

**The Second Judicial District Court Case Management Order:  
A 2016 and 2017 Functional Assessment (draft)**

## SUMMARY OF ANALYSIS

On June 15, 2017, the District Attorney’s Office (“DA’s Office”) published its *Report on the Impact of the Case Management Order on the Bernalillo County Criminal Justice System and Proposed Rule Amendments* (“2017 Report”). The 2017 Report identified numerous problems the DA’s Office claims to have encountered with Case Management Order (CMO) compliance and suggests revisions to the corresponding local rule, LR2-308. These suggested revisions would both extend most deadlines and eliminate or weaken sanctions that currently result from failure to adhere to CMO deadlines.

In response to the 2017 Report, the Court has reviewed the cases cited by the DA’s Office, as well as the other dismissals from 2016 and 2017. The Court has conducted a detailed analysis of the cases dismissed in 2016 and through June of 2017 and the reasons for dismissal. The full report follows this summary.

In 2016, 2787 cases were dismissed, 977 by the Court and 1810 by the DA’s Office. In 2017, of the 916 dismissals June, the Court dismissed 302 and the DA’s Office dismissed 614. In 2016, therefore, the Court initiated 35% of dismissals and 33% in 2017. The DA’s Office initiated 65% of dismissals in 2016 and 67% thus far in 2017.

Comparing the data from 2016 and the partial data from 2017, in most categories, CMO-related dismissals and CMO-related *nolle prosequi* rates have remained fairly consistent.<sup>1</sup>

	<b>DC 2016 (977 total)</b>	<b>NP 2016 (1810 total)</b>	<b>Total 2016 (2787 total)</b>	<b>DC 2017 (302 total)</b>	<b>NP 2017 (614 total)</b>	<b>Total 2017 916 (dismissals)</b>
<b>Arraignment</b>	<b>21</b>	<b>0</b>	<b>21 ( &lt; 1%)</b>	<b>6</b>	<b>0</b>	<b>6 ( &lt; 1%)</b>
<b>Transport</b>	<b>34</b>	<b>7</b>	<b>41 ( 1 %)</b>	<b>23</b>	<b>2</b>	<b>25 (3%)</b>
<b>PTI</b>	<b>46</b>	<b>53</b>	<b>99 (4%)</b>	<b>23</b>	<b>34</b>	<b>57 (6%)</b>
<b>Disclosure</b>	<b>109</b>	<b>7</b>	<b>116 (4%)</b>	<b>20</b>	<b>0</b>	<b>20 (2%)</b>
<b>Multiple</b>	<b>13</b>	<b>25</b>	<b>38 (1%)</b>	<b>22</b>	<b>9</b>	<b>31 (3%)</b>

Based on its review, the Court has determined that no revisions to the CMO are necessary to ensure that the criminal justice system in the Second Judicial District continues to process cases effectively and efficiently, protecting the rights of all parties.

<sup>1</sup> This chart does not represent all dismissal reasons, only those reasons that were highlighted by the 2017 Report.

Most *nolles* result from the age of the case or uncooperative witnesses and victims. Most Court dismissals relate to conditional discharge and deferred sentences. None of these categories is related to the CMO.

Focusing on the CMO, the greatest number of dismissals results from failure to disclose evidence or to provide pretrial interviews. Eliminating the mandatory sanctions provisions from the CMO will not improve either of these problems. The Court's pre-CMO experience indicates that discovery and interview problems only increase without a mechanism for the Court to force the parties to comply with deadlines. Further, the Court's review of the cases indicates that despite the sanctions provision of the CMO, the Court has granted numerous extensions of discovery deadlines in 2016 and 2017. The reasonable conclusion to be drawn from the continued failures to disclose evidence and locate and make available witnesses is not that the deadlines should be extended or that sanctions should be loosened, but rather that stricter deadlines and stricter Court adherence to those deadlines is warranted.

The DA's Office maintains that the CMO has resulted in criminal defendants "winning by default" and defense attorneys take no action and instead wait for the prosecutors to miss an arbitrary deadline, leading to a dismissal. The facts do not support this view.

Dismissed cases do not demonstrate inaction by defense attorneys. Instead, the cases show prosecutorial difficulties with the disclosure of evidence that supports the charges, with ensuring that the defendant is present at hearings, with moving the case efficiently forward toward trial, and with securing interviews with necessary witnesses. These dismissals are not a "win" for any party—and neither is a conviction a "win" for the DA's Office because "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." American Bar Association, *Criminal Justice Standards for the Prosecution Function*, §3-1.2, at p. 2 (4th Ed.); *see also Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quoting La. State Bar Ass'n, Articles of Incorporation, Art. 14, § 7 (1985)).

The DA's Office acknowledges that reformation of policies and procedures within its office is necessary, and many of the problems identified in the *2017 Report* appear to be largely related to how the DA's Office chooses to allocate resources and identify priorities. The Court has noted a reduction in the use of many prosecution tools, including the Early Plea Program, specialty courts, and the criminal information/preliminary hearing process. Discussions at the "CMO workshops" revealed that discovery problems primarily center around the DA's Office obtaining evidence from the Albuquerque Police Department. Further, a review of defendants placed on pretrial services at felony first appearance indicates that only approximately 10% of defendants on pretrial services have their case indicted or bound over within the sixty-day time limit. Thus, many cases are dismissed before coming under the purview of the CMO. These problems clearly cannot be addressed by changes to the CMO, but rather they require changes in the DA's Office's internal procedures.

Additionally, the Court has observed the DA's Office recent focus on preventive detention motions. While the Court strongly supports the effort to ensure public safety, many of the motions have been in cases in which the defendant is already subject to conditions of release that could either be modified or revoked or who is already detained in other cases. Preventive detention motions have also been withdrawn in some cases and in other cases, the matter is pled to a misdemeanor, the prosecutor dismisses the case, or no indictment is brought within ten days. This is again a question of allocation of resources; making better determinations on which cases to file said motion on the front end would save all justice partners a great deal of time and result in the DA's Office having more resources both to address the detention hearings themselves and to actively push for trial in those cases.

The CMO revisions suggested by the DA's Office do not solve communication problems between departments, do not cure the underlying discovery issues or the allocation of resources issues, and overlook the benefit to the State of dismissal without prejudice, which gives the State another chance to proceed—as opposed to exclusion, which would require the State to move forward without potentially necessary witnesses. In addition, some of the proposed revisions limit the Court's discretion in a manner that the New Mexico Supreme Court has already rejected in *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959. The proposed revisions further disregard the documented delays that existed prior to the CMO and disavow responsibility for charging responsibly, conducting pre-charging investigation, preparing the cases, and bringing these cases to trial. Deadlines and consequences hold all participants, including the Court, responsible for rising to the expectations and rigors imposed by our criminal justice system.

The Court is satisfied with the progress that has been made under the CMO and does not support changes to its provisions at this time. Nevertheless, the DA's Office has stated its desire to improve its performance and to reach compliance with the goals of the new case management process. The Court endorses such initiative and will not oppose certain proposed changes to the CMO. The Court received a draft of changes on September 21, 2017, via email, but did not receive the final proposed revisions until the same day as the date of this document, September 26, 2017. The Court is therefore unable at this point to comment on the proposed revisions. This memorandum will be updated when the Court has a chance to review the changes received today. It also plans to address any proposed changes by LOPD. If the CMO is amended, the Court also proposes one change to ensure those cases subject to Rule 5-409 NMRA detention are heard in an expedited manner.

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## **I. INTRODUCTION**

Since the implementation of the Case Management Order (“CMO”), the pilot program for case management reform in the Second Judicial District, the criminal justice partners have been working together to evaluate the new system and propose modifications to identify and address recurring areas of concern. On June 15, 2017, the DA’s Office (“DA’s Office”) published its *Report on the Impact of the Case Management Order on the Bernalillo County Criminal Justice System and Proposed Rule Amendments* (“2017 Report”). The 2017 Report identified numerous alleged problems that the DA’s Office has encountered with CMO compliance and suggests revisions to the corresponding local rule, LR2-308; many of those changes appear to be aimed at eliminating the consequences that currently result from failure to adhere to CMO deadlines.

In response, the Court reviewed hundreds of cases dismissed in 2016 and 2017 to determine the impact of the CMO. The data demonstrates no crisis of unthinking or arbitrary dismissals as suggested by the DA’s Office. Instead the data indicates that the CMO has been working by helping to encourage and require the efficient and fair resolution of cases.

