arrestees to prison after the judgment and sentence is signed.
- Consider ways to hear probation revocations more quickly to reduce unsentenced length of stay for probation violators.

Methodology & Terms

NMSC staff collected data from seven detention centers in New Mexico. A cross-sectional approach similar to a census was used. We collected information for all arrestees in custody in the detention centers in the sample on June 30, 2010. Detention centers provided lists of arrestees in custody on that day. We determined the most serious charge for each arrestee. In cases where arrestees were held on multiple charges or warrants, we chose their most serious charge as the one that held them in the facility. Where an arrestee was held on a warrant and a probation violation, we categorized them by the probation violation. If an arrestee was held on a probation violation and new charges, they were categorized by the new charge. All escapees were excluded. Bernalillo County's custody list included arrestees on community custody which were excluded from the 2003 sample. Any cases that yielded suspicious estimates were excluded.

The analyses in this report focuses on the median length of stay of arrestees based on the sentence status and release type. We report on each arrestees' unsentenced, sentenced, and total length of stay. Additionally by looking at the arrestees total length of stay we determined how each arrestee was released from detention. Of the 5,109 arrestees in the sample, 123 were still in custody when facilities were contacted in late June 2012. This date was used to calculate their length of stay.

Several dates were collected for every arrestee: the date booked into the detention center, the date released from the detention center, and if applicable the date of a sentencing hearing. When feasible, the date the arrestee's sentence was signed was also collected.

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APPENDIX B.

BERNALILLO RISK AND NEED INMATE PROFILE

Summary of All Offenders Assessed Using the Extended COMPAS Assessment

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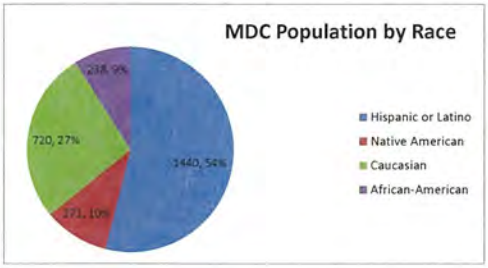
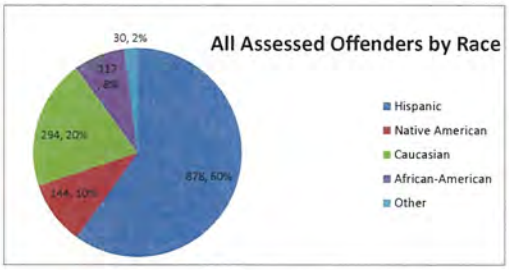
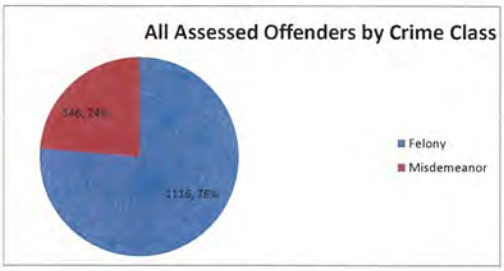
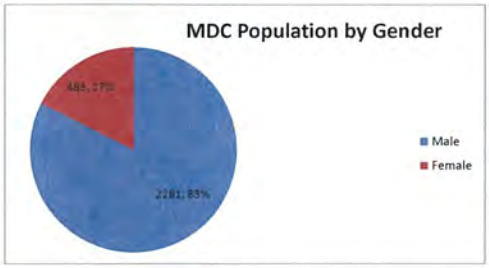
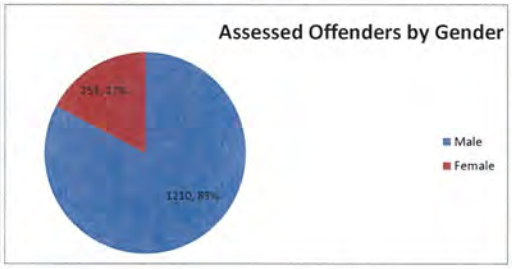
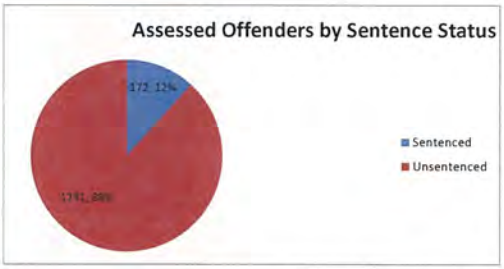


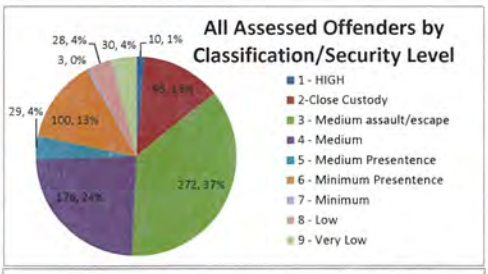


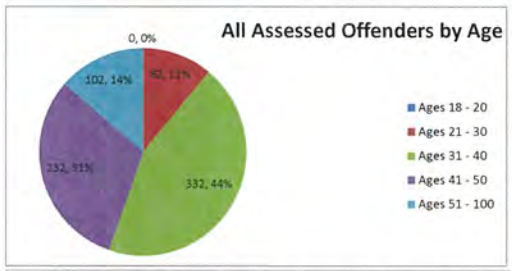


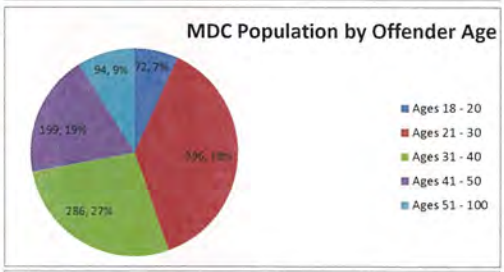


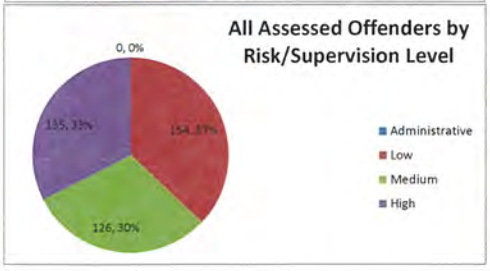


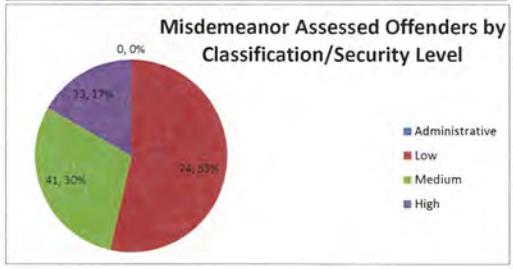


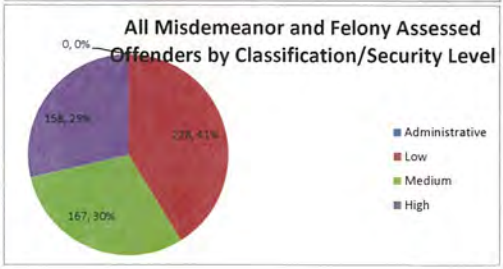


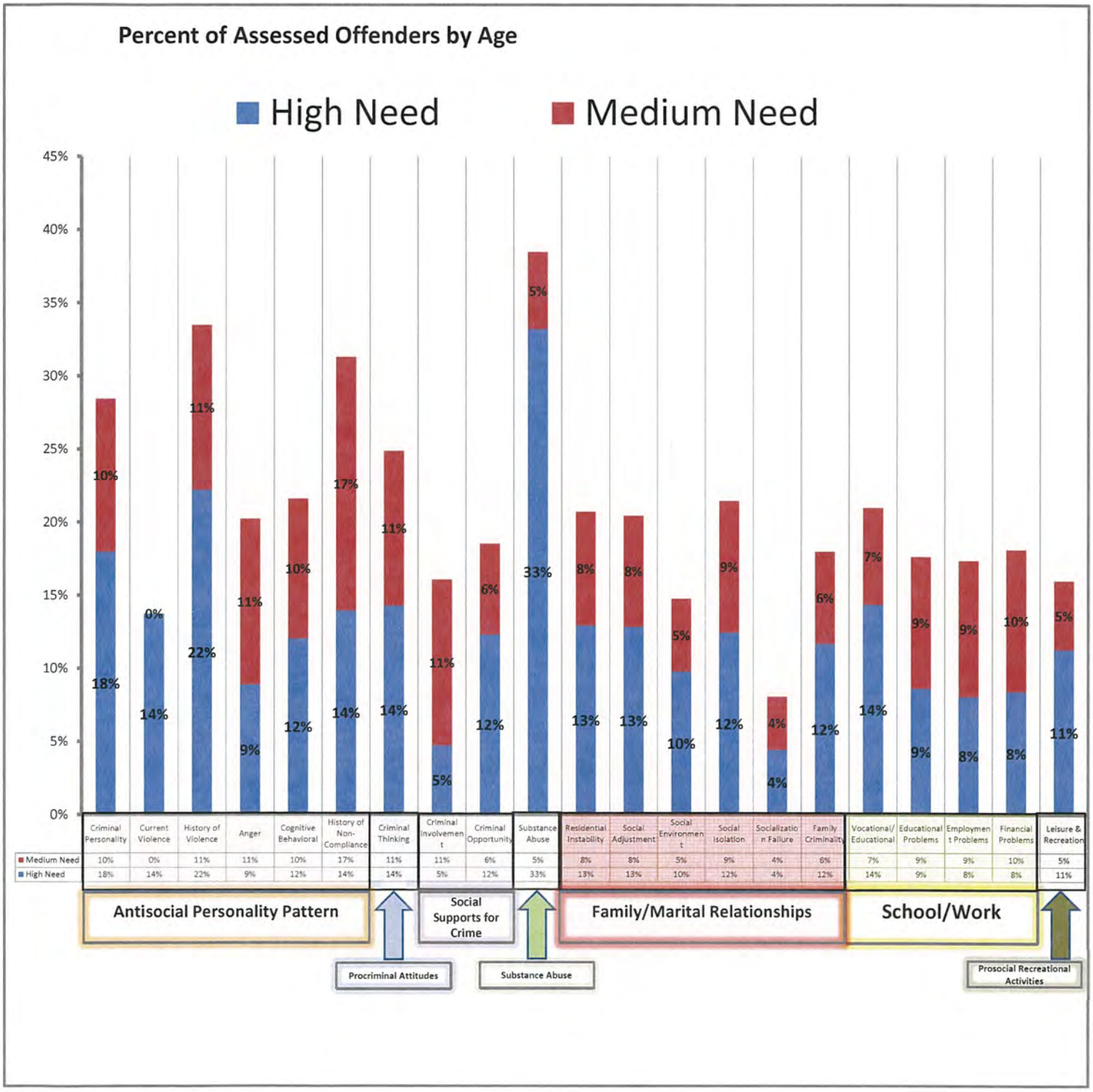


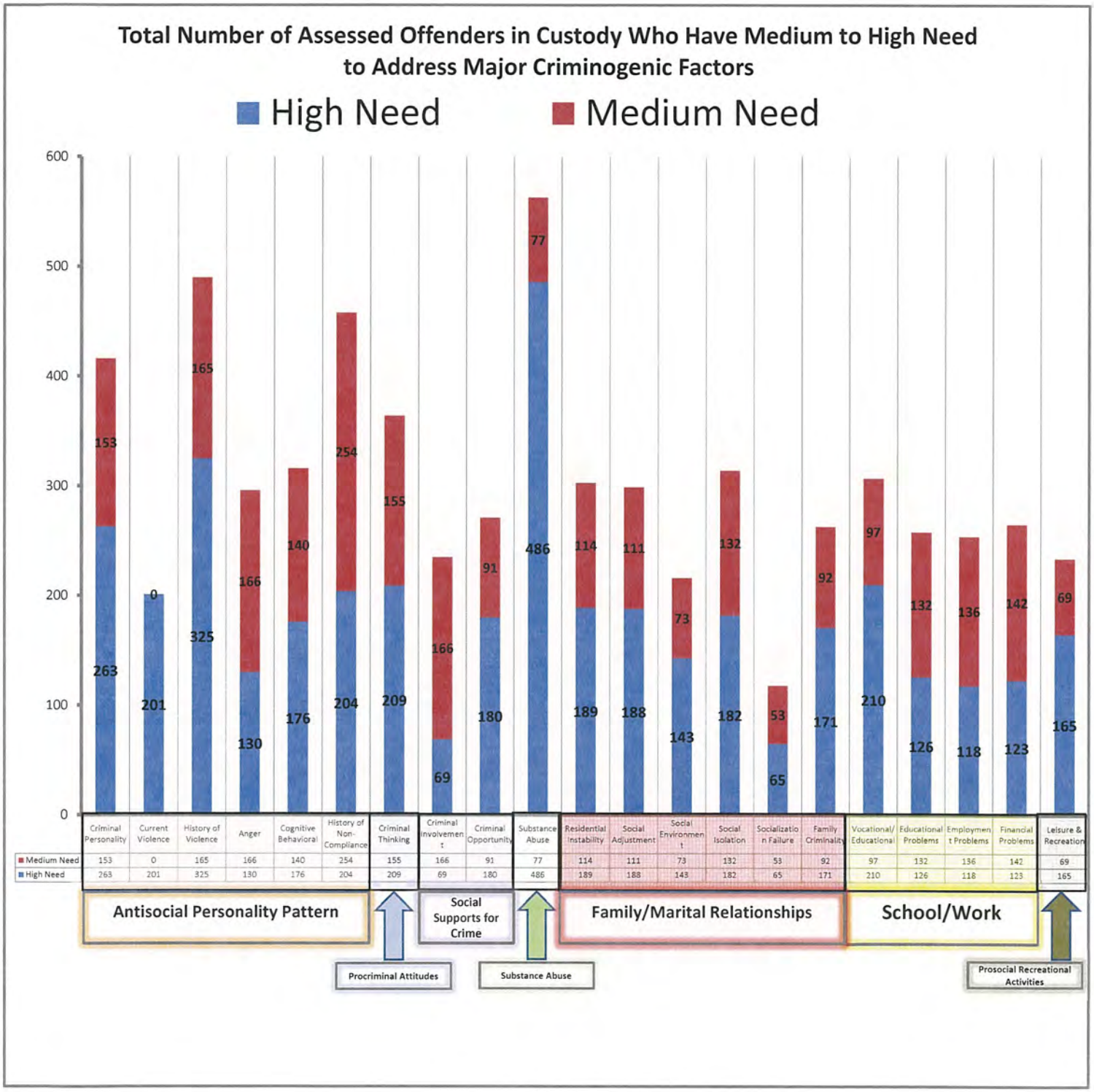









Percent of Assessed Offenders by Age
High Need
Medium Need
45%
40%
35%
30%
25%
20%
15%
10%
5%
0%
Criminal Personality
Current Violence
History of Violence
Anger
Cognitive Behavioral
History of Non-Compliance
Criminal Thinking
Criminal Involvement
Criminal Opportunity
Substance Abuse
Residential Instability
Social Adjustment
Social Environment
Social Isolation
Socialization Failure
Family Criminality
Vocational/ Educational
Educational Problems
Employment Problems
Financial Problems
Leisure & Recreation
Medium Need 10% 0% 11% 11% 10% 17% 11% 11% 6% 5% 8% 8% 5% 9% 4% 6% 7% 9% 9% 10% 5%
High Need 18% 14% 22% 9% 12% 14% 14% 5% 12% 33% 13% 13% 10% 12% 4% 12% 14% 9% 8% 8% 11%
Antisocial Personality Pattern
Social Supports for Crime
Family/Marital Relationships
School/Work
Procriminal Attitudes
Substance Abuse
Prosocial Recreational Activities


Total Number of Assessed Offenders in Custody Who Have Medium to High Need to Address Major Criminogenic Factors
High Need
Medium Need
600
500
400
300
200
100
0
Criminal Personality
Current Violence
History of Violence
Anger
Cognitive Behavioral
History of Non-Compliance
Criminal Thinking
Criminal Involvement
Criminal Opportunity
Substance Abuse
Residential Instability
Social Adjustment
Social Environment
Social Isolation
Socialization Failure
Family Criminality
Vocational/ Educational
Educational Problems
Employment Problems
Financial Problems
Leisure & Recreation
Medium Need 153 0 165 166 140 254 155 166 91 77 114 111 73 132 53 92 97 132 136 142 69
High Need 263 201 325 130 176 204 209 69 180 486 189 188 143 182 65 171 210 126 118 123 165
Antisocial Personality Pattern
Social Supports for Crime
Family/Marital Relationships
School/Work
Procriminal Attitudes
Substance Abuse
Prosocial Recreational Activities

Criminal Personality

HOW IS THIS SCALE MEASURED:

The items in this scale cover the main dimensions identified as components of the criminal personality (e.g. impulsivity, no guilt, selfishness/narcissism, a tendency to dominate others, risk-taking, and a violent temper or aggression.)

NOTES AND TREATMENT IMPLICATIONS:

Personality factors are important primarily for their linkage to responsivity. There seems to be much consensus that very high or extreme scores may identify persons with a psychopathic tendency who are often seen as highly resistant to treatment. However, impulsive decision-making may be amendable to some form of Cognitive Therapy. Effective interventions have been reported in regard to training programs focused on modifying thoughtless or impulsive decision-making. A more in-depth mental health assessment may also be appropriate.

Current Violence

This short scale measures the degree of violence in the present offense. The central item that defines the scale is whether the present offense is an assaultive felony. Other key items involve whether or not a weapon was used, if there was injury to a person, etc.

NOTES AND TREATMENT IMPLICATIONS:

A high score indicates an assaultive offense with a probable victim (s). This may bring victim notification, restraining orders, etc. into the case plan.

History of Violence

HOW IS THIS SCALE MEASURED:

The aim of this scale is to reflect the seriousness and extent of violence in an offender's criminal history. It focuses on the frequency with which violent felony offenses have occurred, the use of weapons, and the frequency of injuries to victims. The frequency of several specific violent offenses are also included in the scale e.g. robbery, homicide, and assaultive offenses.

NOTES AND TREATMENT IMPLICATIONS:

Multiple episodes of violence may suggest the need for more detailed psychological evaluation. Additionally, if the offender is to be released into the community, requirements regarding victim notification may be important. Anger management training and problem-solving skills may be relevant. Programs regarding social cognition to reduce feelings of hostility etc. may also be relevant.

Anger

HOW IS THIS SCALE MEASURED:

Treatment goals for a person scoring high on the anger scale would generally include creating an awareness of the triggers related to the behavioral expression of anger, recognition of internal and environmental patterns that lead to angry feelings and ineffective expression of them, and creating new coping skills to employ when angry feelings arise. Interventions typically include a cognitive behavioral approach through various programs and anger management courses focused on the process of awareness and ultimately new behavior.

NOTES AND TREATMENT IMPLICATIONS:

Treatment goals for persons scoring high on the anger scale would generally include learning to control their emotions and temper, learning to recognize and avoid situations that may precipitate their anger. These goals may be achieved through appropriate anger management programs and cognitive programming to reframe emotional triggers that may precipitate, as well as cognitive reframing to provide better strategies of conflict resolution.

Cognitive Behavioral

HOW IS THIS SCALE MEASURED:

This is a higher order scale that incorporates the concepts and items included in the Criminal Associates, Criminal Opportunity, Criminal Thinking, Early Socialization, and Social Adjustment scales.

NOTES AND TREATMENT IMPLICATIONS:

Scores of 7 and above may suggest a need for cognitive restructuring intervention as part of the case management plan. A high score in this scale may also indicate the need for close supervision of the case. For very high scoring cases, cognitive interventions, coupled with substance abuse treatment (for example), may best begin in a controlled setting that is separated from all community/peer distractions. This might be sequenced prior to other community placement/probation program conditions.

History of Non-Compliance

HOW IS THIS SCALE MEASURED:

This scale focuses on the number of times the offender has failed when he or she has been placed in a community status. The central defining item is the number of times probation or parole has been suspended or revoked. Related items include the number of times the offender has failed to appear for a court hearing, the number of times a new charge/arrest or technical rules violation has occurred while on probation, parole and prior community corrections program placement failures (i.e. electronic monitoring, community service work, day reporting, etc.) Thus the scale involves the risk of technical rules violation failure leading to revocation of probation, pretrial release, or community corrections placement status.

NOTES AND TREATMENT IMPLICATIONS:

Scores of 8 and above indicate a high risk of rules infractions, or technical violations if placed in the community. These offenders have failed multiple times in the past and have other characteristics which put them at risk of non-compliance. A highly structured supervision and case management plan may be in order.

Criminal Thinking

HOW IS THIS SCALE MEASURED:
This scale brings together several cognitions that serve to justify, support, or provide rationalizations for the person's criminal behavior. These dimensions include moral justification, refusal to accept responsibility, blaming the victim, and rationalizations (excuses) that minimize the seriousness and consequences of their criminal activity. These include rationalizations such as: drug use is harmless because it doesn't hurt anybody else, criminal behavior can be justified by social pressures, theft is harmless if those stolen from don't notice or don't need what was taken, etc.

NOTES AND TREATMENT IMPLICATIONS:
Scores of 7 and above may suggest a need for cognitive restructuring intervention as part of the case management plan. Failure may be high if the offender continues to excuse and rationalize his behaviors. A high score in this scale may also indicate the need for close supervision of the case. For very high scoring cases, cognitive interventions, coupled with substance abuse treatment (for example), may best begin in a controlled setting that is separated from all of the community/peer distractions. This might be sequenced prior to other community placement/probation program conditions.

Criminal Involvement

HOW IS THIS SCALE MEASURED:
This scale is defined by the extent of the offenders' involvement in the criminal justice system. A high score indicates a person who has had multiple arrests, multiple convictions, and prior incarcerations. The items centrally defining this scale are the number of arrests and number of convictions. A low score identifies the person who is either a first-time arrest or has minimal criminal history. Thus the central meaning of this scale is the extensiveness of the criminal history.

NOTES AND TREATMENT IMPLICATIONS:
Scores of 8 and greater suggest an extensive criminal history. High scores on criminal history scales will be linked to certain patterns of risk factors.

Criminal Opportunity

HOW IS THIS SCALE MEASURED:
This higher order scale assesses criminal opportunity by using items that represent a combination of the following: time in high crime situations, affiliation with high risk persons who often engage in illegal activities, an absence of pro-social or constructive activities (e.g. working, spending time with family, etc.), an absence of social ties, high boredom, high restlessness and being in a high risk age group. The central items include: being unemployed, living in a high crime area, having friends who engage in drug use, and having no constructive activities.

NOTES AND TREATMENT IMPLICATIONS:
Scores of 7 and above suggest a person who has a fairly high risk lifestyle and for whom it may be important to have increased involvement in more positive and socially constructive activities. Idleness, boredom, unemployment, high-risk friends, drug use, etc., are all valid reasons for interventions. Helping these persons to seek more positive role models, more socially productive activities, and to develop positive social bonds may gradually have a positive impact. Case plans may call for highly structuring the offender's idle time.

Substance Abuse

HOW IS THIS SCALE MEASURED:
The present scale is a general indicator of substance abuse problems. A high score suggests a person has drug or alcohol problems and may need substance abuse treatment intervention. The items in this scale cover prior treatment for alcohol or drug problems, drunk driving arrests, blaming drugs or alcohol for present problems, drug use as a juvenile, and so on.

NOTES AND TREATMENT IMPLICATIONS:
Given the high incidence of alcohol and drug problems in offender samples, it is likely that offenders with scores of 6 and above have serious alcohol or drug problems. It will be important to assess the extent of previous treatments, current attitudes toward treatment, and the responsivity of the offender. Relapse prevention plans may be critical for such offenders. Given the very high frequency of substance abuse problems among offenders, a score of 4 and above indicates a definite need for a more specialized substance abuse assessment inventory (i.e. ASI, SASSI, etc.).

Residential Instability

HOW IS THIS SCALE MEASURED:
The items in this scale measure the degree to which the offender has long term ties to the community. A low score on this scale indicates an offender who has a stable and verifiable address, local telephone and long term local ties. A high-score would indicate a person who has no regular living situation, has lived at the present address for a short time, is isolated from family, has no telephone, and frequently changes residences.

NOTES AND TREATMENT IMPLICATIONS:
This scale may signal weak social ties and stress due to a changing, unstable, and disorganized lifestyle. A high score would suggest a focus on obtaining more stable living arrangements, and building more conventional social ties. The case plan may call for stabilizing the living situation, reestablishing family contacts, etc. Referral to financial supports or subsidized housing may be relevant.

Social Adjustment

HOW IS THIS SCALE MEASURED:
This scale is higher order in the sense that it uses items from other scales that crosscut several domains. It aims to capture the degree to which a person is unsuccessful and conflicted in his/her social adjustment in several of the main social institutions (school, work, family, marriage, relationships, financial.) A high score indicates a person who has been fired from jobs, had conflict at school, failed at school or work, has conflict with family, exhibits family violence, cannot pay bills, has conflicts over money, etc. Thus, the common theme is problematic social relationships across several key social institutions.

NOTES AND TREATMENT IMPLICATIONS:
Good social skills and social supports have been linked to stress and anxiety reduction, and the reduction of both violent and criminal acts. Therefore, high scores (8 and above) may be regarded as a signal that supervision should focus on building stronger social skills and social supports. It is particularly important that social support be built around pro-social companions and pro-social activities (e.g. work colleagues, sports team members, teachers, & family members, if pro-social). A cognitive program may also be appropriate.

Social Environment

HOW IS THIS SCALE MEASURED:
This scale focuses on the amount of crime, disorder, and victimization potential in the neighborhood in which a person lives. High crime is indicated by the presence of gangs, ease of obtaining drugs, the likelihood of being victimized, a belief that a weapon is needed for protection, and so on.

NOTES AND TREATMENT IMPLICATIONS:
Offenders with scores of 7 and above may require help in relocating to a lower risk neighborhood if this is possible, or finding safety in their residential area. This scale often links to other high risk factors (e.g. residential instability, poverty, criminal opportunity, etc.) Therefore, the multi-modal treatment approach may be appropriately aimed at improving residential arrangements, lifestyle issues, and to upgrade conventional skills (i.e. employability).

Social Isolation

HOW IS THIS SCALE MEASURED:
This scale assesses the degree to which the person has a supportive social network and is both accepted and well integrated into this network. The scale is scored such that a high score represents an absence of supports and feelings of social isolation and loneliness. The defining items include: feeling close to friends, feeling left out of things, the presence of companionship, having a close best friend, feeling lonely, etc

NOTES AND TREATMENT IMPLICATIONS:
The case management strategy for offenders scoring high in this scale may include emphasis on working within the family and community (i.e. church, support groups, etc.), to mend or strengthen bonds. Social skills improvements may be appropriate; and work on social cognitions related to negative perceptions and rejection may be important.

Socialization Failure

HOW IS THIS SCALE MEASURED:
This scale combines items reflecting family problems, early school problems, and early delinquency, all of which suggest socialization failure, (how the offender was socialized growing up). The intent is to examine socialization breakdown through its early indicators in school, delinquency, and family problems. A high score would represent a person whose parents were jailed or convicted or had alcohol or drug problems. In addition, a high score is associated with early behavior problems in school (being expelled, failing grades, skipping classes, fighting) and would also manifest serious delinquency problems.

NOTES AND TREATMENT IMPLICATIONS:
A high score on this scale may suggest long term patterns of criminality and deep-seated attitudes and values linked to impaired socialization. Responsivity to treatment may be a problem given the long term and persistent nature of some of the risk factors. High scoring cases may also require specialized supervision to improve responsivity. A cognitive program may be needed.

Family Criminality

HOW IS THIS SCALE MEASURED:
This scale assesses the degree to which the person's family members (mother, father, and siblings) have been involved in criminal activity, drugs, or alcohol abuse. The items cover: arrests of each family member, whether they have been in jail or prison, and whether the parent or parental figure has a history of alcohol or drug problems.

NOTES AND TREATMENT IMPLICATIONS:
A high score in this scale may indicate the need to minimize or structure the contact with certain members of the family to minimize adverse sibling or parental influence and/or exposure to inappropriate substance use. It may further assist in understanding the clients own criminal involvement.

Vocational/Educational

HOW IS THIS SCALE MEASURED:
This higher order scale assesses the degree of success or failure in the areas of work and education. A high score represents a lack of resources. Those who score high will present a combination of failure to complete high school, suspension or expulsion from school, poor grades, no job skills, no current job, poor employment history, access only to minimum wage jobs, etc. Thus, the scale represents a lack of educational and/or vocational resources.

NOTES AND TREATMENT IMPLICATIONS:
Scores of 6 and more may suggest that vocational, educational and employability skills training would be beneficial. Additionally, help may be required in both job seeking and job maintenance. It is important to establish the specific training that is required.

Educational Problems

Employment Problems

Financial Problems

HOW IS THIS SCALE MEASURED:
This scale assesses the degree to which a person experiences poverty and financial problems. It assesses whether the person worries about financial survival, has trouble paying bills, and has conflicts with friends or family over money.

NOTES AND TREATMENT IMPLICATIONS:
Scores of 6 and above (given the overall frequency) on this scale may suggest a strong need for a focus on financial management, finding and keeping jobs, negotiating social assistance, welfare, and so forth. The person may require help in understanding the use of food stamps, unemployment compensation, and other ways of negotiating government social assistance. Counseling on money management and addressing outstanding child support issues may be required. Coupled with vocational/employment information, the case plan may call for priority in stabilizing the person's income, and developing budgeting skills.

Leisure and Recreation

HOW IS THIS SCALE MEASURED:
This scale assesses the degree to which the person experiences feelings of boredom, restlessness, or an inability to maintain interest in a single activity for any length of time. Thus, this scale may be regarded as reflecting a psychological dimension rather than representing the amount of constructive opportunities in the person's community environment.

NOTES AND TREATMENT IMPLICATIONS:
High scores in this scale may require a highly structured case management strategy similar to that mentioned for the criminal opportunity scale as well as consideration, in conjunction with other scales, of the need for a cognitive therapy program. Increasing pro-social activities may be emphasized.

APPENDIX C.

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APPENDIX D.

CONTACT LIST

Contact List

A contact list was created of nearly fifty persons, but upon careful consideration and advice of outsiders with experience in New Mexico, it is omitted herein. Suffice it to say that the Consultant spoke with a great many persons with direct knowledge of all aspects of the jail and system in the County, and determined at the end that it was more likely helpful to not list each person.

APPENDIX E.

ALAN KALMANOFF RESUME

ALAN KALMANOFF

Qualifications

Dr. Kalmanoff, a national law and policy consultant on criminal justice, has taught at UC Berkeley's Boalt Hall School of Law, and directed over 450 police, jail, prison, and related criminal justice system studies for counties for over forty years. An expert witness, he has consulted often with the U.S. and California Departments of Justice, the National Institute of Corrections, and the California Department of Corrections in addition to various legislatures (New Mexico, California, Arkansas, and Florida), cabinet, and court agencies. He has also been appointed to oversee large prison system cases, jail systems of all sizes, and a variety of police and other agencies. His assessments have been featured on "60 Minutes," and he has authored a textbook considered a standard in the field. A skilled facilitator, Dr. Kalmanoff has been appointed to oversee compliance with best practice and court orders in justice systems throughout the nation.

Dr. Kalmanoff examines how a given system operates and what changes can substantially affect cost savings, constitutionality, efficiency, effectiveness, and public safety. This has resulted in improved facilities and processing, employee and client population management, and facility development to realize savings of hundreds of millions of dollars annually.

Education

1972 Ph.D., University of California, Berkeley, College of City and Regional Planning – Social Policies Planning
1969 M.S.W., University of California, Berkeley, School of Social Work – Community Organizing
1967 J.D., University of California, Berkeley, Boalt Hall School of law
1964 B.A., University of Wisconsin, Madison, Honors in Political Science

Experience

1979-Present Founder and Executive Director, Institute for Law & Policy Planning (ILPP), Berkeley, CA.

- ILPP enjoys a national reputation for objectivity and cost savings

1971-Present President/Lead, California Planners, Berkeley, CA.

- California Planners is a nationally recognized justice system firm specializing in investigations, compliance, monitoring, and training. With thirty-five years of working experience with various aspects and levels in law and civil rights issues, Dr. Kalmanoff has developed and led workshops and development of manuals in:
  - Employment Discrimination
  - Advanced Management Training, Team Building
  - Sexual Harassment, Sexual Assault Investigations, Child Abuse Investigation
  - Media Relations
  - Managing/Adapting to Change
  - Mediation and Negotiation
  - Disability Access and Compliance

1972-1992 Founder and Chairman of the Board of Directors, Disability Rights Education and Defense Fund, Berkeley, CA.

- He was Vice President of the Board of Directors of Disability Rights Advocates and a founding board member. His extensive work with these two boards included establishing the legal foundations for both organizations, participating in initial hearings and revisions to the Americans with Disability Act, and long-term involvement with litigation committees. Dr. Kalmanoff has spent nearly forty years advising federal, state, and local agencies in compliance with the constitutional requirements of disability rights.

1998-1999 Federal Court Appointed Special Master and Monitor, various jail, prison, and police cases.

Includes total California Prison System (mental health) as well as frequent nationwide work as an expert witness.

1967-present Attorney at Law.
- Handled complex criminal law and constitutional issues, managed all aspects of cases from inception through completion.

1973-1999 Faculty, University of California (UCB), Berkeley, Schools of Social Work, Criminology; Political Science, and City and Regional Planning, ending at UCB's Boalt Hall School of Law.

1976-1979 Faculty, California State University at San Francisco, Departments of Sociology and Political Science.

1971-1973 Director, Oakland Police Department, California
- Directed a large federal grant to conduct a reorganization of the entire police department.

1969-1970 Executive Director, Oakland, California Lawyers' Committee for Civil Rights.

Selected Consulting Engagements

1981-Present Criminal Justice System Management Consultant.
- Assessing organizations and developing recommended strategies for population management and major policies and facilities planning in county and state systems.
- Led projects in over half of California's counties and over 350 counties nationwide.

- Alameda County, CA (2)
- Allegheny County, PA (5)
- Amador, Calaveras, & Tuolumne Counties, CA
- Butte County, CA (2)
- Bernalillo County, NM
- Champaign County, IL
- City of Caddo Parish, LA
- Contra Costa County, CA
- Dane County, WI (2)
- Douglas County, NE (2)
- Greene County, MO
- Hennepin County, MN
- Hillsborough County, FL (2)
- Humboldt County, CA
- Inyo County, CA
- Jefferson County, AL
- Jefferson County, OR
- Kings County, CA
- Knox County, TN
- Lassen County, CA
- Leon County, FL
- Mariposa County, CA
- Merced County, CA
- Montgomery County, AL
- Nevada County, CA
- Orange County, FL (2)
- City of Olympia, WA
- Palm Beach County, FL
- Placer County, CA
- Polk County, FL
- Polk County, IA
- Salt Lake County, UT
- San Diego County, CA
- City of San Francisco, CA
- San Joaquin County, CA
- San Mateo County, CA
- Santa Clara County, CA
- Sedgwick County, KS
- Snohomish County, WA
- Somerset County, PA
- Spartanburg County, SC
- St. Lucie County, FL (2)
- Summit County, OH
- Sutter County, CA
- Tehama County, CA
- Ventura County, CA
- Washington County, OR
- Yakima County, WA

1983-present Planning Consultant
- Directed the preparation of comprehensive master plans and long-range human resource assessment services for government agencies in many statewide, local, and international fields
- Evaluated California's facility planning goals and policies and made recommendations to the Legislature.

- California Auditor General
- California Department of Corrections
- California Department of Justice
- California Employment Development Dept.
- California Student Aid Commission
- City of Marina, California
- State of New Mexico, NM
- Republic of Singapore, Dept. of Prisons, (training and planning work including alternative dispute resolution

1995-2000 Founder, Access Justice, software company employing XML to integrate criminal justice system databases in seamless management dashboard and comprehensive data integration.

1980-2000 National Institute of Corrections Lead Consultant and Trainer.

- Led various courses on Title VII employment discrimination, management, facilities and program planning, leadership, management of change, legal issues, direct supervision, managing media, system assessment, managing overcrowding, PONI (planning new institutions), and more
- Responded to overcrowding and communities, to trainees from all states and counties, and to various foreign governments.

1976-present Disability Law Consultant. Chaired (for 20 years) Board of Disability Rights, Education and Defense Fund, the agency that authored the Americans with Disabilities Act (ADA); Founding Board Member, Disability Rights Advocates, the agency that litigates the ADA.

1977-present General Legal Consultant.

- Assessed, trained, and evaluated agencies under legal attack, testified as Expert Witness in cases on jails, appointed Special Master and Monitor in Federal law suits on prisons and jails in California as well as police in Ohio; Facilitated criminal justice policy boards and acted as Master of criminal justice, (3 years in Minneapolis, 10 years in Pittsburgh)
- Worked with various agencies to comply with consent decrees and other court orders
- Developed program monitoring curriculums, trained state and regional planning agency staff, and developed proposals regarding various facility planning issues.

1975-1986 Trainer/Consultant.

- Subjects included: interviewing and interrogation skills, handling sexual assault and child abuse, supervision and management, and constitutional issues involving employment
- Provided advanced in-service training for over 150 law enforcement agencies (in effect every California law enforcement agency including the Highway Patrol), National Institute of Law Enforcement and Criminal Justice (NILECJ), numerous California counties, and the U.S. Department of Justice.

1976-1979 Director, Alameda County, California. Revenue sharing evaluations of over 300 community-based social service and mental health programs over 3 years.

1964- 1994 Faculty, University of California, Berkeley, in Social Welfare, Criminology, City Planning, and Law; taught courses on plea bargaining, criminal justice agencies, justice system planning, and the role of attorneys.

Selected Publications

Criminal Justice: Enforcement and Administration. Boston, Massachusetts: Little, Brown & Co., 1976.

"Double Trouble: The Alienation of Disabled Inmates." Corrections Today, December 1982.

Over 1,000 publications on criminal justice issues and projects over 45 years.

APPENDIX F.

SELECTED LETTERS OF REFERENCE

CRIMINAL JUSTICE COORDINATING COMMITTEE

Room A680 Jefferson County Courthouse
716 Richard Arrington Jr. Blvd., North
Birmingham, AL 35203

(205) 328-8231 or 325-5348

April 7, 2003

Institute for Law and Policy Planning (I.L.P.P.)
P. O. Box 5137
Berkeley, CA 94705

Attention: Al Kalmanoff

Hi Kal:

Foster and I have collaborated in providing you some information that should give you a general overview of the activities of the Criminal Justice Coordinating Committee.

The most important "non-event" is that we have not built another jail of any kind! Cost avoidance over the past three years amounts to approximately $100 million; construction and operating costs. Not bad for an "unpaid" committee.

Cooperation between the independently elected officials; i.e., Sheriff, District Attorney, judges, etc., has been good overall. And, our work program for 2003 looks promising.

Drop us a line when time permits.

Best regards,

Joe Curtin, Consultant to the
Jefferson County Commission

Foster Cook., U.A.B., TASC, etc.

Enclosure

P.S. Foster, Doug and myself have continued to parlay support to the Committee, with periodic assistance from Dan.

COURT OF COMMON PLEAS

ALLEGHENY COUNTY
PITTSBURGH, PENNSYLVANIA
15219

ROBERT A. KELLY
PRESIDENT JUDGE

JUDGE'S CHAMBERS
(412) 350-5404

December 17, 2003

Alan Kalmanoff, Executive Director
Institute for Law and Policy Planning
P.O. Box 5137
Berkeley, CA 94705

Dear Mr. Kalmanoff:

As my term as President Judge of Allegheny County is coming to a close, I wanted to take this opportunity to convey my sincere appreciation and commend you on your work here in Pittsburgh.

It would be an understatement for me to confess that I was less than convinced that a Criminal Justice Policy Board was a sound concept in our politically charged environment. Not only were the principal players from different sides of the political spectrum, open hostilities among the group were commonplace. You entered this minefield with confidence, a sound knowledge base of the issues, and a style that allowed all at the table, for at least the 90 minutes of our meetings, to lay down their swords and talk freely without fear of political reprisal.

I am also greatly impressed with the methods you have employed to address the problem areas identified by the Board. Your analyses and reports of jail overcrowding and initial arrest processes were concise and provided timely.

I will certainly pass along to my successor my thoughts on your work. I wish you success in all of your future endeavors.

Sincerely,

Robt A Kelly

ROBERT A. KELLY

RAK/mem

JAMES C. RODDEY
CHIEF EXECUTIVE

County of Allegheny

101 COURTHOUSE ♦ 436 GRANT STREET
PITTSBURGH, PENNSYLVANIA 15219
PHONE (412) 350-6500 ♦ FAX (412) 350-6512

December 15, 2003

To Whom It May Concern:

I am writing to endorse and recommend the services of the Institute for Law and Policy Planning (ILPP). I do so in my capacity as Chief Executive of Allegheny County, Pennsylvania. Allegheny County has a population of 1.3 million and 130 municipalities, the largest of which is the City of Pittsburgh. The County government has 6,000 employees including over 500 law enforcement officers, operates a court system and a 2,400 capacity jail. The annual budget of the County is $1.3 billion.

ILPP was engaged by Allegheny County to facilitate the County Criminal Justice Policy Board which I co-chaired with the President Judge of the Common Pleas Court. The objective of the Board is to explore methods to improve the County Criminal Justice System. Participants include the County Chief Executive, County Manager, the Common Pleas Court, the District Attorney, the County Sheriff and the Public Defender. The issues are wide ranging and include: computer systems, communications, jail over-crowding, overlapping responsibilities, etc. Mr. Alan Kalmanoff, JD, MSW, Ph.D., Board President and Executive Director of ILPP and Mr. Thomas Eberly of ILPP have been responsible for the engagement.

The work performed by Messrs. Kalmanoff and Eberly has been exemplary. They brought structure to a very complicated mosaic of departments, created clearly defined goals, divided the task into manageable components and carefully and effectively maneuvered through the mine fields of egos and territorial fiefdoms.

ILPP demonstrated superior knowledge of their field and the ability to put complicated discussions into concise reports. Dr. Kalmanoff is a skilled and experienced facilitator. He brought clarity to our discussions and managed to satisfy the diverse needs of all participants.

I highly recommend ILPP for any engagement related to any and all functions of the Criminal Justice System.

Respectfully,

James C. Roddey

OFFICE OF THE COUNTY MANAGER

County of Allegheny

ROBERT B. WEBB
COUNTY MANAGER

119 COURTHOUSE • 436 GRANT STREET
PITTSBURGH, PA 15219
PHONE (412) 350-5300 • FAX (412) 350-3581

NANCY L. CARROLL
DEPUTY COUNTY MANAGER

December 29, 2003

I am proud to recognize the Institute for Law and Policy Planning (ILPP) for its efforts on behalf of the Criminal Justice Policy Board (Board) of Allegheny County, Pennsylvania and highly recommend them to your organization. Under the leadership of Board President and Executive Director Dr. Alan Kalmanoff J.D. MSW, Ph.D., the ILPP has provided a sterling work product and valuable guidance to our County as it seeks comprehensive solutions to public safety issues.

The citizens of Allegheny County approved a Home Rule Charter which established a new form of government in 2000 with an elected Chief Executive and appointed Manager. As the first appointed Manager, I sought to address the fragmented decision making, poor communication and lethargic bureaucracy that hampered the government for many years. Based upon recommendations of the Pennsylvania Commission on Crime and Delinquency, I worked with the local Court Administrator to establish a Board to focus on the public safety aspects of the new government.

A national search for a consultant to assist the process was conducted and the ILPP was the consensus choice. Dr Kalmanoff, with the outstanding assistance of Mr. Thomas A. Eberly, Senior Criminal Justice Planner, helped organize the Board and skillfully worked with its members to establish a new, collaborative way of making public safety decisions. During its first year of operation, the Board focused on jail overcrowding and information technology. With the talented guidance of Dr. Kalmanoff and Mr. Eberly, the Board became a place where a diverse group of elected and appointed officials could comfortably meet and set priorities for important issues of mutual concern. After twelve months, the Board is poised to move into an extensive examination of the criminal justice system in Allegheny County and has a mechanism for building a consensus to resolve its most difficult problems.

Dr. Kalmanoff and Mr. Eberly have a thorough understanding of public policy issues and regularly use their extensive experience to facilitate discussion and identify options for the Board's consideration. They pursue the best interests of their client with determination and deliver their services with a caring, personal touch.

I enthusiastically encourage your organization to consider engaging ILPP. If you have any questions about this recommendation I can be reached at (412) 767-5277 or at webb@nauticom.net

Sincerely,

Robert B. Webb
County Manager

BOARD OF SUPERVISORS
County of Dane
ROOM 118, CITY-COUNTY BUILDING
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN 53703-3342
608/266-5758 • FAX 266-4361 • TDD 266-4121

October 3, 2007

To Whom it May Concern:

The Dane County Board of Supervisors retained the services of the Institute for Law and Policy Planning (ILPP) in March, 2007 to conduct a comprehensive criminal justice system assessment. We have found their report to be thorough, insightful, and most helpful in setting a course for improved efficiencies in our justice system.

Dane County, Wisconsin has a population of approximately 460,000 people, and is home to Wisconsin's capital city of Madison. We have seventeen elected circuit court judges, and also separately elect the District Attorney, Sheriff, Clerk of Courts and County Executive. The county is governed by a thirty-seven member Board of Supervisors, who elect their own chair.

Over the last several years, Dane County has been faced with increasing jail populations, the need for facilities improvements, and renting jail beds in other counties. We asked the ILPP, led by Dr. Alan Kalmanoff, to come into this complex, politically sensitive system in the hopes that he could identify improvements that could be undertaken in order to relieve jail overcrowding in the near term, and provide longer term efficiencies in the operations of the courts and other parts of the system

We were very impressed with the quality of the ILPP team that worked on this project. We found the ILPP team to be professional, knowledgeable, and skilled in working with the range of municipal, county and state government staff and elected officials who have roles in the Dane County system.

I found Dr. Kalmanoff to be candid, direct and independent, yet very responsive to our concerns and issues. He was more than willing to discuss his findings and recommendations with the various elected officials who are stakeholders in the system, and accommodate their concerns, while at the same time maintaining his objectivity and critical insights.

In the budget currently being considered by the County Board, we have used the ILPP assessment to estimate $3 million in savings this year alone. We have also put on hold several expensive jail expansion plans until our actual jail bed needs are determined. If you have any questions, feel free to call my office at 608-266-5758.

Sincerely,

Supervisor Scott McDonell, Chair
Dane County Board of Supervisors

DANE COUNTY

Kathleen M. Falk
County Executive

October 5, 2007

To Whom It May Concern:

I am writing this letter on behalf of Dr. Alan Kalmanoff, Executive Director of the Institute for Law and Policy Planning. Dr. Kalmanoff and the ILPP recently completed a report assessing the criminal justice system in Dane County, Wisconsin, which the Dane County Board of Supervisors had requested.

The resulting report, the final version of which Dr. Kalmanoff delivered to the County Board and to my office on September 20, 2007, provided over 100 recommendations for improved efficiencies in our courts, our district attorney's office, and in our sheriff's department. The report also included a thorough assessment of the inefficiencies in our current system, and the ways these inefficiencies contribute to higher jail population rates and longer lengths of stay in the jail. In addition, Dr. Kalmanoff's study provided us with an overview of our current IT systems, the ways these systems do (and do not) work together, and ways we can go about improving integration for added efficiencies.

The report has created a road-map for us to follow in improving the workings of our criminal justice system, and promises to save us over $3 million in the coming year by helping us end the costly practice of transporting and housing inmates in neighboring counties to deal with the crowding in our county jail. Dr. Kalmanoff's good work promises to save our taxpayers millions of dollars while providing for improved public safety, a more efficient criminal justice system, and improved delivery of justice both to defendants and victims.

I have made implementation of the ILPP study an integral part of my 2008 proposed budget, and I believe we will be using this study for many years as we develop better methods of managing our criminal justice system.

In addition, Dr. Kalmanoff brought together an excellent team of scholastic and experienced technicians to do this work. The process he lead was on time. Finally, he and his team were very professional and delightful to work with.

I recommend Dr. Kalmanoff and the ILPP as useful and knowledgeable resources for any jurisdiction seeking to deal with issues of jail crowding and criminal justice system efficiency.

Sincerely,

Kathleen Falk
Dane County Executive

City-County Building, Room 421, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53703-3345
PH 608/266-4114 • FAX 608/266-2643 • TDD 608/266-9138

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GAIL RICHARDSON, DCA
Pat Kroetz, DAA
District Court Administrator
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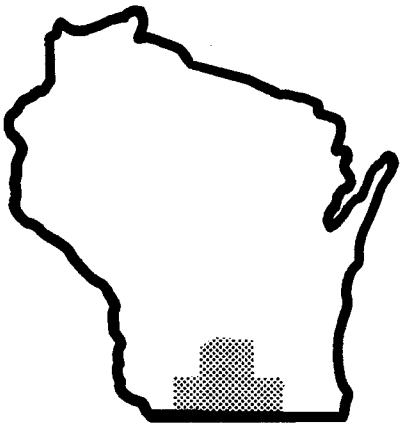
STATE OF WISCONSIN

FIFTH JUDICIAL DISTRICT

215 S. HAMILTON STREET
MADISON, WISCONSIN 53703-3295
FAX (608) 283-4940



A letter to the editor

September 28, 2007

Dear Sir,

The Dane County Judges have now had an opportunity to read the September 20, 2007 Criminal Justice System Assessment Final Report, submitted by the Institute for Law and Policy Planning. This report focuses on reducing the number of inmates in the Dane County jail. No one and no group, either within the criminal justice community or outside of it, is more concerned with jail overcrowding than the Judges. This is a topic of critical importance to the county; for both financial and philosophical reasons. The County Board is to be commended for bringing in an outside consultant to offer a fresh perspective and make recommendations for positive change.

As acknowledged in the report, the Dane County Circuit Court has over time "...thoughtfully evaluated the functions of the criminal justice system and has initiated alternative programs aimed at reducing (jail) crowding." I believe we can diligently and conscientiously continue to explore ways to improve the system in a manner that is both cost-effective and safe for our citizens and which does not negatively affect the remainder of the judicial system (i.e., family law, small claims, civil and probate). Some things can be done immediately or in the short term. Others will involve more time and collaboration. Some may save money or have an immediate impact on the jail population while others may not. Some may cost money.

In a meeting on Thursday, September 27, the Judges agreed to take the following steps immediately, as recommended by the report. Information on in-custody defendants will be regularly provided by the jail, and in conjunction with existing court reports, be used to process in-custody cases more quickly. Court automation, provided by the state court system, will provide a tickler system to be used to identify cases approaching the time for disposition to alert courts to prioritize a hearing. I have approached the Dane County Municipal Judges to explore the use of collection agency referrals in place of commitment to the Dane County jail for failure to pay municipal court fees and fines. This has a potential of reducing the jail population. A group has already met once to develop fair, consistent and rapid procedures to evaluate those arrested to facilitate earlier release. The Drug Treatment Court already eliminated the Education Track earlier this year. Courts will implement procedures to increase efficiency in scheduling. Other changes that can be implemented without delay will become apparent as we move forward.

I am confident that the judges, working with system partners, will identify areas where modifications to current practices can be introduced and, if given county administrative support, can be successfully implemented. I pledge the efforts of the court to a timely, comprehensive and systemic examination of the recommendations, balancing the goal of relieving jail crowding against the protection of individual rights, public safety and the integrity of the law.

Sincerely,
C. William Foust, Chief Judge
5th Judicial District

Carlo Esqueda
Clerk of Circuit Court
and Register in Probate

The work of ILPP in Dane County opened our eyes to the systemic problems of our criminal justice system but, more importantly, provided a framework for understanding how we can address these problems through collaborative means. ILPP's thorough, rigorous analysis will help us improve the policies, procedures and technology of our justice system, but it doesn't stop there. We've been given a roadmap to re-engineering the very culture of our justice system-- and moving toward that goal is what will pay off in the long run in terms of increased service, greater efficiency and substantial cost savings.

Carlo Esqueda
Clerk of Circuit Court and Register in Probate

LR2-400. 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 Court. 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 M.

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, shall be assigned and scheduled as provided for "special calendar" judges as provided in Paragraph L of this rule. Criminal cases filed on or after July 1, 2014, shall be assigned or reassigned to one of seven (7) "new calendar" judges. The seven (7) 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.* The defendant shall be arraigned on the information or indictment within ten (10) days after the date of the filing of the information or 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 wavier of arraignment, or upon the filing of an information, 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 produced or relied upon in the investigation leading to the 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 dismissal of the case.

(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) *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 phone numbers and e-mail addresses of witnesses if available, 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) *Motion to withhold contact information for safety reasons.* A party may seek relief from the court by motion, for good cause shown, to withhold specific contact information if necessary to protect a victim or a witness. If the address of a witness is not disclosed pursuant to court order, the party seeking the order shall arrange for a witness interview or accept at its business offices a subpoena for purposes of deposition under Rule 5-503 NMRA.

(3) *Continuing duty; evidence possessed by state, law enforcement, and other government agencies.* The state shall have a continuing duty to disclose additional information to the defendant within five (5) days of receipt of such information. Evidence

in the possession of a law enforcement agency or other government agency is deemed to be in possession of the state for purposes of this rule.

(4) *Failure to comply; sanctions.* If the state fails to comply with any of the provisions of this rule, the court may enter such order as it deems appropriate under the circumstances, including but not limited to prohibiting the state from calling a witness or introducing evidence, holding the prosecuting attorney in contempt with a fine imposed against the attorney or the employing government office, and dismissal of the case with or without prejudice. 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.

(5) *Providing copies; electronic or paper; e-mail addresses for district attorney and public defender required.* Notwithstanding Rule 5-501(B) NMRA or other rule, a party shall provide to every other party electronic or printed copies of electronic or printed information subject to disclosure under these rules. 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, the party shall copy such delivery to any attorney for the Second Judicial District Attorney's Office or Law Offices of the Public Defender who has entered an appearance in the case at the time discovery is sent electronically.

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

(1) *Initial disclosures; deadline.* 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.

(2) *Witness contact information.* In addition to the disclosures required in Rule 5-502(A) NMRA, the defendant shall provide the phone numbers and e-mail addresses of witnesses, if available.

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

(5) *Failure to comply; sanctions.* If the defendant fails to comply with any of the provisions of this rule, the court may enter any order it deems appropriate under the circumstances, including but not limited to prohibiting the defendant from calling a witness or introducing evidence, holding the defense attorney in contempt with a fine imposed against the attorney or the employing government office, or taking other disciplinary action.

(6) *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.

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

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

(1) *Witness list disclosure requirements.* Within twenty-five (25) days after arraignment or wavier 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, including a brief statement of the expected testimony for each witness, to assist the court in assigning the case to a track as provided in this rule. The continuing duty to make such disclosure to the other party continues at all times prior to trial, requiring such disclosure within five (5) days of when a party determines or should reasonably have determined the witness will be expected to testify at trial.

(2) *Status hearing; factors for case track assignment.* A status hearing,

at which the defendant shall be present, shall be commenced within thirty (30) days of arraignment or the filing of a waiver of arraignment.

(3) *Case track assignment required; factors.* At the status hearing, the court shall determine the appropriate assignment of the case to one of three tracks 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;

(b) the number of witnesses, time needed reasonably to address any evidence issues, and other factors the court finds appropriate to distinguish track 1 and track 2 cases; and

(c) 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.

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

(a) ***Track 1; deadlines for commencement of trial and other events.*** For track 1 cases, the scheduling order shall have trial commence within one hundred eighty (180) 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 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;

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

(vii) *Track 1 - deadline for witness interviews.* Witness interviews will be completed sixty (60) days before the trial date; and

(viii) *Track 1 - deadline for disclosure of scientific evidence.* All parties shall produce the results of any scientific evidence, if different from Rule 5-501(A) NMRA and Rule 5-502(A) NMRA, 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 two hundred seventy (270) 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 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;

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

(vii) *Track 2 - deadline for witness interviews.* Witness interviews will be completed seventy-five (75) days before the trial date; and

(viii) *Track 2 - deadline for disclosure of scientific evidence.* All parties shall produce the results of any scientific evidence, if different from Rule 5-501(A) NMRA and Rule 5-502(A) NMRA, 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 three hundred sixty-five (365) 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 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;

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

(vii) *Track 3 - deadline for witness interviews.* Witness interviews will be completed one hundred (100) days before the trial date; and

(viii) *Track 3 - deadline for disclosure of scientific evidence.* All parties shall produce the results of any scientific evidence, if different from Rule 5-501(A) NMRA and Rule 5-502(A) NMRA, not less than one hundred fifty (150) days before the trial date. In a case where justified by good cause, the court may but is not required to provide for production of scientific evidence less than one hundred fifty (150) days before the trial date. In no case shall the order provide for production of scientific evidence less than one hundred twenty (120) days before the trial date.

(5) *Form of scheduling order; additional requirements and shorter deadlines allowed.* The court may adopt upon order of the chief judge of the district court a form to be used to implement the time requirements of this rule. Additional requirements, and shorter time periods, may be imposed in the court's order in any particular case where appropriate.

(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 this rule. In no case shall a party be given time extensions that in total exceed fifteen (15) days. Unless required by good cause, extensions of time for up to a total of fifteen (15) days to any party shall not result in delay of the date scheduled for commencement of trial. It shall not be assumed that substitution of counsel alone constitutes good cause for an extension of time.

H. **Time limits for commencement of trial.** The time limits for commencement of trial in Paragraph G shall be calculated from whichever of the following events occurs latest:

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

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

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

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

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

(6) if the defendant is arrested for failure to appear or surrenders in

another state or country for failure to appear, the date the defendant is returned to this state;

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

(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 defendants shall continue on the same basis as previously established under these rules for track assignment and otherwise.

I. **Failure to comply with scheduling order.** If a party fails to comply with any provision of this rule, including the time limits imposed by the scheduling order, the court shall impose sanctions as the court may deem appropriate in the circumstances, including but not limited to reprimand by the judge, dismissal with or without prejudice, suppression or exclusion of evidence, and a monetary fine imposed upon a party's attorney or that attorney's employing office with appropriate notice to the office and opportunity to be heard. 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.

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

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

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

necessary to bring the case to prompt resolution.

(3) *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.

K. **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 seven (7) 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.

L. **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. Three (3) 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.

M. **Data reporting to the Supreme Court required.** Until this paragraph is amended or withdrawn, the chief judge shall cause a report to be provided to the Supreme Court at least every month that includes at least the following data:

(1) *Special Calendar Data*

(a) number of cases assigned to the special calendar and number disposed of to date, by judge; and

(b) number of cases assigned to track 1, 2, and 3 by each special calendar judge if the master calendar judge adopts for special calendar cases an assignment process similar to that in Paragraph G of this rule and, if not, comparable measures designed to quantify progress in disposition of cases assigned to the special calendar; and

(2) *New Calendar Data*

(a) number of cases assigned initially to new calendar judges, by judge, and age breakdown starting from date of arraignment or wavier of arraignment of those cases originally assigned by cases (i) less than ninety (90) days from arraignment date, (ii) at least ninety (90) but less than one hundred eighty (180) days from arraignment date, (iii) at least one hundred eighty (180) but less than three hundred sixty-five (365) days from arraignment date, and (iv) three hundred sixty-five (365) or more days from arraignment date;

(b) number of cases assigned to new calendar judges (by judge)

and age breakdown of those cases as stated in Subparagraph (M)(2)(a) above;

(c) number of cases, both those assigned on the effective date of this rule and thereafter, assigned by each judge to track 1, 2, and 3;

(d) identify each case in which an order is entered extending time beyond that applicable to the case's track and for such orders provide the assigned judge and the nature of the order entered; and

(e) identify for each case the number of continuances granted, the party requesting the continuance, and all reasons given for the continuance.

[Adopted by Supreme Court Order No. 14-8300-025, effective for all cases pending or filed on or after February 2, 2015.]

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Criminal Justice Section Standards

Speedy Trial

Speedy Trial

PART I.

GENERAL PRINCIPLES

Standard 12-1.1 Purposes of the Standards on Speedy Trial and Timely Resolution of Criminal Cases

(a) The Standards on Speedy Trial and Timely Resolution of Criminal Cases have three main purposes: (1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective utilization of resources.

(b) These standards should be read in conjunction with other ABA Standards of Criminal Justice, and with recognition that fairness and accuracy are essential components of the criminal justice process. The standards are not intended to emphasize speedy disposition of cases to the detriment of the interests of the parties and the public, including victims and witnesses, in the fair, accurate and timely resolution of cases. In implementing these standards in individual cases and in developing policies for overall management of caseloads, jurisdictions should seek to ensure that both prosecutors and defense counsel have adequate opportunity to investigate their cases, consult with witnesses, review documents, make appropriate motions, and conduct other essential aspects of case preparation.

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Standard 12-1.2 Importance of establishing both speedy trial rules and standards for timely resolution of criminal cases

(a) The right of an accused to a speedy trial is fundamental. It should be effectuated and protected by rule or statute that:
(i) sets specific limits on the time within which either the defendant must be brought to trial or the case must be resolved through a non-trial disposition;
(ii) provides guidelines for computing the time within which the trial must be commenced or the case otherwise resolved; and
(iii) establishes appropriate consequences in the event that the accused's right to a speedy trial is denied.
(b) The public, including victims and witnesses has an interest in the timely resolution of criminal cases. From the commencement of a criminal case to its conclusion, any elapsed time other than reasonably needed for preparation and court events should be minimized. The public's interest should be expressed in formally adopted policies and standards that:
(i) establish goals for the timely resolution of criminal cases from commencement to disposition and for specific stages, taking into account the seriousness and complexity of different types of cases;
(ii) require monitoring of the performance of the courts and other organizational entities with respect to the goals; and
(iii) provide for public dissemination of data concerning organizational performance in relation to the goals.

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Standard 12-1.3 Case differentiation

In establishing statutes or rules for speedy trial and goals and practices for timely resolution of criminal cases, jurisdictions should:
(a) take account of the relative seriousness and complexity of different types of cases; and
(b) distinguish between defendants in detention and defendants on pretrial release. The time limits concerning speedy trial for detained defendants should ordinarily be shorter than the limits applicable to defendants on pretrial release.

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Standard 12-1.4 Systems approach

(a) These standards approach the issues of speedy trial and timely case resolution from a systemic perspective, recognizing that many different institutions, agencies, and individuals play key roles in criminal cases. In order for the purposes of the standards to be achieved, the interests and perspectives of the following should be taken into account:
(i) defendants;
(ii) the public, including victims and witnesses;
(iii) courts;
(iv) prosecutors and defense counsel; and
(v) law enforcement agencies, officials responsible for local detention facilities, pretrial services agencies, probation departments, and other organizations involved in or affected by the prosecution and adjudication of criminal cases.
(b) Jurisdictions should provide adequate resources to the institutions and agencies involved in criminal justice processes, in order to enable the purposes of these standards to be achieved.

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Standard 12-1.5 Caseflow systems that will enable timely resolution of all criminal cases

These standards focus on the timely resolution of all criminal cases, including the large proportion of cases not resolved by trial. In order to utilize limited resources effectively, jurisdictions should design caseflow systems that enable an early assessment of the complexity and prospects for non-trial resolution of cases, and seek to facilitate the early resolution of cases not likely to be tried. Such caseflow systems should ensure that many cases are resolved rapidly, that trial continuances are minimized, that case scheduling functions with a high degree of certainty and predictability concerning case scheduling, and that the jurisdiction's speedy trial requirements and standards for timely resolution can be met.

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PART II.

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DEFENDANT'S RIGHT TO A SPEEDY TRIAL

Standard 12-2.1 Speedy trial time limits

(a) A defendant's right to a speedy trial should be formally recognized and protected by rule or by statute that establishes outside limits on the amount of time that may elapse from the date of a specific event until the commencement of the trial or other disposition of the case. The time limits should be expressed in days or months.

(b) The presumptive speedy trial time limit for persons held in pretrial detention should be [90] days from the date of the defendant's first appearance in court after the filing of a charging instrument. The presumptive limit for persons who are on pretrial release should be [180] days from the date of the defendant's first appearance in court after either either the filing of any charging instrument or the issuance of a citation or summons. Shorter presumptive speedy trial time limits should be set for persons charged with minor offenses.

(c) Certain periods of time should be excluded from the computation of time allowed under the rule or statute, as set forth below in Standard 12-2.3.

(d) Provision should be made for the court to determine, on motion of the prosecution or the defense or on its own motion, that a case is of such complexity that the presumptive speedy trial time limit should be extended in order to enable the parties to make adequate preparations for pretrial proceedings or for the trial itself. The court should give substantial weight to a motion for extension of the speedy trial limit on these grounds that is made, with good cause shown, by either the prosecution or the defense. In the event that a determination of complexity is made, the judge should establish a revised time limit and should state on the record the reasons for extending the time. A motion to extend the speedy trial time limit because of the complexity of the case should be made as soon as practicable.

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Standard 12-2.2 Commencement and setting of speedy trial time limit

The speedy trial time limit should commence, without demand by the defendant, from the date of the defendant's first appearance in court after either a charge is filed or a citation or summons is issued, except that:

(a) If the charge is dismissed and thereafter the defendant is charged with the same offense or one arising out of the same criminal episode, or if a superseding charging instrument is filed by the prosecution in place of the original charge, then:
(i) the court should set a new speedy trial limit as set forth in Standard 12-2.1 or a shorter period. The new limit should commence at the defendant's first appearance before the court on the new charge; and
(ii) in setting the new limit, the court should consider:
(A) the degree to which the new charge is different from the
original charge;
(B) in the case of a superseding charging instrument, the extent to which the superseding instrument alleges offenses or material facts that were known to the prosecution at the time the original charge was filed;
(C) the period of time that has elapsed between the defendant's appearance on the first charge and the defendant's appearance on the second charge;
(D) the reason for the dismissal or the filing of the superseding instrument; provided, however, that if the court finds that the charge was dismissed to avoid the effect of the speedy trial time limit, the new charge should ordinarily be dismissed with prejudice;
(E) any other factor which, in the interests of justice, affects the time in which the defendant should be tried on the new charge;
(b) If the defendant is to be tried again following a mistrial, then a new reasonable speedy trial time limit should be set. The new speedy trial time limit period generally should be shorter than that applicable to the original charge and should commence from the date of the mistrial.
(c) If the defendant is to be tried again following a successful appeal or collateral attack on the conviction, then the speedy trial time limit should be that set forth in Standard 12-2.1 and should commence running from the date the order occasioning the retrial becomes final.

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Standard 12-2.3 Excluded periods

The following periods should be excluded in computing allowable time under the speedy trial rule or statute:

(a) The following periods should be excluded in computing allowable time under the speedy trial rule or statute:

(i) time that elapses during other proceedings in the case against the defendant, including but not limited to an examination and hearing on competency, a period during which the defendant is incompetent to stand trial, and any interlocutory appeals;
(ii) time that elapses during a period when the defendant is on trial or engaged in proceedings in a different case in the same or a different court and was therefore physically unavailable;
(iii) time that elapses as a result of a continuance of the trial date granted at the request or with the consent of the defendant or the defendant's counsel. A defendant who has waived the right to counsel and is proceeding pro se should not be deemed to have consented to a continuance unless the defendant has been advised by the court of the right to a speedy trial and the effect of the defendant's consent;
(iv) time that elapses during any delay caused by the defendant's failure to appear for scheduled court proceedings;
(v) time when the defendant is joined for trial with a codefendant as to whom the speedy trial time limit has not run, if the court finds that, for reasons stated on the record, the interests of justice served by the joinder outweigh the defendant's right to have the trial held within the originally prescribed time limits; and
(vi) other reasonable periods of time when circumstances warrant exclusion of the time upon good cause shown or upon a determination by the court that the interests of justice served by excluding a period of time from the speedy trial time limit outweigh the defendant's right to have the trial held within the originally prescribed time limits. No period of delay resulting from a continuance granted by the court in accordance with this paragraph should be excludable unless the court sets forth, in the record of the case, its reasons for finding that the interests of justice served by the granting of the continuance outweigh the defendant's right to have the trial held within the originally prescribed time limits.
(b) Time required for the consideration and disposition of pretrial motions should not be automatically excluded in computing allowable time under the speedy trial rule or statute. Such time may be excluded by the court upon request or on its own motion pursuant to Standard 12-2.3 (a)(vi).
(c) If the court sets a case for trial on a date that is outside the speedy trial time limit, and the defendant is on notice of the scheduled date, the defendant's failure to object to the trial date on speedy trial grounds should be deemed consent to an extension of the time allowed under

the speedy trial rule or statute to the scheduled date. Time that elapses during such an extended period should be excluded in computing time under the speedy trial rule or statute.

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Standard 12-2.4 Special procedures applicable to persons serving terms of imprisonment

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute that:
(a) if the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, the prosecuting attorney should promptly:
(i) undertake to obtain the presence of the prisoner for trial; or
(ii) cause a detainer to be filed with the official having custody of the prisoner and request the official to so advise the prisoner and to advise the prisoner of the prisoner's right to demand trial;
(b) if an official having custody of such a prisoner receives a detainer, the official should promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that the prisoner does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed;
(c) upon receipt of such certificate, the prosecuting attorney should promptly seek to obtain the presence of the prisoner for trial; and
(d) when the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner should be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of the delivery).

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Standard 12-2.5 Computation of time for persons serving terms of imprisonment

The time for purposes of the right to a speedy trial in the case of a prisoner whose presence has been obtained while the prisoner is serving a term of imprisonment should commence running from the time the prisoner's presence for trial has been obtained. If the prosecuting attorney has unreasonably delayed causing a detainer to be filed with the custodial official or delayed seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time has run.

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Standard 12-2.6 Implementation of speedy trial time limits

In adopting a rule or statute that establishes speedy trial time limits, jurisdictions should provide that:
(a) an indictment, information, or other formal charging instrument should be filed within [30] days after the defendant's first appearance in court after either an arrest or issuance of a citation or summons, so that defendants receive prompt notice of the charges on which they will be held to answer and have adequate opportunity to prepare for pretrial motions and for trial within the speedy trial time limit period;
(b) at the time of the defendant's first appearance in court after either the filing of a charging instrument or the issuance of a citation or summons, the court should advise the defendant of the right to a speedy trial and of the presumptive speedy trial time limit, and should inform the defendant that the granting of a continuance requested or consented to by the defense will have the effect of lengthening the speedy trial time limit period; and
(c) at any time that action is taken that has the effect of extending the time otherwise allowed under the speedy trial rule or statute, the court should set forth its reasons on the record and should confirm, with the prosecution and the defense, the date by which a trial must be held or the case otherwise resolved. The new date should be noted on the record.

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Standard 12-2.7. Effects of exceeding the speedy trial time limit period

(a) If a defendant who is in pretrial detention is not brought to trial and the case is not otherwise resolved before the expiration of time allowed under the speedy trial rule or statute, as extended by periods excluded in accordance with Standard 12-2.3 or extended by the court pursuant to Standard 12-2.1(d), the court should:
(i) order that the defendant be released from detention under conditions set in accordance with the ABA Criminal Justice Standards on Pretrial Release that best minimize the risk of flight and the risk of danger to the community or any person, and set the trial to begin on a date within the speedy trial time limit period for defendants on pretrial release, provided, however, that
(ii) if no condition or combination of conditions of release will reasonably protect the safety of the community or any person:
(A) the court should not order the defendant's release, and should set the trial to begin as expeditiously as possible, receiving the highest possible priority on the court's trial docket and in any event to begin within [15] days, unless the defendant requests a longer period not to exceed [45] days; and
(B) if the trial does not begin within the time set pursuant to subdivision (A), the court should order that the defendant be released from detention under conditions that, to whatever extent reasonably possible, minimize the risk of flight and the risk of danger to the community or any person, and reset the defendant's trial to begin on a date within the speedy trial time limit period for defendants on pretrial release.
(b) If a defendant who is on pretrial release is not brought to trial or the case is not otherwise resolved before the expiration of the time allowed under the speedy trial rule or statute, as extended by periods excluded in accordance with Standard 12-2.3 or extended by the court pursuant to Standard 12-2.1(d), the court should ordinarily dismiss the charges with prejudice, provided, however, that:
(i) after affording the parties an opportunity to be heard, the court may in the interests of justice extend the time limit for a period not to exceed [30] days beyond the date on which the expiration of time is determined by the court, unless the defendant requests a longer period not to exceed [75] days.
(ii) In determining whether and for what period to order such an extension, the court should consider the totality of the circumstances, including:
(A) the gravity of the offense;

(B) the reasons for the failure to bring the defendant to trial within the previously-established time limit;
(C) the extent to which the prosecution or the defense is responsible for the delay; and
(D) the extent of the prejudice to the interests of the defense, the prosecution, or the public that may result from the extension of time or the dismissal of the charges.
(iii) If the court sets an extended period of time pursuant to this paragraph but the trial does not commence within the extended period, the charges should be dismissed with prejudice.
(c) In making a determination concerning actions taken with respect to detention, dismissal, or fixing a date for the commencement of trial pursuant to this standard, the court should set forth, on the record, the reasons for its ruling.
(d) Dismissal of the charge(s) with prejudice pursuant to this standard should forever bar prosecution for the offenses charged and for any other offense required to be joined with that offense.

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PART III.

STANDARDS FOR TIMELY RESOLUTION OF CRIMINAL CASES

Standard 12-3.1 The public's interest in timely case resolution

The interest of the public, including victims and witnesses, in timely resolution of criminal cases is different from the defendant's right to a speedy trial. This interest should be recognized through formal adoption of policies and standards that are designed to achieve timely disposition of criminal cases regardless of whether the defendant demands a speedy trial. Reasons for developing effective policies and standards aimed at timely resolution of criminal cases include:
(a) preserving the means of proving the charge(s) against the defendant;
(b) maximizing the deterrent effects of prosecution and conviction;
(c) increasing the likelihood that rehabilitative purposes of a sentence imposed if the defendant is convicted will be achieved;
(d) minimizing the length of the periods of anxiety for victims, witnesses and defendants, and their families;

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(e) avoiding extended periods of pretrial freedom for defendants who pose risks of public safety or risks of flight;
(f) reducing repetitious handling and review of files by police officers, prosecutors, defense counsel, judges, court staff, and others involved in cases;
(g) reducing costs for jail operation (and avoiding or minimizing the costs of new jail construction) as the length of pretrial detention is minimized for defendants held in custody;
(h) reducing the caseload pressures on pretrial services agencies, as the length of time on supervised release is minimized for released defendants;
(i) better utilizing limited resources, and enhancing the opportunity for all of the institutions, agencies, and practitioners involved in criminal case processing to address high priority cases and issues; and
(j) increasing public trust and confidence in the justice system.

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Standard 12-3.2 Goals for timely case resolution

(a) Each jurisdiction should develop and adopt goals and policies that provide a framework for assuring that all criminal cases are resolved within a time period that is appropriate for the seriousness and complexity of the case.
(b) Each jurisdiction should establish goals for timely resolution of cases that address (i) the period from the commencement of the case (by arrest, issuance of citation, or direct filing of indictment or information) to disposition; and (ii) the time periods between major case events. In establishing these goals, jurisdictions should take account of the seriousness and complexity of cases of different types.
(c) Goals for timely resolution of criminal cases should be developed collaboratively, with involvement of all of the institutions and agencies that have roles in criminal case processing in the jurisdiction, and with the participation of members of the public. Leaders of all of the institutions and agencies involved should participate in the process, should support the standards that are developed, and should seek to establish policies and procedures within their own organizations that will help achieve the standards. The jurisdiction's goals for timely resolution should address at least the following time periods:
(i) arrest to first appearance;

(ii) citation to first appearance;
(iii) first appearance to filing of an indictment, information or other formal charging document in the court in which the charge is to be adjudicated;
(iv) first appearance or filing of the formal charging document to completion of pretrial processes (i.e., completion of all discovery, motions, pretrial conferences, and plea, dismissal, or other disposition in cases that will not go to trial);
(v) completion of pretrial processes to commencement of trial or to non-trial disposition of the case;
(vi) verdict or plea of guilty to imposition of sentence; and
(vii) arrest or issuance of citation to disposition, defined for this purpose as plea of guilty, entry into a diversion program, dismissal, or commencement of trial.
(d) Goals for timely resolution of criminal cases are intended to provide guidance for judges, counsel, court staff, officials in criminal justice agencies, defendants, witnesses, general government, and the public concerning the scheduling of criminal cases and management of criminal caseloads. The establishment of such goals should not create any rights for defendants or others.

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Standard 12-3.3. Monitoring and accountability

(a) Each jurisdiction should establish procedures to monitor the performance of the system (and of each of the organizational entities that have responsibility for particular aspects of case processing) in relation to the goals for timely case resolution. Feedback should be provided to the leaders of the courts, the prosecutor's office, the defense bar, law enforcement agencies, other criminal justice agencies, and general government.
(b) Information about the performance of the system in relation to the goals for timely case resolution should be made available to the public on a regular basis.

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Standard 12-3.4. Consistency of timely resolution standards with other justice system policy objectives

In adopting and implementing standards for timely resolution of criminal cases, jurisdictions should ensure that the standards and the policies used to implement them are consistent with the public's interests in the fair and effective prosecution and defense of criminal cases. The system should be structured to enable expeditious resolution of minor cases and of cases that are not complex, while allowing sufficient time for those that will involve relatively complex pretrial processes or extensive trial preparation.

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PART IV.

ORGANIZING JUSTICE SYSTEM RESOURCES TO ACHIEVE TIMELY RESOLUTION OF CRIMINAL CASES

Standard 12-4.1 Operational goals to guide criminal caseflow

Each jurisdiction should develop and adopt operational goals, for the system as a whole and for the organizational entities involved in the processing of criminal cases, to guide overall caseflow management and case scheduling and to help assure fairness and due process of law. Goals should be established in at least the following areas:
(a) timely resolution of cases, as described in Standard 12-3.2;
(b) firmness/reliability of case scheduling, focused on establishing an expectation that court events will take place when scheduled; and
(c) timeliness, accuracy, and completeness of the information entered into court records and into automated management information systems that support case scheduling and caseflow management.

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Standard 12-4.2 Caseflow management practices and procedures

Each jurisdiction should develop caseflow management practices and procedures that will enable it to meet case processing time standards and speedy trial requirements.

The policies and procedures should be set forth in an overall plan for the jurisdiction. Portions of the plan that are directly relevant to the operations of a court or other organizational entity involved in criminal case processing should be incorporated into operations manuals or similar guides for use by practitioners.

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Standard 12-4.3 Jurisdictional plans for effective criminal caseflow management: essential elements

Elements of a plan for effective overall criminal caseflow management in a local jurisdiction should include:
(a) rapid preparation and transmission, to the prosecutor, of good quality police incident/arrest reports;
(b) rapid retrieval of prior record information about the arrested person, using speedy and reliable identification and record retrieval technology;
(c) rapid preparation of pretrial investigation reports on arrested defendants by a pretrial services agency, and utilization of these reports by judicial officers in promptly setting release conditions for arrested persons;
(d) rapid turnaround of forensic laboratory test results, especially for the testing of suspected drugs seized pursuant to an arrest;
(e) effective early case screening and realistic charging by prosecutors;
(f) early appointment of defense counsel for eligible defendants; for other cases, court procedures that ensure prompt participation by counsel for the defendant;
(g) early provision of discovery, consistent with the provisions governing discovery set forth in the ABA Criminal Justice Standards on Discovery;
(h) early discussions between the prosecutor and the defense counsel concerning possible non-trial disposition of the case;
(i) early case scheduling conference conducted by the assigned judicial officer to:
(1) review the status of discovery and negotiations concerning possible non-trial disposition;
(2) schedule motions; and
(3) make any orders needed;
(j) case scheduling practices that use techniques of differentiated case management to facilitate expeditious disposition of simple cases, enable rapid identification of cases likely to require more attorney time and judge attention, and make good use of limited courtroom and

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lawyer preparation time;
(k) case timetables addressing the time periods allowed for completion of discovery, filing of motions, and other case events that are set at an early stage of the case by the judge in consultation with the prosecutor and defense counsel;
(l) early filing and disposition of motions, including motions requiring evidentiary hearings;
(m) close monitoring of the size and age of pending caseloads, by the court and the prosecutor's office, to ensure that case processing times in individual cases do not exceed the requirements of the speedy trial rule and that case processing time standards are being met for the overall caseload;
(o) a policy of granting continuances of trials and other court events only upon a showing of good cause and only for so long as is necessary, taking into account not only the request of the prosecution or defense, but also the public interest in prompt disposition of the cases;
(p) procedures enabling resolution of all charges pending against a defendant, whether in the same case or in different cases and whether in the same court or a different court of the state, provided that defense counsel and the prosecutor(s) who filed the charges agree to the consolidation of the cases; and
(q) elimination of existing case backlogs (i.e., cases pending longer than the established case processing time standards), following a backlog reduction plan developed collaboratively by the court, the prosecutor's office, the defense bar, and law enforcement and other criminal justice agencies involved in and affected by criminal case processing.

Return to this Standard's Table of Contents Return to listing of Criminal Justice Standards

Standard 12-4.4 Acquisition and use of information for case processing

Jurisdictions should seek to use modern information technology to enable the courts and all of the other organizations involved in the criminal caseflow process to rapidly gather, store, disseminate, and retrieve information about cases, and should structure the flow of information to:
(a) enable the prosecution and defense to obtain reliable information about the charge, the evidence, and the defendant as rapidly as possible for purposes of case preparation, negotiation, and trial; and

(b) enable the court to have reliable information upon which to make decisions concerning the pretrial custody or release status of the defendant at the time of initial appearance and, thereafter, to make informed decisions concerning possible diversion, sentence, or other disposition.

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Standard 12-4.5 Court responsibility for management of calendars and caseloads

(a) Control over the trial calendar, and over all other calendars on which a case may be placed, should be vested in the court. The court should exercise responsibility for case scheduling and for the expeditious resolution of all cases beginning at the time of first appearance, taking account of information relevant to case scheduling that may be provided by both the prosecutor and defense counsel. Continuances should be granted only by a judicial officer, on the record. The court should grant a continuance only upon a showing of good cause and only for so long as is necessary. In ruling on requests for continuances, the court should take into account not only the request or consent of the prosecution or defense, but also the public interest in timely resolution of cases. If a ruling on the request for a continuance will have the effect of extending the time within which the defendant must be brought to trial, the judge should state on the record the new speedy trial time limit date and should seek confirmation of this date by the prosecution and the defense.
(b) The court should establish mechanisms and procedures to promote the resolution of all cases within the time periods established by applicable management goals and without exceeding the time limits of the speedy trial rule or statute. Reports on the age and status of pending cases should be prepared regularly for the chief judge of the court and made available to leaders of other organizational entities involved in criminal case processing.