The issue of effective case management involves the interests of the community, the resources of the State, and the rights of persons charged with crimes. The matter must be considered in its entire, complex context, with reference to what processes have worked and what has failed to work in the past. To function, the system requires the combined efforts of parties with sometimes disparate and competing goals. No criminal justice colleague should be disadvantaged while working within the system, but neither can any colleague refuse to shoulder the reasonable burden of its assigned duties.

The 2017 Report selects cases to create what appears to be a pattern of arbitrary dismissals. The Court’s review of each case cited by the DA’s Office, in addition to hundreds of other cases, shows that the CMO is working to move cases through the criminal justice process toward resolution. The Court does not believe that any changes to the CMO are currently necessary. Instead, it believes the CMO works well if each criminal justice partner commits to the reform that has been set in motion and adjusts its internal culture to conform to the process that was adopted by our community to achieve enhanced justice.

Nevertheless, the Court has evaluated proposed changes to the CMO, has agreed not to oppose certain changes, and has drafted one alternative change.

## **II. HISTORY AND PURPOSE OF THE CASE MANAGEMENT ORDER**

The criminal justice partners began the process of reform to address an enormous backlog of criminal cases in the Second Judicial District Court, as well as systemic, dangerous, and expensive overcrowding in the Metropolitan Detention Center (“MDC”).



Specifically, the Bernalillo County Criminal Justice Review Commission (“BCCJRC”) was created in 2013 by the New Mexico Legislature to review:

the criminal justice system in Bernalillo county, including the judicial process, sentencing, community corrections alternatives and jail overcrowding for the purposes of identifying changes that will improve each members’ agency or organization’s ability to carry out its duties in the criminal justice system and ensuring that criminal justice is indeed just.

Exhibit 1, HB 608, *An Act Relating to Criminal Justice; Creating the Bernalillo County Criminal Justice Review Commission; Providing Duties and Requiring a Report*, at pp. 2-3. The BCCJRC was “created to exist from July 1, 2013 through June 30, 2015,” and was required to “make written recommendations for revisions or alternatives to local and state laws that in the determination of the commission will serve to improve the delivery of criminal justice in Bernalillo county.” Exhibit 1, at pp. 1, 3.

In its November 18, 2014, report to the Legislative Finance Committee, the BCCJRC described its extensive research and investigation into the criminal justice system in Bernalillo County.<sup>2</sup> Exhibit 2, *Report to Legislative Finance Committee*, Nov. 18, 2014, at pp. 1-2 (“2014 Report”). The BCCJRC reported the MDC population exceeded the expected population by more than 1000, prior to reforms, and the average length of stay in MDC before adjudication was 222 days, while in other New Mexico counties, the average length of stay was 162 days. Exhibit 2, at p. 2. The BCCJRC noted:

Too many defendants were being held for too long in pretrial detention, often as a 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.

Exhibit 2, at p. 3. The *2014 Report* outlined the skyrocketing cost of housing detainees out-of-county, because MDC was above capacity. Exhibit 2, at p. 4. Many adjustments and improvements to the system were made in order to reduce incarcerated populations and facilitate the more efficient flow of cases through the court systems. Exhibit 2, at pp. 5-7. Nevertheless, the BCCJRC reported that “[o]ne remaining important step to achieve the goals of the BCCJRC is to adhere to time limits on case processing that have real consequences.” Exhibit 2, at p. 7. The *2014 Report* continued, “[u]nless parties within the

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<sup>2</sup> The materials on which the BCCJRC relied are available for review at the [nmcourts.gov](http://nmcourts.gov) website under the “BCCJCC” tab (<https://www.nmcourts.gov/bccjcc.aspx>). “BCCJCC” is the new standing entity, the Bernalillo County Criminal Justice Coordinating Council, which replaced the term-limited BCCJRC.

system expect there to be consequences for not preparing cases for earlier disposition, nothing will change.” Exhibit 2, at p. 7.

To that end, the Supreme Court issued the CMO by order dated November 6, 2014. Exhibit 2, at p. 7; Exhibit 3, *In the Matter of the Adoption of Local Rule LR2-400 NMRA to Implement a Criminal Case Management Pilot Program in the Second Judicial District Court* (Nov. 6, 2014). The process of adopting the CMO is described later in this assessment. The CMO adopted Rule LR2-400 NMRA, “a procedural rule that sets strict deadlines and implements procedural safeguards designed to avoid delay while ensuring fair and speedy disposition of pending and future criminal cases in the Second Judicial District Court.” Exhibit 3, at p. 2. The Supreme Court ordered that LR2-400 would be effective “for all cases pending or filed on or after February 2, 2015. Exhibit 3, at pp. 2-3.

### **III. THE CRIMINAL PROCESS**

Many of the issues addressed by the CMO, and subsequently raised by the DA’s Office, involve the nuances of the criminal charging process and prosecution procedures. It is impossible to discuss the nuances of the changes effected by LR2-400 and the amended LR2-308 without a common understanding of the principles and procedures of criminal prosecution. Many provisions imposed by the CMO have roots in long-standing provisions and time limits that have always been built into the process. Further, the familiar terms “dismissal,” “arraignment,” and “discovery,” lose meaning outside of the continuous and evolving process—a process of criminal justice designed both to hold citizens accountable for wrongdoing *and* to protect the rights of the person accused.

For some matters, the CMO and subsequent Local Rules altered the general rules of Criminal Procedure. Review of the general rules will put the current evaluation of the CMO and the local rules in the appropriate context.

#### **A. The Initiation of Proceedings (General Rules that Existed Prior to LR2-308)**

The DA (also referred to as the “State”)<sup>3</sup> may initiate felony charges in either the Metropolitan Court (“Metro Court”) or the Second Judicial District Court. In any event, the New Mexico Constitution requires that under most circumstances, no person shall be held to answer for a felony “unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies.” N.M. Const. art. II, § 14.

##### **1. Metro Court Initiation**

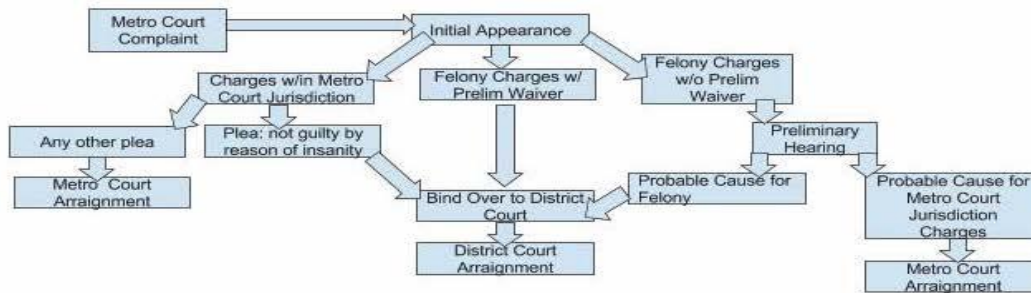
A criminal action can be generally initiated in Metro Court with the filing of a criminal complaint. Rule 7-201(A)(1) NMRA. In most cases, a felony complaint will be

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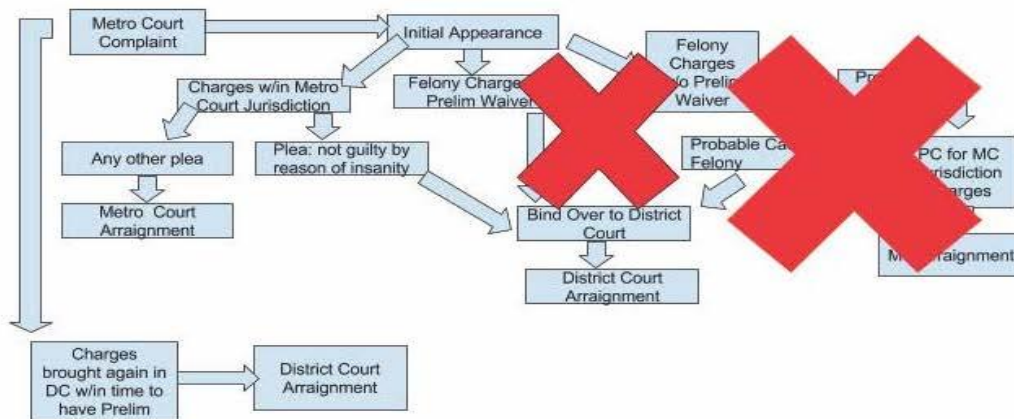
<sup>3</sup> In some instances cases are brought by the Attorney General’s Office instead of the DA’s Office. The same procedures apply in such cases.

filed in Metro Court and will be governed by Rule 7-201. *See* Rule 5-201 NMRA, committee commentary. The Metro Court has jurisdiction over preliminary examinations in any criminal action, and if the criminal action otherwise exceeds the Metro Court’s jurisdiction, the Metro Court may “commit to jail, discharge or recognize the defendant to appear before the district court as provided by law.” NMSA 1978, § 35-3-4(A), (C) (1985); NMSA 1978, § 34-8A-3 (2001).