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Time to Disposition

Measure 3

Definition: The percentage of cases disposed or otherwise resolved within established time frames.

Purpose: This measure, used in conjunction with *Measure 2 Clearance Rates* and *Measure 4 Age of Active Pending Caseload,* is a fundamental management tool that assesses the length of time it takes a court to process cases. It compares a court's performance with local, state, or national guidelines for timely case processing. When the underlying data conform to the *State Court Guide to Statistical Reporting*, the measure takes into account periods of inactivity beyond the court control (e.g., absconded defendants, cases suspended pending decision on an appeal) and provides a framework for meaningful measurement across all case types.

Time standards to ensure timely justice have existed for over 40 years. The National Center for State Courts (NCSC), in conjunction with the Conference of State Court Administrators (COSCA) and Conference of Chief Justices (CCJ), revised previous national standards, engaging practitioners in a two-year collaboration informed by empirical performance data from state courts. These standards were approve by CCJ, COSCA, the American Bar Association (ABA), and the National Association for Court Management (NACM). Courts should take note of these revised standards, as well as any additional standards specific to their jurisdiction.

Model Time Standards for State Trial Courts

Criminal	
Felony	75% within 90 days 90% within 180 days 98% within 365 days
Misdemeanor	75% within 60 days 90% within 90 days 98% within 180 days
Traffic & Local Ordinance	75% within 30 days 90% within 60 days 98% within 90 days
Habeas corpus/Post-conviction proceedings (following a criminal conviction)	98% within 180 days
Civil	
General Civil	75% within 180 days 90% within 365 days 98% within 540 days
Summary Matters	75% within 60 days 90% within 90 days 98% within 180 days
Family	
Dissolution/Divorce/ Allocation of Parental Responsibility	75% within 120 days 90% within 180 days 98% within 365 days
Post Judgment Motions	98% within 180 days
Protection Orders	90% within 10 days 98% within 30 days
Juvenile	
Delinquency & Status Offense	For youth in detention: 75% within 30 days 90% within 45 days 98% within 90 days For youth not in detention: 75% within 60 days 90% within 90 days 98% within 150 days
Neglect & Abuse	Adjudicatory Hearing 98% within 90 days of removal Permanency Hearing 75% within 270 days of removal 98% within 360 days of removal
Termination of Parental Rights	90% within 120 days after the filing of a termination petition 98% within 180 days after the filing of a termination petition
Probate	
Administration of Estates	75% within 360 days 90% within 540 days 98% within 720 days
Guardianship/Conservator of Incapacitated Adults	98% within 90 days
Civil Commitment	98% within 15 days

Source: National Center for State Courts Web site, http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1836

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
800-466-3063

Copies and updates at
www.courtools.org

Method: This measure should be reviewed on a regular (e.g., monthly, quarterly, annual) basis. If reviewed regularly, the court can observe trends as they develop, then aggregate the data for annual reporting.

For each case type, the first task is to compile a list of all cases that were disposed or otherwise resolved during the reporting period. For the purpose of this measure, "disposed or otherwise resolved" is defined as having had an *Entry of Judgment.* If the data for the measure are not available in automated form, and data collection requires manual review of case files, then the measure will likely need to be taken on an annual basis. Sampling is an option in courts where case volumes are high.

Sampling

This measure should be calculated for all cases disposed or otherwise resolved during the reporting period. However, sampling will be necessary in courts where case volumes are high if a complete report cannot be produced by the case management system. In most instances, a sample of 300 cases will be sufficient. To obtain a random sample requires: a list of all cases in the population, a unique identification number for each case, and a method for selecting cases. A straightforward method is systematic sampling where only the first case is randomly selected and then every nth case from a list is selected for the sample, i.e., if the total number of civil cases in a court was 3,000 and the sample size was to be 300 cases, select every tenth case (3000/300=10).

Which Cases Are Included?

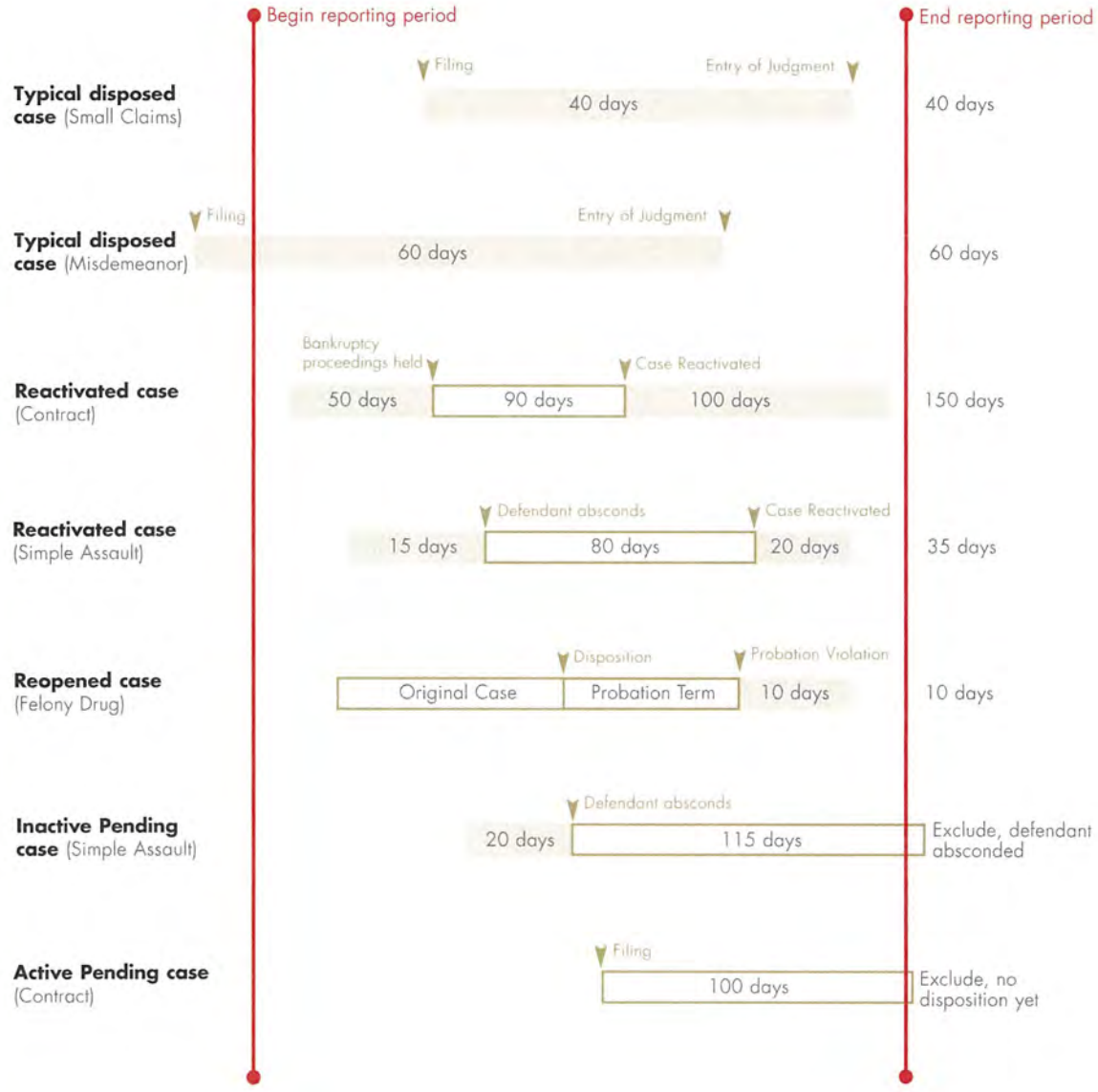
There are two kinds of cases for which the time to disposition can be computed. The first are typical cases that move through the system without interruption. When these cases are disposed or otherwise resolved by *Entry of Judgment* during the reporting period, they should be counted. The filing dates for these cases will vary, but what qualifies them for inclusion is the fact that the disposition dates all fall within the reporting period (e.g., the calendar year).

The second kind are cases that had their progress interrupted and underwent a period of inactivity, but were *Reopened* or *Reactivated* by the court and disposed of during the reporting period. An example of this is a contract case that is *Placed on Inactive Status* pending the outcome of bankruptcy proceedings. Following those proceedings, the contract case resumes and is disposed. Another example is a criminal case in which the defendant absconds after the case was filed. The case is *Placed on Inactive Status* during this time, but when the defendant is apprehended and returned to court, the case resumes and is disposed.

Cases in which judgment was previously entered but which have been *Reopened* due to a request to modify or enforce existing judgments are also included. For example, the court might grant a motion to consider newly discovered evidence, and thus reopen a case. In juvenile cases, a case might be reopened due to violation of probation, or due to failure of parents to comply with a court order. When these *Reopened* cases are disposed during the reporting period, they should be included in this measure. In all these examples, the time that is counted starts when the case is reopened, not with the date of the original filing.

Cases that are in an official period of inactivity at the end of the reporting period should *not* be included in this measure. As this type of case is considered to be among the court's *Inactive Pending* cases at the end of the reporting period (i.e., they are not moving toward disposition for a known and legitimate reason and the court is aware of this), they should be excluded from the analysis. *Active Pending* cases are excluded from analysis, since no disposition has been reached.

Time Calculation Examples



Time to Disposition

Measure 3

Analysis and Interpretation

Superior Court

	Percemtage of Cases Disposed				Number of Days	
	180 days		365 days			
	Current	Goal	Current	Goal	Mean	Median
Criminal-Felony	70%	90%	97%	98%	170	121
Civil-General	82%	75%	95%	90%	151	93
Family-Divorce	90%	90%	92%	98%	158	105

This table summarizes time to disposition in one court across three case types. The court is almost meeting its 365-day standard in criminal cases, exceeding its 365-day standard in civil cases, and lagging behind in domestic cases. The court should examine criminal caseflow management in the first 180 days, the period in which the court is furthest from its goal.

Time to Disposition in Felony Cases- 98% at 365-Day Time Standard

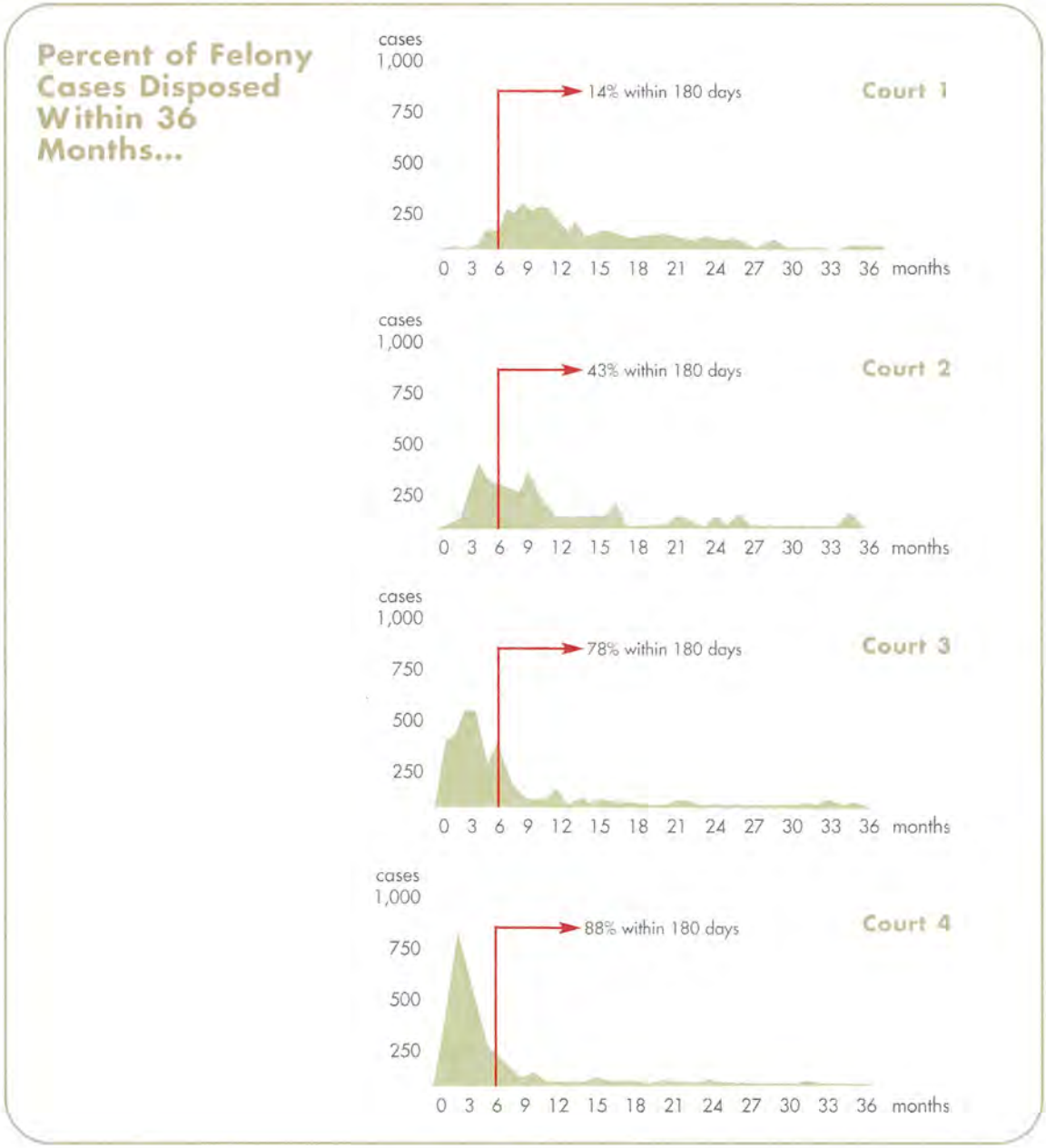
The court has adopted the new Model Time Standards and was steadily improving, meeting this goal in June. In the months that followed, however, time to disposition increased. The court needs to examine what happened, especially in July and October, to determine and source of the decline in performance.

Comparing Time to Disposition in Civil and Criminal Cases (using a 365-Day Time Standard)

Increases in the criminal caseload caused the court to shift judicial officers from civil to criminal cases and initiate caseflow management improvements in June. Time to disposition for criminal cases improved, but not without a corresponding decline in time to disposition performance in civil.

The graphics here show one way to display time to disposition data for felony cases in four courts. The data show that the vast majority of cases are resolved within six months in the two faster courts, compared to about eighteen months in the two slower courts. The profile of felony case time to disposition in different courts may vary due to the seriousness of the case mix, charging and pleading practices, and the manner of disposition. Of course, differences in time to disposition will also result from variation in court case management practices. Documenting differences in case processing time among courts is the first step in analyzing the reasons for those differences.

For all types of cases, time to disposition is a basic court management tool. Compiling data on the timing of key case events, consistent definition of terms, and distinguishing between active and inactive cases are basic ingredients to understanding and improving caseflow management.



Terms You Need to Know

Active Pending: A count of cases that, at the end of the reporting period, are awaiting disposition.

Entry of Judgment: A count of cases for which an original entry of judgment–the court's final determination of the rights and obligations of the parties to a case–has been filed. For cases involving multiple parties/issues, the manner of disposition should not be reported until all parties/issues have been resolved.

Mean: The average value of a set of numbers, equal to the sum of all values divided by the number of values.

Median: The middle value in a distribution of numbers. Half of the values will be above this point, half will be below.

Percentile: A percentile is a score below which a given percentage of the cases falls. Thus, if cases aged 120 days represent the 90th percentile of a court's pending caseload, it means that 90% of those cases are aged 120 days or less. Spreadsheet and statistical software can calculate percentile ranking of data.

Placed on Inactive Status: A count of cases whose status has been administratively changed to inactive because the court will take no further action in the case until an event restores the case to the court's active pending caseload.

Random Sample: A sample chosen that minimizes bias in the selection process. A random sample of case files is typically generated by a computer or selected from a random number table. Systematic samples require a randomly selected starting point, then the taking of every *n*th case, i.e., if the total number of civil cases in a court was 3,000 and the sample size was to be 300 cases, select every tenth case (3,000 ÷ 300 = 10).

Reactivated: A count of cases that had previously been placed in an Inactive Pending status, but for which further court proceedings and activities can now be resumed so that the case can proceed to disposition.

Reopened: A count of cases in which judgments have previously been entered but which have been restored to the court's pending caseload due to the filing of a request to modify or enforce the existing judgment.

Reopened Disposition: A count of cases that were disposed of by a modification to and/or enforcement of the original judgment of the court.

Time Standards: An acknowledged measure of comparison, measured as the time (in days) it takes to process a case, from filing to disposition. A time standard is expressed in terms of the percentage of cases that should be resolved within a certain time frame (e.g., 98% within 180 days).

CourTools

Developed by the NCSC Court Performance Community of Practice.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. _____

_____,

Defendant(s).

PRETRIAL AND CRIMINAL CASE MANAGEMENT ORDER

The defendant(s) _____, appeared for arraignment and pleaded not guilty on _____, 20__ before the undersigned U.S. Magistrate Judge, Choose an item.. The government, the United States of America, appeared through Assistant U.S. Attorney(s) _ _____. Defendant(s) appeared in person and with counsel, _____.

Section 1: Purpose.

This Pretrial and Criminal Case Management Order summarizes the parties' disclosure and discovery obligations. This Order applies to the charge(s) now on file and to any superseding charge(s) filed in this case. It also puts the case on track to be tried within the deadlines imposed by the Speedy Trial Act of 1974, as amended, 18 U.S.C. § 3161 et seq., and this Court's implementation of that statute through D. Kan. Rule CR 50.1.

The Court and the parties acknowledge that complete, early, and orderly discovery facilitates the fair and efficient resolution of cases. A principal purpose of this Order is to

reduce or eliminate the inefficient filing of boilerplate discovery motions and motions for extension of time. The Court, by this Order and the parties' good faith allegiance to its directives, endeavors to reach a just determination in this case, avoid unnecessary motion practice, secure administrative fairness, and eliminate unnecessary expense and delay.

Accordingly, the parties must communicate with each other regarding scheduling and discovery to fulfill the Court's Order. The Court strongly encourages the parties to exchange information promptly and at times sooner than those specified. Moreover, the parties are encouraged to provide more comprehensive discovery than required by the letter of this Order, by rule, or by statute, and in a manner that promotes efficiency and accessibility. *See* Fed. R. Crim. P. 2.

Section 2: Timing.

The original arraignment date governs the times specified in this Order. The times will *not* be automatically modified, suspended, extended, or restarted by the filing of additional or superseding charges. *See* D. Kan. Rule CR 50.1. Counsel must promptly notify the Court if they contend the filing of additional or superseding charges requires the time limits to be modified.

A Status Conference before the presiding U.S. District Judge, Choose an item., will be held on **[approximately 45 days after arraignment]** _____ **_____, 20__, at ___ _.m.**, in Courtroom _____ of the U.S. Courthouse in Choose an item., Kansas.

Section 3: Meet and Confer.

The Court expects that *before* the Status Conference the government will, in good faith, provide all reasonably available discovery and discuss with the defense any anticipated rolling discovery. Likewise, the defense will discuss anticipated reciprocal discovery. The Court strongly encourages the parties to commence discovery and to promptly meet and confer to allow an informed and informative discussion about the scope and timing of discovery and related issues.

The parties must thoroughly discuss the following matters, as then known to the parties, so as to provide a complete and accurate report to the Court at the Status Conference:

1. The status of discovery production and a firm but realistic schedule for any rolling discovery;

2. The discovery media and format[1] and any issues related to the production of electronically stored information (ESI);[2]

3. The parties' prospective witnesses;[3]

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[1] The defense may opt to receive hard copies of discovery if available and if it can be disseminated sooner than discovery in electronic format.

[2] See "Recommendations for ESI Discovery Production in Federal Criminal Cases," published by the Department of Justice and the Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) (February 2012).

[3] This includes government cooperating witnesses, as confirmed by the government at that time. If disclosure of witness-locating information poses a security concern, the government may alternatively make the witness available for defense interview, with the witness's consent.

4. Whether the government intends to invoke the Jencks Act under 18 U.S.C. § 3500, in part or in whole, and if so, when it will agree to produce witness statements, as set forth in Fed. R. Crim. P. 26.2;

5. In cases in which the government is not invoking the Jencks Act provisions, statements of prospective government witnesses and memoranda of interviews of prospective government witnesses, and when such information will be disclosed; whether there is a need for the statements or memoranda to be redacted; and, if so, when the unredacted information will be provided. If the parties are unable to reach an agreement regarding redaction, the Court must be notified at the Status Conference. The Court may require the government to show why, specific to the case or the witness, temporary redaction is necessary and appropriate.

6. Whether the defense intends to opt out of any discovery receipt that would trigger reciprocal discovery obligations under Fed. R. Crim. P. 16(b) and Section 10, below.

7. Whether any discovery should be subject to a protective order;

8. Any discovery dissemination limitations;

9. Information required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny.

10. Evidence under Fed. R. Evid. 404(b), regardless of whether the government intends to offer it at trial;

11. Reciprocal discovery, as required by Fed. R. Crim. P. 16(b)(1), and notice of defenses as more fully described in Section 10, below; and

12. Whether the case should be designated as complex under the Speedy Trial Act.

Section 4: Status Conference.

At the Status Conference, the parties must (1) request a Fed. R. Crim. P. 11 change-of-plea hearing, or (2) propose deadlines for pretrial motions and trial in compliance with the Speedy Trial Act. The parties must advise the Court whether evidentiary hearings on such motions are anticipated and how long the trial is expected to

last. The Court expects the parties will be prepared to report on the matters listed in Section 3, above, and offer a firm but realistic schedule for any remaining discovery to be completed.

Any motion to toll or expand the Speedy Trial Act must be filed before the Status Conference and comply with Section 13, below.

The government must give notice if it intends to invoke the Jencks Act, 18 U.S.C. § 3500. The defense must give notice if it intends to opt out of receiving any discovery that would trigger reciprocal discovery obligations under Fed. R. Crim. P. 16(b).

Any unresolved discovery or scheduling matters must be presented to the Court at the Status Conference, along with the reasons the parties could not agree despite good faith allegiance to the directives of this Order and despite their having met and conferred. The Court may rule upon the unresolved matters at the Status Conference, or may direct the parties to further confer or to file written motions for the Court's consideration. In cases in which the government is not invoking the Jencks Act, if the parties are unable to reach an agreement about redaction of witness statements of prospective government witnesses or memoranda of interviews of prospective government witnesses, the Court will grant a related motion only upon a specific showing that temporary redaction is necessary and appropriate in this case and for that witness.

Section 5: Automatic Discovery and Notice Obligations.

A specific request by either party is *not* necessary to trigger the obligations set forth in this Order or any discovery-related rule or statute. In general, the parties must immediately comply with:

1. All notice provisions of the Federal Rules of Criminal Procedure;[4]

2. *Brady* and *Giglio*, and their progeny; and

3. If the government has given notice it intends to invoke the Jencks Act, it must produce witness statements according to 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2.

A party may *not* assert the absence of a specific request as a reason for its failure to comply with this Order or any applicable rule or statute.

Section 6: Government's Discovery Obligations.

This Order requires the government to provide discovery, commencing on or before the date of arraignment, and to timely complete discovery, as more fully outlined below, so the parties are equipped to engage in intelligent and informed plea negotiations early in this case. Discovery is tied to the date of arraignment, *not* the trial setting, given most cases are disposed of by plea, and given a defendant's decision to plead guilty is a critical decision that must be made voluntarily and with knowledge, information, and understanding about the factual and evidentiary basis for the charges at issue, as well as the exculpatory and inculpatory evidence about the defendant's conduct.

Without limiting the foregoing general directives, pursuant to Fed. R. Crim. P. 16(a) and other statutes, laws, and rules, *unless* the defense has opted out of any discovery receipt that would trigger reciprocal discovery obligations under Fed. R. Crim.

[4] Fed. R. Crim. P. 12 (government notice of intent to use evidence defendant may seek to suppress); Fed. R. Crim. P. 12.1 (notice of alibi defense); Fed. R. Crim. P. 12.2 (notice of insanity defense); Fed. R. Crim. P. 12.3 (notice of public authority defense); Fed. R. Crim. P. 16 (parties' disclosures and discovery); and Fed. R. Crim. P. 26.2 (production of witness statements).

P. 16(b), the government must provide discovery by copying for the defense and/or permitting the defense to inspect and copy or photograph all discovery, including:

1. Any relevant written or recorded statements made by the defendant, including grand jury testimony, in the government's possession, custody, or control, the existence of which is known or by the exercise of due diligence may become known to the government;

2. The substance of any relevant oral statement made by the defendant, and that portion of any written record containing the substance of any relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a government agent;

3. A copy of the defendant's prior criminal record, if any, in the government's possession, custody, or control, the existence of which is known or by the exercise of due diligence may become known to the prosecutor;

4. Any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, in the government's possession, custody, or control and that are material to the preparation of a defense or are intended for use by the government as evidence in its case-in-chief at trial, or were obtained from or belong to the defendant;

5. Any results or reports of physical or mental examinations, or scientific tests or experiments, or copies thereof in the government's possession, custody, or control, the existence of which is known or by the exercise of due diligence may become known to the government, and that are material to the presentation of a defense or are intended for use by the government as evidence in its case-in-chief at trial;

6. Except in cases in which the government has invoked the Jencks Act provisions, as allowed above, all statements or memoranda of proffers by a government witness, including the name of the witness, and either information to locate the witness or an offer to arrange access for the defendant to interview the witness if the witness consents to such interview. Any proffer statements by a government witness must be produced in unredacted form, unless the parties agree or the Court orders otherwise;

7. The government must provide the defendant a written summary of testimony the government intends to use under Fed. R. Evid. 702, 703, or 705 during its case-in-chief. As required by Fed. R. Crim. P. 16(a)(1)(G), this summary must describe the witness's opinions, the bases and reasons

for those opinions, and the witness's qualifications. If the defendant requests such expert discovery and the government complies, or if the defendant has given notice under Fed. R. Crim. P. 12.2(b) of an intent to present expert testimony of the defendant's mental condition, then the defendant must provide the government reciprocal expert discovery. *See* Fed. R. Crim. P. 16(b)(1)(C);

8. Pursuant to *Brady* and its progeny, all evidence in the government's possession, custody, or control that would tend to exculpate the defendant, that is, evidence favorable to a defense or dispositive motion, or would serve to mitigate any punishment that which may be imposed in this case;

9. Pursuant to *Giglio* and its progeny, all evidence in the government's possession, custody, or control that would constitute impeachment of government witnesses. *Giglio* evidence includes, but is not limited to, the following:

   a. Any evidence tending to show threats, promises, payments, or inducements made by the government or any of its agents that would bear upon the credibility of any government witness;

   b. Any statement of any government witness that is inconsistent with a statement by the witness that led to the indictment in this case;

   c. Any statement of any government witness that the attorney for the government knows or reasonably believes will be inconsistent with the witness's testimony at trial;

   d. Any prior conviction of any government witness that involved dishonesty or false statement or for which the penalty was death or imprisonment in excess of one year under the law under which he or she was convicted;

   e. Any pending felony charges against any government witness; and

   f. Any specific instances of the conduct of any government witness that would tend to show character for untruthfulness; and

10. Evidence under Fed. R. Evid. 404(b), including evidence of other crimes, wrongs, or acts of the defendant, regardless of whether the Government introduces the evidence at trial. While the notice of Rule 404(b) use is not due until 21 days before trial (*see* Section 9, below), any evidence properly characterized as Rule 404(b) evidence must be disclosed subject to the general discovery deadlines set forth below, and subject to the continuing duty to disclose discovery during the life of the case. Because Rule 404(b)

evidence may be critical to plea negotiations, early discovery of such evidence is warranted.

Section 7: Protection of Discovery Material.

Although the exchange of discovery is critical to the efficient and just resolution of a matter, the production of information may present inherent risks to the privacy and safety interests of the parties and non-parties, such as witnesses, victims, and cooperating individuals. The parties may enter into a written agreement regarding the dissemination of witness statements. Otherwise, pursuant to Fed. R. Crim. P. 16(d)(1), the following protective conditions apply to witness statements, as defined by 18 U.S.C. § 3500.

1. Witness statements must be maintained in a safe and secure manner by defense counsel.

2. Witness statements may not be disseminated to the defendant personally, except as by court order or written agreement between the parties.

3. Witness statements and other protected material may be disclosed by defense counsel *only* to the following designated persons:

    a. investigative, secretarial, clerical, and paralegal personnel;

    b. independent expert witnesses, investigators, or advisors retained by defense counsel in connection with this action;

    c. other witnesses testifying to the contents of the document/material; and

    d. other persons authorized by the Court upon motion of either party.

Counsel must provide a copy of this Order to any designated person to whom discovery material is disclosed, and they must agree to be subject to the terms of this Order.

These statements may not be redacted except as ordered by the Court. The foregoing provisions do not prevent disclosure of discovery material in support of any

motion, or at a hearing, trial, or sentencing proceeding held in connection with this case, or to any District Judge or Magistrate Judge of this Court for purposes of this case.

Section 8: Jencks Act Material.

As earlier indicated, if the government chooses to invoke the provisions of the Jencks Act, 18 U.S.C. § 3500, it must give notice to the Court at the Status Conference. The Court acknowledges the statutory authority of the government to withhold witness statements until the witness has testified. But the Court encourages early and complete production in the interest of fairness and the efficient and expeditious resolution of cases, consistent with the other cooperative and collaborative provisions of this Order. The Court expects the invocation of the Jencks Act will be rare, and understands the government and defense have a written memorandum of understanding that requires either the U.S. Attorney or Criminal Chief to approve any invocation of the Jencks Act. At the very least, in the interests of a timely and orderly trial, the government must be prepared to provide Jencks Act material three days before trial.

In the production of discovery, *Brady* and *Giglio* trump *Jencks*. That is, if material qualifies as either *Brady* or *Giglio*, then it must be provided as directed by Section 6, above, even if it otherwise qualifies as Jencks Act material.

Section 9: Government's Discovery Deadlines.

Discovery must commence on or before the date of arraignment of the defendant(s). Discovery must be completed within 30 days after arraignment, to the extent possible. Any such discovery not provided by 30 days after arraignment must be

promptly provided upon availability. This 30-day deadline does not apply to discovery that is:

1. not yet available;
2. not yet memorialized in writing;
3. ESI that is not yet processed and formatted for delivery and access; or
4. Jencks Act materials.

Except in cases in which the government has invoked the Jencks Act, if any witness provides a statement within 30 days of trial, the government must promptly provide the defense with a summary of the witness's statements that are different in any respect than prior oral or written statements by the witness, or that provide information or detail not provided by the witness in any prior statements discovered by the defense. The government must provide this summary to the defense by email within 72 hours of the witness's statements, and in no event any later than 4 hours before the witness testifies. The statements or memoranda of interviews must also be memorialized in writing and promptly provided to the defense.

The government must file its notice of Fed. R. Evid. 404(b) evidence it intends to use at trial, on or before 21 days before trial.

Section 10: Reciprocal Discovery.

The government is granted reciprocal discovery *unless* the defense has given notice that it intends to opt out of receiving discovery that would trigger reciprocal discovery obligations. Specifically, as required by Fed. R. Crim. P. 16(b)(1)(A), (B), and (C), the defense must provide:

1. The government with the opportunity to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

   a. the item is within the defendant' possession, custody, or control; and

   b. the defendant intends to use the item in the defendant's case-in-chief at trial.

2. The government with the opportunity to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

   a. the item is within the defendant's possession, custody, or control; and

   b. the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

3. A written summary of any testimony the defense intends to use under Fed. R. Evid. 702, 703, or 705 as evidence at trial, if:

   a. the defendant requests disclosure under Fed. R. Crim. P. 16(a)(1)(G) and the government complies, or

   b. the defendant has given notice under Fed. R. Crim. P. 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

Summaries of expert testimony must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

The defense must provide reciprocal discovery within 14 days after the government makes its disclosures as required in Section 6, above. Within that same 14-day period, the defense must provide the government disclosure of information called for by Fed. R. Crim. P. 12.1, 12.2, and 12.3.

If the defendant timely discloses an alibi defense under Rule 12.1, then within 14 days after the defendant's disclosure, the government must serve upon the defendant a

written notice stating the names and locating information (or ability to access for interview) the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

Section 11: Electronically Stored Information (ESI).

All discovery in electronic media must be accessible, searchable, and organized. The parties agree to provide discovery in PDF, TIFF, or native/near-native file formats. Any information needed to access the material must be provided contemporaneously. If particular discovery warrants different media or format, or the proprietary nature of the format makes the discovery generally unreadable, the parties must work together to ensure timely access to the material. The disclosing party must not degrade the searchability of documents or eliminate metadata associated with files as part of the document-production process. Imaged files must be searchable unless the receiving party agrees to accept the discovery in a non-searchable format. The Court will employ as a guide, and the parties are strongly encouraged to follow, the "Recommendations for ESI Discovery Production in Federal Criminal Cases." *See* footnote 2 in Section 3, above.

Section 12: Continuing Duty to Disclose Discovery.

All parties have a continuing duty to promptly provide any newly discovered or acquired information within the scope of this Order. Failure to abide by these obligations could result in the imposition of sanctions or the following remedies as set out in Fed. R. Crim. P. 16(d)(2). The Court may:

1. order the party to permit the discovery or inspection, specify its time, place,

and manner, and/or prescribe other just terms and conditions;

2. grant a continuance;

3. prohibit that party from introducing the undisclosed evidence; or

4. enter any other order that is just under the circumstances.

Section 13: Speedy Trial Act.

30 DAYS FROM ARREST → INFO / INDICTMENT
70 DAYS FROM INFO/INDICTMENT → COMMENCE TRIAL
- TOLLED BUT RESUMES IF PROSECUTION DISMISSED

Any motion seeking to extend the 70-day Speedy Trial Act trial deadline and to designate excludable time under the ends-of-justice provision in 18 U.S.C. 3161(h)(7) must be filed *jointly* by the government and the defense. Any disagreements between the parties must be concisely set forth in the motion, e.g., the reasons for the competing positions and supporting rationale. A motion filed after the Status Conference will be closely scrutinized by the Court to determine whether it raises issues that should have been reasonably anticipated before the Status Conference.

Motions to extend the Speedy Trial Act's deadlines that are supported only by conclusory or boilerplate statements tracking the language found in 18 U.S.C. 3161(h)(7)(B)(i)-(iv), even if stipulated by the parties, have been held by the Tenth Circuit to be insufficient as a matter of law.[5] For example, it is not enough merely to state that counsel is new and needs more time to adequately prepare for trial, or that counsel or witnesses will be out of town in the weeks preceding trial. Press of other business ordinarily is *not* sufficient to justify an ends-of-justice continuance. Simply put, the Court must be in a position to make adequate factual findings that the ends of justice

[5] *United States v. Toombs*, 574 F.3d 1262, 1269 (10th Cir. 2009); *see also Zedner v. United States*, 547 U.S. 489, 498 (2006).

served by granting any requested extension actually do outweigh the best interests of the defendant, *and the public*, in a speedy trial. In addition, counsel must email to the chambers of the judge who will preside at the conference a proposed order that includes detailed findings under 18 U.S.C. 3161(h)(7). Factors important to this Court include *why* the mere occurrence of the event identified by the party as necessitating the continuance results in the need for additional time and, in turn, *how* failure to grant the continuance would prejudice that party's position at trial, would be likely to make a continuation of such proceeding impossible, or otherwise result in a miscarriage of justice. For example, what's the procedural stage of the case? Does the case have a complicated history? If there's recently disclosed discovery, how much discovery was produced previously, what's the nature, relevance, or importance of the new discovery, and what further investigation is needed as a result of the new discovery? And why is the length of the requested continuance (e.g., one month vs. two months) appropriate?

If either party moves to designate the case as complex, the reasons should be explained in reasonable detail. In cases that don't qualify as unusual or complex, the motion should address whether the failure to grant a continuance would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the government continuity of counsel, or would deny the defense counsel or the prosecutor the reasonable time necessary for effective preparation, taking into account and demonstrating (not just stating) that counsel has exercised due diligence. If a witness is unavailable, the motion should explain the significance of the witness, why the witness is unavailable, and when the witness will be available.

In multi-defendant cases, the motion must list, as to each defendant, the date on which the indictment or information was filed, the date of the defendant's initial appearance, whether the defendant is in custody and, if so, the date on which the defendant went into custody. In such cases, although the joinder of an additional defendant with new charges might result in excludable time (*see* 18 U.S.C. 3161(h)(6)), new defendants may be subject to different Speedy Trial Act deadlines and thus the motion must address the prospect that one or more defendants might be tried separately to ameliorate speedy-trial concerns.

Section 14: Flexibility.

As indicated in Section 1, above, the basic purposes of this Order are to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay. See Fed. R. Crim. P. 2. Accordingly, at any time, for good cause shown, the Court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. See Fed. R. Crim. P. 16(d)(1).

IT IS SO ORDERED.

Dated _____, 20__, at Choose an item., Kansas.

_____

, Choose an item..
U.S. Magistrate Judge

August 31, 2017

20th Judicial Circuit

LEE COUNTY FELONY CASE MANAGEMENT

Differentiated case management procedures were developed in Lee County in 2008. The procedures were established to improve predictability, efficiency and timely disposition of felony criminal cases in the circuit court and to ensure compliance with provisions and aims of the Florida Rules of Criminal Procedures. Techniques allow for management of cases according to their nature and complexity with early disposition of appropriate cases to allow for individual judge management on more complex cases. The Case Management Unit provides direct support to the judiciary presiding over felony cases.

Pretrial officers monitor case processing goals and standards and communicate to the stakeholders a heightened awareness of particular statuses. Pretrial officers ensure early representation of counsel, and track case events while coordinating scheduling for motions, grouping attorneys cases together, consolidating pending cases for the same defendant and ensuring a manageable number of cases are scheduled for each session. Pretrial officers document case notes to provide to the judiciary with detailed events and progress, coordinate trial calendars and senior judge backup. Pretrial officers also research inactive felony cases to facilitate case closure and generate performance measures and age pending reports for each respective felony judge.

There are five circuit judges assigned to the felony division, resulting in a five week rotation schedule, as follows:
Week 1- Case management Week- Arraignments, Case Management and Pretrial Conferences
Week 2- Motions Week
Weeks 3, 4 and 5: Trial Call/Trial Week 1, 2 and Complex Trial Week

Division Information:
Division D- Honorable Joseph Fuller
Case Manager- Pretrial Officer Kimberly Hart, khart@ca.cjis20.org

Division E- Honorable Bruce Kyle
Case Manager- Pretrial Officer Candy Caughey, ccaughey@ca.cjis20.org

Division F- Honorable Ramiro Manalich
Case Manager- Pretrial Officer Mercedes Pena-Barcia, mbarcia@ca.cjis20.org

Division R- Honorable J. Frank Porter
Case Manager- Pretrial Officer Maureen Ganim, mganim@ca.cjis20.org

Division S- Honorable Margaret Steinbeck
Case Manager, Team Lead Ashley Cohen, acohen@ca.cjis20.org

Tracks and Time Goals:
Prior to or at felony arraignment, the State Attorney's Office assigns all new felony cases opened by the Clerk of Court a "track" designation. Below is a graph to understand the track flow process in all Felony Criminal Cases.

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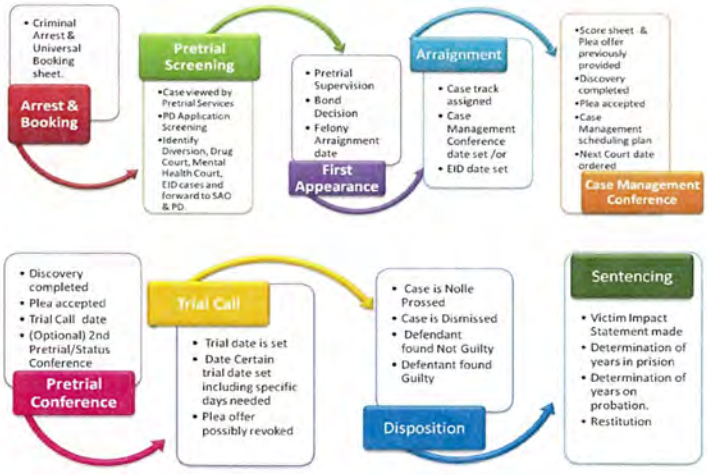
6 MONTHS 180 | 8 MONTHS 240 | 12 MONTHS 360

"A" Expedited Track	"B" Standard Track	"C" Complex Track
Arraignment Time Goal -180 days from arrest date (6 months) 3rd Degree	***Arraignment*** Time Goal - 240 days from arrest date (8 months) 2nd Degree	***Arraignment*** Time Goal - 360 days from arrest date (12 months) 1st Degree/ Complexity
Case Management Conference - 61-80 days from arrest	***Case Management*** Conference - 61-80 days from arrest	***Case Management*** Conference - 61-80 days from arrest
Pretrial Conference Speedy Trial ***NOT WAIVED***: 111-125 days from arrest Speedy Trial ***WAIVED***: 150-170 days from arrest	***Pretrial Conference*** Speedy Trial ***NOT WAIVED***: 111-125 days from arrest Speedy Trial ***WAIVED***: 150-165 days from arrest	***Pretrial Conference*** Speedy Trial ***NOT WAIVED***: 111-125 days from arrest Speedy Trial ***WAIVED***: 240 days from arrest
Trial Call Speedy Trial ***NOT WAIVED*** 141-155 days from arrest Speedy Trial ***WAIVED***: 150-170 days from arrest	***Trial Call*** Speedy Trial ***NOT WAIVED***: 141-155 days from arrest Speedy Trial ***WAIVED***: 231 days from arrest	***Trial Call*** Speedy trial ***NOT WAIVED***: 141-155 days from arrest Speedy Trial ***WAIVED***: 300 days from arrest

Case Flow Process

To help better understand, below is a graph to illustrate the process of a criminal case and what to expect at the various hearings:



Key Terms:

Early Intervention Docket (EID) - This docket is used for the quick disposition of many 3rd degree felonies. The EID calendar is held twice monthly and presided over currently by a Senior Judge, the Honorable Hugh Starnes. The State Attorney's Office (SAO) refers cases to the EID calendar based on the charge as well as the defendant's criminal record. This docket was developed to help the regular felony track judges concentrate more time on cases seeing motions and trials rather than cases easily resolved with a plea at their first hearing. The EID date provided at Arraignment is often earlier than the normal Case Management Conference (CMC) date that a defendant would be provided. Most cases on the EID calendar resolve with either a plea to probation, Felony Diversion, PreTrial Intervention, jail time, or a nolle prosse.