Pursuant to the rules, cases initiated in Metro Court could follow this path.

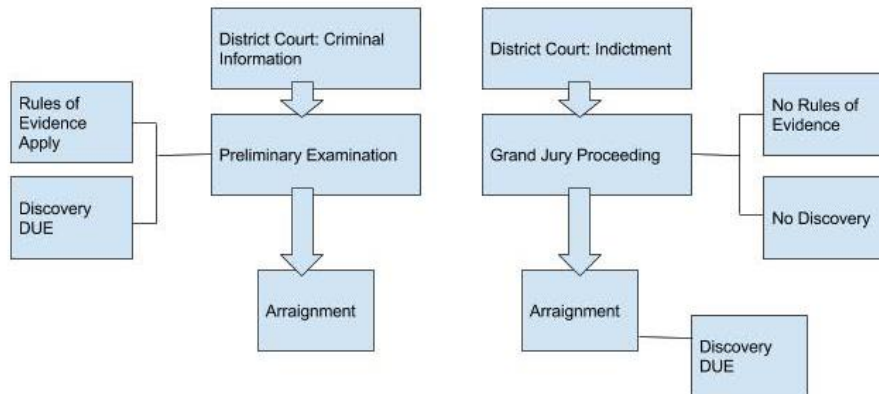


Rule 7-202 (A)(1) NMRA, which has been in place since 1992, requires a preliminary examination to take place within 10 days if a defendant is in-custody and 60 days if defendant is out of custody. *See Exhibit 4, Legislative History of Rule 7-202 NMRA.* This is what is commonly referred to as the 10-day Rule. In the Second Judicial District, however, cases rarely proceed from a Metro Court complaint through preliminary examination in Metro Court. Instead, complaints are filed and then re-indicted or re-filed in the district court within the time period for the preliminary examination. The process instead follows this path:



## 2. District Court Initiation or Continuation

In district court, the DA initiates a case by an information or an indictment. Rule 5-201(A). The district court initiation procedure follows this path:



If a person is charged by criminal information, he or she is entitled to a preliminary examination, unless the preliminary examination is waived. N.M. Const., art. II, § 14. A preliminary examination must be held no later than ten days after the first appearance if the defendant is in custody or sixty days after first appearance if the defendant is not in custody. Rule 5-302(A)(1) NMRA. The DA is also required to provide to defendant “any tangible evidence in the prosecution’s possession, custody, and control, including records, papers, documents, and recorded witness statements that are material to the preparation of the defense or that are intended for use by the prosecution at the preliminary examination.” Rule 5-302(B)(2) NMRA. The rules of evidence apply during a preliminary examination. Rule 5-302(B)(5) NMRA. If the court finds probable cause, the defendant is bound over for trial. Rule 5-302(D)(2) NMRA.

If the DA charges an individual by way of indictment, the prosecutor is not required to disclose to the defendant most evidence it intends to use at a grand jury proceeding. *See, e.g.*, Rule 5-302A NMRA. Further, the rules of evidence do not apply at a grand jury proceeding. NMSA 1978, § 31-6-11 (2003).

If the State proceeds by indictment, many discovery obligations are put off until arraignment. If the State proceeds by information, the discovery obligations are triggered for the preliminary examination, and the DA must produce witnesses to testify in accordance with the rules of evidence. Historically and contrary to the practices of other counties, the DA’s Office in this jurisdiction most frequently proceeds by grand jury, rather than by criminal information. This has the effect of pushing discovery out further and may result in delays in case flow. In response, this Court started a preliminary hearing program—offering preliminary examination hearings time two days each week. Despite the Court’s setting aside additional time for preliminary examinations, the DA has failed to fully take advantage of this time; many of the time slots set aside for preliminary hearings are not filled. The Court will continue to push for more cases to be brought via preliminary hearing rather than grand jury by increasing the number of preliminary hearing days and reducing the number of grand jury days.

Generally, a criminal defendant must be arraigned within fifteen days of filing the criminal information or indictment, or the date of arrest. *See* Rule 5-303(A)(1) NMRA.

At the arraignment, the court notifies the defendant of the charges in the indictment or information and asks the defendant to enter a plea. *See* Rule 5-303(B) NMRA.

Pursuant to Rule 5-501(A)(1-6) NMRA, if the DA has charged by indictment, the DA is generally required to provide the following to the defendant within ten days of arraignment or waiver of arraignment:

(1) any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the DA;

(2) the defendant's prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

At least ten days prior to trial, the State must certify to the Court, by filing a "certificate of compliance," that "all information required to be produced pursuant to [the Rule] has been produced, except as specified." Rule 5-501(D) NMRA. If the State does not comply, the Court may enter an order requiring the disclosure of said discovery, grant a continuance, prohibit the party from calling the undisclosed witness or introducing the undisclosed evidence, hold the non-disclosing attorney in contempt, or "enter such order as it deems appropriate under the circumstances." Rule 5-501(H); Rule 5-505(B) NMRA.

The rules give the parties the opportunity to offer evidence that was previously undisclosed, if the evidence is discovered after the certificate of compliance is filed. *See* Rule 5-505(A) NMRA.

The defendant has similar discovery obligations. Rule 5-502(A) NMRA. The defendant must also file a certificate of compliance no later than ten days prior to trial and is subject to similar sanctions if discovery obligations are not met. The New Mexico Supreme Court has explained that sanctions are warranted if a party violates a “clear, unambiguous, and reasonable discovery order.” *State v. Le Mier*, 2017-NMSC-017, ¶ 1, 394 P.3d 959. The Court is permitted to exercise its discretion to select an appropriate sanction.

#### **IV. Dismissals and *Nolle Prosequi***

Charges against a defendant can be dismissed either by the court or by the DA’s Office, referred to as a *nolle prosequi* (“*nolle*”). Generally, a *nolle* is a statement by the prosecutor that it is choosing not to prosecute the case and it results in a dismissal of criminal charges with the ability to bring those charges again in a new proceeding. Dismissals can either be with or without prejudice. Most dismissals are without prejudice.

Dismissals without prejudice, meaning the case can be filed again, are often advantageous for both parties. Dismissal of the case without prejudice is generally viewed as a less harsh sanction than the exclusion of a witness who has not been interviewed or disclosed to the other party. Exclusion of a necessary witness requires the party to proceed to trial without all of the available or necessary evidence, while dismissal without prejudice permits one party additional time to secure the evidence and the other party sufficient time to review and test that evidence.

#### **A. Historical Changes to the Rules Impacting Case Flow--The Six-Month Rule, Rule 5-604 NMRA**

Prior to 2010, Rule 5-604(B) required trials in district court to be commenced within six months (“the six-month rule”). That rule originally included mandatory dismissal language and was, over time, revised with more permissive language. In 2010, however, the New Mexico Supreme Court abolished the six-month rule for all “pending” cases and instructed courts to instead utilize a speedy trial analysis. *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301

Speedy trial analysis requires the Court to balance four factors: (1) the length of delay, (2) the reasons for the delay, (3) whether the defendant asserted the right to speedy trial, and (4) the actual prejudice to the defendant. *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). In considering the length of delay, the Court first determines if the case is simple, intermediate, or complex and then evaluates whether the delay was too long according to established time periods. *Garza*, 2009-NMSC-038, ¶¶ 47-48. In the *Garza* case, the New Mexico Supreme Court expanded the established time periods to twelve months for a simple

case, fifteen months for an intermediate case, and eighteen months for a complex case. *Garza*, 2009-NMSC-038, ¶¶47-48. This expansion was intended to create congruence between the six-month rule and speedy trial analysis, and to afford greater flexibility in light of the “greater inherent delays in the prosecution of cases.” *Id.* ¶ 46.

Thus, after the *Savedra* and *Garza* cases, the time limits governing the disposition of cases had evolved from a default position of six-months, to allowing even the simplest of cases to remain on a court’s docket for more than a year before a court could consider disposing of a case for failure to move that case forward. The Court, however, retained the discretion to impose sanctions, including dismissal, for failure to abide by court orders, failure to produce evidence, and failure to abide by the rules. *State v. Martinez*, 1998-NMCA-022, ¶ 9, 124 N.M. 721 (affirming a district court’s order striking a witness as a sanction for violation of a discovery order and explaining “while the district court generally should fashion the least severe sanction which will accomplish the desired result, we do not believe the district court should be burdened with an independent duty to consider less severe alternatives when they are not raised by the party being sanctioned.”).

#### **B. Historical Changes to the Rules Impacting Case Flow--*Harper* and *Le Mier*: Discretion to Select Dismissal as a Sanction**

In 2011, the New Mexico Supreme Court addressed the analysis for the imposition of sanctions in criminal cases. *State v. Harper*, 2011-NMSC-044, 150 N.M. 745. In *Harper*, the New Mexico Supreme Court explained “the exclusion of witnesses should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party.” *Id.* ¶ 21.

The District Courts, the Court of Appeals, and most of the criminal bar for years interpreted *Harper* to hold that the exclusion of a witness was most often improper “absent an intentional refusal to comply with a court order, prejudice to the opposing party, and consideration of less severe sanctions” and that any serious sanction against the State must be conditioned on a finding prejudice to the defendant. *Harper*, 2011-NMSC-044, ¶¶ 15, 19. Thus, absent a finding of prejudice to the defendant or an intentional refusal to comply with a court order, excluding a witness as a sanction was held to be an abuse of discretion by the court. *Id.* ¶ 15.

Given the requirements understood by the District Courts and the Court of Appeals in *Harper* and *Garza* and the elimination of the six-month rule, the District Courts were left with little choice but to grant continuances when parties were not prepared for trial, sometimes in addition to a lesser sanction on the offending party. Few cases involve “intentional refusal.” Instead, discovery and interview problems result from negligence: a lack of personnel, too-high caseloads, difficulty scheduling witnesses, witnesses “forgetting” and failing to show up, frustration in serving subpoenas, lengthy delays in state labs, and late disclosures based on “internal policies.”

The net effect of these changes, together, was that cases stalled and ended up taking years to resolve. Unfortunately, the Second Judicial District backlog in 2009, *before* the changes flowing from *Savedra* and *Garza*, was already substantial. According to the National Center for State Courts (NCSC), in 2009, the pending inventory was 20% higher than it had been in 2004 and filing to non-jury disposition took on average almost six months and filing to jury-verdict averaged nearly 20 months. Exhibit 5, NCSC, *Integrative Leadership Reducing Felony Case Delay and Jail Overcrowding: A Lesson in Collective Action in Bernalillo County, New Mexico*, Appendix A (February 2015). As a result of the abolition of enforcement mechanisms and the unavailability of discretion to impose sanctions, that backlog only continued to grow.

Five years later, the New Mexico Supreme Court clarified the standard in *Le Mier* stating:

*Harper* did not establish a rigid and mechanical analytic framework. Nor did *Harper* embrace standards so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority. Such a framework and such limitations would be unworkable in light of the fact that our courts' authority to exclude witnesses is discretionary, and courts must be able to avail themselves of, and impose, meaningful sanctions where discovery orders are not obeyed and a party's conduct injects needless delay into the proceedings.

2017-NMSC-017, ¶ 16. Thus, *Le Mier* has clarified that the district courts are empowered to impose sanctions for the failure to abide by discovery deadlines and reinforces the authority that was ultimately granted by the CMO.

The backlog of the cases in the Second Judicial District, prior to implementation of the CMO, demonstrates that when the district court is left with no effective enforcement mechanism, the parties do not take the initiative in moving cases forward on their own. In short, the Court requires the availability of sanctions, such as dismissal, to ensure cases are brought to timely and efficient disposition.

## **V. LR2-400**

After the elimination of the six-month rule in 2010, the backlog of unresolved cases in the Second Judicial District ballooned, the time to trial increased significantly, and the population of MDC exploded. Exhibit 2, at p. 2. The MDC population increase is significant in part because MDC houses those individuals who are incarcerated and awaiting trial in the Second Judicial District. The longer the time to trial, the longer the defendant waits in MDC for an adjudication of the charges. In January 2013, NCSC estimated that improvements in the felony processing could reduce the MDC population by 210-250 inmates. Exhibit 5, at p. 7.



The BCCJRC was formed to address these problems and, as noted above, identified case management and scheduling as a key factor to reform. The Administrative Office of the Courts (“AOC”) requested that the Criminal Judges in the Second Judicial District (“the Criminal Judges”) draft a proposed case management pilot rule and that the proposed rule include serious sanctions for lack of compliance with the case management system. Exhibit 6, *Second Judicial District Court’s Response to Questions Posed by the New Mexico Supreme Court* (dated June 19, 2014), at p. 1. AOC requested the Criminal Judges to seek the input of the criminal bar—including the Law Office of the Public Defender (“LOPD”), the DA’s Office, and the private defense bar.

The Criminal Judges contacted the criminal bar, requested input on the project, and received responsive comments and concerns from the criminal bar. The Criminal Judges met and developed five goals for the proposed rule:

- (1) encouraging the State to file charges *after* it had done the majority of its investigation through the use of strict discovery deadlines with sanctions;
- (2) limiting how the excusal rule is utilized, thus allowing cases to be reassigned when necessary to move a case forward, as well as reducing the delay that results from late peremptory challenges;
- (3) providing meaningful deadlines with automatic sanctions to allow the judges to more effectively shepherd cases through their dockets;
- (4) encouraging earlier pleas in those cases that would eventually result in a plea anyway; and
- (5) maintaining enough flexibility to deal with the unique circumstances present in each case, thus protecting a judge’s ability to ensure the fair and just administration of cases.

Exhibit 6, at pp.1-2. A draft rule resulted from these meetings and was submitted to the AOC and the New Mexico Supreme Court for review. Exhibit 7, Pilot Draft Rule. The LOPD also submitted a proposed rule. Exhibit 8, LOPD’s Proposed Rule (Feb. 26, 2014). The DA’s Office chose not to submit a proposed rule. Exhibit 9, DA’s Office Letter (dated Feb. 26, 2014).

The New Mexico Supreme Court responded with questions about the Criminal Judges’ proposal. See Exhibit 10, *Second Judicial District’s Response to Questions Posed by the New Mexico Supreme Court* (June 19, 2014). The Supreme Court questioned how many times a case could be dismissed without prejudice and why the preliminary hearing track was not more often used and offered its own suggestions. The Supreme Court’s recommendations included reducing the time for excusing judges, a master calendar system for the Criminal Judges; a trailing calendar for scheduling conferences; more compressed time to trial deadlines; and more specific deadlines in the CMO for discovery events, including identifying witnesses and expected testimony, witness interviews, pretrial motions.

After additional communications, the Criminal Judges submitted a revised CMO proposal, which had been reviewed by the criminal bar. See Exhibit 11, *Revised CMO Proposal by the New Mexico Supreme Court* (dated July 31, 2014). The concerns and objections of the criminal bar were noted in the correspondence with the Supreme Court. The Criminal Judges, the criminal bar, and the Supreme Court continued to work together and modify the proposals, and the Supreme Court issued a revised draft proposal.

The Criminal Judges responded to the revised draft CMO on September 18, 2014. Among other recommendations, the Criminal Judges continued to advocate for pre-charging investigation and certification of readiness for trial. Exhibit 12, *Second Judicial District Court's Comments Regarding the Supreme Court's Revised Pilot Rule Proposal*, at pp. 1-2 (dated September 18, 2014). Such certification would eliminate extended pre-conviction incarceration, reduce discovery issues, encourage earlier pleas by making the breadth of evidence to prove the charges immediately available to the defendant, and assist with appropriate charging decisions that would ensure that the charges brought were supported by the evidence. Exhibit 12, at pp. 2-3.

On September 30, 2014, the Criminal Judges submitted additional comments to the Supreme Court's final CMO draft. Exhibit 13, *Second Judicial District Court's Suggested Revisions to the Supreme Court's Final Draft CMO Proposal* (dated Sept. 30, 2014). The purpose of these comments was to improve implementation, correct mistakes, and address procedure. Exhibit 13, at p. 1. The Criminal Judges again raised concerns about the implementation of a pre-charging certificate of readiness. Exhibit 13, at pp. 2-3.