Nolle Prosse/Nolle Prosequi/Nol Pros - A term used in reference to a formal entry upon the record made by a prosecutor in a criminal action in which that individual declares that he or she wishes to discontinue the action as to certain defendants, certain issues, or altogether. In Latin, nolle prosequi "we shall no longer prosecute".

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Speedy Trial - In criminal prosecutions, the right of a defendant to demand a trial within a short time since to be held in jail without trial is a violation of the "due process" provision of the 5th Amendment (applied to the states by the 14th Amendment). Each state has a statute or constitutional provision limiting the time an accused person may be held before trial. In Florida, a person charged for a felony arrest, the law has set 175 days as a reasonable time for affording a speedy trial. Charges must be dismissed and the defendant released if the period expires without trial. However, defendants often waive the right to a speedy trial in order to prepare a stronger defense, and if the accused is free on bail he/she will not be hurt by the waiver.

Administrative Office Of The Courts
20th Judicial Circuit

August 31, 2017
[Print]

FELONY CASE MANAGEMENT

Felony case management procedures were developed in January of 2008, with the intent to expand best practices to all counties to promote uniformity in practice throughout the 20th Judicial Circuit. Procedures were established to improve predictability, efficiency and timely disposition of felony criminal cases in the circuit court and to ensure compliance with provisions and aims of the Florida Rules of Criminal Procedure. Differentiated Case Management techniques allow courts to tailor the case flow process to the requirements of individual cases. The main concepts of Differentiated Case Management are: (1) Setting case tracks, based on criteria that determines the necessary case events and time goals (2) Enhanced organization of court events by using a Pretrial Scheduling Order (3) Close case monitoring to ensure that the case progresses in the most efficient manner

Since inception, the Court, the State Attorney, the Public Defender and the defense bar have collaborated with a view towards a just and efficient disposition of criminal cases.

More information on the Pretrial Program can be found by choosing your county below:
LEE | CHARLOTTE | COLLIER | GLADES | HENDRY

TRANSLATE PAGE

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DISTRICT 15B
LOCAL CRIMINAL RULES

The United States and North Carolina Constitutions guarantee every person the right to due process and to a speedy trial, and assure the rights of victims of crime as well as insure that all persons charged with a crime shall receive all constitutional protections.

Rule 1: General Provisions

1.1 Purpose: These Rules and Criminal Case Management System (CCMS) incorporated herein provide for the orderly, prompt, and just disposition of criminal matters in the Superior Court of the 15B Judicial District.

1.2 Policy: It is the policy of this district that:

1.2.1 All constitutional, statutory, and other rights of defendants, victims, and other witnesses and the State will be protected.

1.2.2 Every event in a criminal case (such as determination of pretrial release, first appearance, appointment of counsel, probable cause hearing, discovery, plea offer, and response, indictment, hearing of motions, arraignment, trial, and sentencing) occur at the earliest time feasible and in an orderly fashion.

1.2.3 There be a reliable schedule of events in every case and every party have timely and actual notice. At a minimum, at each appearance the next event shall be scheduled, when practical.

1.2.4 Criminal cases be handled in a different manner that includes all parties being prepared and present as determined by the DA and Defense Counsel; everyone working cooperatively to raise and address all issues, thereby moving the case along as much as possible at each hearing.

1.2.5 Exceptional cases and circumstances be identified and events scheduled accordingly (see 15B Local Criminal Rule 1.4).

1.2.6 The individual needs of court personnel, attorneys, victims, defendants and witnesses, law enforcement officers, probation officers, and all other persons be handled with understanding and consideration.

1.3 Criminal Case Management Schedule: A Criminal Case Management Schedule ("Case Management Schedule" or "CMS") for each felony case and all cases pending in Superior Court (except Probation matters – see 15B Local Criminal Rule 13) shall be prepared and maintained by the District Attorney in conjunction with the Judicial Support Staff (JSS). The CMS shall be available to each defendant and attorney. A case tracking system (the "Automated Criminal/Infractions System" or "ACIS") shall monitor the number, age, type, name of attorney, next scheduled event, and procedural status of all pending criminal cases and provide for printed schedules and calendars.

1.4 Exceptional cases:

1.4.1. The Senior Resident Judge may designate a specific resident judge or a specific judge assigned to hold court in the District to preside over all proceedings in a particular case. That judge may, with input from the attorneys, create a CMS based on the unique circumstances of the case, or may order the one created pursuant to 15B Local Criminal Rule 1.3.

1.4.2. A Resident Judge may designate a specific case as exceptional for the purposes of deviating from the standard CMS based on the complexity of factual or legal issues, discovery issues, or for other good cause shown. Such a designation pursuant to this rule shall not require the designation of a specific judge to preside over all proceedings.

1.5 Application: These rules shall apply to all felony cases, misdemeanor appeals, and probation violations beginning on the date these rules are adopted as indicated herein below. Superior Court cases pending as of that date may be calendared by the District Attorney at Trial Sessions and may be integrated into the Criminal Case Management System as appropriate.

1.6 Speedy Trial: The Court may modify the CMS upon a motion for speedy trial by either party.

1.7 Jail Cases: The cases of persons confined to jail or other incarceration awaiting trial shall be given priority. The list of inmates provided by the Sheriff to the Clerk shall be available for review at each session of Court.

1.8 Citation: These local rules are to be cited as "15B Local Criminal Rule #____."

Rule 2: Time Standard Goals

2.1 "Speedy Trial" Policy: Each case should be tried or disposed of promptly.

2.2 Time Standards: The Superior Court cases in each county should be disposed of promptly. The following standards are guidelines for prompt disposal of cases, with time computed from the Initiation Date, as defined in 15B Local Criminal Rule 4:

Felonies and Misdemeanor Appeals

50% within 50 days (first setting)
75% within 80 days (2nd setting or pretrial hearing)
95% within 120 days
98% within 180 days (all but murder and other exceptional cases)
All within 365 days

Probation Violations

60% heard at second setting
All heard within 60 days

Rule 3: Appearance of Attorney and Appointment of Counsel

3.1 Appearance of Counsel

3.1.1 Appearance: An attorney shall advise the Clerk of Court and the responsible prosecutor (hereinafter, "RP") soon after undertaking representation. An attorney shall be deemed to be making a general appearance unless a notice of a limited appearance is appropriately filed. [The form "Notice of Limited Appearance" shall be used] Any attorney making a limited appearance shall advise his client of his rights to counsel. Prior to an attorney's last appearance in the matter, the attorney shall make reasonable efforts to ensure that the Court has made proper inquiry and taken appropriate action regarding waiver or appointment of substitute counsel.

3.1.2 Duty upon Appearance: Upon making an appearance in a case, the attorney is responsible for ensuring the Clerk, JSS, and RP have all contact information for the attorney, including email, phone, facsimile, and mailing address.

3.1.3 Presumed method of communication: Communication from the JSS shall be presumed to be via email, unless the attorney notifies the JSS that another method is necessary.

3.1.4 Duty to Keep Current: Attorneys are under a continuing obligation, when practicing in District 15B, to keep the Clerk and JSS informed of all contact information, including a current email address.

3.2 Appointed Counsel

3.2.1 Public Defender: The Public Defender shall designate an intake attorney who is responsible for obtaining basic information, providing Public Defender contact information, and advising client of basic rights at each day of Superior Court, including administrative sessions. The Public Defender shall keep the courtroom clerk advised of the assigned intake attorney for the day. That attorney shall meet with the client that day if available. If the intake attorney is not available, the defendant shall be informed when and where to contact the Public Defender's Office.

3.2.2 Private Appointed Counsel: Private counsel shall be appointed pursuant to Requirements for Appointment of Counsel in the 15B Judicial District, provided that the Court will seek to appoint an attorney willing to handle the case in a timely manner.

3.3 Attorneys of Record: The ACIS and other court records shall accurately reflect the names of the defense attorney and the responsible prosecutor. Whenever counsel changes, the Clerk of Court shall correct the court record immediately except that the District Attorney and Public Defender will record any changes of their attorneys on the ACIS and notify the opposing party. The senior Superior Court courtroom clerk in each county is responsible for maintaining a list of attorneys appearing in Criminal Superior Court. Names entered in ACIS and other records shall be exactly as on that list.

3.4 Probation Violations: When a Probation Officer cites a person for a probation violation hearing and the officer intends to recommend revocation or a material modification, then the officer shall send the defendant to the Clerk's office for appointment of counsel. Any person arrested for a probation shall be cited, or if in custody, taken to the next available court session for appointment of counsel.

3.5 Duties of Newly Appointed Counsel: Newly appointed counsel shall:

3.5.1 Immediately determine any conflict. If there is one, then advise the Court, the client and the RP and obtain an order appointing new counsel. If court is not in session or a Superior Court Judge is not otherwise available, take the client to the Clerk's Office so that new counsel may be appointed immediately.

3.5.2 Immediately confirm the client's addresses and telephone numbers for court records.

3.5.3 Immediately review the Release Order and take appropriate action.

3.5.4 As soon as practical, determine the status of the case, the CMS and generally review the case with the client.

3.5.5 As soon as practical, talk with the RP and endeavor to take all actions which can be done during that day or session to resolve the case or as many issues as possible.

3.5.6 As soon as practical, with regard to a probation violation, talk with the Probation Officer and seek to resolve the matter that day or during that session.

Rule 4: Initiation Date

The Initiation Date of a case in Superior Court is the date of a waiver or finding of probable cause, date of appeal from District Court, date of indictment, date of a filed bill of information, or filing of an order changing venue, the last to occur. A probation violation case is initiated upon the service of the Violation Report.

Rule 5: Discovery

5.1 Discovery Request Presumed: Once counsel has appeared or been appointed in a case, it shall be presumptively assumed that counsel is seeking those items discoverable under the constitutions and laws of North Carolina and the United States. No formal request for discovery under 15A-902(a) need be made. Provision of discovery by the State acts as an automatic request for reciprocal discovery from the Defendant. The Court may, after motion by the opposing party or on its own motion, impose sanctions for failure to provide discovery, reciprocal discovery, or continuing discovery as provided by law or anticipated by these rules.

5.2 Timely Discovery: Discovery, even if partial, shall be made as quickly as feasible. The RP shall also make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, mitigates the offense, "has a reasonable probability" of altering the jury's verdict in favor of the defendant, or mitigates punishment or sentencing. In any event, the District Attorney shall provide discovery to the defendant at least 10 days prior to the first Administrative Setting. Failure to provide timely discovery constitutes reasonable grounds for a continuance by the defendant.

5.3 Protection of Confidentiality: Consistent with discovery statutes and rules, attorneys are strongly encouraged to protect the privacy of individuals, as well as private financial, health, and other records received in the discovery process.

Rule 6: Plea Offers

6.1 Offer and Worksheet: The RP shall extend a written or electronic plea offer and sentencing worksheet to defense counsel no later than 10 days prior to the first Administrative Setting. The offer may include an expiration date.

6.2 Response: Defense counsel shall promptly inform the defendant of the plea offer. If possible, defense counsel shall communicate an acceptance or rejection of the plea offer to the RP prior to the next setting of the case.

6.3 Discussions: After receiving the plea offer, the defense attorney should consult with the RP and discuss any reasons why the offer should be different. The RP should then review the original offer and make certain it is the best offer to be made.

6.4 Dismissal: If the RP takes a dismissal, the RP should notify the defendant or defense counsel, if represented, of such action by the end of the next business day following such dismissal. In addition, if the defendant is in custody, the written dismissal shall promptly be served on the chief officer of the custodial facility.

6.5 Plea offer change: If the RP discovers the prosecution is unable to fulfill an understanding previously agreed upon in plea negotiations, the RP shall give prompt notice to the defense counsel. Defense counsel should be given reasonable time after such notice to discuss any new offer with the client and such change may constitute grounds for a continuance.

6.6 Actual Innocence: The RP shall always be vigilant for any case where the accused may be innocent of the offense charged. In any such case, the RP shall strive to ensure that an accused not be treated unfairly.

Rule 7: Informal Case Conferences

The RP and defense attorney may have an informal case conference as early as feasible, and subsequent conferences as needed. The conferences may be in person, by telephone, or electronically. During those conferences they shall seek to resolve as many issues as possible including discovery, plea offers, motions and other matters. Also, they shall identify all matters which need to be considered by the Court.

Rule 8: Motions

8.1 Motions Practice: Motions shall be filed and served as provided in N.C.G.S. Chapter 15A unless otherwise provided in these rules or a Scheduling Order.

8.2 Deadlines for Filing: All pre-arraignment motions should be filed at least one week prior to the final administrative setting. All other pretrial motions should be filed promptly after counsel determines the motions are appropriate.

8.3 When Heard: Pending motions may be heard at any scheduled hearing. Motions may be calendared by notice after consultation with opposing counsel and the JSS.

Rule 9: Scheduling and Calendaring for Motions, Pleas, Trials, and Sentencing.

9.1 Cooperative Scheduling: The District Attorney and the JSS shall work together with the Public Defender, attorneys, Clerks of Superior Court, probation officers, victim witness coordinators, sentencing services professionals and other affected parties in scheduling all matters. The professional and personal obligations of participants shall be considered.

9.2 Scheduling: The next court appearance shall be scheduled, if practical.

9.2.1 The initial appearance and first appearance shall be scheduled as provided in the District 15B Pre-trial Release Policy. Magistrates should consult the JSS regarding scheduling cases in Superior Court.

9.2.2 District Court: At the first appearance the District Court Judge should schedule the date for Probable Cause Hearing. Upon a finding or waiver of probable cause, the defendant shall be given notice that the case is being transferred to the Superior Court Division. If known at that time, the Defendant should be informed of the date and time of the Administrative Setting in Superior Court.

9.2.3 Superior Court: The JSS shall prepare a proposed Scheduling Order for each case. The Court and parties will review the order at each hearing. The Court will then enter a Scheduling Order which may be modified only by the Court, the JSS, or as provided in these rules.

9.3 Conflicting Schedules: Attorneys and defendants should bring his/her calendar to all hearings to identify any conflicts. Victims, witnesses, attorneys, probation officers and other affected persons shall immediately advise the District Attorney and JSS of any scheduling conflicts, vacation, illness or other conflict. Attorneys shall advise witnesses of trial dates within two weeks of trial being scheduled and immediately let opposing counsel and the JSS know of any conflicts. An attorney may then request the Court to reschedule the trial date, in conjunction with 15B Local Criminal Rules 9.1 and 9.4. No matters shall be scheduled during a period of properly designated Secured Leave (pursuant to 15B Local Criminal Rule 18) upon proper notice; failure to designate Secured Leave or properly appear in court in person or through an associate shall be grounds for sanctions, including but not limited to contempt.

9.4 Trial Date: The District Attorney shall announce a proposed trial date at the Administrative Setting and the defendant may respond. The Court shall set that date as the tentative trial date unless, after providing the parties an opportunity to be heard, the Court determines that the interest of justice require the setting of a different date. In that event, the District Attorney shall propose another trial date for consideration. The Court shall then enter a Trial Scheduling Order, if not already set as part of the CMS. The trial date shall occur no sooner than 30 days after the final administrative setting unless agreed upon by the State and the defendant. The trial should be within 30 to 90 days of the final administrative setting. A pretrial motion hearing or arraignment shall not be considered an "administrative setting" except by agreement by State and the Defendant.

9.5 Trial date set by Court: When a case has not been tried or otherwise disposed of within 120 days of indictment or service of notice of indictment when required, the case shall be scheduled on the next available calendar for a hearing for the purpose of establishing a trial date.

9.6 Venue for Administrative Settings: Venue for administrative settings may be in any county within the district when necessary to comply with the terms of the criminal case docketing plan. The presence of the defendant is only required for administrative settings held in the county where the case originated.

9.7 Setting and Publishing of Trial Calendar

9.7.1 The District Attorney shall prepare the trial calendar not less than ten (10) working days prior to each session of criminal trial court. The trial calendar shall schedule the cases in the order in which the District Attorney anticipates they will be called for trial, and should not contain cases that the district attorney does not reasonably expect to be called for trial.

9.7.2 The Clerk of Court shall promptly publish the calendar on this district's web site (www.nccourts.org) and send a copy to each attorney of record and unrepresented defendant. The copy may be sent by email, placed in the attorney's box at the Courthouse or, when requested, by regular mail.

9.8 Trial Scheduling: Trial Calendar cases should be scheduled to effectively use the available court resources while minimizing inconvenience for those summoned for jury service and for other participants, including victims, witnesses, court personnel and attorneys. Cases may be scheduled by the day and for a morning or afternoon.

9.9 Trial Order Deviation: Deviation from the announced order or the order set forth in the trial calendar will require approval of the Presiding Judge if the defendant objects; but the defendant may not object if all the cases scheduled to be heard before the defendant's case have been disposed of or delayed with the approval of the presiding judge. A case may be continued from the trial calendar only by consent of the State and the defendant (with approval of the Court) or upon order of the presiding judge or a Resident Superior Court judge for good cause shown.

9.10 Cases not reached: Trials not reached will be promptly rescheduled by the District Attorney upon consultation with the parties and JSS.

Rule 10: Administrative Settings

10.1 Administrative Settings: Administrative Settings shall be at times certain on an appropriate frequency. Schedules shall be continuously developed and flexible. Although the calendar will be available upon request, attorneys and unrepresented parties will be responsible for keeping track of all scheduled events.

10.2 Administrative Settings Scheduled: Each case shall be scheduled for a certain day and time during the next available Administrative Week after Initiation, but shall occur no sooner than two weeks from Indictment.

10.2.1 The Clerk of Court is responsible for the preparation and publication of the Administrative Calendar.

10.2.2 The District Attorney and JSS will seek to group all the cases of each defense counsel together.

10.2.3 If the Grand Jury does not act on the indictment prior to the Administrative Setting, discovery is complete and a plea offer has been

extended, either party may reschedule the setting upon notice to the other unless the Defendant is willing to proceed on a Bill of Information, the Defendant does not have an attorney, the defendant is in custody or there is some matter to be addressed by the Court.

10.3 Attendance: The defendant, defense counsel and the RP shall attend the administrative setting. The Defendant and defense counsel may be excused from attendance with the consent of the RP. However, the Court may require the attendance of any defense counsel and/or Defendant later in the same session or at a subsequent Administrative Setting. Victims may also attend and be heard as provided by the Victim Rights Act.

10.4 Administrative Setting Agenda: At the First Administrative Setting, the Court shall:

10.4.1 Determine counsel status.

10.4.2 Identify conflicts of interest.

10.4.3 Determine if charges are to be joined for trial and if cases of other defendants are to be joined for trial.

10.4.4 Review Pretrial Release status.

10.4.5 Determine victim notification status.

10.4.6 Confirm that discovery and, if applicable, reciprocal discovery is complete. If not, schedule completion. Also, hear and rule on any discovery issues.

10.4.7 Confirm that a plea offer has been conveyed and responded to by counsel. Inquire as to the status of plea negotiations.

10.4.8 Hear any pre-trial motions. Schedule a time for hearing motions not heard.

10.4.9 Arraign the defendant unless the defendant has filed or files a written waiver.

10.4.10 Review the status of the case and address any unresolved issues. If discovery has not been completed, a plea offer made, a plea offer responded to or for other good cause, the Court may continue the hearing until later in the session or schedule a subsequent Administrative Setting.

10.4.11 Set deadlines for filing and responding to any pre-trial motions allowed to be filed later.

10.4.12 Identify all exceptional or special issues such as competency, agreements for testimony, further investigation, request for delay, unavailable witnesses. These matters should be ruled upon, noted, and scheduled on the CMS.

10.4.13 Inquire whether the defendant understands plea offer and that the offer may be withdrawn.

10.4.14 At the request of either party, the Court will conduct a plea conference in order to make every effort to resolve cases at the earliest possible stage of the proceeding.

10.4.15 Adjudicate any guilty pleas or schedule a time for entry of plea, and then sentence or schedule sentencing. (Sentencing may be delayed by plea agreement or upon request in the discretion of the Court.)

10.4.16 Schedule a trial date as provided in 15B Local Criminal Rule 9. 4 or 9.5.

10.5 Subsequent Administrative Setting: The Court may schedule a subsequent Administrative Setting if found necessary to promote the fair administration of justice. It is expected that most cases will be resolved at the first or second Administrative Setting, or if not resolved, scheduled for trial.

Rule 11: Motions for Continuance

11.1 Motions for Continuance: Motions for continuance of trials should be made in writing and opposing counsel notified as soon as an attorney learns of grounds for the motion. Any person making a motion at a later date must show good cause for the failure to timely file.

11.2 Form of Motion: All applications for continuance shall be by written motion made on state form AOC-CR-410. The application shall include the name of the case; the file number(s); date of arrest; name, address (including email), telephone and fax numbers of attorneys (including opposing counsel); the grounds for application, any relevant witness information (such as: out-of-state witness, subpoena unserved, witness in custody), the number of previous continuances and the position of the other party, if known.

11.3 Timing, Location: The motions shall be heard at the earliest possible date. The JSS may set the motion for hearing in either county.

11.4 When Granted: The Court may continue a trial upon motion of either party for compelling reasons when in the best interest of justice.

11.5 If Granted: Any continuance shall be to a trial date certain.

11.6 Conflicting engagements and jail cases: When an attorney has conflicting engagements in different courts, priority shall be as described in Rule 3.1 of the General Rules of Practice for the Superior and District Court.

11.7 Request for continuance prior to Trial Session: Requests may be made to a Resident Superior Court Judge or to the Presiding Superior Court Judge for the week of trial.

Rule 12: Sanctions

12.1 Defendant, Witness: Failure of a defendant or witness to appear as required shall subject that person, at the discretion of the judge, to any sanctions provided by law.

12.2 Attorney: Failure to comply with any section of these rules shall subject counsel to all sanctions allowed by law and deemed appropriate in the discretion of the Presiding Judge.

Rule 13: Probation Violation Cases

13.1 First Appearances: First Appearances in Probation Violation Cases ("PVCs") shall take place within seven (7) days of service of the violation report.

13.2 Preliminary Hearing: Pursuant to 15A-1345, unless waived, a preliminary hearing on an allegation of a probation violation shall be held within seven working days of an arrest of a probationer to determine if probable cause exists. Otherwise, the probationer shall be released and continue on probation pending the probation violation hearing.

13.3 Scheduling: PVCs shall, when practical, be heard on the next available Administrative Session of Court.

13.3.1 No probation violation hearing shall be set the same week an attorney is appointed unless both the prosecution and defense agree to hear the matter.

Rule 14: Motions for Appropriate Relief

14.1 Review by Judge: Motions filed seeking appropriate relief shall be forwarded by the Clerk of Court to the office of a Resident Superior Court Judge for review pursuant to N.C.G. S. 15A-1420(1)-(7).

14.2 Upon review, a Superior Court Judge shall take one of the following actions:

14.2.1. Dismissal: Dismiss the motion without evidentiary hearing but with written order stating the reasons for the denial of an evidentiary hearing and the denial of the motion; OR

14.2.2. Evidentiary Hearing: Allow an evidentiary hearing, appoint counsel if necessary and notify the District Attorney that an evidentiary hearing has been allowed; and immediately schedule an initial hearing date at a future administrative court session within sixty (60) days in the county where the motion was filed.

Rule 15: Evidence and Exhibits *(see NC General Rule 14 and AOC Forms)*

15.1 Trial or Other Hearing: The attorneys shall be responsible for handling and marking of evidence. Parties appearing pro se shall be instructed and assisted by the clerk in applying these rules.

15.1.1. Marking of Exhibits: All exhibits shall be marked, numbered, and introduced with "evidence" tags or labels indicating whether State or Defendant as applicable. When there are multiple defendants, labels shall reflect the specific defendant. Counsel shall attempt to mark and number all exhibits before the trial or hearing. The exhibits should also be provided to opposing counsel before the trial or hearing.

15.1.2. Custody: All evidence shall be in the custody of the Clerk once it is introduced. Prior to that time, the respective attorneys, parties and witnesses shall be responsible for all evidence. If possible, the Court and attorneys should agree on disposition of evidence at the end of a trial or hearing.

15.1.3 Log: The courtroom clerk shall maintain an evidence log on form AOC-G-150. Attorneys are encouraged to provide a list of proposed exhibits and case law citations to the clerk and court reporter prior to the beginning of any hearing or trial.

15.1.4 Large Exhibits, Diagrams, Posters: When a party offers an enlarged documentary exhibit, the party shall also offer the document or a photographic reproduction of the document in its regular size to the Court. Enlargements shall be maintained by the party producing them unless otherwise directed by the Court. If the Clerk is to preserve any documents or other exhibits mounted on foamboard or other backing, the offering party should remove it from the backing.

15.1.5 Copies: Attorneys shall be responsible for ensuring simultaneous viewing by the Court, attorneys, and jury all documents which are introduced into evidence, when practical. This may be done electronically (video, PowerPoint, slides, etc), or by ensuring sufficient copies of each document to provide the Court, attorneys, and each juror with a copy. At the conclusion of the trial, the Clerk shall destroy all copies upon maintaining the original or 1 copy of the document.

15.2 Preservation of Evidence

15.2.1 Conclusion of Trial: At the conclusion of trial, the Courtroom Clerk shall take all of the evidence, confirm that it is clearly marked. The Clerk shall prepare disposition and destruction orders for signing by the Judge.

15.2.2 Packaging: The Clerk shall place all evidence in a package (envelope, plastic bag, or cardboard box as appropriate), seal the package with tape, date and initial the seal in a manner so that later the Clerk may determine if the package has been breached.

15.2.3 Notice of Intent to Dispose of Evidence: The courtroom clerk shall prepare and serve each attorney with a Notice of Intent to Dispose of Exhibits/Evidence (form AOC-G-151) prior to the conclusion of the trial.

15.2.4 Inventory: The Clerk shall maintain an inventory of all evidence in custody of the Clerk.

15.2.5 Controlled Substances: Whenever controlled substances are introduced into evidence, the Clerk shall place the controlled substances in a sealed envelope and initialize it in a manner that the Clerk can tell if the envelope has been breached. All controlled substances shall be secured in a safe or other secure locked depository within the vault in the Clerk's Office. Only the Clerk and any designated evidence custodians designated by the Clerk shall have access to that depository.

15.2.6 Inventory of Controlled Substances: A copy of the inventory of controlled substances shall be provided by the Clerk to a Resident Superior Court Judge, the District Attorney, and the Sheriff, at least quarterly. Twice a year, on or about the 15th of January and the 15th of July, the Clerk shall review the inventory of all evidence and destroy all which are no longer needed in accordance with all State law and rules.

15.2.7 Firearms, Ammunition, and other Incendiary Devices: Firearms, ammunition, and other incendiary devices shall be separately inventoried by the Clerk. They shall be separately maintained in a locked, sealed cabinet within the vault in the Clerk's Office. Only the Clerk and any designated evidence custodian shall have access to it. At the conclusion of each trial, the Clerk shall inquire of the District Attorney and the defense attorney as to the preservation of any ammunition or incendiary devices. The Clerk shall also request of the Court an order to destroy the firearm, and shall maintain that order with the inventory of the firearm and in the appropriate court file.

15.2.8 Biological Evidence: Biological evidence, including but not limited to, DNA samples, shall be preserved according to law.

Rule 16. News Media

(see NC General Rule 15)

16.1 Access to the Courts: It is the policy to provide access to the Courts by the media in accordance with NC General Rule 15.

16.2 Notification to Courts: News media may be allowed pursuant to NC General Rule 15 only if a Resident Superior Court Judge or Presiding Judge is notified.

16.3 Jurors: Media coverage, publication, or identification of jurors is expressly prohibited at any stage of a judicial proceeding, including jury selection.

Rule 17. Weapons in Court

17.1 No Weapons: Except as provided in N.C.G.S. Sec. 14-415.11(c), and 14-269.4, no one except a Law Enforcement Officer who is on duty may possess firearms or other weapons in any Courthouse.

Rule 18. Secure Leave Policy

18.1 Designation of Secure Leave: Each attorney is entitled to designate three weeks during each calendar year as secure leave during which time no matter requiring that attorney's appearance shall be calendared for hearing in any court in this District and the attorney shall not otherwise be required to appear before any tribunal of this District. The weeks designated may be consecutive.

18.2 Time to Designate: A secured leave period shall be designated 90 days or more in advance. Attorneys shall not be entitled to designate a period subsequent to a trial or other matter having already been set by a Court.

18.3 Method of Designation: Designation shall be made by the attorney filing a letter in the offices of the Clerks of Superior Court of Orange and Chatham Counties as applicable. The offices of the Clerks of Superior Court for Judicial District 15B shall maintain a file containing letters from attorneys regarding vacation status. In addition, attorneys shall file a copy with the offices of the Resident Superior Court Judges and the Chief District Court Judge if they practice in the respective division and depending upon "division" pendency of the case(s) referenced in the letter. Any pending criminal case should be referenced. Also, the attorney shall give a copy to the District Attorney. The attorneys shall retain a copy of the letter marked filed which may be provided to the judges and opposing counsel as needed. Any attorney practicing in the civil courts shall comply with 15B Local Civil Rule 25.

18.4 This policy is not exclusive: For extraordinary circumstances, the Court may designate other or additional weeks of vacation when an attorney is faced with a particular or unusual situation or for other reasons as has been the custom in this District.

Rule 19. Mailing Address

19.1 Mailing Addresses for the JSS in District 15B:

Orange County:
Trial Court Coordinator
Superior Court Judges' Office
Old Orange County Courthouse
104 East King Street
Hillsborough, North Carolina 27278
Tel. (919) 245-2221
Fax (919) 644-3026
Email Stacie.J.Cruz@nccourts.org

Chatham County:
Judicial Assistant
Superior Court Judges' Office
Chatham County Courthouse
PO Box 609
Pittsboro, North Carolina 27312
Tel. (919) 542-7234
Fax (919) 542-7204
Email Tammy.K.Keshler@nccourts.org

19.2 Physical Locations: The offices of the Resident Superior Court Judges are located at the following addresses:

Orange:
Old Orange County Courthouse, 104 East King Street, Hillsborough, NC 27278.

Chatham:
Chatham County Courthouse, 1 Hillsboro Street, Pittsboro, NC 27312. The courthouse is in the middle of the traffic circle, and the offices are on the 3rd floor, which are accessible via the stairwell on the east side, behind the courtroom. Persons with disabilities or who anticipate difficulty in accessing the office should call ahead to make arrangements.

19.3 Appropriate Office to Contact: Contact the JSS or Resident Superior Court Judge in the county in which the case is filed.

Rule 20. Notice

20.1 Notice: These rules shall be posted at the following:

- Clerk's office in Orange and Chatham Counties
- Superior Court Judges' Offices in Orange and Chatham Counties
- www.nccourts.org

20.2 Copy to Attorneys: These rules shall be distributed to all attorneys of record within the judicial district pursuant to Rule 2 of the Superior and District Court Rules.

20.3 Additional Copies: The Clerks and the JSS shall maintain a supply of these Rules for those attorneys and parties who request the same.

New Mexico court OKs changes to speedy trial rule

By Maggie Shepard / Journal Staff Writer

Published: Wednesday, January 27th, 2016 at 2:35pm
Updated: Wednesday, January 27th, 2016 at 10:33pm

ALBUQUERQUE, N.M. — The New Mexico Supreme Court has finalized how it will loosen the 2014 rules it put into place to get the Bernalillo County criminal justice framework in working order, correcting a yearslong backlog of cases that contributed to an overpopulated jail.

Cases have started to move through court faster and the jail population has come down, but District Attorney Kari Brandenburg and Albuquerque Police Chief Gorden Eden loudly complained about the rules.

New Mexico Supreme Court Chief Justice Barbara Vigil, left, chats with APD Chief Gorden Eden following the meeting with representatives of the District Attorney's Office, Albuquerque police, Bernalillo County Sheriff's Department and Law Offices of the Public Defender to discuss proposed amendments to the case management order in the 2nd Judicial District. (Adolphe Pierre-Louis/Albuquerque Journal)

They said the strict timelines for turning over evidence and holding hearings were unworkable and resulted in cases being dropped, endangering the community by letting dangerous criminals off the hook.

The court agreed in November 2015 to look at changing the Case Management Order, or CMO, after receiving suggested changes from the Bernalillo County Criminal Justice Oversight Committee. The committee was tasked with streamlining the criminal justice system to bring down the jail population and protect the constitutional rights of innocent people.

The DA's Office and the Albuquerque Police Department participate in that committee.

K

Most of the requested changes targeted extending deadlines for evidence to be turned over from police to prosecutors and for prosecutors to turn it over to defense attorneys. Under the former, and new, CMO rules, a judge can dismiss a case if parties fail to meet deadlines.

But those deadlines were sometimes unreasonable, especially in complicated cases or cases with uncooperative witnesses.

That, Eden and Brandenburg said, meant some dangerous defendant cases were being dismissed on technicalities, jeopardizing the community.

Among the changes, released Wednesday, are timeline extensions: between 30 and 90 days extra depending on case type.

The amended rules also add a new provision aimed at the complaint that the rules were releasing dangerous people from charges.

The provision allows the district attorney to lodge a community safety protest if a judge dismisses a case on a timeline violation.

Second District Court Chief Judge Nan Nash said the extensions and other changes do not threaten the improved case flow the court has experienced under the CMO.

"It gives us a bit more time to fit everything in, and, consequentially, a little bit more freedom as we get matters set for trial," Nash said Wednesday.

She said she appreciates the Supreme Court's collaboration and its willingness to listen to the various parties affected by the rule.

Brandenburg's office was still reviewing the changes Wednesday night to determine how the changes will affect prosecutors' work.

Albuquerque City Attorney Jessica Hernandez said in a statement that the changes "are a step in the right direction" but that "there are other important issues that still need to be addressed to help keep our community safe," such as burdensome evidence requirements.

The changes go into effect Tuesday.

Contact the writer.

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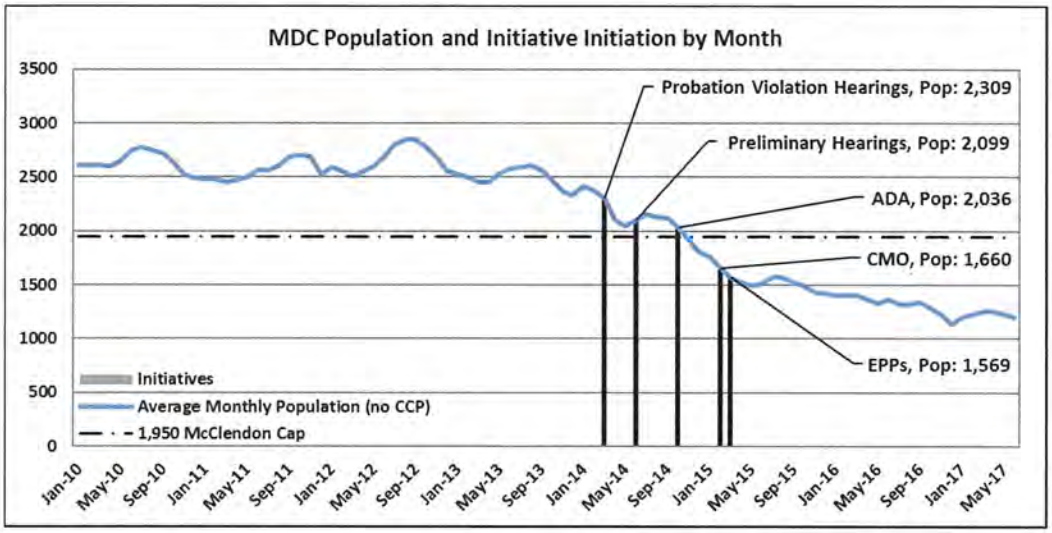
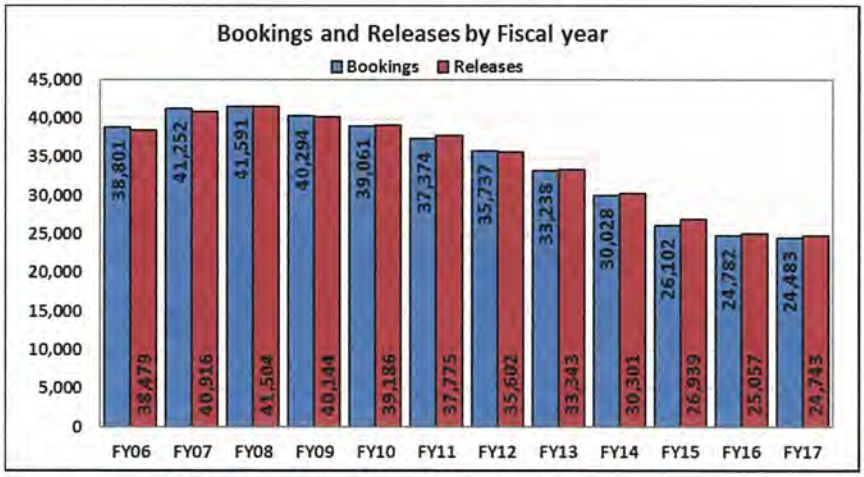
Population, Booking, and Length of Stay

The population of the Metropolitan Detention Center[1] peaked at just over 2,900 people in August of 2012. At the end of fiscal year 2017, the population was at 1,144, a decrease of approximately 60%.

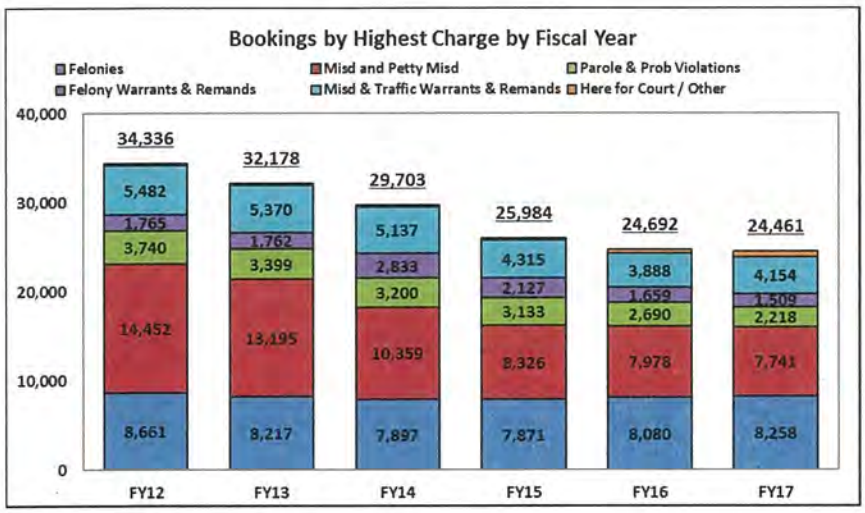


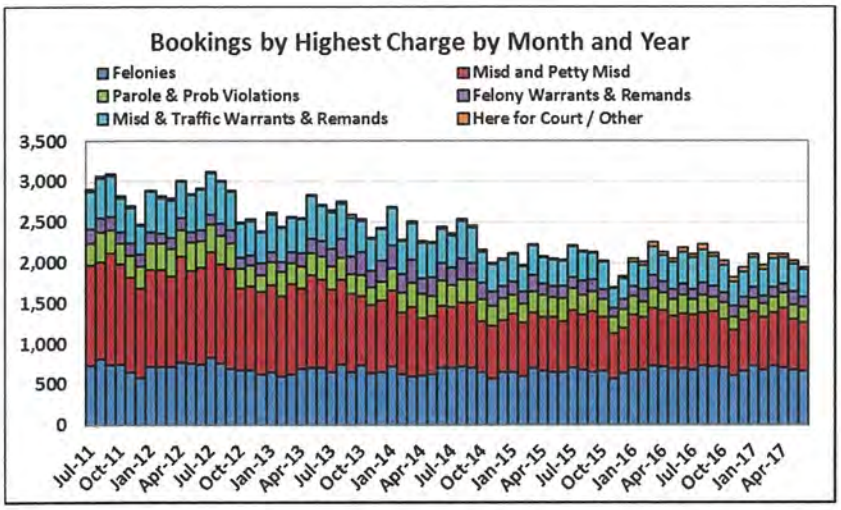
Jail population is driven by two factors: the number of jail admissions and the length of stay. The number of annual bookings by fiscal year had been declining for years and has stayed relatively consistent over the last two years.