While this analysis focuses on the comments offered by the Criminal Judges, all of the justice partners were afforded multiple opportunities to weigh in on the proposed CMO. The Supreme Court entered the CMO on November 6, 2014, after reviewing comments from all of the justice partners and conducting a public hearing on the matter. Exhibit 3. The new local rule was designed to govern "time limits for criminal proceedings in the Second Judicial District Court." Exhibit 14, LR2-400(A) (approved Nov. 6, 2014). The general "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." Exhibit 14, LR2-400(A). The new rule implemented the following relevant changes:

1. Case management calendars to address long-pending cases and newer cases separately, in order to clear the backlog while implementing the new rule prospectively. Exhibit 14, LR2-400(B)(1), (L).
2. The deadline for arraignment is reduced to ten (10) days after information or indictment or arrest, if defendant is not in custody and seven (7) days if the defendant is in custody. Exhibit 14, LR2-400(C)(1).
3. A status conference, for scheduling purposes, no later than thirty (30) days after arraignment or waiver of arraignment. Exhibit 14, LR2-400(G)(2). The parties

must exchange witness lists within twenty-five (25) days of arraignment or waiver of arraignment, including a brief statement of expected testimony. Exhibit 14, LR2-400(G)(1). At the status conference, the Court was directed to determine the appropriate “track” for the case management deadlines and enter a mandatory scheduling order. Exhibit 14, LR2-400(G)(3), (4). The rule explains the different factors for the Court to use to assign a scheduling “track” and outlines the deadlines for each case event for the different track assignments. Exhibit 14, LR2-400(G)(3), (4). The rule established deadlines for pretrial conferences, notice of need for an interpreter, pretrial motions and responses, witness interviews, and disclosure of scientific evidence. Exhibit 14, LR2-400(G)(4).

4. Certificate of readiness filed at or before arraignment or waiver of arraignment that the case was sufficiently investigated before indictment or information and (a) the case will reach a timely disposition by plea or trial within the rule’s time limits, (b) the court will have enough information to make a track determination at the status hearing, (c) discovery produced or relied on in the investigation leading to the indictment or information was provided to defendant; and (d) the state’s failure to comply with the time limits will result in dismissal absent extraordinary circumstances. Exhibit 14, LR2-400(C)(2)(a-d).
5. Initial disclosures (the information required by Rule 5-501(A)(1-6) are due from the State at arraignment or within five (5) days of a written waiver of arraignment. Exhibit 14, LR2-400(D)(1). The State was additionally required to provide the available phone numbers and email addresses of witnesses, copies of documentary evidence, all recordings made by law enforcement or otherwise in the possession of the State, and authorization for the defendant to examine physical evidence in the State’s possession. Exhibit 14, LR2-400(D)(1). Defendant was required to provide information to the State no less than five (5) days before the required status hearing. Exhibit 14, LR2-400(E)(1).
6. Sanctions for the State’s failure to comply with the provisions of the rule:

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.

Exhibit 14, LR2-400(D)(4). The Court was also authorized to impose sanctions for the defendant’s lack of compliance:

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.

Exhibit 14, LR2-400(E)(5).

7. Time for commencement to trial, calculated from the latest of the following events: date of arraignment, determination of competency, an order of mistrial, mandate disposing of an appeal, arrest for failure to appear or surrender, ineligibility for pre-prosecution diversion, or separation of a defendant's case from co-defendant's case. Exhibit 14, LR2-400(H).

8. The rule specified sanctions for the failure to comply with a 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.

Exhibit 14, LR2-400(I).

9. Extension of time for trial is available for up to thirty (30) days, on a showing of good cause beyond the control of the parties or the court and on written findings of the Court demonstrating such good cause. Exhibit 14, LR2-400(J)(1). If an extension is necessary, but the Court does not find good cause, the Court "shall impose" sanctions as set forth in LR2-400(I). Any additional extensions may only be granted if the chief judge or another judge approved and designated by the chief judge finds in writing that exceptional circumstances warrant the extension. Exhibit 14, LR2-400(J)(1). If the chief judge refused to find exceptional circumstances, the case was required to be tried or dismissed with prejudice. Exhibit 14, LR2-400(J)(4).

LR2-400 went into effect on February 2, 2015. Exhibit 3.

## **VI. MODIFICATIONS TO LR2-400 AND THE IMPLEMENTATION OF LR2-308**

In September 2015, the BCCJRC reported to the Legislative Finance Committee. Exhibit 15, *Bernalillo County Criminal Justice Review Commission: Report to Legislative Finance Committee* (Sept. 28, 2015). The BCCJRC reported reduced populations at MDC, as well as a reduction in the length of stay at MDC. Exhibit 15, at p. 4. The BCCJRC also noted that the DA's Office was utilizing the more efficient criminal information/preliminary examination pilot charging process in some cases, rather than empaneling grand juries. Exhibit 15, at p. 5. Additionally, the Early Plea Program showed promise for resolution of cases. In August 2015, 272 early plea hearings were scheduled, and the parties resolved 74% of the cases and referred an additional 7% to a drug court program. Exhibit 15, at p. 5.

By the time of the BCCJRC's report in September 2015, more than two-thirds of the special calendar cases had been resolved and it was anticipated that the remainder would conclude before the end of 2016. Exhibit 15, at pp. 6-7. Regarding the other changes implemented by the CMO, the BCCJRC reported that

[T]he 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.

Exhibit 15, at p. 8. Nevertheless, the BCCJRC acknowledged that “[i]ncremental but badly needed adjustments to some of the requirements in the CMO [were] being proposed and [would] be considered by the New Mexico Supreme Court.” Exhibit 15, at p. 9. These adjustments, if adopted, “should modify some of the most difficult challenges imposed by the CMO and further improve the efficient processing of criminal cases.” Exhibit 15, at p. 9.

The Supreme Court indicated it would be willing to consider changes to LR2-400 based on the input from the justice partners. It again gave each justice partner multiple opportunities to express concerns and offer suggestions for revisions.

As the criminal justice partners considered amendments to LR2-400, the DA's office and the Albuquerque Police Department suggested that large numbers of cases were dismissed at arraignment because of a "10-day Rule." Exhibit 16, *Second Judicial District Court's Suggested Revisions to the Supreme Court's Final Draft CMO Proposal*, at pp. 2-3 (dated Dec. 7, 2015). The Criminal Judges noted that the "10-day Rule" did not originate in the CMO but had instead been around since the 1990's as part of Rules 7-702 and 5-302, that most dismissals occurred at the scheduling conference (55 days after arrest), and "full investigation" was not required within ten days. *Id.* For their part, the Criminal Judges requested clarification of the application of *Harper* to CMO-related sanctions and noted that the provision of LR2-400(A), which removed the Court's imposition of sanctions from the purview of conflicting law, including *Harper*, "permitted the district court to once again exercise docket control and move cases forward." Exhibit 16, at pp. 3, 4-5. The Supreme Court again held a public meeting in which it made clear that LR2-400 did not require the entire investigation to be completed and all discovery to be turned over at arraignment.

After these proceedings, LR2-400 was recompiled as LR2-308, effective for all cases in which a track assignment was made on or after February 2, 2016. The new rule made the following changes based on the input from the justice partners:

1. Special calendar provisions. *Compare* LR2-400(B)(1) *with* LR2-308(B)(1).
2. Arraignment and certification of readiness must occur within ten (10) days or seven (7) days of the filing of an information or indictment, or the entry of a bind-over order rather than from the filing of the information. *Compare* LR2-400(C)(1), (2) *with* LR2-308(C)(1), (2).
3. The witness list must include a certification that the State has provided the discovery that is in the possession of the State, in addition to the information that was relied on in the investigation. *Compare* LR2-400(C)(2) *with* LR2-308(C)(2).
4. The definition of "evidence deemed in possession of the state" is evidence "in the possession or control of any person or entity who has participated in the investigation or evaluation of the case." *Compare* LR2-400(D)(3) *with* LR2-308(D)(4).
5. The "failure to comply" provisions in the discovery rules LR2-400(D)(4) and LR2-400(E)(5) are deleted and sanctions for non-compliance are generally governed by LR2-308(I).
6. A service by email provision for pleadings subsequent to initial disclosures. LR2-308(D)(6), LR 2-208(E)(5).
7. The witness list disclosure rule requires the party to verify that names and contact information is current as of the date of disclosure. LR2-308(F)(1).