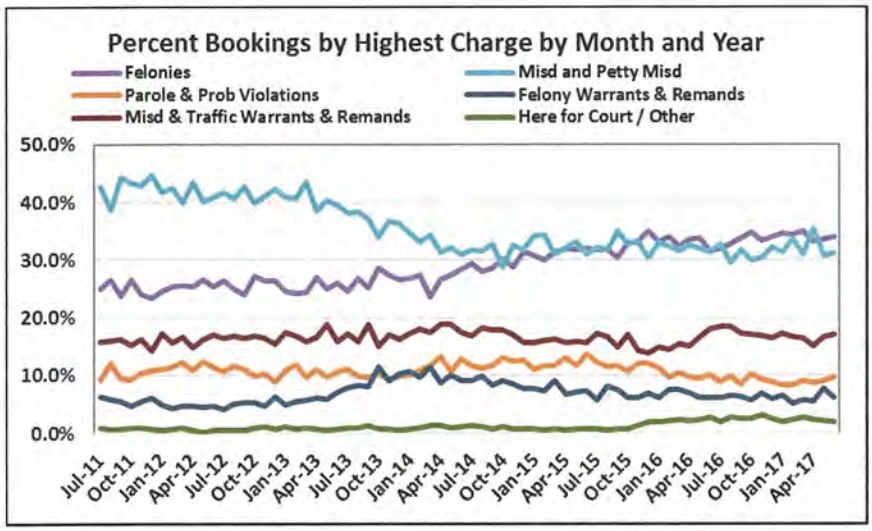
Using data from EJS[2], the available information on charges[3] was used to identify the highest charge associated with the bookings. These bookings were totaled by fiscal year and month and year.

[1] In custody, no CCP, with out of county
[2] The information system used at the MDC to collect inmate information.
[3] While additional information is located in EJS, the programming is not available to pull this information.

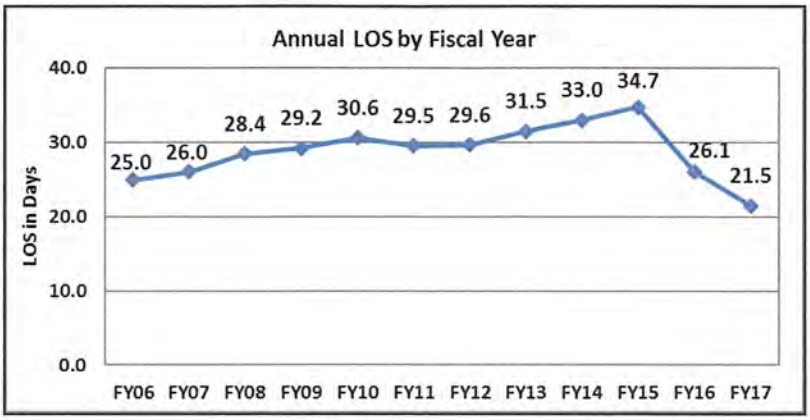




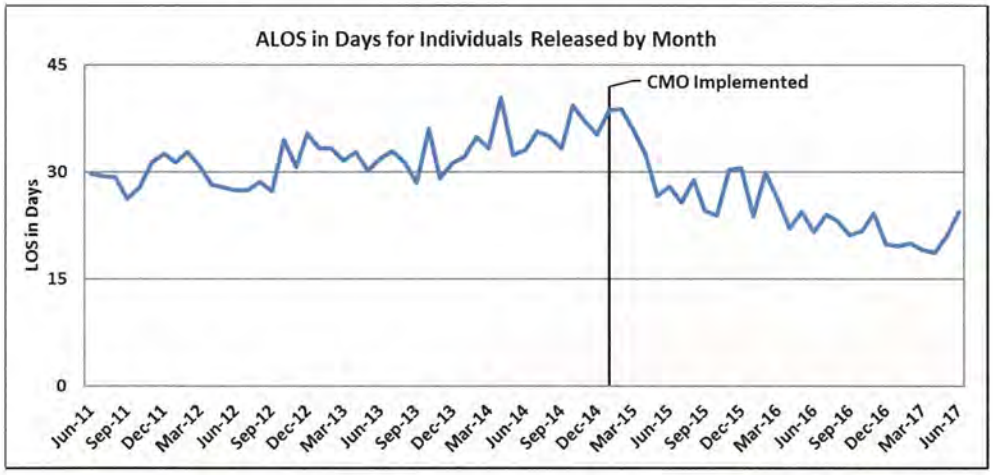
Since July of 2011, the proportion of bookings comprised of felonies has increased while the proportion of misdemeanors and petty misdemeanors as decreased.



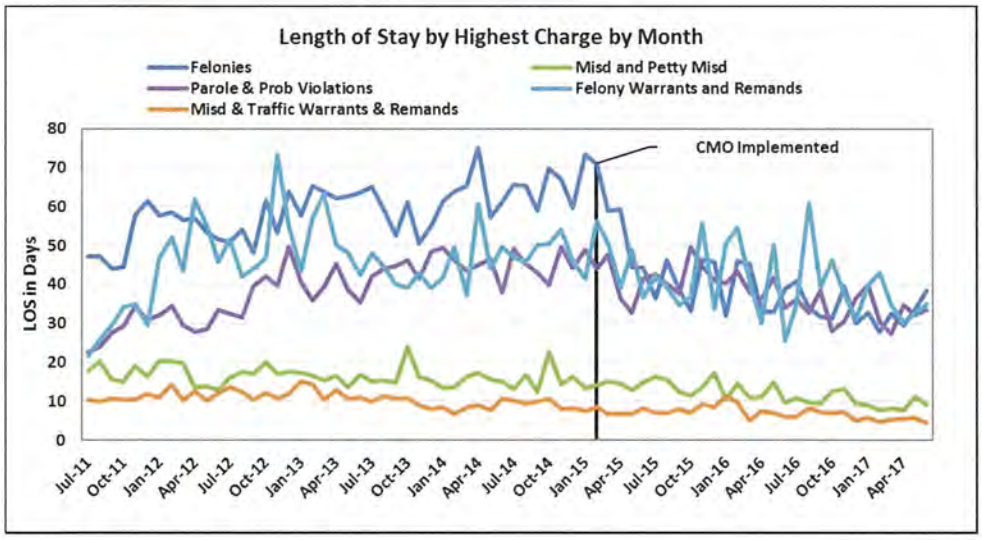
The length of stay (LOS) had increased for several fiscal years and then decreased during fiscal years 2016 and 2017.



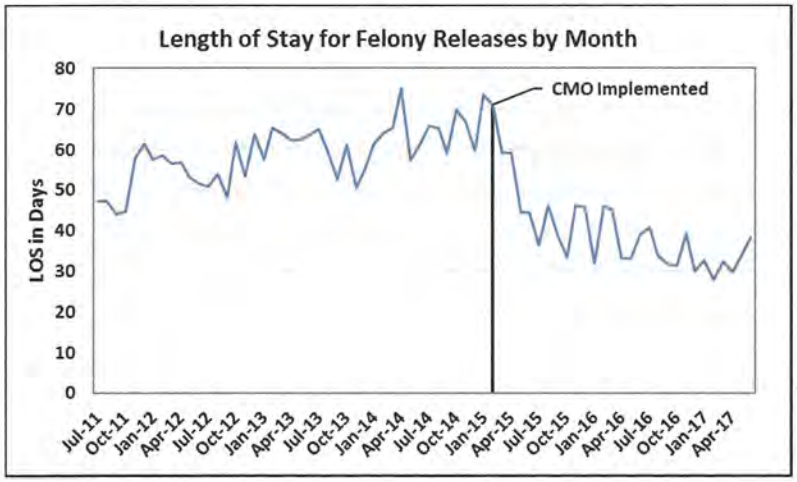
The monthly LOS was charted and this decrease occurs at approximately the same time as the implementation of the CMO.



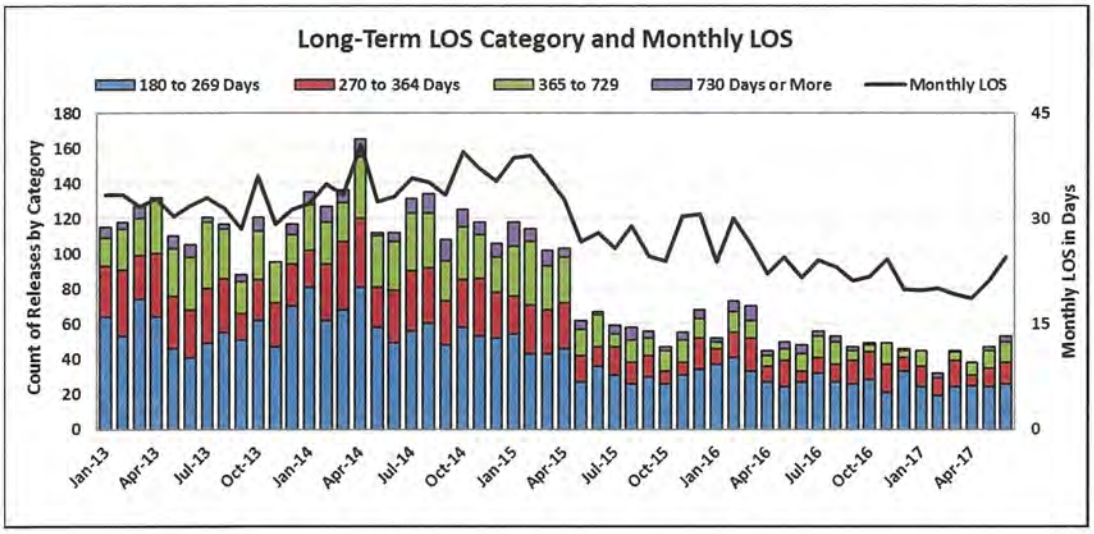
The LOS was calculated for broad charge categories.



Below is a closer look at the LOS for releases for which the booking had a felony as the highest charge. After the implementation of the CMO, the LOS for felony bookings decreased.



The intent of the CMO is to resolve cases in a quick manner. In 2015 there was a drop in people released with longer lengths of stay which contributed in part to the decrease in the overall LOS by month.



2012-2013 Policy Paper
Evidence-Based Pretrial Release

Final Paper

Conference of State Court Administrators

M

Author

Arthur W. Pepin, Director
New Mexico Administrative Office of the Courts

COSCA Policy and Liaison Committee

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Table of Contents

Glossary of Terms

Bail – Bail refers to a deposit or pledge to the court of money or property in order to obtain the release from jail of a person accused of a crime. It is understood that when the person returns to court for adjudication of the case, the bail will be returned in exchange. If the person fails to appear, the deposit or pledge is forfeited. There is no inherent federal Constitutional right to bail; a statutory right was first created in the 1960s.

Bond – A term that is used synonymously with the term "bail" and "bail bond." (*See above*).

Citation release – a form of nonfinancial pretrial release in which the defendant is issued a written citation, usually at the time of arrest, and signs the citation pledging to appear in court when required.

Commercial bail agent/bondsman – a third party business or person who acts as a surety on behalf of a person accused of a crime by pledging money or property to guarantee the appearance of the accused in court when required.

Compensated surety – a bond for which a defendant pays a fee to a commercial bail agent, which is nonrefundable.

Conditional release – a form of nonfinancial pretrial release in which the defendant agrees to comply with specific kinds of supervision (e.g., drug testing, regular in-person reporting) in exchange for release from jail).

Deposit bond - a bond that requires a defendant to post a deposit with the court (usually 10% of the bail amount), which is typically refunded upon disposition of the case.

Full cash bond – a bond deposited with the court, the amount of which is 100% of the bail amount. The bond can be paid by anyone, including the defendant.

Pretrial - The term "pretrial" is used throughout this paper to refer to a period of time in the life of a criminal case before it is disposed. The term is a longstanding convention in the justice field, even though the vast majority of criminal cases are ultimately disposed through plea agreement and not trial.

Property bond – a bond that requires the defendant to pledge the title of real property valued at least as high as the full bail amount.

Release on recognizance – a form of nonfinancial pretrial release in which the defendant signs a written agreement to appear in court when required and is released from jail.

Surety–a person who is liable for paying another's debt or obligation.

Surety bond – a bond that requires the defendant to pay a fee (usually 10% of the bail amount) plus collateral if required, to a commercial bail agent, who assumes responsibility for the full bail amount should the defendant fail to appear. If the defendant does appear, the fee is retained by the commercial bail agent.

I. Introduction

Pretrial judicial decisions about release or detention of defendants before disposition of criminal charges have a significant, and sometimes determinative, impact on thousands of defendants every day while also adding great financial stress to publicly funded jails holding defendants who are unable to meet financial conditions of release. Many of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released.[1] Conversely, some with financial means are released despite a risk of flight or threat to public safety, as when a bond schedule permits release upon payment of a pre-set amount without any individual determination by a judge of a defendant's flight risk or danger to the community. Finally, there are individuals who, although presumed innocent, warrant pretrial detention because of the risks of flight and threat to public safety if released.

Evidence-based assessment of the risk a defendant will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety. The Conference of State Court Administrators advocates that court leaders promote, collaborate toward, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions. COSCA further advocates the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crimes.

II. The Law

The Supreme Court of the United States has said, "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[2] The right to bail has been a part of American history in varying degrees from the beginning -- 1641 in Massachusetts and 1682 in Pennsylvania. Other state constitutions adopted the Pennsylvania provision as a model.[3] Nine states and Guam follow the pattern of the United States Constitution by prohibiting "excessive bail" without explicitly guaranteeing the right to bail.[4] Forty state constitutions, as well as the Puerto Rico Constitution and the District of Columbia Bill of Rights, expressly prohibit excessive bail.[5] One state, Maine, had a constitutional provision prior to 1838 that expressly provided the right to bail, but by amendment that year the Maine Constitution now only prohibits bail in capital cases, without otherwise addressing the matter.[6] However, the Maine Supreme Judicial Court held that the current language continues the guarantee of the right to bail that was express prior to 1838.[7] The Federal

Judiciary Act of 1789 provided for the absolute right to bail in non-capital cases. The Eighth Amendment prohibition on excessive bail was adopted in 1791 as part of the Bill of Rights.[8]

Freedom before conviction permits unhampered preparation of a defense and prevents infliction of punishment before conviction. Without the right to bail, the presumption of innocence would lose its meaning.[9] The purpose of bail is to ensure the accused will stand trial and submit to sentencing if found guilty.[10] Another legitimate purpose is reasonably to assure the safety of the community and of crime victims.[11]

Twelve states, the District of Columbia, and the federal government have enacted a statutory presumption that defendants charged with bailable offenses should be released on personal recognizance or unsecured bond unless a judicial officer makes an individual determination that the defendant poses a risk that requires more restrictive conditions or detention.[12] Six other states have adopted this presumption by court rule.[13] However, it is common in many states to have bail schedules, adopted statewide or locally, that establish a pre-set amount of money that must be deposited at the jail in order for a defendant to obtain immediate release, without any individual assessment of risk of flight or danger to the community. In a 2009 nationwide survey of the 150 largest counties, among the 112 counties that responded, 64 percent reported using bond schedules.[14]

Despite the common use of bond schedules (also commonly termed "bail schedules"), they seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant's risk of failure to appear and threat to public safety. Two state high courts have rejected the practice of imposing non-discretionary bail amounts based solely on the charge, as in a bail schedule. The Hawai'i Supreme Court found an abuse of discretion for a trial court to apply a bail schedule promulgated by the senior judge that ignored risk factors specific to the defendant.[15] The Oklahoma Court of Criminal Appeals overturned a statutory mandate for a particular bail amount attached to a specific crime: "[The statute] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail."[16]

In the United States in the twenty-first century, it is common to require the posting of a financial bond as the means to obtain pretrial release, often through procuring the services of a commercial bond company, or bail bondsman. Bonding companies typically require a non-refundable premium payment from the defendant, usually 10 percent of the bail set by the court. Many companies also require collateral sufficient to cover the full bond amount.[17] In 2007 the DOJ Bureau of Justice Statistics reported that an estimated 14,000 bail agents nationwide secured the release of more than 2 million defendants annually.[18] The United

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States and the Philippines are the only countries that permit the widespread practice of commercial bail bonds.[19] In countries other than these two, "[b]ail that is compensated in whole or in part is seen as perverting the course of justice."[20]

III. The Consequences of Pretrial Release versus Incarceration

From the perspective of the defendant, who is presumed innocent, pretrial release mitigates the collateral consequences of spending weeks or months awaiting trial or a plea agreement. Jail time can result in job loss, home loss, and disintegrated social relationships, which in turn increase the likelihood of re-offending upon release.[21]

In 2010 the United States had the world's highest total number of pretrial detainees (approximately 476,000) and the fourth-highest rate of pretrial detention (158 per 100,000).[22] A study of felony defendants in America's 75 largest urban counties showed that in 1990, release on recognizance accounted for 42% of releases, compared to 25% released on surety bond. By 2006, the proportions had been reversed: surety bonds were used for 43% of releases, compared to 25% for release on recognizance.[23] Taking into account all types of financial bail (surety bond, deposit bail, unsecured bond, and full cash bond), it is clear that the majority of pretrial release requires posting of financial bail.

The same study of felony defendants showed that 42% were detained until disposition of their case.[24] Pretrial incarceration imposes significant costs on taxpayer-funded jails, primarily at the local government level. In 2010, "taxpayers spent $9 billion on pre-trial detainees."[25] The increased practice of requiring financial bonds has contributed to increased jail populations, which has produced an extraordinary increase in costs to counties and municipalities from housing pretrial detainees. The most recent national data indicates that 61% of jail inmates are in an un-convicted status, up from just over half in 1996.[26]

In addition to the financial costs from increased pretrial detention, the cost in unequal access to justice also appears to be high. The movement to financial bonds as a requirement for pretrial release, often requiring a surety bond from a commercial bond seller, makes economic status a significant factor in determining whether a defendant is released pending trial, instead of such factors as risk of flight and threat to public safety. A study of all nonfelony cases in New York City in 2008 found that for cases in which bail was set at less than $1,000 (19,617 cases), in 87% of those cases defendants were unable to post bail at arraignment and spent an average of 15.7 days in pretrial detention, even though 71.1% of these defendants were charged with nonviolent, non-weapons-related crimes.[27] In short, "for the poor, bail means jail."[28] The impact of financial release conditions on minority defendants reflects disparate rates of poverty among different ethnic groups. A study that sampled felony cases in 40 of the 75 largest counties nationwide found that, between 1990 and

1996, 27% of white defendants were held in jail throughout the pretrial period because they could not post bond, compared to 36% of African-American defendants and 44% of Hispanic defendants.[29]

The practice of conditioning release on the ability to obtain a surety bond has so troubled the National Association of Pretrial Services Agencies (NAPSA) that, in its Third Edition of Standards on Pretrial Release (and in previous editions beginning in 1968), Standard 1.4(f) provides that "[c]onsistent with the processes provided in these Standards, compensated sureties should be abolished." According to NAPSA, compensated sureties should be abolished because the ability to pay a bondsman is unrelated to the risk of flight or danger to the community; a surety bond system transfers the release decision from a judge to private party making unreviewable decisions on unknown factors; and the surety system unfairly discriminates against defendants who are unable to afford non-refundable fees required by the bondsman as a condition of posting the bond.[30] The American Bar Association also recommends that "compensated sureties should be abolished."[31] The Commonwealth of Kentucky and the State of Wisconsin have prohibited the use of compensated sureties.[32] In addition, Illinois and Oregon do not allow release on surety bonds (but do permit deposit bail).[33]

The ability of a defendant to obtain pretrial release has a significant correlation to criminal justice outcomes. Numerous research projects conducted over the past half century have shown that defendants who are held in pretrial detention have less favorable outcomes than those who are not detained —regardless of charge or criminal history. In these studies, the less favorable outcomes include a greater tendency to plead guilty to secure release (a significant issue in misdemeanor cases), a greater likelihood of conviction, a greater likelihood of being sentenced to terms of incarceration, and a greater likelihood of receiving longer prison terms."[34] Data support the common sense proposition that pretrial detention has a coercive impact on a defendant's amenability to a plea bargain offer and inhibits a defendant's ability to participate in preparation for a defense. In summarizing decades of research, the federal Bureau of Justice Assistance noted that "research has demonstrated that detained defendants receive more severe sentences, are offered less attractive plea bargains and are more likely to become 'reentry' clients because of their pretrial detention – regardless of charge or criminal history."[35]

IV. Evidence-Based Risk Assessment: The Lesson of *Moneyball* and the Challenge of Adopting New Practices

Michael Lewis's book *Moneyball* documents how Oakland A's general manager Billy Beane used statistics and an evidence-based approach to baseball that yielded winning seasons despite severe budgetary constraints.[36] His approach attracted considerable antagonism in the baseball community because it deviated from long-held practices based on intuition and gut feelings, tradition, and ideology. As

persuasively set forth more recently in *Supercrunchers*, the cost of ignoring data and evidence in a broad variety of human endeavors is suboptimal decision-making.[37] This realization and the commensurate movement toward evidence-based practice, by now firmly ensconced in medicine and other disciplines, have finally emerged in the fields of sentencing, corrections, and pretrial release (but not without resistance, as in baseball).

In 1961, the New York City Court and the Vera Institute of Justice organized the Manhattan Bail Project, an effort to demonstrate that non-financial factors could be used to make cost-effective release decisions.[38] Decades later, the movement away from financial conditions and toward use of an evidence-based risk assessment in setting pretrial release conditions appears to be gathering momentum. The 2009 Survey of Pretrial Services Programs found that the majority of 112 counties responding to a survey of the 150 largest counties use a combination of objective and subjective criteria in risk assessment. Eighty-five percent of those responding counties reported having a pretrial services program to assess and screen defendants and present that information at the first court appearance.[39] The ongoing development of evidence-based decision-making in pretrial release decisions is demonstrated by the release in August 2011 of a monograph by the National Institute of Corrections recommending outcome and performance measures for evaluating pretrial release programs.[40] Looking forward to the type of assessments that would support evidence-based pretrial decisions, an accumulation of empirical research strongly suggests the following points:

- Actuarial risk assessments have higher predictive validity than clinical or professional judgment alone.[41]
- Post-conviction risk factors (relating to recidivism) should not be applied in a pretrial setting.[42]
- Several measures commonly gathered for pretrial were not significantly associated with pretrial failure: residency, injury to victim, weapon, and alcohol.[43]
- The six most common validated pretrial risk factors are prior failure to appear; prior convictions; current charge a felony; being unemployed; history of drug abuse; and having a pending case.[44]
- Defendants in counties that use quantitative and mixed risk assessments are less likely to fail to appear than defendants in counties that use qualitative risk assessments.[45]
- Not only are subjective screening devices prone to demographic disparities, but these devices produce poor results from a public safety perspective.[46]
- The statewide pretrial services program in Kentucky, begun in 1968, now uses a uniform assessment protocol that results in a failure to appear rate of only 10 percent and a re-arrest rate of only 8 percent.[47]

- Pretrial programs that use quantitative and mixed quantitative-qualitative risk assessments experience lower re-arrest rates than programs that only use qualitative risk assessments.
- The number of sanctions a pretrial program can impose in response to non-compliance with supervision conditions further lowers the likelihood of a defendant's pretrial re-arrest.[48]

The use of a validated pretrial risk assessment tool when making a judicial decision to release or not, and the attendant conditions on release based on that assessment, fits within a well-functioning case management regimen. While different instruments have been used with success in different jurisdictions, in general, research on pretrial assessment conducted over decades has identified these common factors as good predictors of court appearance and/or danger to the community:

- Current charges;
- Outstanding warrants at the time of arrest;
- Pending charges at the time of arrest;
- Active community supervision at the time of arrest;
- History of criminal convictions;
- History of failure to appear;
- History of violence;
- Residence stability over time;
- Employment stability;
- Community ties; and
- History of substance abuse.[49]

A comprehensive guide to implementing successful evidence-based pretrial services into the pretrial release determination, with step-by-step instructions on the process from formation of a Pretrial Services Committee through program implementation, is available from the Pretrial Justice Institute.[50]

Perhaps the best-known use of evidence-based risk assessment to reduce reliance on financial release conditions exists in the District of Columbia's Pretrial Services Agency (PSA).[51] Paradoxically, the DC pretrial Code requires detention if no combination of conditions will reasonably assure that a defendant does not flee or pose a risk to public safety.[52] If the prosecutor demonstrates by clear and convincing evidence that a defendant presents a serious flight risk or threat to the victim or to public safety, the defendant is detained without the option for pretrial release. However, the DC Code also provides that a judge may not impose a financial condition as a means of preventative detention.[53] PSA conducts a risk assessment (flight and danger) through an interview with the defendant within 24 hours of arrest that assesses points on a 38-factor instrument, assigning a defendant into a category as high risk, medium risk, and low risk.[54] In 1965, only 11% of defendants were released without a money bond, but by 2008, 80% of all defendants were released without a money bond, 15% were held without bail, and 5% were held with financial bail (none on surety bond), while at the same time 88% of released defendants made all court appearances and 88% completed pretrial release without any new arrests.[55]

Another example of the impact of evidence-based pretrial risk assessment is found in the Harris County (Houston), Texas, "direct filing" system.[56] As charges are being accepted and filed, the defendant is transferred to the central jail for intake. At the jail, the pretrial screening department interviews the defendant and collects data such as family composition, employment status, housing, indigency status, education level, health problems and medications, and potential mental health issues. This process culminates in a risk classification, identifying defendants who are appropriate for release on personal recognizance bond. The process continues through appearance before a magistrate (typically within 12 hours of arrest), where defendants granted personal bond and those able to post cash or surety bonds are released from jail.[57] An estimate of net savings and revenue for Fiscal Year 2010 showed that Harris County gained $4,420,976 in avoided detention costs and pretrial services fees collected after deducting for the costs of pretrial services.[58]

Kentucky abolished commercial bail bondsmen in 1976 and implemented the statewide Pretrial Services Agency that today relies on interviews and investigations of all persons arrested on bailable offenses within 12 hours of his or her arrest. Pretrial Officers conduct a thorough criminal history check and utilize a validated risk assessment that measures flight risk and anticipated conduct to make appropriate recommendations to the court for pretrial release. Furthermore, Pretrial Services provides supervision services for pretrial defendants, misdemeanor diversion participants and defendants in deferred prosecution programs.

In 2011 Pretrial Services processed 249,545 cases in which a full investigation was conducted on 88% of all incarcerated defendants.[59] Using a validated risk assessment tool, Pretrial Services identifies defendants as being either low, moderate, or high risk for pretrial misconduct, (i.e. failing to appear for court hearings or committing a new criminal offense while on pretrial release). Ideally, low risk defendants (those most likely to return to court and not commit a new offense) are recommended for release either on their recognizance or a non-financial bond. Statistically, about 70% of pretrial defendants are released in Kentucky; 90% of those make all future court appearances and 92% do not get re-arrested while on pretrial release.[60] When looking at release rates by risk level, the data shows that judges follow the recommendations of Pretrial Services. In 2011, judges ordered pretrial release of 81% of low risk defendants, 65% of moderate risk defendants, and 52% of high risk defendants.[61]

In 2011, Kentucky adopted House Bill 463, a major overhaul of the Commonwealth's criminal laws that intended to reduce the cost of housing inmates while maintaining public safety.[62] Since adoption of HB 463, Pretrial Services data shows a 10% decrease in the number of defendants arrested and a 5% increase in the overall release rate, with a substantial increase in non-financial

releases and in releases for low and moderate risk defendants. The non-financial release rate increased from 50% to 66%, the low risk release rate increased from 76% to 85%, and the moderate risk release rate increased from 59% to 67%. In addition, pretrial jail populations have decreased by 279 defendants, while appearance and public safety rates have remained consistent.[63]

There are other, similar examples of successful implementation of evidence-based pretrial assessments that deliver on the promise of pretrial release without financial conditions.[64] Evidence-based pretrial risk assessment in the context of skillful and collaborative case management and data sharing should be embraced as the best practice by judges, court administrators, and court leaders. Reliance on a validated, evidence-based pretrial risk assessment in setting non-financial release conditions balances the interests of courts in both protecting public safety and safeguarding individual liberty.

V. The Way Forward

> *"The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. . . .The law favors release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."*
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> ABA Criminal Justice Standards on Pretrial Release, Third Edition
> Standard 10-1.1.

By adopting this paper, COSCA is not leading a parade, but joining in some very good and credible company. As noted in 2011 by a leading official of the United States Department of Justice, "Within the last year, a number of organizations have publicly highlighted the need to reform our often antiquated and sometimes dangerous pretrial practices and replace them with empirically supported, risk-based decision-making."[65] Not surprisingly pretrial services agencies themselves support this effort,[66] but so do a wide variety of other justice-oriented interest groups: the National Association of Counties,[67] the American Jail Association,[68] the International Association of Chiefs of Police,[69] the American Council of Chief Defenders,[70] the American Bar Association,[71] the Association of Prosecuting Attorneys,[72] and the American Association of Probation and Parole.[73]

Following the 2011 National Symposium on Pretrial Justice hosted by the U.S. Department of Justice (DOJ), the DOJ's Office of Justice Programs collaborated with the Pretrial Justice Institute to convene in October 2011 the first meeting of the Pretrial Working Group. Information about the continuing work of the Pretrial Working Group subcommittees can be found at the Web site published by the Office of Justice Programs in association with the Pretrial Justice Institute. The stated goals of this effort are to exchange information on pretrial justice issues, develop a website to disseminate information on the work of the subcommittees, and inform evidence-based pretrial justice policy making.[74]

There are two major obstacles to reform. First, there is resistance to changing the status quo from those who are comfortable with or profit from the existing system. This resistance can be overcome by a well-

executed, evidence-based protocol, as has been demonstrated in the District of Columbia and in Kentucky. Second, courts tend to be deliberate in adopting change and to require persistent presentation of well-documented advantages to new approaches, such as evidence-based practices in the pretrial release setting. In this regard, familiarity with evidence-based decision making in drug courts, at sentencing, and in evaluating court programs should help gain acceptance for evidence-based practices in the pretrial setting. Part of this shift in practice might include elimination of or decreased reliance on bail schedules, which are in use in at least two-thirds of counties across the country.[75] State court leaders should closely follow and make a topic of discussion the efforts of the Department of Justice and its Pretrial Justice Working Group discussed above, as well as continuing efforts by the American Bar Association which is supporting transition toward evidence-based pretrial practices through its Pretrial Justice Task Force.[76]

State court leaders must take several steps to leverage the emerging national consensus on this issue:

- Analyze state law and work with law enforcement agencies and criminal justice partners to propose revisions that are necessary to
  - support risk-based release decisions of those arrested;
  - ensure that non-financial release alternatives are available and that financial release options are available without the requirement for a surety.
- Collaborate with experts and professionals in pretrial justice at the national and state levels.
- Take the message to additional groups and support dialogue on the issue.
- Use data to promote the use of data; determine what state and local data exist that would demonstrate the growing problem of jail expense represented by the pretrial population, and that show the risk factors presented by that population may justify broader pretrial release.
- Reduce reliance on bail schedules in favor of evidence-based assessment of pretrial risk of flight and threat to public safety.

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[5] ALA. CONST. art. I, §16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. I, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 7; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 9; KY. CONST. § 16; LA. CONST. art. I, § 8; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEB. CONST. Art. I, § 9; NEV. CONST. art. I, § 7; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI; Tenn. CONST. ART. I, §15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; VT. CONST. ch. 2, § 40; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14; P.R. CONST. art. II, § 11; D.C. Code, Bill of Rights, art. I, § 108.

[6] ME. CONST. art. I, § 10.

[7] Fredette v. State, 428 A.2d 395, 404-05 (Me. 1981).

[8] U.S. CONST. amend. VIII (1791).

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[59] Data provided August 2012 by Laurie Dudgeon, Director, Administrative Office of the Courts of Kentucky, directly from the Pretrial Services case management system, known as the Pretrial Release Information Management (PRIM).

[60] *Ibid.*

[61] *Ibid.*

[62] Kentucky legislation 11 RS HB 463/EN accessed at http://www.lrc.ky.gov/record/11rs/hb463.htm

[63] *Ibid.*

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[65] Laurie Robinson, Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, remarks at the National Symposium on Pretrial Justice, Washington, D.C., May 31, 2011.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Filing Date: November 6, 2014

NO. 34,531

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

WALTER ERNEST BROWN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Kenneth H. Martinez, District Judge

Jody Neal-Post
Albuquerque, NM

Jorge A. Alvarado, Chief Public Defender
Jeff Rein, Assistant Public Defender
Albuquerque, NM

for Appellant

Office of the District Attorney
Guinevere Ice
Albuquerque, NM

for Appellee

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OPINION

DANIELS, Justice.

{1} The Bill of Rights of the New Mexico Constitution guarantees that "[a]ll persons . . . before conviction" are entitled to be released from custody pending trial without being required to post excessive bail, subject to limited exceptions in which release may be denied in certain capital cases and for narrow categories of repeat offenders. N.M. Const. art. II, § 13. Our rules of criminal procedure provide the mechanisms through which we honor this constitutional right to pretrial release. The rules require that a defendant be released from custody on the least restrictive conditions necessary to reasonably assure both the defendant's appearance in court and the safety of the community. *See* Rule 5-401 NMRA. In this case, Defendant Walter Brown presented the district court with uncontroverted evidence demonstrating that nonmonetary conditions of pretrial release were sufficient to reasonably assure that Defendant was not likely to pose a flight or safety risk. Despite this evidence, the district court ordered that Defendant be held in jail unless he posted a $250,000 cash or surety bond, based solely on the nature and seriousness of the charged offense. We conclude that the district court erred by requiring a $250,000 bond when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient. We therefore entered an order reversing the district

court's pretrial release order and instructing the district court to release Defendant on appropriate nonmonetary conditions. We now issue this precedential opinion to explain the basis for our decision, to clarify the purposes and controlling legal principles for setting bail, and to provide guidance for future pretrial release decisions.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Defendant Walter Brown was arrested on May 26, 2011, and indicted two weeks later on an array of charges, including first-degree felony murder and, alternatively, second-degree murder. The district court imposed a $250,000 cash or surety bond at Defendant's 2011 arraignment. After spending more than two years in pretrial custody awaiting trial because he lacked the financial resources to post such a high bond, Defendant moved the district court to review his conditions of release and to release him under the supervision of the Second Judicial District Court's pretrial services program with appropriate nonmonetary conditions of release. Defendant agreed to accept conditions of release that included monitoring by a GPS device, living with his father, making regular contact with the pretrial services program, and maintaining employment at a local restaurant that had agreed to hire him.

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{3} In support of his motion, Defendant provided the district court with extensive information about his personal history and characteristics. Defendant's nineteenth birthday occurred two months before his arrest in this case. An only child who has always lived with one or both of his parents, he cannot live independently due to developmental and intellectual disabilities. He attended special education classes throughout his school years in Albuquerque and has a second-grade comprehension level for math, writing, and reading. Defendant dropped out of high school during his senior year and subsequently worked at several local restaurants. In spite of his disabilities, while in pretrial detention he successfully completed a variety of educational and counseling programs and obtained a high school diploma.

{4} At a hearing on his motion for release on nonmonetary conditions, Defendant presented testimony from Dr. James Harrington, a psychologist with the district court's pretrial services program who had interviewed and evaluated Defendant to determine whether he would be an appropriate candidate for supervised pretrial release. Dr. Harrington characterized Defendant as compliant, cooperative, and honest during the interview. Dr. Harrington concluded that Defendant exhibits none of the factors typically correlated with dangerousness or a risk of flight, such as prior criminal history or a history of mental illness or substance abuse. Dr. Harrington also

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verified that Defendant has the capacity to understand and comply with the proposed conditions of supervised release. Based on his evaluation, Dr. Harrington opined that Defendant was an appropriate candidate for release under the supervision of the pretrial services program with GPS monitoring.

{5} The State declined to cross-examine Dr. Harrington or to present any evidence of its own. Instead, the State simply argued that the $250,000 bond should remain in place due to the serious nature of the criminal charges against Defendant. In support of its argument, the State proffered an undisputed account of the factual circumstances underlying the charges. On the day of the alleged homicide while she was highly intoxicated, Defendant's acquaintance Rebecca Duran got into an altercation with several people at a house. Before leaving the house, Duran threatened to come back and "get even" with the people there. After leaving, Duran sought out Defendant and an acquaintance named Eugene Helfer and asked them to accompany her back to the house, where neither Duran nor Helfer nor Defendant lived, to retrieve Duran's personal belongings. Neither Defendant nor Helfer had been present during the earlier altercation.

{6} When Duran returned to the house with Defendant and Helfer, they knocked on the front door; when there was no answer, they went around to the back of the

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house and entered by opening a sliding glass door. Once inside, Duran attacked several people and hit the victim in the head with a wrench. As explained by the State, Duran was "the one mostly arguing" and "starting stuff." At some point the victim pushed Helfer, who is Defendant's friend. Defendant reacted by stabbing the victim once with a folding pocket knife, fatally piercing the victim's heart.

{7} After hearing from Defendant and the State, the district court orally denied Defendant's motion for release on nonmonetary conditions on the ground that Defendant's charge of first-degree felony murder carried a possible life sentence that would require at least thirty years of imprisonment. The district court subsequently filed a written order setting forth detailed factual findings. Based on the evidence presented at the motion hearing, the district court found that the pretrial services program could fashion appropriate conditions of release for Defendant and that Defendant could live with his father and return to his former job if released. The district court also found that Defendant's IQ is 70, that Defendant has longstanding ties in the community, and that Defendant has the support of both of his parents. The district court's findings included Dr. Harrington's conclusions that Defendant has no alcohol or substance abuse issues and no pending criminal proceedings or history of violence outside the allegations in this case. The district court found that Defendant

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had "been entirely compliant for the entirety of his pretrial incarceration of over 2 years and 4 months" and had "appeared timely and without incident at all scheduled hearings in this case." The district court called its findings "uncontroverted." And the district court explicitly found that the State had presented no information indicating that Defendant would commit new crimes, pose a danger to anyone, or fail to appear in court if released from custody. Despite these findings, the district court kept Defendant's $250,000 bond in place due to "the nature and seriousness of the alleged offense."

{8} After several more months of pretrial confinement, Defendant filed a second motion, again seeking release under the supervision of the pretrial services program with appropriate nonmonetary release conditions. At a hearing on the second motion, defense counsel reiterated the information presented at the first hearing five months earlier and argued that Defendant's unique personal history made him likely to comply with conditions of release and unlikely to commit additional crimes while released. Dr. Harrington testified again that he deemed Defendant to be a good candidate for nonmonetary pretrial release. Defendant also presented the testimony of Patrick Wojtowicz, the pretrial services officer likely to supervise Defendant if released. Mr. Wojtowicz verified that Defendant could live with his father and return

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to work if released. Mr. Wojtowicz confirmed that Defendant would be capable of using public transportation to get to the pretrial services office for appointments. And Mr. Wojtowicz agreed with Dr. Harrington that pretrial release with GPS monitoring and supervision by the pretrial services program would be a good fit for Defendant. Without specifically controverting the evidence presented at the hearing, the State argued against any change to Defendant's conditions of release on the theory that the seriousness of the charges alone justified the requirement of a $250,000 bond for release pending trial.

{9} After hearing from the parties, the district court judge admitted that he was "absolutely impressed" with Defendant's presentation but "hesitant to act upon it." The district court orally denied Defendant's second motion to amend the conditions of pretrial release. Defense counsel asked the district court judge to clarify the reasons for his decision. The judge explained that the nature of the allegations and the potential sentence led the judge to believe that releasing Defendant "may present a danger of either flight or to other members of the community." The district court did not file a written order disposing of the second motion.

{10} After the district court denied Defendant's second motion to amend the conditions of release, Defendant appealed to the Court of Appeals by filing a motion

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under Rule 12-204 NMRA, which provides the procedure for appealing a district court's pretrial release order. Defendant asked the Court of Appeals to reverse the pretrial release order and to enter an order setting appropriate conditions of release. The Court of Appeals transferred the appeal to this Court, which has exclusive appellate jurisdiction over cases involving potential sentences of life imprisonment. *See State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that "the legislature intended for [the Supreme Court] to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death").

{11} After hearing oral arguments from the parties, this Court filed an order (1) accepting the transfer from the Court of Appeals, (2) reversing the district court's pretrial release order, and (3) remanding this case to the district court to set appropriate nonmonetary conditions of release, including GPS monitoring and supervision by the district court's pretrial services program.

II. DISCUSSION

A. This Court Has Exclusive Jurisdiction over Defendant's Appeal Because He Faces a Possible Sentence of Life Imprisonment

{12} As a preliminary matter we consider whether Defendant's appeal should be heard by this Court or by the Court of Appeals. The extent of this Court's appellate

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jurisdiction is a question of law that we review de novo. *See Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 18, 147 N.M. 523, 226 P.3d 622.

{13} Article VI, Section 2 of the New Mexico Constitution gives this Court exclusive appellate jurisdiction over appeals from final district court judgments "imposing a sentence of death or life imprisonment" as well as jurisdiction over other appeals "as may be provided by law." In this case, Defendant appeals from an interlocutory pretrial release order, not a final judgment. *See Tijerina v. Baker*, 1968-NMSC-009, ¶ 8, 78 N.M. 770, 438 P.2d 514 (per curiam) (concluding that a pretrial release order is interlocutory); *State v. David*, 1984-NMCA-119, ¶ 13, 102 N.M. 138, 692 P.2d 524 (explaining that an "interlocutory bail determination is not a final judgment").

{14} Defendant's right to file this interlocutory appeal arises under NMSA 1978, Section 39-3-3(A)(2) (1972), which permits an appeal from a district court "order denying relief on a petition to review conditions of [pretrial] release." We have held that Section 39-3-3(A), in conjunction with Article VI, Section 2 of the New Mexico Constitution, gives this Court exclusive appellate jurisdiction over interlocutory appeals in criminal cases where the defendant faces a possible sentence of life imprisonment or death. *See Smallwood*, 2007-NMSC-005, ¶¶ 6-11. In *Smallwood*, we

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identified Section 39-3-3 as "the one statute dealing specifically with appellate jurisdiction over interlocutory appeals in criminal cases" and noted that the statute permits a defendant to appeal to either "'the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts.'" *Smallwood*, 2007-NMSC-005, ¶ 9 (quoting Section 39-3-3(A)). Because the New Mexico Constitution vests this Court with exclusive appellate jurisdiction over final district court judgments imposing a sentence of life imprisonment or death, we concluded that Section 39-3-3(A) confers "this Court with jurisdiction over a criminal defendant's interlocutory appeal in cases where a sentence of life imprisonment or death *could be* imposed." *Smallwood*, 2007-NMSC-005, ¶ 10.

{15} In this case, Defendant is charged with first-degree felony murder, an offense that carries a possible sentence of life imprisonment. *See* NMSA 1978, § 30-2-1(A) (1994); NMSA 1978, § 31-18-14 (2009). We therefore hold that this Court has exclusive appellate jurisdiction to consider Defendant's appeal.

{16} Although this Court has exclusive appellate jurisdiction to hear Defendant's appeal, Defendant filed his appeal in the Court of Appeals. It appears that an inadvertent omission in our procedural rules may have caused Defendant's error. Under Rule 5-401(G), a person who has been unable "to meet the bail set[] shall,

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upon motion, be entitled to have a hearing to review the amount of bail set."[1] And if a person "continues to be detained" after such a hearing "because of a failure to meet a condition imposed," then that person may appeal "to the *Supreme Court or Court of Appeals*, as jurisdiction may be vested by law, in accordance with the Rules of Appellate Procedure." Rule 5-405(A) NMRA (emphasis added).

{17} And although Rule 5-405(A) recognizes this Court's appellate jurisdiction to review certain pretrial release orders, Rule 12-204 NMRA of the Rules of Appellate Procedure instructs litigants to initiate such appeals by filing a motion in the Court of Appeals. *See* Rule 12-204(A) ("An appeal provided for by NMSA 1978, § 39-3-3A(2), and Rule 5-405 of the Rules of Criminal Procedure shall be taken by filing a motion with the clerk of *the court of appeals* within ten (10) days after the decision of the district court and serving a copy on the district attorney and the appellate division of the attorney general." (emphasis added)). We conclude that Rule 12-204 should be amended to reflect this Court's exclusive jurisdiction over interlocutory appeals from pretrial release orders in cases where the defendant faces

[1]The term "bail" as used in this opinion may refer to either (1) the "process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance" or (2) the "security such as cash, a bond, or property" that a person must provide in order to gain such release. Black's Law Dictionary 167 (10th ed. 2014).

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a possible sentence of life imprisonment or death, and we ask our Rules of Appellate Procedure Committee to draft proposed rule amendments for this Court's consideration.

B. The District Court Failed to Impose the Least Restrictive Conditions of Release That Would Reasonably Assure Defendant's Appearance in Court and the Safety of the Community

{18} We now turn to the merits of Defendant's appeal. Defendant argues that the district court erred by disregarding the undisputed evidence concerning his suitability for pretrial release and by basing its pretrial release order solely on the nature of the charges, excluding consideration of other factors that the district court must consider under Rule 5-401(C) of the Rules of Criminal Procedure for the District Courts. The State has maintained that a $250,000 bond is justified by the nature and seriousness of the charges in this case. In order to fully explain why we set aside the district court's pretrial release order in this case, we begin with an abbreviated review of the origins and history of bail and an examination of the bail provisions in the New Mexico Constitution and our rules of criminal procedure.

1. Constitutional Right to Bail in New Mexico

{19} The New Mexico Constitution affords criminal defendants a right to bail in Article II, Section 13, which provides that "[a]ll persons shall, before conviction be

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bailable by sufficient sureties" and that "[e]xcessive bail shall not be required." These provisions were first incorporated into the written law of territorial New Mexico when Brigadier General Stephen Kearny promulgated the Kearny Bill of Rights in 1846. *See Kearny Bill of Rights*, cl. 9 (1846, reprinted in Vol. 1 of NMSA 1978) ("[A]ll persons shall be bailed by sufficient sureties, except in capital offenses where proof of guilt is evident."); *Kearny Bill of Rights*, cl. 10 ("[E]xcessive bail shall not be required."). Article II, Section 13 enshrines the principle that a person accused of a crime is entitled to retain personal freedom "until adjudged guilty by the court of last resort." *Tijerina*, 1968-NMSC-009, ¶ 9; *see Bandy v. United States*, 81 S. Ct. 197, 197 (1960) ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.").

{20} Notwithstanding the presumption that all persons are bailable pending trial, the right to bail "is not absolute under all circumstances." *Tijerina*, 1968-NMSC-009, ¶ 9. Article II, Section 13 contains two exceptions that restrict the right to bail as to certain persons. First, the district court may deny bail altogether to a person charged with a capital offense if "the proof is evident or the presumption great." N.M. Const. art. II, § 13. Second, the district court may deny bail

> for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following

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instances:

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

Id. A court cannot refuse to set bail and detain a defendant pending trial under either of these exceptions without first providing the defendant with adequate procedural due process protections, including the right to counsel, notice, and an opportunity to be heard. *See David*, 1984-NMCA-119, ¶ 23 (citing *Tijerina*, 1968-NMSC-009).

{21} Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court. *See* Rule 5-403(A) NMRA (providing that the court may revoke release "upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge"); *State v. Segura*, 2014-NMCA-037, ¶ 8, 321 P.3d 140 (explaining that the court may revoke bail to ensure "the proper administration of justice" or "for violation of a condition of pretrial release" (internal quotation marks and citation omitted)). Accordingly, if

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a defendant fails to appear in court, commits additional crimes, or violates conditions of pretrial release, the court may, upon notice and hearing, revoke the defendant's release and remand the defendant into custody. *See Tijerina*, 1968-NMSC-009, ¶ 11 (noting that due process requires "notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody"); *Segura*, 2014-NMCA-037, ¶ 23 (concluding that the state has the burden of establishing facts to support a revocation of bail and that the defendant has a due process right to contest the state's evidence). *But cf. State v. Romero*, 2006-NMCA-126, ¶¶ 1-2, 140 N.M. 524, 143 P.3d 763 (holding that a bail bond may be forfeited for failure to appear but not for violation of other conditions of release), *aff'd*, 2007-NMSC-030, ¶ 6, 141 N.M. 733, 160 P.3d 914. Under all other circumstances, the New Mexico Constitution requires that "[a]ll persons shall . . . be bailable by sufficient sureties" and that "[e]xcessive bail shall not be required." N.M. Const. art. II, § 13.

2. Origins and History of Bail in England

{22} The right to pretrial release set forth in the New Mexico Constitution has roots that extend back to medieval England, where bail originated "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* 1 (1964); *see* IV William Blackstone, *Commentaries on the Laws of England*

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in Four Books 1690 (Rees Welsh & Co. 1902) (1769) ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)). *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 34-66 (1977) (describing the origins and history of bail in England); Elsa de Haas, *Antiquities of Bail* 128 (1940) (concluding that the "root idea of the modern right to bail" came from "tribal custom on the continent of Europe").

{23} During the Anglo-Saxon period in England before the Norman conquest, the penalty for most crimes was a monetary fine paid as compensation to the victim. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 519-20 (1983). Under this system of justice, the sheriff often required the accused to secure a third party, or surety, to guarantee the appearance of the accused for trial and the payment of the fine upon conviction. *See id.* at 520; *see also Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 966 (1961). The amount of money pledged as bail was identical to the penalty prospect upon a conviction, and the surety was required to pay the fine if the accused failed to appear for trial. Carbone, *supra*, at 520. This system

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of bail ensured victim compensation and deterred pretrial flight because the surety bore financial responsibility for payment of the penalty and had an incentive to produce the accused for trial. *Id.*

{24} Following the Norman conquest of 1066, capital and corporal punishment began gradually to replace monetary fines as the penalty for most offenses, and accused persons faced longer delays between accusation and trial as they waited for traveling judges to arrive and dispense local justice. *See id.* at 519, 521; *see also* Freed & Wald, *supra*, at 1 ("Disease-ridden jails and delayed trials by traveling justices necessitated an alternative to holding accused persons in pretrial custody."). The development of corporal and capital punishment complicated the use of bail because the amount of money pledged no longer correlated directly to the potential punishment. Carbone, *supra*, at 522. The endowment of local sheriffs with discretion in setting bail led to rampant corruption and abuse. *See United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc) (explaining that sheriffs "exercised a broad and ill-defined discretionary power to bail" prisoners and that this "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and who "accepted bribes from those who were not otherwise entitled to bail").

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{25} In response to historical abuses, the common law right to bail was codified into written English law. In 1215, the principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta, which proclaimed that "no freeman shall be taken or imprisoned . . . [except by] the judgment of his peers or by the law of the land." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (internal quotation marks and citation omitted). In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See Bail: An Ancient Practice Reexamined*, *supra*, at 966; Carbone, *supra*, at 523-26. In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing; and in 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See* Carbone, *supra*, at 528. In crossing the Atlantic, American colonists carried concepts embedded in these documents that became the foundation for our current system of bail. *See id.* at 529.

3. Bail in the United States

{26} The presumption that defendants should be released pending trial became widely adopted throughout the United States in both the state and federal systems. *See*

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Bail: An Ancient Practice Reexamined, *supra*, at 967. One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013). States modeled these provisions on the Pennsylvania Constitution of 1682, which provided that "'all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'" *See* Carbone, *supra*, at 531-32 ("[T]he Pennsylvania provision became the model for almost every state constitution adopted after 1776.").

{27} At the federal level, the first United States Congress established a statutory right to bail by enacting the Judiciary Act of 1789, which provided an absolute right to bail in noncapital cases and bail at the discretion of the judge in capital cases. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91; *see also* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 971 (1965) (explaining that the "bail problem" was before the first Congress in the spring and summer of 1789). The first Congress also proposed that the states adopt the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and English Bill

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of Rights, prohibits excessive bail. *See* U.S. Const. amend. VIII; N.M. Const. art. II, § 13; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment "on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights"). But unlike the New Mexico Constitution, the United States Constitution does not contain an explicit right to bail clause and guarantees only that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII; *see Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (explaining that the United States Constitution can be construed only as a prohibition against excessive bail in those cases in which it is proper to grant bail because the Eighth Amendment does not provide a "right to bail"). The United States Supreme Court has held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of adequately assuring the presence of the accused] is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). As the Court explained,

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to

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> conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285 . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

{28} Despite the ancient origins and broad recognition of the right to bail in this country, studies of the administration of bail in the twentieth century raised a number of concerns about its widespread misuse. *See* Field Study, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958); Note, *Compelling Appearance in Court: The Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Arthur L. Beeley, *The Bail System in Chicago* (1927). *See generally* Wayne H. Thomas, Jr., *Bail Reform in America* 3-19 (1976); Ronald Goldfarb, *Ransom* (1965); Foote, *supra*; Freed & Wald, *supra*, at 9-21. The studies all concluded that the system of money bail in the United States discriminates against indigent defendants who lack the financial resources to post bail. *See, e.g.*, Thomas, *supra*, at 11, 19 ("The American system of bail allows a person arrested for a criminal offense the right to purchase his release pending trial. Those who can afford the price are released; those who cannot remain in jail. . . . The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor."). Researchers also found that defendants incarcerated pending trial were held "under

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harsher conditions than those applied to convicted prisoners," even though many of those defendants ultimately were either acquitted or given no sentence of imprisonment upon the disposition of their cases. Foote, *supra*, at 960.

{29} These concerns were accompanied by criticism of the growing role commercial bail bond agents played in determining whether defendants would be released pending trial. *See* Notes, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1490 (1966). No commercial bail bond industry existed in medieval England, where pretrial release was conditioned upon the accused securing a reputable friend or relative to personally assure the accused's appearance for trial. *See* Thomas, *supra*, at 11-12; *see also* F.E. Devine, *Commercial Bail Bonding* 5 (1991) (explaining that sureties in eighteenth-century England "were viewed as actively exercising a friendly custody of the accused"). To the contrary, the English judicial system has always found the concept of commercial sureties repugnant. *See generally* Devine, *supra*, at 37 (explaining that, in the nineteenth century, the English common law treated an agreement to pay a surety for bail as an "unenforceable illegal contract contrary to the public interest" and, in the twentieth century, as a "crime of conspiracy to effect a public mischief" or a crime of "conspiracy to obstruct the court of justice"); *id.* at 45 (explaining that the English Bail Act of 1976 sets forth criminal penalties for agreeing

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to indemnify a surety in a criminal proceeding, effectively barring any commercial bail bond industry). England is not alone in its rejection of the commercial bail bond industry. "Viewed from an international perspective, the commercial bail bonding system has provoked an almost universally unfavorable reaction" in common law judicial systems, and "only one country, the Philippines, has adopted a commercial bail bonding system similar to the American system." *Id.* at 15.

{30} Contrary to this international trend, a commercial bail bond industry emerged in the early United States. Contributing factors included the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives who might serve as personal sureties, and the ability of defendants to flee into the vast American frontier. *See Thomas*, *supra*, at 11-12. By the middle of the twentieth century in the United States, commercial bail bond companies who charged defendants a nonrefundable fee for their services, typically ten percent of the bond amount, frequently posted money bail. *See id.* at 11; Freed & Wald, *supra*, at 22-24.

{31} A commercial bail bond may enable a defendant to post money bail required by the court as additional assurance that the defendant will appear for trial. *See Stack v. Boyle*, 342 U.S. at 5 ("Like the ancient practice of securing the oaths of responsible

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persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."). But critics argued that the commercial bail bond industry inappropriately delegated to private agents the power to determine which defendants get released. *See Preventive Detention Before Trial*, *supra*, at 1490. As one federal judge observed, the effect of the commercial bail bond industry

> is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court [is] relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

{32} Some fifty years ago, widespread concerns about problems and inequities in bail practices sparked national interest in establishing new bail procedures and pretrial programs that would treat the rich and the poor more equitably by facilitating pretrial release without the requirement of monetary bonds. The modern bail reform movement began with the Manhattan Bail Project, conducted in the 1960s by the Vera Foundation in New York City. *See* Thomas, *supra*, at 3, 20-27; Goldfarb, *supra*, at 150-72. Through the Manhattan Bail Project, defendants were interviewed prior to their first appearance in court to evaluate whether they were good candidates for

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pretrial release on recognizance; that is, release "on one's honor pending trial." Goldfarb, *supra*, at 153-54. The standard interview questions included an inquiry into a defendant's personal background, community ties, and criminal history. *Id.* The interviewer scored a defendant's answers using a point-weighing system and verified answers for accuracy, usually over the telephone with references the defendant provided. *Id.* at 154-55, 174-75. The interviewers gave the resulting information to the court and made recommendations regarding which defendants should be released on recognizance. *Id.* at 155. The Manhattan Bail Project proved successful. During the first three years of the experiment, defendants released on recognizance at the recommendation of the Vera Foundation were about three times more likely to appear for trial than defendants in control groups deemed eligible for release on recognizance who instead were released on money bail. *Id.* at 155, 157. The Manhattan Bail Project "showed that defendants could be successfully released pretrial without the financial guarantee of a surety bail agent if verified information concerning their stability and community ties were presented to the court." Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* 4 (U.S. Dep't of Justice Nov. 2007). The success of the Manhattan Bail Project increased national interest in bail reform and triggered the creation of pretrial services

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programs across the country. *See* Timothy R. Schnacke et al., Pretrial Justice Inst., *The History of Bail and Pretrial Release* 10 (2010); *see also* Marie VanNostrand et al., *Our Journey Toward Pretrial Justice*, 71 Fed. Probation, no. 2, 2007, 20, 20 (discussing pretrial services agencies "as providers of the information necessary for judicial officers to make the most appropriate bail decision" and to "provide monitoring and supervision of defendants released with conditions pending trial").

{33} Driven by the same concerns that inspired the Manhattan Bail Project, Congress enacted the Bail Reform Act of 1966, the first major reform of the federal bail system since the Judiciary Act of 1789. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." *Id.* Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant's appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use

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of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on "travel . . . or place of abode" are sufficient to reasonably assure the defendant's appearance. *See id.* Sec. 3, § 3146(a); *see also* VanNostrand et al., *supra*, at 20 (explaining that the 1966 Act "established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail"). By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large. *See* H.R. Rep. No. 89-1541 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2299.

{34} Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act explains that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that

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give appropriate recognition to the danger a person may pose to others if released." S. Rep. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains many of the key provisions of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act); *see also* 18 U.S.C. § 3142(a) (providing generally the current federal procedure for ordering either release or detention of a defendant pending trial), *held unconstitutional on other grounds by, e.g.*, *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

{35} Twentieth-century advances in pretrial justice notwithstanding, the administration of bail in the United States remains problematic. *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 Fed. Probation 28, 30 (1993) ("Even after decades of bail reform, serious questions about the fairness and effectiveness of pretrial release in the United States have not been resolved."). A recent United States

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Department of Justice report, which provides statistics about state court felony defendants in the nation's seventy-five largest counties between 1990 and 2004, reflects some of the enduring inequalities in our nation's system of bail. *See* Cohen & Reaves, *supra*. The report demonstrates that, in the last two decades, states have again increased their reliance on commercial surety bonds while decreasing the use of personal recognizance releases. *See id.* at 1-2 ("Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases."). As a result, the number of pretrial inmates in jail populations has grown "at a much faster pace than sentenced inmates, despite falling crime rates." Kristin Bechtel et al., Pretrial Justice Inst., *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* 1-2 (Nov. 2012). Most of the defendants who remain in custody pending trial stay in jail because they cannot afford the bail set by the court, not because they have been denied bail altogether. *See* Cohen & Reaves, *supra*, at 1 ("Among [felony] defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met."). "Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released." *Id.* Twenty percent of these detained defendants "eventually had their case dismissed or were acquitted,"

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so many of them could have avoided imprisonment altogether if only they had the resources to post bail. *Id.* at 7.

{36} To address the persistent inequities and inefficiencies in our current administration of bail, a number of national entities have promulgated standards and best practices for pretrial release programs. *See, e.g.*, Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) (hereinafter *ABA Standards*); Nat'l Ass'n of Pretrial Servs. Agencies, *Standards on Pretrial Release* (3d ed. 2004) [hereinafter *NAPSA Standards*]; Nat'l Dist. Attorneys Ass'n, *National Prosecution Standards*, Standards 4-4.1 to 4-4.5, at 56-57 (3d ed. 2009). Renewed interest in pretrial justice has led some commentators to suggest that the criminal justice system in the United States has begun to experience a new wave of bail reform in the twenty-first century. *See* Bechtel et al., *supra*, at 2 n.1; Schnacke et al., *supra*, at 21-27 (noting that "jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release").

4. The New Mexico Pretrial Release Rules

{37} The New Mexico Rules of Criminal Procedure provide the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution. *See* Rule 5-401 (providing procedures

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for district courts); Rule 6-401 NMRA (providing procedures for magistrate courts); Rule 7-401 NMRA (providing procedures for metropolitan court); Rule 8-401 NMRA (providing procedures for municipal courts). New Mexico modeled its bail rules, which were first adopted in 1972, on the federal Bail Reform Act of 1966. *See* NMSA 1978, Crim. P. Rule 22 (Repl. Pamp. 1980; including the May 1972 New Mexico Supreme Court order); *see also* Committee commentary to Rule 5-401 (explaining that the rule is modeled on the Bail Reform Act of 1966). Like the Bail Reform Act of 1966, the New Mexico bail rules establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require financial security. *See* Rule 5-401(A); *State v. Gutierrez*, 2006-NMCA-090, ¶ 17, 140 N.M. 157, 140 P.3d 1106 (recognizing "that the purpose of the Federal Bail Reform Act of 1966, from which our rule is derived, was to encourage more releases on personal recognizance").

{38} Originally, the only valid purpose of bail in New Mexico was to ensure the defendant's appearance in court. *See* Crim. P. Rule 22(a) (requiring the judge to make a pretrial release decision that would "reasonably assure the appearance of the person as required"); *see also State v. Eriksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit

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to the punishment to be imposed by the court."). To further incentivize appearance in court, in the early 1970s the Legislature granted courts statutory authority to order forfeiture of bail upon a defendant's failure to appear, *see* NMSA 1978, § 31-3-2(B)(2) (1972, as amended through 1993), and enacted separate criminal penalties for failure to appear, *see* NMSA 1978, § 31-3-9 (1973, as amended through 1999). Following recognition in the federal Bail Reform Act of 1984 that public safety is a valid consideration in pretrial release decisions, this Court amended our rules to require judges to consider not only the defendant's flight risk but also the potential danger that might be posed by the defendant's release to the community in determining which conditions of release should be fashioned. *See* Rule 5-401 NMRA (1990) (prescribing that judges consider "the appearance of the person as required" and "the safety of any other person and the community").

{39} If a person is bailable under Article II, Section 13 of the New Mexico Constitution, our rules of criminal procedure require the trial court to set the least restrictive of the bail options and release conditions that "will reasonably assure appearance of the person as required" and "the safety of any other person and the community." Rule 5-401(A)-(D). In doing so, the court must evaluate the available information about the defendant and the extent of the flight risk and safety concerns

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posed by the defendant. To guide the courts in accomplishing this task, the rule provides a list of factors that the court must take into account:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including:
> (a) the person's character and physical and mental condition;
> (b) the person's family ties;
> (c) the person's employment status, employment history and financial resources;
> (d) the person's past and present residences;
> (e) the length of residence in the community;
> (f) any facts tending to indicate that the person has strong ties to the community;
> (g) any facts indicating the possibility that the person will commit new crimes if released;
> (h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and
> (i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and
> (5) any other facts tending to indicate the person is likely to appear.

Rule 5-401(C).

{40} Rule 5-401 prioritizes five increasingly exacting bail options pending trial: (1)

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release on the defendant's personal recognizance; (2) release upon the execution of an unsecured appearance bond; (3) release upon the execution of an appearance bond accompanied by a cash deposit to the court of a specified percentage of the total amount set for bail; (4) release upon the execution of a bond secured by property belonging to either the defendant or an unpaid surety; and (5) release upon either execution of a bond by a licensed bail bond agent or execution of an appearance bond by the defendant accompanied by a cash deposit of one hundred percent of the amount set for bail. *See* Rule 5-401(A)-(B). The trial court must consider this hierarchy of release options in the order set forth in the rule, beginning with the least restrictive option. *Id.*; *see Gutierrez*, 2006-NMCA-090, ¶¶ 9-10 (specifying that the options "'are set forth in the order of priority [in which] they are to be considered by the judge'" (quoting Rule 5-401 Committee commentary)). Whenever possible, the court should dispense with the requirement of any financial security and should release the defendant either on the defendant's "personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court." Rule 5-401(A). But if the court makes specific written findings demonstrating that nonfinancial release options "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," the

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court may require the defendant to execute one of the types of secured bonds enumerated in the rule. Rule 5-401(B).

{41} In addition to choosing an appropriate bail option, the trial court should consider whether to impose additional nonmonetary conditions to limit and monitor the defendant's conduct while released pending trial. *See* Rule 5-401(D). The court may condition the defendant's continued pretrial release on refraining from further criminal conduct while awaiting trial. *See* Rule 5-401(D)(1). Rule 5-401(D)(2) sets forth a range of other potential conditions that the court may consider and instructs the court to order the least restrictive condition or combination of conditions that "will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice." The court has a duty to tailor the conditions of pretrial release to the needs and risks posed by each individual defendant. *See id.* For example, if a defendant is charged with a crime of violence against a household member, the additional conditions might include a limitation on the possession of weapons and a requirement that the defendant avoid contact with the alleged victim or witnesses. *See* Rule 5-401(D)(2)(e), (h). Or, if the defendant is charged with a crime involving controlled substances, the court might order the defendant to undergo drug testing and substance abuse treatment. *See* Rule

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5-401(D)(2)(j)-(k).

5. The District Court Requirement of a Monetary Bond in This Case Was Unsupported by Evidence and Contrary to Law

{42} In brief, a pretrial release determination under the New Mexico Constitution and our rules of criminal procedure includes three main inquiries. First, is the defendant bailable pending trial, or should the defendant be detained under one of the exceptions in Article II, Section 13 of the New Mexico Constitution? Next, if bailable, which of the release options stated in Rule 5-401 is the least restrictive in reasonably assuring appearance while maintaining the safety of the community? *See* Rule 5-401(A)-(B). And finally, should any additional nonmonetary conditions of release be imposed to place limitations on the defendant's conduct while released pending trial? *See* Rule 5-401(D).

{43} This Court will reverse a district court's pretrial release decision "only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 12-204(C). Although this Court may set aside a pretrial release order for any one of these three reasons, we conclude in this case that reversal is warranted on all three grounds. *See N.M. Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89 (explaining that a decision "is arbitrary and

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capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record" (internal quotation marks and citation omitted)); *State v. Cebada*, 1972-NMCA-140, ¶ 9, 84 N.M. 306, 502 P.2d 409 ("An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered."). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B&B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted).

{44} The district court necessarily determined that Defendant was bailable by entering a pretrial release order at Defendant's arraignment in 2011 but then imposed the most restrictive type of bail available under Rule 5-401, a full cash or surety bond in the amount of $250,000. *See* Rule 5-401(B)(3). The court also prohibited Defendant from possessing firearms, alcohol, or illegal drugs; violating the law; leaving the county without the court's permission; entering liquor establishments; or making contact with any alleged victim, codefendant, or witness in the case. Additionally, the district court required that Defendant maintain weekly contact with his attorney and notify his attorney of any changes to his contact information.

{45} It is not clear from the record before this Court what, if any, information the

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district court had when it first entered the pretrial release order at Defendant's arraignment, and we do not review that earlier decision. We address only the ruling that has been appealed to us, the refusal to modify the $250,000 cash or surety bond that Defendant was unable to post.

{46} After the first bail review hearing, the district court found there were no facts indicating that Defendant would likely "commit new crimes," pose "a danger to anyone," or "be unlikely to appear if released." The information Defendant presented at the second review hearing was consistent with the information he presented in support of his first motion. The State failed to present any new information at the second hearing or to controvert Defendant's evidence and continued to rely solely on the nature of the crime charged. The district court, without a further written order, declined to change the conditions of release, stating merely that Defendant "*may* present a danger of either flight or to other members of the community," in contrast to the court's own finding following the first motion hearing that Defendant did not pose a flight or safety risk (emphasis added).

{47} Contrary to the explicit requirements set forth in our rules, the district court failed to explain in the record any rational connection between the facts in the record and the ruling of the court, perhaps because there was no such connection. *See* Rule

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5-401(G) ("Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set."); *see also Gutierrez*, 2006-NMCA-090, ¶ 21 (cautioning judges to follow the directives of Rule 5-401 when "exercising their discretion to set conditions of release"). We hold that the district court's decision was arbitrary and capricious and that the court abused its discretion by issuing a ruling at the second motion hearing that was contrary to both the record and the district court's previous findings of fact, without articulating any principled reason or factual basis for the decision.

{48} All of the evidence Defendant presented supported a modification of Defendant's bail, and none of the evidence supported the district court's decision to keep the $250,000 bond in place. The State failed to controvert Defendant's evidence, offered no evidence of its own, and declined to cross-examine Defendant's witnesses. The district court denied Defendant's first motion despite the court's express finding that there were no facts indicating that Defendant would pose a flight or safety risk if released. The district court denied Defendant's second motion without entering any findings of fact to support its decision, explaining only that "the nature of the allegations" and "the exposure that is contained within the various counts of the indictment" led the court to conclude that releasing Defendant "may present a danger

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of either flight or to other members of the community." This conclusion is inconsistent with the record and unsupported by substantial evidence.

{49} The district court's decision was contrary to Rule 5-401, which sets forth the mandatory procedure for district courts to follow when making a pretrial release decision. The district court was required to evaluate and balance each of the factors set forth in Rule 5-401(C) and to impose the least restrictive of the bail options and release conditions necessary to reasonably assure that Defendant would not pose a flight or safety risk. The record makes it clear that the court did not comply with the law.

{50} The findings of fact the district court entered following the first motion hearing demonstrate that all of the information regarding Defendant's personal history and characteristics supported a reduction of Defendant's bond. The district court found that Defendant "would have an appropriate place to live with his father," that Defendant's "former employers were seeking his return to employment," and that Defendant's "ties in the community are longstanding and continuing with the familial support of his parents." The district court also found that Defendant had no pending criminal charges, no alcohol or substance abuse problems, and no history of violence outside the allegations in this case. And the district court found that Defendant had

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"been entirely compliant for the entirety of his pretrial incarceration of over 2 years and 4 months" and had "appeared timely and without incident at all scheduled hearings in this case." Finally, the district court documented the absence of any facts indicating that Defendant would predictably "commit new crimes," pose "a danger to anyone," or "be unlikely to appear if released." Although the district court noted that it had drawn no conclusions "as to the weight of the evidence" against Defendant, it denied Defendant's first motion solely because of "the nature and seriousness of the alleged offense."

{51} It is clear that the district court based its pretrial release decision on only one of the factors identified in Rule 5-401(C)—"the nature and circumstances of the offense charged"—to the exclusion of all other factors. While a judge has discretion to evaluate and balance each of the factors set forth in Rule 5-401(C), the judge "shall" consider and weigh all of the factors, and no single factor automatically controls. *See* Rule 5-401(C). Appropriately, the district court considered the charges and potential punishment in this case in assessing flight risk and danger to the community posed by this Defendant, but the district court failed to balance this information with the evidence presented in support of Defendant's motion. Because the district court failed to give proper consideration to all of the factors set forth in

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Rule 5-401(C), its continued imposition of the $250,000 bond was contrary to law.

{52} Neither the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense. Bail is not pretrial punishment and is not to be set solely on the basis of an accusation of a serious crime. As the United States Supreme Court has emphasized, "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." *Stack v. Boyle*, 342 U.S. at 6. The State has argued that $250,000 is a standard bond for an offense that can result in life imprisonment. This argument runs contrary to both the letter and purpose of Rule 5-401, which requires the judge to make an informed, individualized decision about each defendant and does not permit the judge to put a price tag on a person's pretrial liberty based solely on the charged offense. *See ABA Standards*, Standard 10-5.3(e), at 110 ("Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."). Empirical studies indicate that the severity of the charged offense does not predict whether a defendant will flee or reoffend if released pending trial. *See* Curtis E.A. Karnow, *Setting Bail*

for Public Safety, 13 Berkeley J. Crim. L. 1, 14-16 (2008) (reviewing studies indicating that "evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending"); 4 Wayne LaFave et al., *Criminal Procedure*, § 12.1(b), at 12 (3d ed. 2007) (citing studies and stating that the "likelihood of a forfeiture does not appear to depend upon the seriousness of the crime"). Setting money bail based on the severity of the crime leads to either release or detention, determined by a defendant's wealth alone instead of being based on the factors relevant to a particular defendant's risk of nonappearance or reoffense in a particular case. *See Hairston v. United States*, 343 F.2d 313, 316-17 (D.C. Circ. 1965) (Bazelon, C.J., dissenting) ("Setting high bail to deny release discriminate(s) between the dangerous rich and the dangerous poor and masks the difficult problems of predicting future behavior which is, in itself, fraught with danger of excesses and injustice." (alteration in original) (internal quotation marks and citation omitted)). Because of this, judges "should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision." *ABA Standards*, Standard 10-1.7, at 50.

{53} Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial

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release. *See* N.M. Const. art. II, § 13; Rule 5-401; *see also Bandy*, 81 S. Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."). Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required. N.M. Const. art. II, § 13; *cf.* 18 U.S.C. § 3142(c)(2) (providing that a federal "judicial officer may not impose a financial condition that results in the pretrial detention of the person"), *held unconstitutional on other grounds by, e.g.*, *Karper*, 847 F. Supp. 2d 350.

{54} We understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community. We also recognize that some members of the public may have the mistaken impression that money bonds should be imposed based solely on the nature of the charged crime or that the courts should deny bond altogether to one accused of a serious crime. We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully

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honor the rule of law when it dictates an action that is not politically popular, particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one. As Justices Jackson and Frankfurter explained in reversing a high bond set by a federal district court, "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. at 8 (Jackson, J., joined by Frankfurter, J., specially concurring).

III. CONCLUSION

{55} For the reasons stated in this opinion, we reaffirm our prior order holding that the district court unlawfully failed to release Defendant pending trial on the least restrictive of the bail options and release conditions necessary to reasonably assure Defendant's appearance and the safety of the community, our reversal of the district court's continued imposition of a $250,000 bond, and our order that Defendant be released on nonmonetary conditions pending trial.

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{56} **IT IS SO ORDERED.**

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

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IMPACT OF AMENDMENT TO ARTICLE 2, SECTION 13 OF THE CONSTITUTION OF NEW MEXICO

Under New Mexico's Constitution, judges cannot deny release to a defendant known to be a danger to the community or a substantial flight risk. Dangerous defendants who can post bond are released. Poor defendants who are neither a danger to the community or a substantial flight risk remain in jail.

The proposed constitutional amendment authorizes judges to deny bail and detain dangerous defendants if, *"after a hearing, the court finds by clear and convincing evidence that no release conditions will reasonably ensure the appearance of the person as required or protect the safety of any other person or the community."* The amendment also ensures that no person eligible for pretrial release "*shall be detained solely because of financial inability to post a money or property bond."*

The amendment will increase public safety, reduce recidivism and detention costs.

Increase Public Safety

- Judges currently cannot deny release to a defendant known to be a danger to the community or substantial flight risk.
- Dangerous defendants who are able to post bond are repeatedly arrested and released to commit new crimes.

The amendment gives judges the authority to detain dangerous defendants and keep them from endangering the community while they await trial.

Reduce Recidivism

- The average length of pre-trial detention in New Mexico is 55 days.
- Low risk defendants held 8-14 days "are 51% more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours." *("The Hidden Costs of Pretrial Detention," November 2013, the Laura and John Arnold Foundation)*
- "When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours." Those detained 31 or more days are 1.74 times more likely to commit a new crime before trial. *(Hidden Costs of Pretrial Detention)*

- "Detained defendants are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial." (*"Investigating the Impact of Pretrial Detention on Sentencing Outcomes" November 2013, The Laura and John Arnold Foundation)*
- "Sentences for detained defendants are also significantly longer: Jail sentences are nearly three times as long, and prison sentences are more than twice as long." (*Investigating the Impact of Pretrial Detention)*

Reduce Detention Costs

The amendment will decrease the use of jail space, county resources, and taxpayer dollars to house, feed, provide medical care for, transport, and guard accused persons who do not need to be detained.

- The Judiciary's case management data shows that an estimated 40% of defendants are detained pending trial because they cannot post a bond.
- Statewide, the average daily population in New Mexico's detention facilities is 7,305 of which an estimated 2,922 (40%) are pretrial detainees.
- The average cost to house an inmate per day is $72.03 or $210,472 statewide, per day, for pretrial detainees ($72.03 x 2,922).
- In jurisdictions where pretrial detention of dangerous defendants is permitted approximately 15% of all defendants are detained.
- Assuming: (1) New Mexico's experience will be similar to that of other jurisdictions that detain about 15% of dangerous defendants, and (2) the 40% of defendants who are currently detained in pretrial in New Mexico are detained because they cannot afford to post bond:
    - New Mexico detention centers should see an estimated 62.5% drop in pretrial detainees after adoption of the proposed amendment (detained population reduced from 40% to 15%).
        - Resulting in a reduction in the daily population of pretrial detainees from 2,922 to 1096 (-1,826 daily).
        - And an estimated statewide savings of $131,527 (1,826 x $72.03) per day at detention centers, on which the counties spend not less than $275 million annually.

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5-401. Pretrial release.

A. **Hearing.**

(1) ***Time.*** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) *Percentage bond.* The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) *Property bond.* The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5-401.1 NMRA.

(c) *Cash or surety bond.* The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings regarding secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice

(2) ***Written findings regarding secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.** If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

H. **Case pending in district court; motion for review of conditions of release.**

(1) ***Motion for review.*** If the district court requires a secured bond for the

defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is thereupon released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

J. **Record of hearing.** A record shall be made of any hearing held by the district court under this rule.

K. **Cases pending in magistrate, metropolitan, or municipal court; petition for release or review by district court.**

(1) ***Case within magistrate, metropolitan, or municipal court trial jurisdiction.*** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The

defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(4) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** Upon the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly transmit to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

M. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. **Release from custody by designee.** The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under

Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. **Bind over to district court.** For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

P. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

R. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — This rule provides "the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution." *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142.

This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or

unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond where the property

belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule Rule 5-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Paragraph F also requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody due to inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to "the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161"); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.").

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief district court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant's first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the

district court upon notice from the district attorney that an information or indictment has been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in district court with respect to matters of pretrial release. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release hearing the court is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

5-401. [~~Bail~~] Pretrial release.

A. **Hearing.**

(1) ***Time.*** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

[~~A.~~]B. **Right to [~~bail~~] pretrial release; recognizance or unsecured appearance bond.** Pending trial, any [~~person bailable~~] defendant eligible for pretrial release under Article [~~2,~~] II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the [~~person's~~] defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, [~~subject to any release conditions imposed pursuant to Paragraph C of this rule,~~] unless the court makes [~~a written finding that such~~] written findings of particularized reasons why the release will not reasonably [~~assure~~] ensure the appearance of the [~~person~~] defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

[~~B.~~]E. **Secured [~~bonds~~] bond.** If the court makes [~~a written finding that~~] findings of the reasons why release on personal recognizance or [~~upon execution of an~~] unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably [~~assure~~] ensure the appearance of the [~~person~~] defendant as required, the court may require a secured bond for the defendant's release. [~~or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community.~~]

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) *Percentage bond.* [~~the execution of a bail~~] The court may require a secured appearance bond executed by the defendant in [~~a~~] the full amount specified in the order setting conditions of release, [~~specified amount executed by the person and~~] secured by a deposit [~~of~~] in cash of ten percent (10%) of the amount [~~set for bail~~] specified. [~~, or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required.~~] The deposit may be returned as provided in Paragraph M of this rule. [~~The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a bail bond for the full amount of the bail set;~~]

(b) *Property bond.* The court may require the execution of a [~~bail~~] property bond by the defendant or by unpaid sureties in the full amount [~~of the bond~~] specified in the order setting conditions of release, secured by [~~and~~] the pledging of real property [~~as required by~~] in accordance with Rule [~~5-401A~~] 5-401.1 NMRA[~~; or~~].

(c) *Cash or surety bond.* The court may give the defendant the option [~~the execution~~] of [~~a~~] either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a [~~bail~~] surety bond [~~with~~] executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release. [~~as provided in Rule 5-401B NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.~~

~~Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.~~

~~C. **Factors to be considered in determining conditions of release.** The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:~~

~~(1) the nature and circumstances of the offense charged, including whether the~~

~~offense is a crime of violence or involves a narcotic drug;~~

~~(2) the weight of the evidence against the person;~~

~~(3) the history and characteristics of the person, including:~~

~~(a) the person's character and physical and mental condition;~~

~~(b) the person's family ties;~~

~~(c) the person's employment status, employment history and financial resources;~~

~~(d) the person's past and present residences;~~

~~(e) the length of residence in the community;~~

~~(f) any facts tending to indicate that the person has strong ties to the community;~~

~~(g) any facts indicating the possibility that the person will commit new crimes if released;~~

~~(h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and~~

~~(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;~~

~~(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and~~

~~(5) any other facts tending to indicate the person is likely to appear.~~

~~D. **Additional conditions; conditions to assure orderly administration of justice.** The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:~~

~~(1) the condition that the person not commit a federal, state or local crime during the period of release; and~~

~~(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:~~

~~(a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;~~

~~(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;~~

~~(c) a condition that the person maintain or commence an educational program;~~

~~(d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;~~

~~(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;~~

~~(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;~~

~~(g) a condition that the person comply with a specified curfew;~~

~~(h) a condition that the person refrain from possessing a firearm,~~

~~destructive device or other dangerous weapon;~~

~~(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;~~

~~(j) a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;~~

~~(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;~~

~~(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;~~

~~(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.~~]

[~~E.~~]F. [~~**Explanation of conditions by court.**~~] **Order setting conditions of release; findings regarding secured bond.**

(1) ***Contents of order setting conditions of release.*** The [~~release order of the court~~] order setting conditions of release shall

[~~(1)~~] (a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the [~~person's~~] defendant's conduct; and

[~~(2)~~] (b) advise the [~~person~~] defendant of

[~~(a)~~] (i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

[~~(b)~~] (ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the [~~person's~~] defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

[~~(c)~~] (iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice[~~; and~~

~~(3) unless the defendant is released on personal recognizance, set forth the circumstances which require that conditions of release be imposed~~].