8. Extended time lines, within the track assignment rules, for bringing the case to trial. *Compare* LR2-400(G)(4)(a), LR2-400(G)(4)(b), LR2-400(G)(4)(c) *with* LR2-308(G)(4)(a), LR2-308(G)(4)(b), LR2-308(G)(4)(c).
9. The form scheduling order may be altered at the discretion of the trial judge “and the judge may alter any of the deadlines described in Subparagraph (G)(4) of this rule to allow for the case to come to trial sooner.” LR2-308(G)(5).
10. The amount of time the court may extend time periods under paragraph G are enlarged from 15 to 30 days. *Compare* LR2-400(G)(6) *with* LR2-308(G)(6). Additionally, the restrictions regarding substitution of counsel are loosened.
11. Discretion to enter an amended scheduling order if one of the listed triggering events occurs to extend the time limits for commencement of trial. LR2-308(H). The new rule lists additional triggering events, including severance, recusal, change of venue, or a granted motion to withdraw plea. *Compare* LR2-400(H)(1-8) *with* LR2-308(H)(1-12).
12. More detailed guidelines for imposing sanctions for failure to comply with orders entered under the rule. LR2-308(I). Notably, in LR2-400, sanctioning for violations of time limits at arraignment was discretionary. In LR2-308, the sanctioning provisions provide more limitations on a judge’s ability to impose the sanction of dismissal, but requires sanctions for violations at all levels in the process.

LR2-400(I)	LR2-308(I)
<p><b>I. Failure to comply with scheduling order.</b>            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</p>	<p><b>I. Failure to comply.</b>            (1) If a party fails to comply with any provision of this rule or the time limits imposed by a scheduling order entered under this rule, the court shall impose sanctions as the court may deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply.            (2) In considering the sanction to be applied the court shall not accept negligence or the usual press of business as sufficient excuse for failure to comply. If the case has been re-filed following an earlier dismissal, dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule, subject to the provisions in Subparagraph (4) of this</p>

<p>re-filed following an earlier dismissal, dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule.</p>	<p>paragraph.</p> <p>(3) The sanctions the court may impose under this paragraph include, but are not limited to, the following:</p> <ul style="list-style-type: none"> <li>(a) a reprimand by the judge;</li> <li>(b) prohibiting a party from calling a witness or introducing evidence;</li> <li>(c) a monetary fine imposed upon a party's attorney or that attorney's employing office with appropriate notice to the office and an opportunity to be heard;</li> <li>(d) civil or criminal contempt;</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>(e) dismissal of the case with or without prejudice, subject to the provisions in Subparagraph (4) of this paragraph.</li> </ul> <p>(4) The sanction of dismissal, with or without prejudice, shall not be imposed under the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) the state proves by clear and convincing evidence that the defendant is a danger to the community; and</li> <li>(b) the failure to comply with this rule is caused by extraordinary circumstances beyond the control of the parties.</li> </ul>
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13. LR2-308(J) sets forth a new subsection relating to the certificate of readiness prior to pretrial conference or docket call.

Both the prosecutor and defense counsel shall submit a certification of readiness form five (5) days before the final pretrial conference or docket call, indicating they have been unable to reach a plea agreement, that both parties have contacted their witnesses and the witnesses are available and ready to testify at trial, and that both parties are ready to proceed to trial. This certification may be by stipulation. If either party is unable to proceed to trial, it shall submit a written request for extension of the trial date as outlined in Paragraph K of this rule. If the state is unable to certify the case is ready to proceed to trial and does not meet the requirements for an extension in Paragraph K of this rule, it shall prepare and submit notice to the court that the state is not ready for trial and the court shall dismiss the case.



14. Modification of the statistical reporting obligations. *Compare* LR2-400(M) with LR2-308(N).

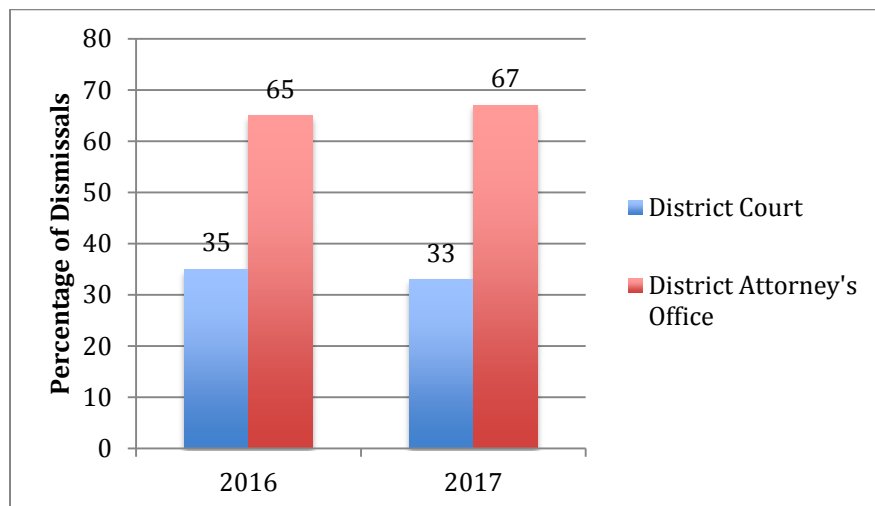
Exhibit 17; LR2-308.

The primary amendments to LR2-400, which are derived from proposals from the justice partners, involved expanding some time-to-trial deadlines, more specifically delineating the bases for imposing sanctions, providing for additional judicial discretion in extending certain deadlines under certain circumstances, and setting forth the requirements for a “certificate of readiness.” The other smaller changes are also significant. For example, throughout the new rule, requirements to provide current contact information are included. This recognizes that one of the significant issues in moving cases forward in this jurisdiction has historically been the loss of contact with witnesses. LR2-308 also recognizes “the State” incorporates several agencies working together on an investigation and therefore requires the disclosure of information in the possession of any person or entity that participated in the investigation.

## VII. THE OPERATION OF LR2-308 IN 2016 AND 2017

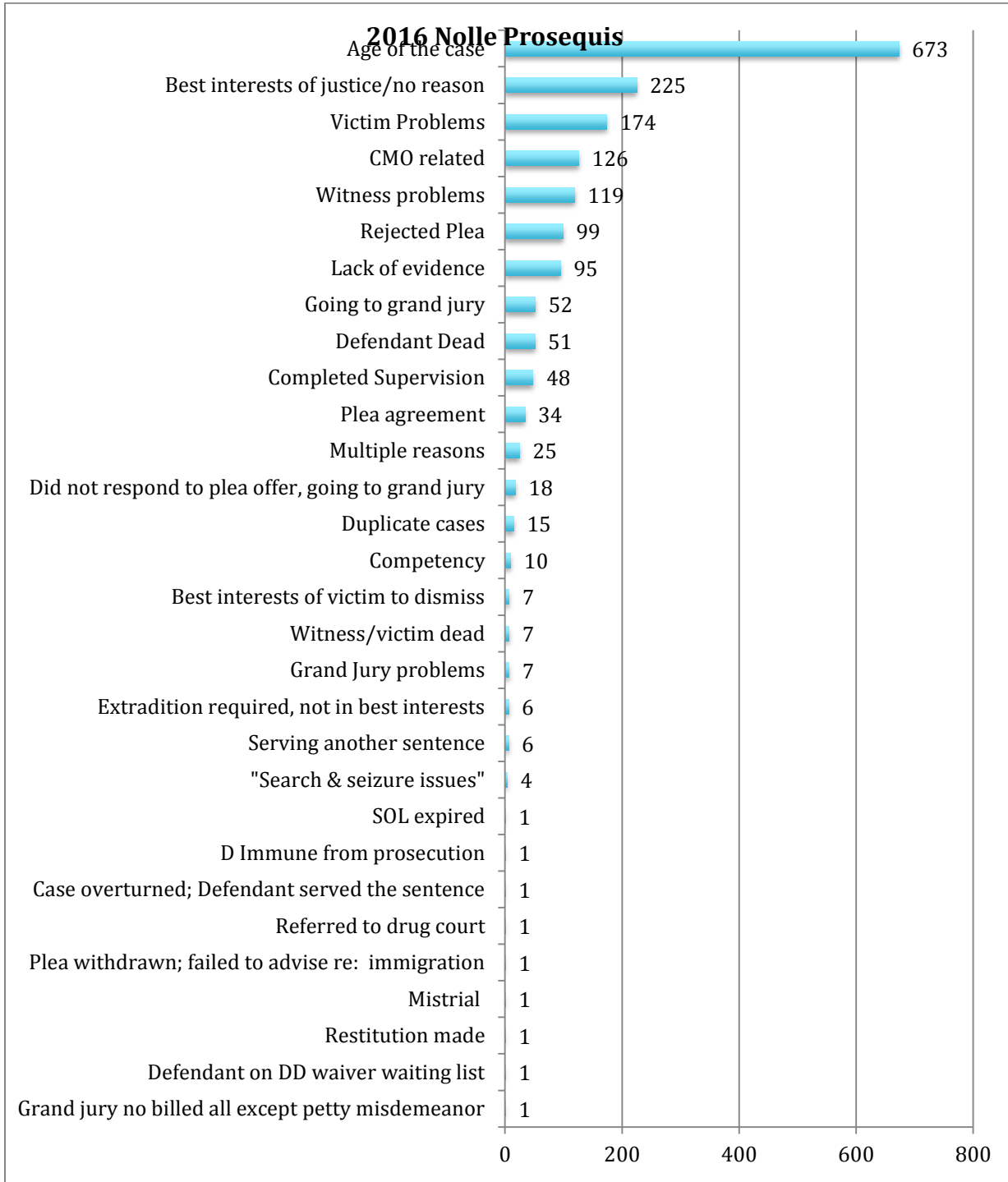
The Court has reviewed hundreds of dismissals and compiled general data relating to cases dismissed in 2016 and through May 2017, in order to analyze the causes for dismissal. With regard to the following analysis, the Court notes that its calculations are based on those reasons stated in the filed document; there may be other reasons or motivations underlying the dismissal that were not recorded, but those additional reasons will not be evidenced through the numbers reported herein. The Court’s analysis nevertheless offers the broad picture arising from the filed dismissals to demonstrate generally how the CMO is operating.