(2) ***Written findings regarding secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

[~~F.~~]G. [~~**Detention**~~] **Pretrial detention.** [~~Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, Section 13 of the New Mexico Constitution.~~] If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

[~~G.~~]H. [~~**Review**~~] **Case pending in district court; motion for review of conditions of release.** [~~A person for whom bail is set by~~]

(1) ***Motion for review.*** If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody [~~and who after~~] twenty-four (24) hours [~~from the time of transfer to a detention facility continues to be detained~~] after the

issuance of the order setting conditions of release as a result of the [~~person's~~] defendant's inability to [~~meet the bail set~~] post the secured bond or meet the conditions of release in the present case, the defendant shall, [~~upon~~] on motion of the defendant or the court's own motion, be entitled to [~~have~~] a hearing to review the [~~amount of bail set~~] conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the [~~release~~] order setting conditions of release is amended and the [~~person~~] defendant is thereupon released, the court shall state in the record the reasons for [~~continuing the amount of bail set~~] declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A [~~person~~] defendant who is ordered released on a condition [~~which~~] that requires that the [~~person~~] defendant return to custody after specified hours[~~, upon application~~] shall, on motion of the defendant or the court's own motion, be entitled to [~~have~~] a hearing to review the conditions imposed. Unless the requirement is removed and the [~~person~~] defendant is [~~thereupon~~] released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release [~~pursuant to this paragraph~~] under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

[~~H.~~]I. **Amendment of conditions.** The court [~~ordering the release of a person on any condition specified in this rule~~] may amend its order setting conditions of release at any time [~~to increase the amount of bail set or impose additional or different conditions of release~~]. If [~~such~~] the amendment of the [~~release~~] order [~~results~~] may result in the detention of the [~~person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of Paragraph G of this rule shall apply~~] defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

[~~I.~~]J. **Record of hearing.** A record shall be made of any hearing held by the district court [~~pursuant to~~] under this rule.

[~~J. **Return of cash deposit.** If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph B of this rule, when the conditions of the appearance bond have been performed and the defendant's guilt for whom bail was required has been adjudicated by the Court, the clerk~~

~~shall return the sum which has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.~~]

K. **Cases pending in magistrate, [~~or~~] metropolitan, or municipal court; petition for release or review by district court.**

(1) ***Case within magistrate, metropolitan, or municipal court trial jurisdiction.*** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A [~~person~~] defendant charged with [~~an~~] a felony offense [~~which is not within magistrate or metropolitan court trial jurisdiction and~~] who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the [~~person's~~] defendant's arrest. [~~with the clerk of the district court for release pursuant to this rule Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:~~

~~(1) continue the bail set and any condition of release imposed by the magistrate or metropolitan court;~~

~~(2) impose any bail or condition of release authorized by Paragraphs A, B or D of this rule;~~

~~(3) continue any revocation of release imposed pursuant to Rule 5-403 NMRA; or~~

~~(4) after a hearing, revoke the release of a defendant pursuant to Subparagraph (2) of Paragraph A of Rule 5-403 NMRA.~~]

(3) ***Petition; requirements.*** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(4) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** Upon the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one

of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly transmit to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

M. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

[~~L.~~]N. **Release from custody by designee.** [~~Any or all of the provisions of this rule, except the provisions of Paragraphs F, G and K of this rule, may be carried out by responsible persons designated in writing by the~~] The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if [~~such~~] the person or [~~such~~] the person's spouse is

[~~(1)~~] related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state. [~~or~~

~~(2) employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.~~]

[~~M.~~]O. **Bind over [~~in~~] to district court.** [~~The~~] For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall [~~remain in the magistrate or metropolitan court, except that it shall~~] be transferred to the district court upon the filing of an information or indictment [~~or bind over to that~~] in the district court.

[~~N.~~]P. **Evidence.** Information [~~stated in, or~~] offered in connection with or stated in any proceeding held or order entered [~~pursuant to~~] under this rule need not conform to the New Mexico Rules of Evidence.

[~~O.~~]Q. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

[~~P.~~]R. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to [~~bail~~] pretrial release shall not preclude the subsequent statutory [~~or constitutional~~] disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release

unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — [~~Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:~~

~~(1) the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or~~

~~(2) the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.~~]

This rule provides "the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution." *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the [~~Federal Bail Reform Act of 1966, as amended~~] federal statute governing the release or detention of a defendant pending trial. [~~Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.~~] *See* 18 U.S.C. §[§] 3142. [~~et seq. The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (c), respectively, of 18 USCA § 1342.~~]

[~~In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond. Because bail and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal and metropolitan court bail rules were derived from and are substantially identical to this rule.~~] This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that

may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

[~~Under this rule, the types of bonds authorized to be posted are set forth~~] As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority [~~they are to be considered by the judge or designee~~] set forth in Paragraph E. [~~The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.~~

~~If a secured bond is required to assure the appearance of the defendant, the judge or designee~~] The court must first consider requiring an appearance bond [~~with~~] secured by a cash deposit of 10% [~~or such other percentage of the amount of the bond~~]. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court [~~has not authorized a cash deposit of less than 100% of the amount of bond set,~~] requires a cash or surety bond, the defendant [~~may~~] has the option either to execute an appearance bond and deposit [~~one hundred percent (~~]100%[~~)~~] of the amount of the bond with the court [~~Last of all the defendant may~~] or to purchase a bond from a paid surety. A paid surety may execute a [~~corporate~~] surety bond or a real or personal property bond [~~. A real or personal property bond may only be executed by a paid surety~~] only if the conditions of Rule [~~5-401B~~] Rule 5-401.2 NMRA are met. [~~Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.~~]

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). [~~Although bail hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, Form 9-302A~~] Paragraph F also requires [~~the judge or designee to set forth~~] the court to make written findings justifying the imposition of [~~the reasons why~~] a secured bond, if any [~~was required rather than release on personal recognizance~~]. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

[~~The provision allowing the court to set additional conditions of release in order to assure "the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.~~]

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who

is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody due to inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to "the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161"); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.").

[~~Pursuant to~~] Under NMSA 1978, Section 31-3-1 [~~NMSA 1978~~], the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee [~~Designees~~] must be [~~named in writing~~] designated by the chief district court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may [~~not~~] be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant's first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court upon notice from the district attorney that an information or indictment has been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph [~~M~~] P of this rule dovetails with [~~Subparagraph (2) of Paragraph D of~~] Rule [~~11-1101~~] 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in [~~either the magistrate or~~] district court with respect to matters of pretrial release [~~or bail~~]. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release hearing the court is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R of this rule does not prevent a judge from being recused under the provisions of the New Mexico

Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.
[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

5-403. Revocation or modification of release orders.

A. **Scope.** In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

(1) if the defendant is alleged to have violated a condition of release; or

(2) to prevent interference with witnesses or the proper administration of justice.

B. **Motion for revocation or modification of conditions of release.**

(1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.

(2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. **Issuance of summons or bench warrant.** If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. **Initial hearing.**

(1) The court shall hold an initial hearing as soon as practicable, but no later than three (3) days after the defendant is detained.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.

(3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. **Evidentiary hearing.**

(1) ***Time.*** The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.

(2) ***Defendant's rights.*** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. **Order at completion of evidentiary hearing.** At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

(1) continue the existing conditions of release;

(2) set new or additional conditions of release in accordance with Rule 5-401 NMRA; or

(3) revoke the defendant's release, if the court finds by clear and convincing evidence that

(a) the defendant has willfully violated a condition of release and that

no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or

(b) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. **Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. **Review of conditions.** If the court enters an order setting new or additional conditions of release, the defendant may file a motion to review the conditions under Rule 5-401(H) NMRA. If, upon disposition of the motion, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

J. **Appeal.** If the court revokes the defendant's release, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.

K. **Petition for review of revocation order issued by magistrate, metropolitan, or municipal court.** If the magistrate, metropolitan, or municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph.

(1) ***Petition; requirements.*** The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** Upon the filing of the petition, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The case shall proceed in the magistrate, metropolitan, or municipal court while the petition is pending.

(3) ***District court review.*** The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release in accordance with Rule 5-401 NMRA.

(4) ***Transmission of district court order to magistrate, metropolitan, or municipal court.*** The district court shall promptly transmit the order to the magistrate, metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

(5) ***Appeal.*** If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

L. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release or detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from reviewing a lower court's order revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 ("If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts."); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 ("Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line."), *rev'd on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation

revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is reviewing a lower court's order setting or revoking conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph L of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

The 1975 amendment to Rule 5-402 NMRA makes it clear that this rule may be invoked while the defendant is appealing a conviction. *See* Rule 5-402 NMRA and commentary.
[As amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

5-409. Pretrial detention.

A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled "Expedited Motion for Pretrial Detention" and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a written expedited motion for pretrial detention at any time in both the court where the case is pending and in the district court. The motion shall include the specific facts that warrant pretrial detention.

(1) The prosecutor shall immediately deliver a copy of the motion to

(a) the detention center holding the defendant, if any;

(b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

C. **Case pending in magistrate or metropolitan court.** If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court's jurisdiction to set or amend conditions of release shall then be terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial release until the case is remanded by the district court following disposition of the detention motion under Paragraph I of this rule.

D. **Case pending in district court.** If a motion for pretrial detention is filed in the district court and probable cause has not been found under Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203 NMRA, Rule 6-204(B) NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the district court finds no probable cause, the district court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion for pretrial detention without prejudice.

E. **Detention pending hearing; warrant.**

(1) ***Defendant in custody when motion is filed.*** If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a

defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.

(2) ***Defendant not in custody when motion is filed.*** If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant's arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. **Pretrial detention hearing.** The district court shall hold a hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community.

(1) ***Time.***

(a) *Time limit.* The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

(i) the filing of the motion for pretrial detention; or

(ii) the date the defendant is arrested as a result of the motion for pretrial detention.

(b) *Extensions.* The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court may extend the time limit for holding the hearing as follows:

(i) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the delay;

(ii) upon the defendant filing a written waiver of the time limit; or

(iii) upon stipulation of the parties.

(2) ***Discovery.*** At least twenty-four (24) hours before the hearing, the prosecutor shall provide the defendant with all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing.

(3) ***Defendant's rights.*** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

(4) ***Prosecutor's burden.*** The prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

(5) ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing.

G. **Order for pretrial detention.** The court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The court shall file written findings of the individualized facts justifying the detention as soon as possible, but no later than two (2) days after the conclusion of the hearing.

H. **Order setting conditions of release.** The court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file written findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than two (2) days after the conclusion of the hearing.

I. **Further proceedings in magistrate or metropolitan court.** Upon completion of the hearing, if the case is pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate or metropolitan court may modify the order setting conditions of release upon a showing of good cause, but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court.

J. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

K. **Successive motions for pretrial detention and motions to reconsider.** On written motion of the prosecutor or the defendant, the court may reopen the detention hearing at any time before trial if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on whether the previous ruling should be reconsidered.

L. **Appeal.** Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

M. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. —

Paragraph A - In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably

could be faced with a request to detain under the preexisting exception to the right to pretrial release in "capital offenses when the proof is evident or the presumption great." As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed.

Paragraph B - Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant's arrest under Rule 5-208(D) NMRA.

Paragraph C - Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction to set or amend the conditions of release. The filing of the motion does not, however, stay the case in the magistrate or metropolitan court. Nothing in this rule shall prevent timely preliminary examinations from proceeding while the detention motion is pending.

Paragraphs C and D - Federal constitutional law requires a "prompt judicial determination of probable cause" to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

Paragraph F - Paragraph F sets forth procedures for pretrial detention hearings. Subparagraph (F)(3) describes the defendant's rights at the hearing. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing. Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I - If the district court issues a detention order under Paragraph G of this rule, the magistrate or metropolitan court cannot release the defendant while the case is pending. The

magistrate or metropolitan court should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.

Paragraph J - Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.").

Paragraph L - Either party may appeal the district court's ruling on the detention motion. Under Article II, Section 13, an "appeal from an order denying bail shall be given preference over all other matters." *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

Paragraph M - Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See* NMSA 1978, § 38-3-9. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

5-408. Pretrial release by designee.

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person's first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. **Minor offenses; release on recognizance.**

(1) ***Persons eligible.*** A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) ***Exceptions.*** A person arrested for any of the following offenses is not eligible for release under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5 NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;

(h) stalking under Section 30-3A-3 NMSA 1978;

(i) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(k) enticement of a child under Section 30-9-1 NMSA 1978;

(l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;

(m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;

(n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;

(o) violating an order of protection under Section 40-13-6 NMSA 1978; or

(p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

P

C. **Pretrial release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. **Pretrial release under release on recognizance program.** A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court.

E. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B, Paragraph C, or Paragraph D of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Under NMSA 1978, Section 31-3-1 and Rule 5-401(N) NMRA, the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. In the past, some courts have used fixed secured bond schedules tied to the level of the charged offense, rather than any individual flight risk of the arrestee, a practice that has been specifically prohibited by new Subparagraph (E)(1)(d) of Rule 5-401 NMRA (as reflected in the 2017 amendment), and that has constitutional implications. *See, e.g.*, Memorandum and Opinion Setting out Findings of Fact and Conclusions of Law, *ODonnell v. Harris Cty.*, No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017); Opinion, *Jones v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015).

The provisions in this new rule provide more detailed guidance for courts for authorizing release by designees, who are generally detention center or court employees, and contains several situations in which release by designees can be authorized, none of them including fixed secured bond schedules.

Paragraph B of this rule sets out a statewide standard method of automatic release by designees in cases involving minor offenses, where no exercise of discretion is required on the part of the designee. Subparagraph (B)(2) identifies certain offenses excepted from automatic release under Subparagraph (B)(1), including the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery, enticement of a child, violating an order of protection, and driving under the influence of intoxicating liquor or drugs.

Paragraph C of this rule will independently permit a designee to release an arrestee if specifically authorized to be released through use of a Supreme Court-authorized risk assessment instrument.

Paragraph D of this rule provides flexibility for individual courts to operate their own Supreme Court-authorized release on recognizance programs that may rely on individualized discretionary assessments of arrestee eligibility by designees, in addition to the release authority authorized in Paragraphs B and C of this rule, so long as they are exercised within the parameters of Court-approved programs.

P

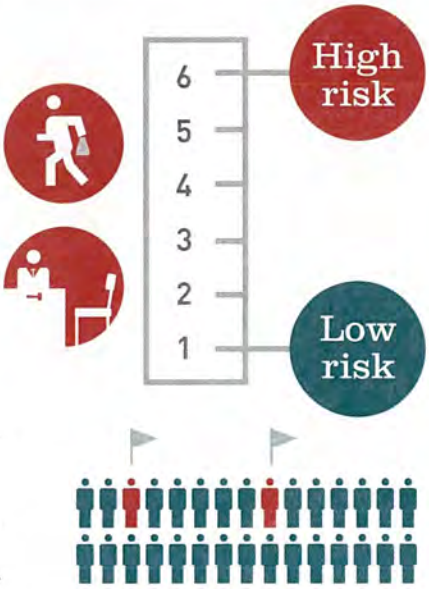
[Adopted by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]

The Public Safety Assessment (PSA)

Following a person's arrest, a judge must decide whether that person should:

A judge considers many factors in making this decision. One tool that judges may use to help make this decision is the PSA.

The PSA produces a score that represents the likelihood that a defendant who is released before trial will commit a new crime or will fail to appear for a future court appearance.



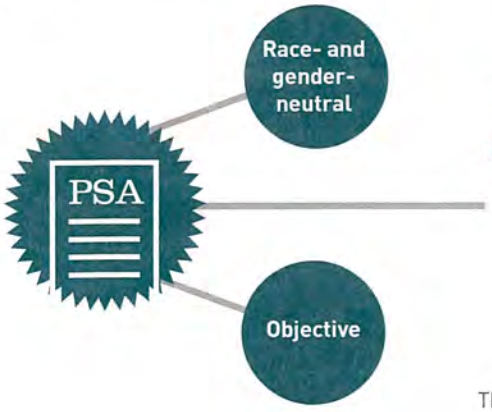
The PSA also flags the small number of defendants who pose an elevated risk of committing a crime of violence if released before trial.

The PSA score is calculated based on nine factors.

- Current violent offense
- Pending charge at the time of the offense
- Prior misdemeanor conviction
- Prior felony conviction
- Prior violent conviction
- Prior failure to appear pretrial in past 2 years
- Prior failure to appear pretrial older than 2 years
- Prior sentence to incarceration
- Age at current arrest

The PSA does NOT look at any of the following factors:

The PSA provides information that is race- and gender-neutral. It helps guide pretrial decision making in an effort to increase safety, reduce taxpayer costs, and enhance fairness and efficiency in the system.



The PSA was developed from research using data from across the United States.

The PSA score is not the only information that a judge considers, and the final decision will always be made by a judge.

For more information about the PSA, please visit www.arnoldfoundation.org.

Q

ljaf
laura and john arnold foundation

PSA

PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA

The pretrial phase of the criminal justice process should aim to protect public safety and assure defendants' appearance in court, while honoring individuals' constitutional rights, including the presumption of innocence and the right to bail that is not excessive. Yet research shows that low-risk, nonviolent defendants who can't afford to pay often spend extended time behind bars, while high-risk individuals are frequently released from jail. This system causes significant harm to too many individuals and is a threat to our communities.

A growing number of jurisdictions are now reforming their pretrial systems to change the way they make pretrial release and detention decisions. These communities are shifting away from decision making based primarily on a defendant's charge to decision making that prioritizes the individual's level of risk—both the risk that he will commit a new crime and the risk that he will fail to return to court if released before trial. This risk-based approach can help to ensure that the relatively small number of defendants who need to be in jail remain locked up—and the significant majority of individuals who can be safely released are returned to the community to await trial.

PUBLIC SAFETY ASSESSMENT: AN EVIDENCE-BASED TOOL TO EVALUATE RISK

In partnership with leading criminal justice researchers, the Laura and John Arnold Foundation (LJAF) developed the Public Safety Assessment™ (PSA) to help judges gauge the risk that a defendant poses. This pretrial risk assessment tool uses evidence-based, neutral information to predict the likelihood that an individual will commit a new crime if released before trial, and to predict the likelihood that he will fail to return for a future court hearing. In addition, it flags those defendants who present an elevated risk of committing a violent crime.

ljaf
laura and john arnold foundation

PSA

DEVELOPMENT

LJAF created the PSA using the largest, most diverse set of pretrial records ever assembled—1.5 million cases from approximately 300 jurisdictions across the United States. Researchers analyzed the data and identified the nine factors that best predict whether a defendant will commit new criminal activity (NCA), commit new violent criminal activity (NVCA), or fail to appear (FTA) in court if released before trial.

RISK FACTORS

The table below outlines the nine factors and illustrates which factors are related to each of the pretrial outcomes—that is, which factors are used to predict NCA, NVCA, and FTA.

RELATIONSHIP BETWEEN RISK FACTORS AND PRETRIAL OUTCOMES

Risk Factor	FTA	NCA	NVCA
1. Age at current arrest		X	
2. Current violent offense			X
Current violent offense & 20 years old or younger			X
3. Pending charge at the time of the offense	X	X	X
4. Prior misdemeanor conviction		X	
5. Prior felony conviction		X	
Prior conviction (misdemeanor or felony)	X		X
6. Prior violent conviction		X	X
7. Prior failure to appear in the past two years	X	X	
8. Prior failure to appear older than two years	X		
9. Prior sentence to incarceration		X	

Note: Boxes where an "X" occurs indicate that the presence of a risk factor increases the likelihood of that outcome for a given defendant.

The PSA relies solely on the above nine variables. It does not rely on factors such as race, ethnicity, or geography.

FACTOR WEIGHTING

Each of these factors is weighted—or, assigned points—according to the strength of the relationship between the factor and the specific pretrial outcome. The PSA calculates a raw score for each of the outcomes. Scores for NCA and FTA are converted to separate scales of one to six, with higher scores indicating a greater level of risk. The raw score for NVCA is used to determine whether the defendant should be flagged as posing an elevated risk of violence.

HOW RISK SCORES ARE CONVERTED TO THE SIX-POINT SCALES AND NVCA FLAG

Risk Factor	Weights
Failure to Appear (maximum total weight = 7 points)	
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 2; 2 or more = 4
Prior failure to appear pretrial older than 2 years	No = 0; Yes = 1
New Criminal Activity (maximum total weight = 13 points)	
Age at current arrest	23 or older = 0; 22 or younger = 2
Pending charge at the time of the offense	No = 0; Yes = 3
Prior misdemeanor conviction	No = 0; Yes = 1
Prior felony conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2
Prior failure to appear pretrial in past 2 years	0 = 0; 1 = 1; 2 or more = 2
Prior sentence to incarceration	No = 0; Yes = 2
New Violent Criminal Activity (maximum total weight = 7 points)	
Current violent offense	No = 0; Yes = 2
Current violent offense & 20 years old or younger	No = 0; Yes = 1
Pending charge at the time of the offense	No = 0; Yes = 1
Prior conviction	No = 0; Yes = 1
Prior violent conviction	0 = 0; 1 or 2 = 1; 3 or more = 2

FTA Raw Score	FTA 6 Point Scale	NCA Raw Score	NCA 6 Point Scale	NVCA Raw Score	NVCA Flag
0	1	0	1	0	No
1	2	1	2	1	No
2	3	2	2	2	No
3	4	3	3	3	No
4	4	4	3	4	Yes
5	5	5	4	5	Yes
6	5	6	4	6	Yes
7	6	7	5	7	Yes
		8	5		
		9-13	6		

JUDICIAL DISCRETION

The PSA is a decision-making tool for judges. It is not intended to, nor does it functionally, replace judicial discretion. Judges continue to be the stewards of our judicial system and the ultimate arbiters of the conditions that should apply to each defendant.

NONPROFIT IMPLEMENTATION AND OWNERSHIP

LJAF provides the PSA at no cost to jurisdictions that adopt it and funds technical support to help localities integrate the tool into their operations. The PSA cannot be implemented by a jurisdiction, incorporated into software, or otherwise used or reproduced without LJAF's express, prior written consent.

Public Safety Assessment

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PUBLIC SAFETY ASSESSMENT RESOURCES

Public Safety Assessment Risk Factors and Formula

Overview of the Public Safety Assessment

Research Report: Results from the First Six Months of the Public Safety Assessment –Court in Kentucky

View More

The most important decisions made during the pretrial phase pertain to whether a defendant will be detained or released before trial. Many defendants are low-risk individuals who, if released before trial, are highly unlikely to commit other crimes and are likely to return to court. Others present moderate risks and can often be managed in the community through supervision, monitoring, or other interventions. There is, of course, a small group of defendants who should most often be detained because they pose significant risks of committing acts of violence, committing additional crimes, or skipping court. The key, then, is to make sure that we accurately distinguish among the low-, moderate-, and high-risk defendants, and identify those who are at an elevated risk for violence.

Currently, only about 10 percent of courts use evidence-based risk-assessment instruments to help them decide whether to release, supervise, or detain defendants. In order to address this issue, LJAF developed the Public Safety Assessment (PSA), a pretrial risk-assessment tool that is designed to assist judges in making release/detention determinations.

The PSA was created using a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions. We analyzed the data to identify the factors that are the best predictors of whether a defendant will commit a new crime, commit a new violent crime, or fail to return to court. These factors include whether the current offense is violent; whether the person had a pending charge at the time of the current offense; whether

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the person has a prior misdemeanor conviction; whether the person has a prior felony conviction; whether the person has prior convictions for violent crimes; the person's age at the time of arrest; how many times the person failed to appear at a pretrial hearing in the last two years; whether the person failed to appear at a pretrial hearing more than two years ago; and whether the person has previously been sentenced to incarceration. The PSA does not consider factors such as race, gender, level of education, socioeconomic status, and neighborhood. The PSA is more objective, far less expensive, and requires fewer resources to administer than previous techniques. And because it was developed and validated using data from diverse jurisdictions from across the country, it can be used anywhere in the United States. It has been adopted by approximately 38 jurisdictions, including the states of Arizona, Kentucky, and New Jersey—as well as three of the largest cities and two of the largest jail systems.

We are commissioning extensive, third-party research studies on the PSA to measure its impact. Jurisdictions interested in the PSA can request more information by emailing VBersch@arnoldfoundation.org.

VIDEOS

Judge Susan Brown

Susan Brown, Presiding Judge of District Criminal Courts in Harris Co., TX, explains how judges will use the PSA to help them make decisions about whether to release or detain defendants based on the risk they pose to the community. Judge Brown's remarks were delivered during a press conference on May 24, 2016.

Judge Margaret Harris

Margaret Harris, Presiding Judge of County Criminal Courts in Harris Co., TX, describes what judges take into consideration as they decide whether to release or detain a defendant and how the PSA will provide judges with more information. Judge Harris' remarks were delivered during a press conference on May 24, 2016.

District Attorney Devon Anderson

Devon Anderson, District Attorney in Harris Co., TX, explains that the PSA will help to protect citizens' rights and improve public safety because judges will be better equipped to identify high-risk defendants who should remain in jail before trial even when they have the financial means to post bail. Ms. Anderson's remarks were delivered during a press conference on May 24, 2016.

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Public Defender Alex Bunin

Alex Bunin, Public Defender in Harris Co., TX, explains that the PSA will help judges identify low-risk defendants who can be safely released before trial, thereby reducing the negative consequences for individuals and society that occur when a defendant is needlessly detained. Mr. Bunin's remarks were delivered during a press conference on May 24, 2016.

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Commissioner Gene Locke

Gene Locke, Commissioner in Harris Co., TX, explains that the PSA will increase fairness in the local criminal justice system and will benefit the entire community by helping to safely reduce the jail population. Commissioner Locke's remarks were delivered during a press conference on May 24, 2016.

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Matt Alsdorf

Matt Alsdorf, Vice President of Criminal Justice at the Laura and John Arnold Foundation, explains that the PSA is a race- and gender-neutral tool developed using rigorous research and evidence. Mr. Alsdorf's remarks were delivered during a press conference on May 24, 2016.

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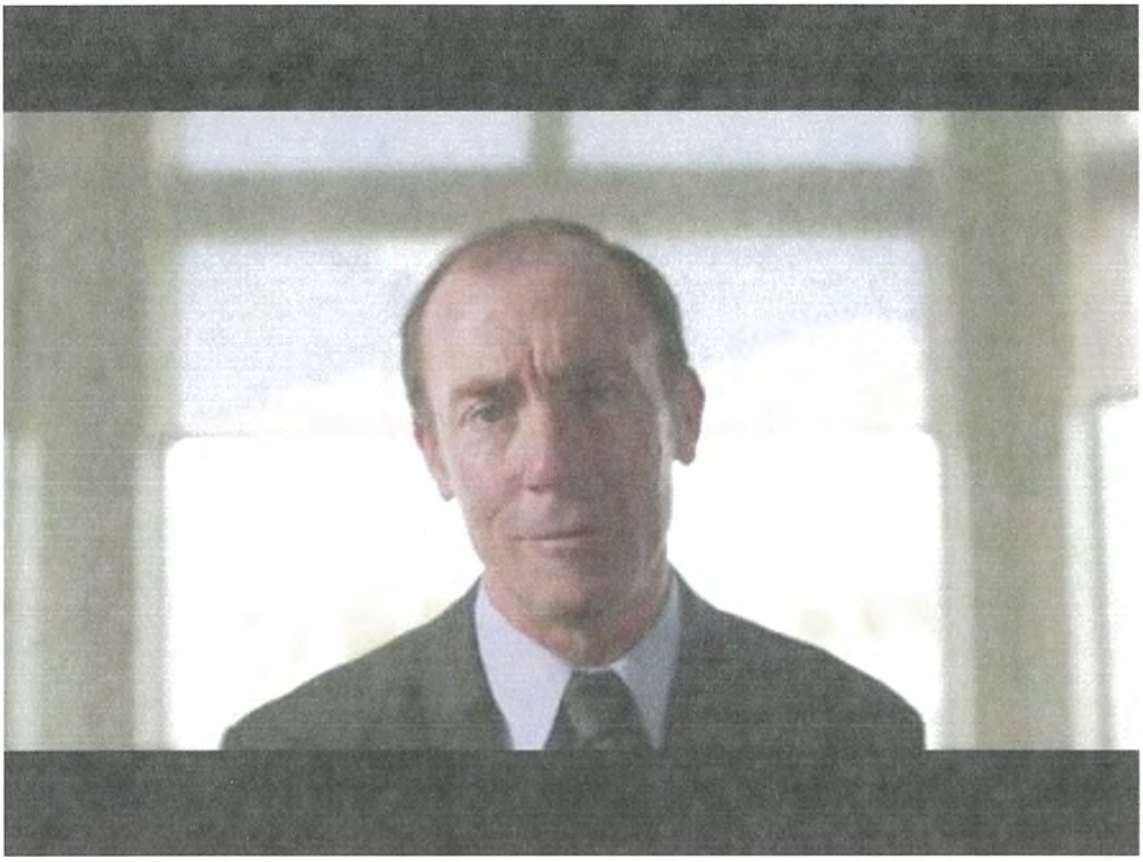
Judge Regan Miller

Regan Miller, the Chief District Court Judge in Mecklenburg Co., NC, says the PSA gives him greater confidence that he is treating each defendant fairly. His comments were recorded in June 2015.

Q

District Attorney Andrew Murray

Andrew Murray, the District Attorney in Mecklenburg Co., NC, explains that the PSA is helping to ensure that people who are a danger to the community are detained, while low-level offenders and those who pose little risk to society are safely released. His comments were recorded in June 2015.



Public Defender Kevin Tully

Kevin Tully, the Public Defender in Mecklenburg Co., NC, says the PSA is an important aspect of the community's pretrial reform efforts. His comments were recorded in June 2015.

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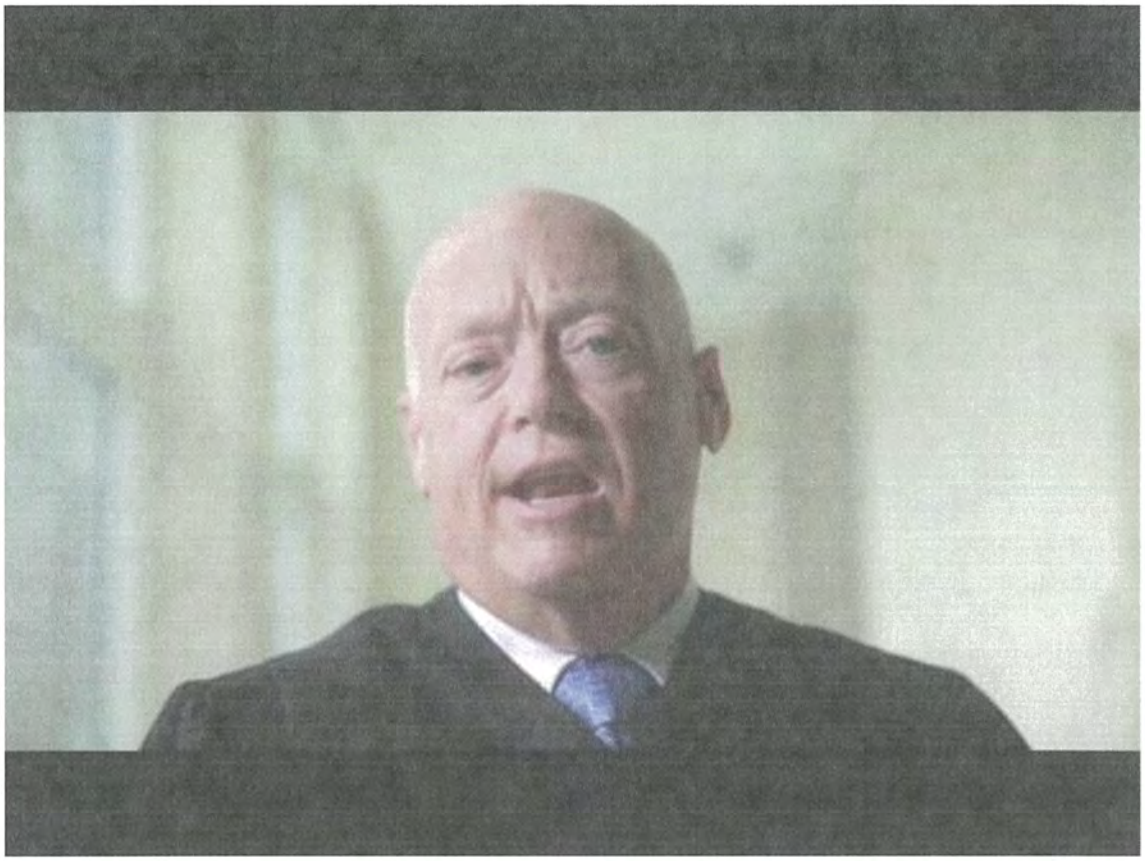

Judge David Tapp

David Tapp, a Circuit Court Judge in the Commonwealth of Kentucky, explains that the PSA does not take into account factors that could be discriminatory. His comments were recorded in June 2015.

Judge Karen Thomas

Karen Thomas, a District Court Judge in the Commonwealth of Kentucky, says the PSA provides objective information that allows her to make release and detention decisions based on more than just her own gut instinct. Her comments were recorded in June 2015.

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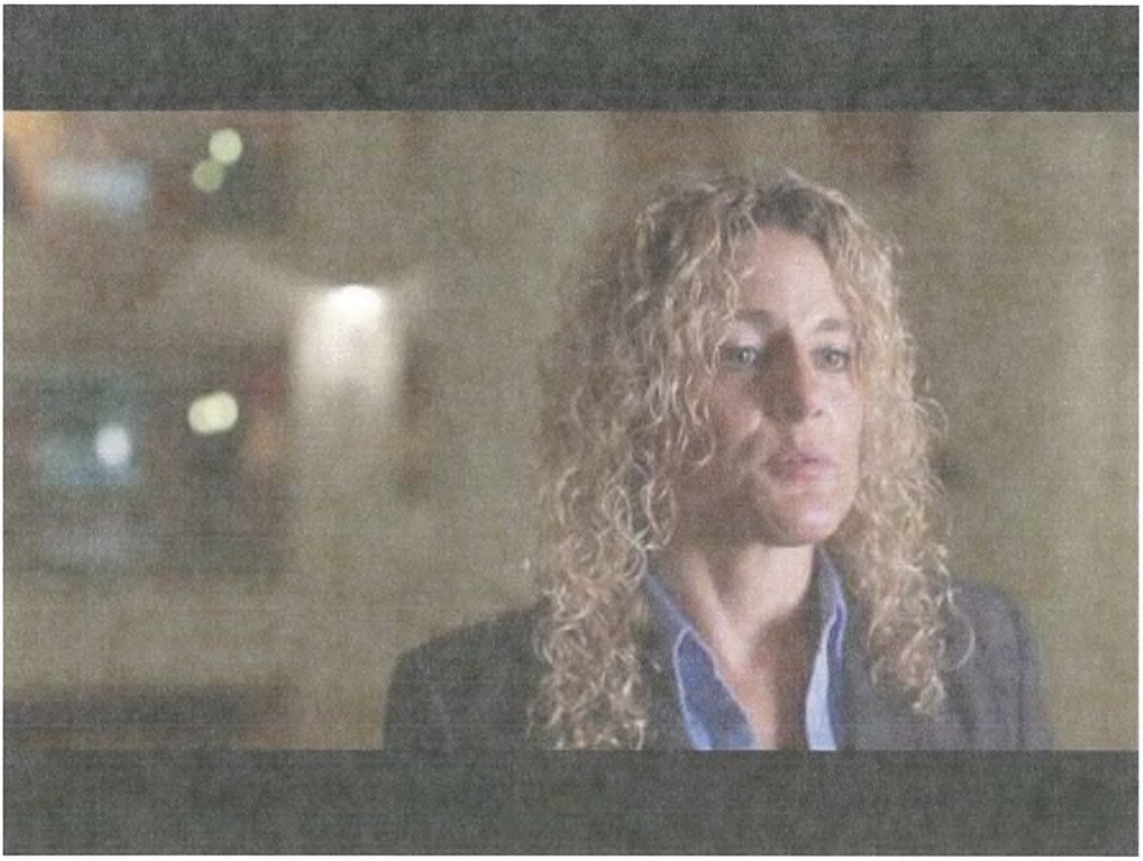


Pretrial Services General Manager Tara Klute

Tara Klute, the General Manager of Pretrial Services for the Commonwealth of Kentucky, says the PSA is the most predictive tool ever used in the Commonwealth. Her comments were recorded in June 2015.

Pretrial Services Supervisor Kristie Wooley

Kristie Wooley, a Pretrial Supervisor in Pinal County, AZ, says the PSA gives judges more information to help them make effective decisions. Her comments were recorded in June 2015.

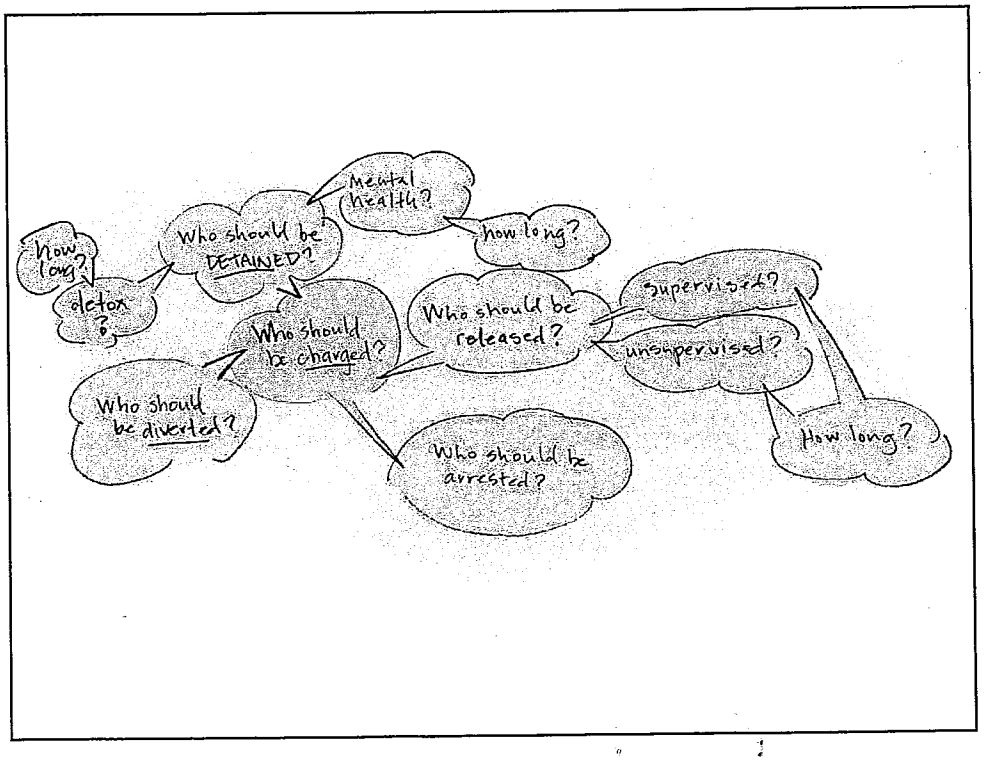
PSA

Public Safety Assessment

Transformational Change
in the Pretrial System

ljaf
laura and john arnold foundation®

Virginia Bersch
Deputy Director of National Implementation
Criminal Justice Initiative



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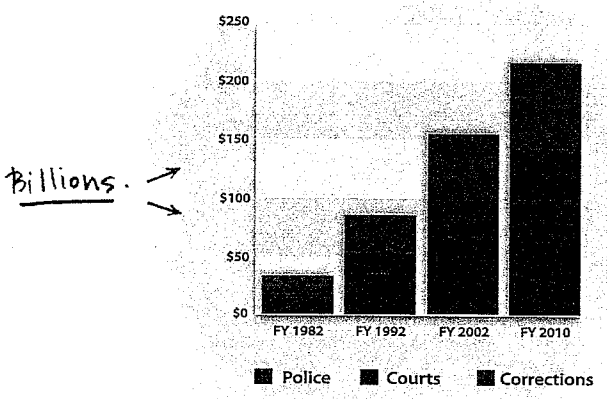
State and local spending



↑731% corrections ↑582% courts ↑470% police

$9 billion

pretrial cost per year

"Pretrial decisions determine mostly everything."