In 2016, 2787 cases were dismissed, 977 by the Court and 1810 by the DA’s Office. In 2017, of the 916 dismissals reviewed, the Court dismissed 302 and the DA’s Office dismissed 614. In 2016, therefore, the Court initiated 35% of dismissals and 33% in 2017. The DA’s Office initiated 65% of dismissals in 2016 and 67% thus far in 2017.



**A. 2016 Dismissals and *Nolle Prosequis***

A particular prosecutor can elect to dismiss a case for any number of reasons. In 2016, the *nolle prosequis* were sorted into several categories.



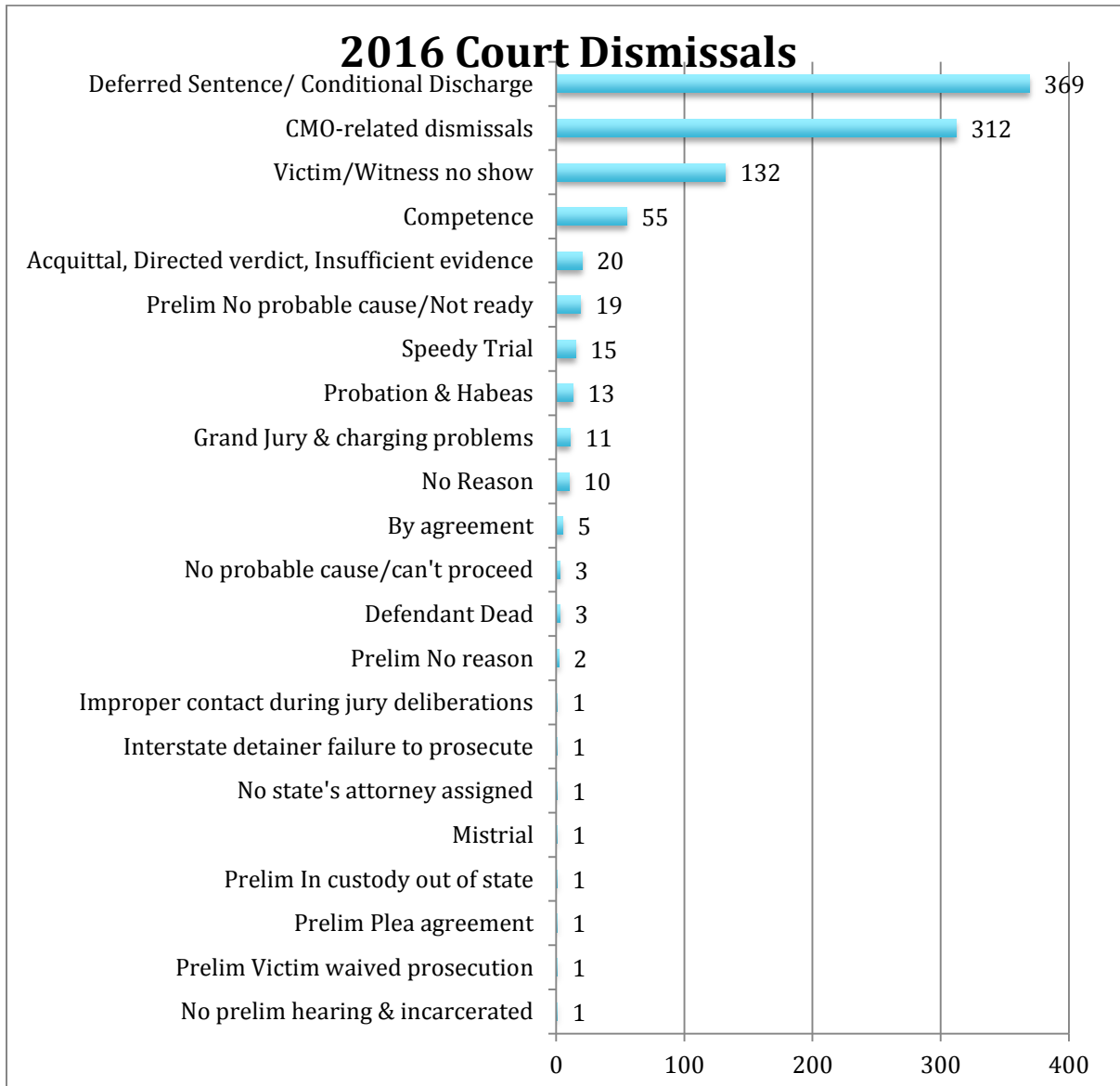
Of the cases included in “CMO-related,” many were not truly related to the CMO—for example, often pretrial interviews could not take place because the witness could not be located and the deadline was not the primary purpose for dismissal. The dismissal or *nolle prosequi* document often does not identify the CMO as a basis for dismissal, but in an effort to provide a thorough picture, the Court has been over-inclusive. All cases that were dismissed for suppression of evidence or exclusion of witnesses were included in this category. The DA’s Office dismissed two (2) cases for failure to disclose evidence. Eighteen (18) cases specifically referenced the CMO as a basis for the dismissal. Forty-six (46) cases were dismissed by the State based on suppressed or excluded evidence (including one suppression specifically related to a failure to conduct a pretrial interview). The State dismissed seven (7) cases for failure to transport and fifty-three (53) cases for failure to conduct pretrial interviews.

Some of these categories have more specific reasons for dismissal. For example, within the category “Transport,” seven cases total cited “transport” for the reason that the prosecutor dismissed the case, and each case noted that the transport difficulty was because the defendant was in custody for a federal case. One of these cases cited the CMO as a reason for the dismissal. Similarly, in the category “Grand Jury problems,” four cases were dismissed because the target did not receive the proper notice, one case was dismissed specifically for improper grand jury instructions, and two additional cases cited deficiencies in the grand jury process.

In the category “Rejected Plea,” of the 99 total cases dismissed for this general reason, 86 cases were dismissed because the defendant rejected a plea offer and the prosecutor was going to continue to grand jury or a preliminary examination. Two cases were dismissed (without prejudice) because the defendant failed to appear at a plea hearing (and presumably the State chose to *nolle* the case and re-file additional charges) and eleven cases were dismissed because the defendant generally rejected a plea offer. In a related category, “Going to grand jury,” the cases were dismissed for a multitude of reasons and the prosecutor was going to bring the case before a grand jury. The reasons include the victim or witness failing to appear at the preliminary hearing, a re-indictment, adding a charge, a conflict of interest, a withdrawn plea, or simply not proceeding forward with a preliminary examination. Most of the cases in this category offered no reason for going to the grand jury or went to grand jury because the defendant did not respond to a plea offer.