Foote **1956**
McCoy **2007**
Sacks & Ackerman **2012**

Defendants detained for the entire pretrial period are **4X**

more likely to be sentenced to jail or prison and **receive longer sentences.**

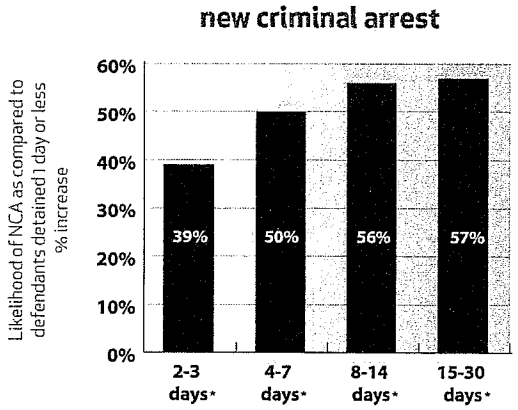
3X

jail: **3X**

Prison: **2X**

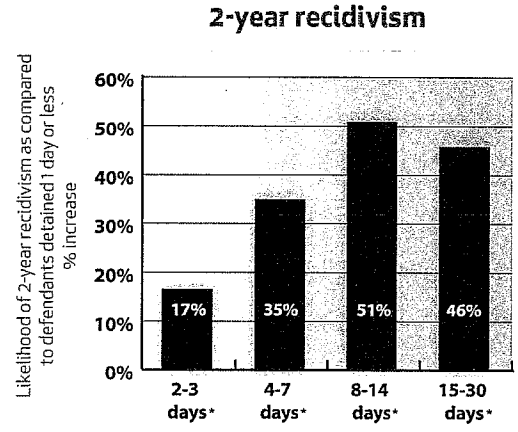
Q

The impact of detention on low-risk defendants



* = statistically significant at the .01 level or lower

The impact of detention on low-risk defendants



* = statistically significant at the .01 level or lower

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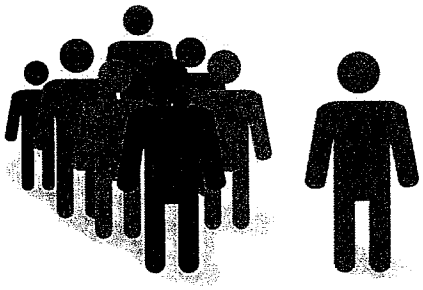
Even for low bails, $1,000 or less,

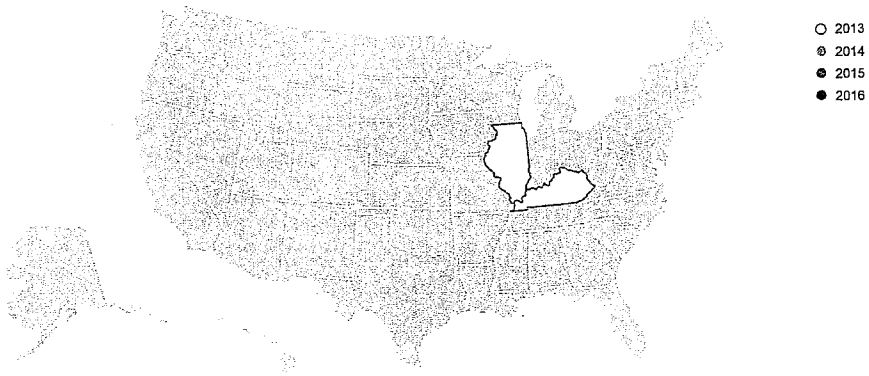
7 out of 8

defendants arrested on misdemeanor charges in New York City can't make bail.



Their average pretrial detention was 16 days.

State-Level Pretrial Initiatives (2013)



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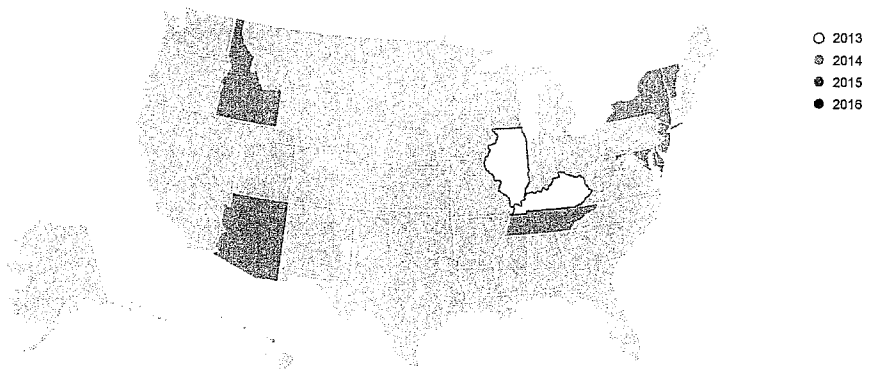
State-Level Pretrial Initiatives (2014)



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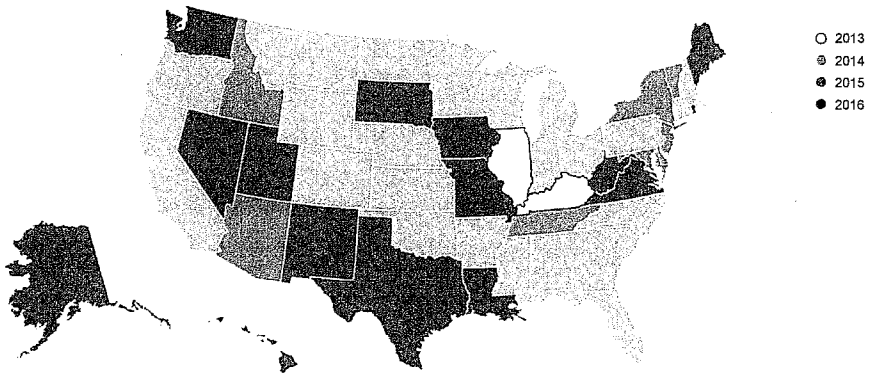
State-Level Pretrial Initiatives (2015)



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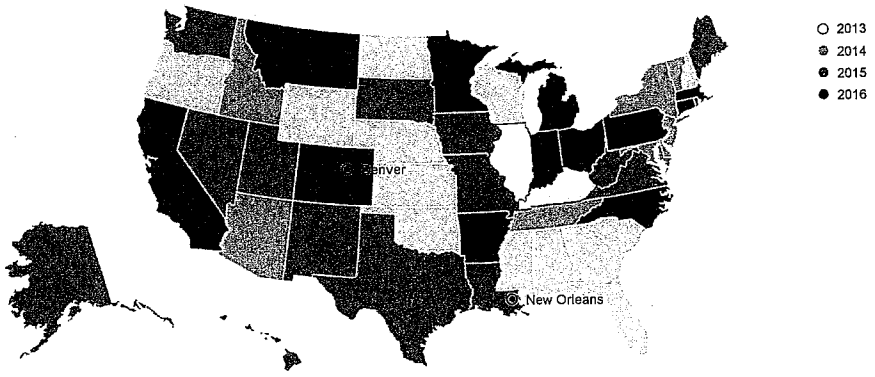
State-Level Pretrial Initiatives (2016)



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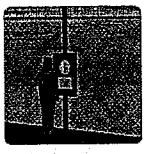


Locked Up for Being Poor

THE NEW YORK TIMES • ADDED 05.08.2017

When Bail Is Out of Defendant's Reach, Other Costs Mount Money bail, entrenched in most jurisdictions, is under new scrutiny, with some critics decrying what they see as racial and financial inequities.

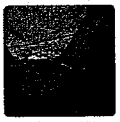
THE NEW YORK TIMES • ADDED 06.10.2015 • BROKEN LINK?

New Jersey Alters Its Bail System and Upends Legal Landscape

THE NEW YORK TIMES • ADDED 02.07.2017 • BROKEN LINK?

California lawmakers target bail system, saying it punishes the poor

THE SACRAMENTO BEE • ADDED 02.06.2017 • BROKEN LINK?



Federal Judge Says Harris County Bail System Is Unfair to Poor Defendants

HOUSTONPRESS.COM • ADDED 04.29.2017 • BROKEN LINK?

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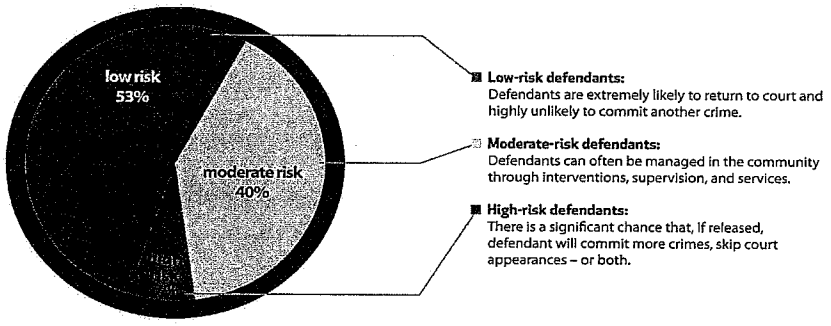
How Measuring Risk Can Make Us Safer

Who is in our criminal justice system?



DUAL SYSTEM ERRORS

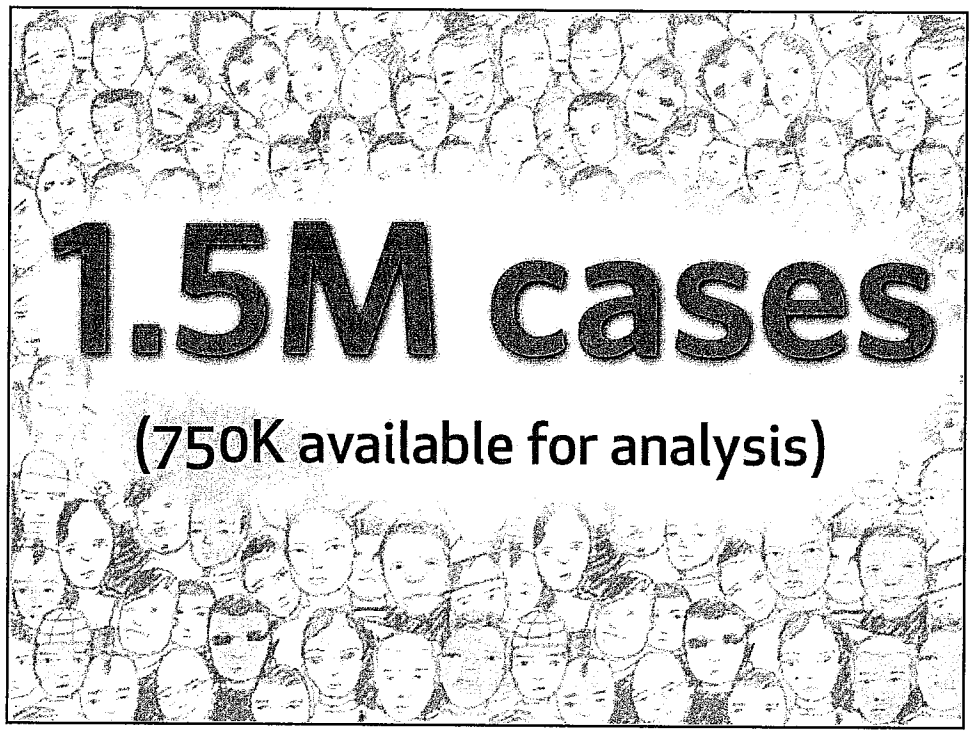
1. Many **high-level/violent** individuals who pose a significant risk to public safety are released.
2. Many **low-level/non-violent** individuals are detained.

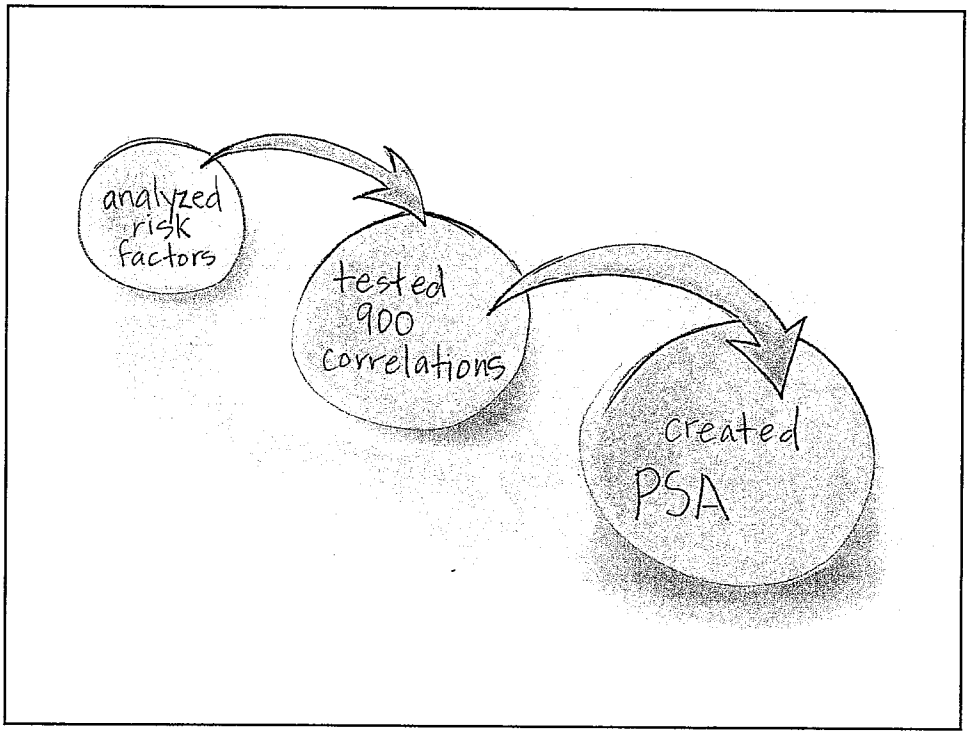
Risk assessment works.

BUT...

90% of jurisdictions Don't use it.

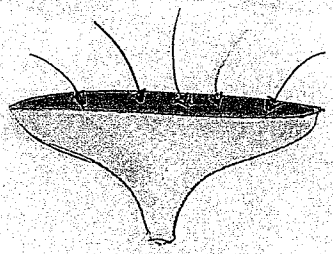
Q


1.5M cases
(750K available for analysis)


analyzed risk factors
tested 900 correlations
created PSA

Q

Administrative data



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Risk scales

NVCA NCA FTA

The PSA provides information about the risk that an individual poses. Judges can use this information – in concert with their professional discretion – to decide whether to release or detain a defendant.

Initial results indicate that the PSA is helping to protect public safety while reducing jail populations and freeing up funds for other government priorities.

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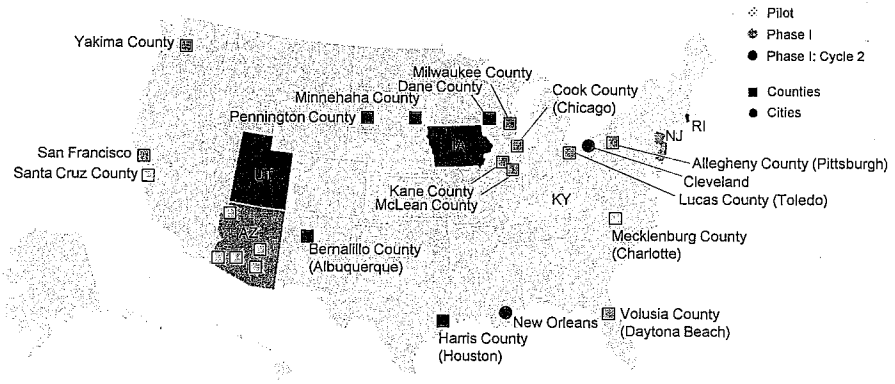
PSA Sites



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THANK YOU

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News

AUGUST 8, 2016 | PRESS RELEASE

New data: Pretrial risk assessment tool works to reduce crime, increase court appearances

TOLEDO, OH—Officials in Lucas County released new data showing that more individuals are being released on their own recognizance, pretrial crime is down, and significantly more people are reporting for court hearings since the county began using a data-driven pretrial risk assessment tool known as the Public Safety Assessment (PSA). The PSA is being used, or is in the process of being implemented, in 30 cities and states across the country to help judges make consistent and risk-based decisions about whether to release or detain defendants prior to trial. Specifically, the Lucas County data show that:

- **The number of releases without the need for bail nearly doubled.** The percentage of pretrial defendants released by the court on their own recognizance, meaning they did not have to post bail, jumped from 14 percent before the county began using PSA to almost 28 percent today.
- **Pretrial crime is down.** The percentage of pretrial defendants arrested for other crimes while out on release has been cut in half—from 20 percent before the county began using the PSA to 10 percent today. In addition, the percentage of pretrial defendants arrested for violent crimes while out on release has decreased—from 5 percent before the county began using the PSA to 3 percent today.
- **More defendants are returning to court.** The percentage of pretrial defendants who skipped their court date has been dramatically reduced—from 41 percent before the county began using the PSA to 29 percent today.
- **The PSA is race and gender neutral.** In Lucas County, black and white defendants are being released at equal rates. Unlike some risk assessments, the PSA does *not* take into account factors that some have argued could be discriminatory such as a person's ethnic background, income, level of education, employment status, or neighborhood.

"The Public Safety Assessment is an important part of our effort to ensure that we are using our jail to house the right people—those who pose a risk to public safety or of not returning to court," Judge Gene Zmuda of the Lucas County Court of Common Pleas explained. "It is helping our judges make more effective decisions about who should be in jail and who can be safely released."

Lucas County first began using the PSA in January 2015 as part of an integrated response to a federal court order capping the jail population at 403 inmates. The Lucas County Court of Common Pleas sought to ensure that the jail's limited space was being occupied by the defendants who were the most likely to commit new crimes or skip court if released—and that lower-risk defendants were being supervised in the community in ways that are consistent with the risk posed.

In addition to assisting judges in determining which defendants to release and which to detain before trial, the PSA is helping Lucas County Sheriff John Tharp and the courts in Lucas County manage and reduce the jail population at a level that is at or below the federal cap. Prior to implementation of the PSA, many defendants charged with lower-level crimes were released immediately after booking because the jail did not have space for them. Others were held in jail for some time but were then let out under an "emergency release" protocol in order to keep the jail population below the cap. Because these releases were based primarily on what a defendant was charged with, rather than the level of risk posed, many defendants with a long record of reoffending or skipping court were quickly let out, while lower-risk defendants remained in jail. As a result, more than four of every 10 defendants didn't return for their court dates, and one in five was rearrested while their original case was still pending. With the PSA in place, Lucas County is now able to make these decisions based on risk and has seen the dramatic reductions in pretrial crime, violence, and missed court dates cited above.

Working with Dr. Marie VanNostrand, one of the nation's leading researchers and practitioners in pretrial criminal justice, Lucas County has overhauled its pretrial system. Cases are now being processed more efficiently, with the number of cases resolved at a defendant's first appearance more than doubling from 8 percent to 17 percent. Because of the system improvements, judges are now able to designate low-risk defendants for release and high-risk defendants for detention (with an attendant increase in pretrial detention from 17 percent of defendants to 23 percent), rather than having the emergency-release protocol drive these outcomes. As a result, the number of emergency releases has plummeted from 39 percent of pretrial defendants to 5 percent.

The PSA was developed by the Laura and John Arnold Foundation (LJAF), a philanthropic organization that made the risk assessment available free of charge. It provides information that judges can consider when deciding whether to release or detain a defendant prior to trial. The PSA uses neutral, reliable data to produce two risk scores: one predicting the likelihood that an individual will commit a new crime if released pending trial, and another predicting the likelihood that he will fail to return for a future court hearing. Scores fall on a scale of one to six, with higher

scores indicating a greater level of risk. The PSA also flags defendants that it calculates present an elevated risk of committing a violent crime.

There are early indications from other communities that the tool is helping to reduce crime and jail populations in those locations, but the results in Lucas County are especially striking, according to LJAF Vice President of Criminal Justice Matt Alsdorf.

"We applaud the criminal justice team in Lucas County for their leadership and foresight in identifying ways that the Public Safety Assessment could help manage the Lucas County Jail population," Mr. Alsdorf explained. "The results are very positive and are a further indication that the tool is making it possible for communities to address their specific needs in ways that make the system more effective, efficient, and fair."

The PSA was created using the largest, most diverse set of pretrial records ever assembled—1.5 million cases from approximately 300 jurisdictions across the United States. Researchers analyzed the data and isolated factors that most often exist for defendants who commit a new crime, commit a violent crime, or fail to return to court if released before trial.

The factors are:

- Whether the current offense is violent
- Whether the person had a pending charge at the time of the current offense
- Whether the person has a prior misdemeanor conviction
- Whether the person has a prior felony conviction
- Whether the person has prior convictions for violent crimes
- The person's age at the time of arrest
- How many times the person failed to appear at a pretrial hearing in the last two years
- Whether the person failed to appear at a pretrial hearing more than two years ago
- Whether the person has previously been sentenced to incarceration.

Though these neutral factors can help judges gauge the risk that a defendant poses, they do not impede a judge's discretion or authority in any way. The decision about whether to release or detain a defendant always rests with the judge regardless of the scores produced by the risk assessment.

ALL NEWS, PRESS RELEASES, AND BLOG POSTS

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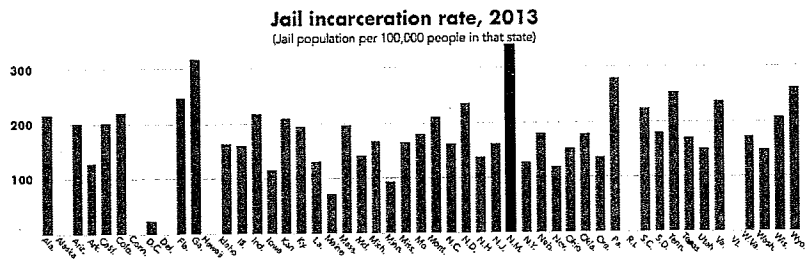
ARNOLD PUBLIC SAFETY ASSESSMENT

WHY WE NEED IT



From: Era of Mass Expansion, Why State officials Should Fight Jail Growth. Prison Policy Initiative (2017). *emphasis added.*

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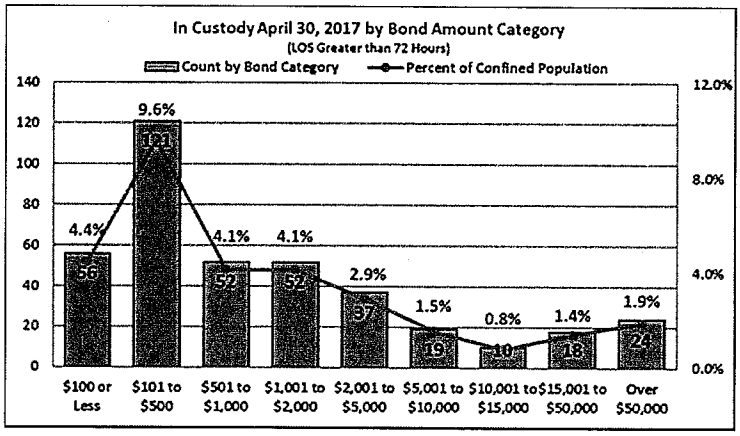
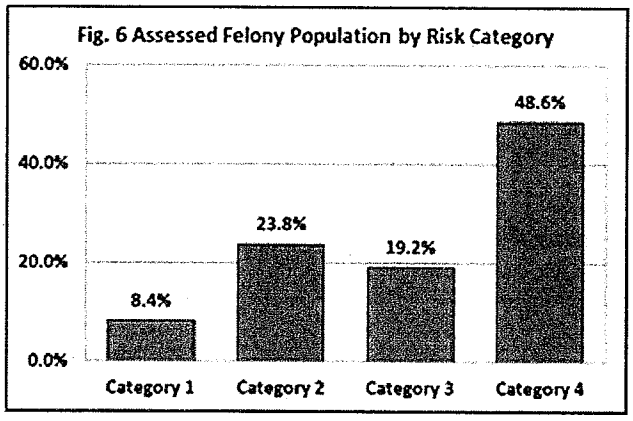
People Held on Financial Bonds



Incarcerated Population With Known Risk Category (6/30/16)



Advantages of the PSA

- Extensive Data Base and Research
- Types of Risk Measured Separately
- Violence Flag
- Agreed upon Release Recommendation Matrix

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PRETRIAL JUSTICE IN NEW MEXICO

Bail reforms implemented through a constitutional amendment give judges new tools to better protect the public and assure equal justice for all New Mexicans.

- Under the American system of justice, people charged with a crime are presumed innocent until proven guilty.
  - This principle is so important that the New Mexico Constitution since statehood has guaranteed that people charged with a crime have a right to be released pretrial, except in limited instances.
  - By allowing a person to remain free while awaiting trial, the state avoids punishing a person awaiting a determination of guilt.

- For the first time in state history, district court judges can lawfully hold felony defendants in jail before trial if they are shown to be too dangerous for release.
  - Detention of a defendant may occur only if a prosecutor files a written request with the court and proves by clear and convincing evidence that pretrial jailing is necessary for the public safety. Judges cannot initiate a preventive detention proceeding.
  - Only people charged with a felony – not a misdemeanor – are subject to possible pretrial detention.
  - The constitution does not provide magistrate, metropolitan and municipal court judges with the preventive detention authority.

- The state constitution, as amended by voters in 2016, ensures that defendants who are not dangerous or a flight risk cannot be held in jail pretrial solely because they cannot afford a bail bond.
  - Under previous bail practices, dangerous defendants could return to the streets if they could afford a money bond. But defendants who posed no danger would remain locked up pretrial if they lacked the money for a bail bond.
  - Equal justice is a right for all people, not a privilege for those with money.

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- Requiring defendants to post a money bond does not deter them from committing new crimes while awaiting trial.
  - Under state law, a commercial money bail bond is not forfeited if a defendant is arrested for a new crime while released pretrial on another charge.
  - A commercial money bond cannot be forfeited if a defendant violates conditions of their release such as failing a drug test, obtaining a weapon or violating curfew.
  - The only purpose of a bail bond is to provide a financial incentive for a defendant to return to court. A money bond does not protect public safety.

- The term bail is often misunderstood. Bail refers to the broad categories and conditions of pretrial release for criminal defendants.
  - One form of bail is a commercial money or surety bond.
  - Before imposing a money bond, courts must consider nonfinancial bail conditions, such as requiring "house arrest" to confine the defendant to a residence and a GPS ankle monitor to track the person's location, and barring any contact with the crime victim.

- Court rules governing pretrial release and detention have been updated to comply with the constitutional amendment.
  - The rules spell out procedures and deadlines for judges, prosecutors and defense attorneys to follow in criminal cases.
  - The updated procedural court rules that went into effect in July 2017 do not establish new law but only implement the requirements of the constitution and state statutes.

Authorized and printed by the
Administrative Office of the Courts of New Mexico

September 18, 2017

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KEY FACTS AND LAW REGARDING PRETRIAL RELEASE AND DETENTION

INTRODUCTION

New Mexico, like the federal government and an increasing number of states in recent years, has been changing court practices to better protect public safety and improve the fairness of its pretrial justice system. The objective is to effectively distinguish between people charged with a crime who should be held in jail while awaiting trial and those allowed to remain free until their guilt can be determined. There is a growing recognition nationwide that meaningful pretrial justice reform requires moving to a system in which release and detention decisions are made based upon evidence of the risks posed by a criminal defendant rather than whether defendants are wealthy enough to secure their release by buying a money bond. Under reforms in New Mexico, judges set pretrial release conditions by weighing the risks that defendants will fail to appear at future court hearings or commit another offense if released while awaiting trial.

In the past few years, New Mexico has taken two significant steps in pretrial justice reform:

(1) Approval by the New Mexico Legislature (91% in favor) and voters (87% in favor) in 2016 of a constitutional amendment to give district judges new authority to deny release to proven dangerous defendants – no matter how much they can pay for a bail bond. The amendment also ensures that defendants who are neither a danger nor a flight risk may not be kept in jail before trial only because they cannot afford to buy a money bond.

(2) Implementation of procedural court rules in July 2017 to enforce the constitutional amendment's mandates, better protect public safety, and improve equal protection of the law.

This is a guide to key facts about those reforms.

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THE FULL TEXT OF THE 2016 CONSTITUTIONAL AMENDMENT

[The new constitutional language is underlined.]

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO ARTICLE 2, SECTION 13 OF THE CONSTITUTION OF NEW MEXICO TO PROTECT COMMUNITY SAFETY BY GRANTING COURTS NEW AUTHORITY TO DENY RELEASE ON BAIL PENDING TRIAL FOR DANGEROUS DEFENDANTS IN FELONY CASES WHILE RETAINING THE RIGHT TO PRETRIAL RELEASE FOR NON-DANGEROUS DEFENDANTS WHO DO NOT POSE A FLIGHT RISK. BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. It is proposed to amend Article 2, Section 13 of the constitution of New Mexico to read:

"All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner."

REQUIREMENTS OF THE 2016 CONSTITUTIONAL AMENDMENT

1. For the first time in New Mexico history, district judges may deny pretrial release to dangerous defendants in order to protect community safety. In the past, judges had no authority to detain dangerous defendants who could buy a bond or make an installment payment deal with a bail bondsman. Pretrial release and detention decisions must now be based on evidence of a defendant's danger or flight risk, not on whether someone charged with a crime can afford a bail bond.

2. Only a district judge has the authority to conduct a detention hearing or enter an order denying pretrial release. The constitutional amendment, as approved by the Legislature, did not grant magistrate, metropolitan, or municipal court judges the authority to deny pretrial release to dangerous defendants.

3. A defendant can be detained pretrial only if a prosecutor files a written motion in court and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. Judges on their own accord cannot initiate a pretrial detention proceeding.

4. Low-risk arrestees who are neither a danger nor a flight risk may not be jailed pending trial solely for lack of money to afford a bail bond. This enforces several fundamental principles of American justice: (1) an accused citizen is innocent until proven guilty at a trial; (2) the government has the burden of producing evidence to satisfy a jury or judge that guilt has been proven beyond a reasonable doubt; (3) a bail bond cannot be set so high that it acts as pretrial punishment because of the defendant's inability to pay the bond; and (5) all accused citizens are entitled to equal protection of the laws, no matter how much money they may have.

5. Constitutional provisions must be upheld by all government officials. Statutes enacted by the Legislature and procedural rules promulgated by the Supreme Court must comply with the Constitution, and all judges must support and uphold constitutional mandates in their rulings.

6. The provisions of the 2016 constitutional amendment and court rules to comply with the amendment were based on federal statutes that have been expressly upheld as constitutional over 30 years ago by the United States Supreme Court in *U.S. v. Salerno*, 481 U.S. 739 (1987), and on similar constitutional reforms approved by New Jersey voters in 2014.

COURT RULE UPDATES REQUIRED BY CONSTITUTIONAL CHANGES

1. The New Mexico Supreme Court, on recommendation of a broad-based state bail reform committee, updated procedural rules for courts to comply with the requirements of the constitutional amendment.

2. The committee was chaired by a former dean of the University of New Mexico Law School and included members from all branches of government, the attorney general's office, district attorneys, defense attorneys, county officials, commercial bail bondsmen, judges from various levels of courts, and a retired federal judge.

3. The updated court rules:

(a) Establish evidence-based procedures for conducting detention-for-dangerousness hearings (Rule 409);

(b) Guide judges in determining what monetary bond or other release conditions are necessary to assure a defendant will return to court (Rule 401B-F);

(c) Clarify that fixed-money bail schedules cannot be used because they do not take into account evidence of a defendant's dangerousness or flight risk (401E); and

(d) Clarify that defendants may have their pretrial release completely revoked if they fail to appear in court or commit new crimes while awaiting trial (Rule 403).

4. Federal and state law has long required that arrestees be released on nonfinancial conditions before trial unless the court determines that will not reasonably assure a defendant will return to court. This has been part of federal law since 1966, and New Mexico law since 1972. Those provisions were not created by the updated court rules that took effect in July 2017.

5. In place of inconsistent fixed-money bond schedules used by many local jurisdictions, the updated rules (Rule 408) tighten regulation of procedures for the release of defendants before they initially appear before a judge. This ends the practice of releasing high-risk defendants on fixed-money bond amounts before a court appearance for a detention or release hearing. Court procedural rules do not prohibit the use of monetary bonds, but continue previous legal requirements that money bonds can be required only when needed to assure a defendant's return to court (Rule 401). Unlike four states and all nations except the United States and the Philippines, the new court rules do not outlaw the selling of bail bonds or their requirement by a court where financial security is determined to be appropriate to mitigate a defendant's flight risk.

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MONEY BONDS NEVER PROTECT PUBLIC SAFETY

1. Money bonds do nothing to protect public safety or deter a released defendant from committing new crimes while bonded out. Even worse, some defendants may have committed new crimes to get money to pay for money bonds.

2. A money bond's lawful purpose is not to protect public safety, but only to provide additional assurance that a released defendant will return to court. *State v. Eriksons*, 1987-NMSC-108.

3. Money bonds cannot lawfully be forfeited for a defendant's commission of new crimes while out on bail. New Mexico statutes do not "authorize[] forfeiture of bail for anything other than failure to appear." *State v. Romero*, 2007-NMSC-030. NMSA 31-3-2. No American jurisdiction allows judges to forfeit money bonds for commission of new crimes by a defendant while on release.

4. Money bonds cannot lawfully be used to prevent a defendant's pretrial release or as pretrial punishment for the charged offenses. "Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release." *State v. Brown*, 2014-NMSC-038. The same is true under controlling law in the federal constitution, as observed by the United States Supreme Court: "[R]equiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. *Stack v. Boyle*, 342 U.S. 1 (1951); *Bandy v. U.S.*, 81 S. Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom.").

5. Money bonds are not required to be used as conditions of release by either the New Mexico or the U.S. constitutions. The term "bail," as used in the constitutions, is a "broad category of nonmonetary and monetary pretrial release; money bonds are only one form of bail. Commercial money bonds did not exist until around 1900, over 100 years after the adoption of the U.S. constitution." *State v. Brown*, 2014-NMSC-038. "Bail" includes the "process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance. . ." Black's Law Dictionary 167 (10th ed. 2014).

6. The United States Supreme Court has recognized that the federal constitution's only reference to bail, the 8th Amendment's right against excessive bail, "has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." *Salerno v. United States*, 481 U.S. 739 (1987).

7. A bail bondsman does not enforce pretrial release conditions imposed by a court, such as drug or alcohol testing, curfews, preventing contact with victims or witnesses, travel restrictions, weapons restrictions, GPS monitoring, or the requirement not to commit new crimes. A violation of any of these conditions cannot be grounds to forfeit a bond.

FIXED-MONEY BOND SCHEDULES ARE DANGEROUS AND UNJUST

1. Some defendants in the past could gain their release shortly after arrest by posting a money bond at the jail based on dollar amounts assigned to specific offenses. These fixed-money bond schedules neither protect public safety nor guard against flight risk because they do not take individual risk or criminal history into account. They resulted in repetitious arrest-and-release for high-risk defendants.

2. Fixed-money bond schedules deny equal protection of the law to low-risk arrestees who cannot afford a bond and remain in jail pretrial despite the fact they are neither dangerous nor flight risks.

3. Fixed-money bond schedules were never established by New Mexico laws and have been held in numerous cases to be inconsistent with state and federal law. See the precedents surveyed in *Odonnell v. Harris County*, https://www.gpo.gov/fdsys/pkg/USCOURTS-txsd-4_16-cv-01414/pdf/USCOURTS-txsd-4_16-cv-01414-5.pdf; http://www.houstonpress.com/news/judge-rips-harris-county-bail-system-in-historic-ruling-9399890

4. The various county-by-county fixed-money bond schedules created inconsistent provisions that meant arrestees on the very same state charges were treated differently in the amount of money bond they were required to post, depending on what side of a county line they were arrested.

5. No federal or state court has ever held that fixed-money bond schedules are required by any federal or state constitutional provision.

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RISK ASSESSMENTS HELP IDENTIFY DANGER AND FLIGHT RISKS

1. New Mexico courts may use a pretrial risk assessment to provide evidence-based information to assist judges in deciding conditions of release for a defendant awaiting trial. "A pretrial risk assessment instrument or tool provides an objective analysis of whether an arrested person is likely to appear in court and not get rearrested if released before trial. Using a pretrial risk assessment tool reduces bias and subjectivity in court decisions about who should be detained before trial and which conditions, if any, should be required of those who are released." https://www.pretrial.org/solutions/risk-assessment/

2. The thoroughly-validated Public Safety Assessment (PSA) created by the Laura and John Arnold Foundation is the recognized leader for risk assessment instruments. The PSA is being used or in the process of being implemented in about three dozen jurisdictions across the country to protect public safety while avoiding unnecessary taxpayer-funded jailing of low-risk arrestees.

http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/

http://www.ncjp.org/pretrial/universal-risk-assessment

https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html

3. Under court rules (Rule 401), judges should consider, but not be controlled in their release and detention decisions, by the results of a Supreme Court-approved risk assessment instrument. Although no instrument has yet been fully tested and approved for statewide use, a pilot project using the Arnold Foundation's PSA has been authorized in Bernalillo County. The Supreme Court will determine whether to authorize use of the PSA in courts elsewhere in New Mexico in 2018, after analyzing the results of the pilot project.

4. Risk assessment instruments are an additional evidence-based tool for judges to use, but do not replace a judge's consideration of all other relevant factors in setting conditions of release in an individual case.

5. One advantage of the Arnold Foundation's PSA is that it does not require court personnel and funding to conduct individual interviews of arrestees to obtain the necessary information for its use. The background data is quickly available from computerized databases.

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NEW COURT RULES HAVE NOT CAUSED HIGHER CRIME RATES

1. The 2016 constitutional amendment and court procedural rules that enforce the constitution's requirements were written to better deal with long-standing problems related to crime in New Mexico, including the ability of dangerous defendants to gain their release through money bonds.

2. Crime rates in the Albuquerque area rose from 2010 to 2016, and during the time dangerous defendants were able to rotate in and out of jails and courts through release on money bonds. None of the 2010-to-2016 crime rate increase can be attributed to the adoption of the constitutional amendment in November 2016, or revised procedural rules that became effective in July 2017.

3. Because of the constitutional amendment, prosecutors can request and district judges have new authority (Rule 409) to prevent the release of dangerous defendants, no matter how much they can pay for a money bond.

4. Under court procedural rules, all judges have the explicit authority to change conditions of release or to revoke pretrial release entirely for defendants who commit new crimes while released. This authority addresses the past problems of defendants who were released on bail bonds only to be arrested for another crime, for which a new bond could be posted and the defendant against released

5. Procedural rules (Rule 12-204) allow prosecutors and defense counsel to appeal pretrial release and detention decisions, and obtain prompt rulings by a court.

6. An objective assessment of the effect of the constitutional amendment will take at least 12 months. During that time prosecutors, judges and others can develop experience in applying their new authority to detain dangerous defendants, and reliable statistical data can be developed and reviewed.

7. The New Mexico Constitution and rules changes were modeled after provisions of law in other states, the federal courts, and the District of Columbia that have been found to protect public safety while ensuring that taxpayer-supported jail space is not used for low-risk defendants who do not pose a danger or a flight risk. There is no reason to believe we cannot achieve similar successes in New Mexico.

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EARLY RELEASE MUST BE BASED ON LOW RISK AND NOT MONEY

1. Updated procedural rules (Rule 408) allow people arrested for lower-level offenses to be released from jail before they appear before a judge. Courts can delegate the initial release authority to county detention facilities, but this system does not apply to people arrested for felonies and certain other offenses, including drunken driving, domestic violence and aggravated battery, or to a person already on pretrial release, probation, or parole.

2. No arrestee may be released under these provisions while a prosecutor's detention motion is awaiting a ruling or after a court's detention order has been entered.

3. These early release provisions are designed to release only low-risk defendants before court appearance, unlike fixed-money bond schedules that in the past allowed high-risk defendants to gain their release from jail by posting a money bond before seeing a judge.

4. Defendants who pay no bond as part of their pretrial release are just as likely to return to court as those required to pay a cash or surety bond, according to studies of bail practices in Colorado and Baltimore.

http://www.pretrial.org/download/research/Unsecured+Bonds.+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf (Pretrial Justice Institute).

http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf (Maryland Office of the Public Defender).

5. The Administrative Office of the Courts has issued a model order that standardizes and clarifies the scope of delegations of early release authority for low-risk misdemeanor arrestees.

6. Rules 408 (C) and (D) will allow future use of court-approved validated risk assessment instruments and court supervised release-on-recognizance (ROR) programs for the early release of other low-risk defendants. This will not burden detention center personnel with making discretionary judicial decisions. Decisions in those cases will be made by court officials working under court approved guidelines, based on specific risk-relevant facts relating to each arrestee.

7. Any district court may apply for Supreme Court approval of a pilot project to use a pretrial risk assessment instrument. The Second Judicial District Court used a risk assessment tool developed in Kentucky prior to implementing the Arnold Foundation's PSA in May 2017.

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NM BAIL REFORMS ARE PART OF NATIONAL REFORM EFFORTS

1. The federal government began modern bail reform with the Bail Reform Act of 1966, requiring release on nonmonetary conditions unless financial security is required to assure court appearance in individual cases. Many states, including New Mexico in 1972, modeled their bail rules on the federal reforms. Compare federal 18 U.S. Code § 3142 with New Mexico Rules 401 and 409.

2. The federal government enacted the Bail Reform Act of 1984 to better protect public safety by authorizing federal judges to deny pretrial release for defendants on a showing of clear and convincing evidence of dangerousness. *Salerno v. United States*, 481 U.S. 739 (1987). New Mexico constitutional provisions, which allowed few exceptions to the broad right of pretrial release, prevented the state from following suit at that time. That changed in 2016 when the Legislature and voters approved a constitutional amendment allowing judges to deny release based on dangerousness if a prosecutor files a written motion to detain the defendant and shows by clear and convincing evidence that the defendant is dangerous. New Jersey took a similar step with a 2014 constitutional amendment.

3. States throughout the country, including Arizona, are engaged in bail reform efforts like those in New Mexico:

http://www.ncsc.org/~/media/microsites/files/trends%202017/trends-2017-final-small.ashx

http://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system

http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/01/locked-up-is-cash-bail-on-the-way-out

http://www.azcentral.com/story/news/local/arizona/2017/06/21/arizona-courts-back-away-cash-bail-system-bond-companies-worried/400209001/

4. Justice system participants nationwide, including the International Association of Chiefs of Police and the National Sheriffs Association, support bail reform:

http://www.theiacp.org/portals/0/pdfs/Pretrial_Booklet_Web.pdf

http://www.sheriffs.org/sites/default/files/uploads/documents/2012resolutions/2012-6%20Pretrial%20Services.pdf

https://www.pretrial.org/download/policy-statements/Conferene%20of%20Chief%20Justices%20Resolution%20on%20Pretrial%20Justice%20-%202013.pdf

https://1newsnet.com/aba-house-supports-bail-reform-other-criminal-justice-measures/

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