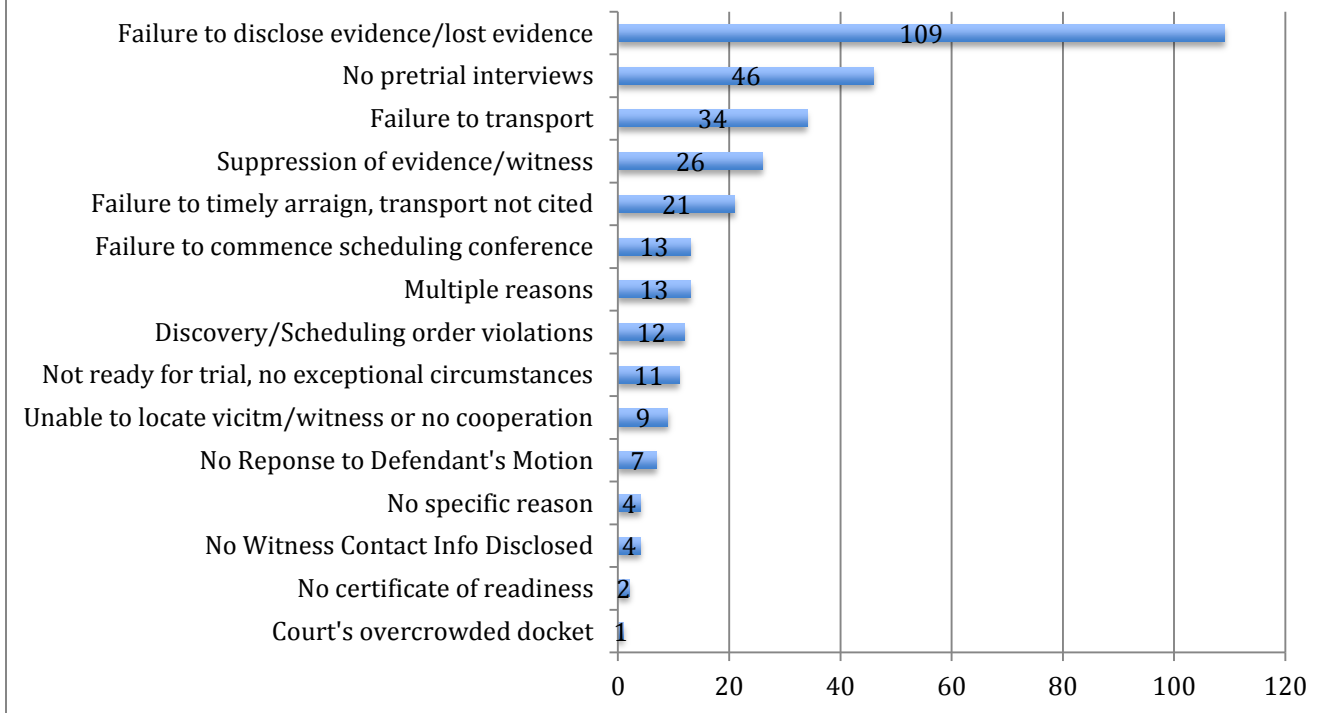
Sometimes the same charges are filed in more than one case and the duplicate charges needed to be dismissed. The prosecutor dismissed fifteen (15) cases in 2016 for this reason. By a large amount, the DA’s Office dismissed the most cases based on the age of the case—old cases, which had been pending for many years. Nearly forty percent of all prosecutor-dismissed cases in 2016 were because of the age of the case. The next largest category of dismissals included cases dismissed “in the best interest of justice,” with no specific reason offered. Two hundred and twenty-five (225) cases are in that category, or 12% of all *nolle prosequis* in 2016. The remaining large categories include the unavailability of or the inability to locate the victim or a witness; and the death of a victim, witness, or defendant.

The Court dismissed 977 cases in 2016, for many different reasons. The primary reasons were the defendant's completion of a deferred sentence or conditional discharge (369 or 37.8% of court dismissals) and CMO-related dismissals (312 or 31.9% of court dismissals).



The CMO-related dismissals (any dismissals that could be related to the CMO) stem from a variety of reasons. The chart below breaks out the reasons for CMO-related dismissals by the Court:

## 2016 CMO-Related Dismissals



The failure to conduct pre-trial interview dismissals were found in orders that crossed categories and included dismissals based on the CMO (40), as well as orders that simply relied on the failure to conduct interviews without other reference (6). The Court included every dismissal that cited failure to conduct pretrial interviews, even if the reason was unavailability and not untimeliness. Eight (8) cases that were dismissed by the Court for multiple reasons involved failure to conduct interviews. Exhibit 18, Multiple Reasons (Dismissals) Spreadsheet.

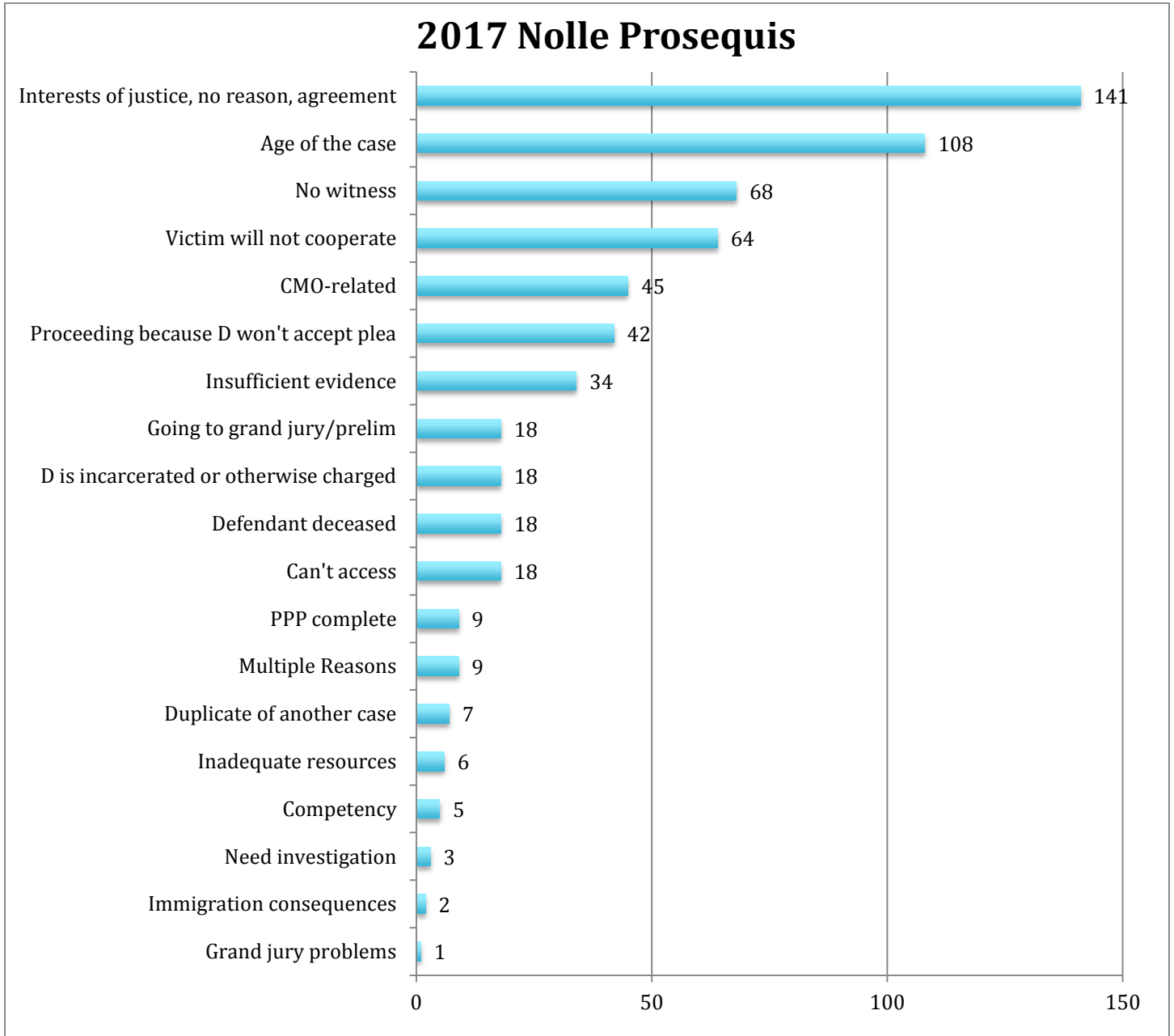
In 2016, failure to transport accounted for 41 dismissals (1%), combining court dismissals and *nolle prosequis*; failure to conduct pretrial interviews accounted for 99 total dismissals (3.6%); the destruction or failure to timely disclose evidence accounted for 116 dismissals (4%);<sup>4</sup> and the failure to arraign a defendant within time limits accounted for 21 dismissals (1%).<sup>5</sup> An additional 38 cases were dismissed for multiple reasons—which could account for cases that fall into many individual categories.

<sup>4</sup> If the pleading did not state a specific reason for dismissal, the dismissal was placed in a more general category. For example, if a *nolle prosequi* asserted evidence suppression as a basis, but did not communicate that the evidence was suppressed because of untimely disclosure, the dismissal is counted in the “evidence suppressed” category and not the “failed to disclose” category.

<sup>5</sup> It is possible all of the failure to timely arraign dismissals involve transport issues.

## B. 2017 Nolle Prosequis and Court Dismissals

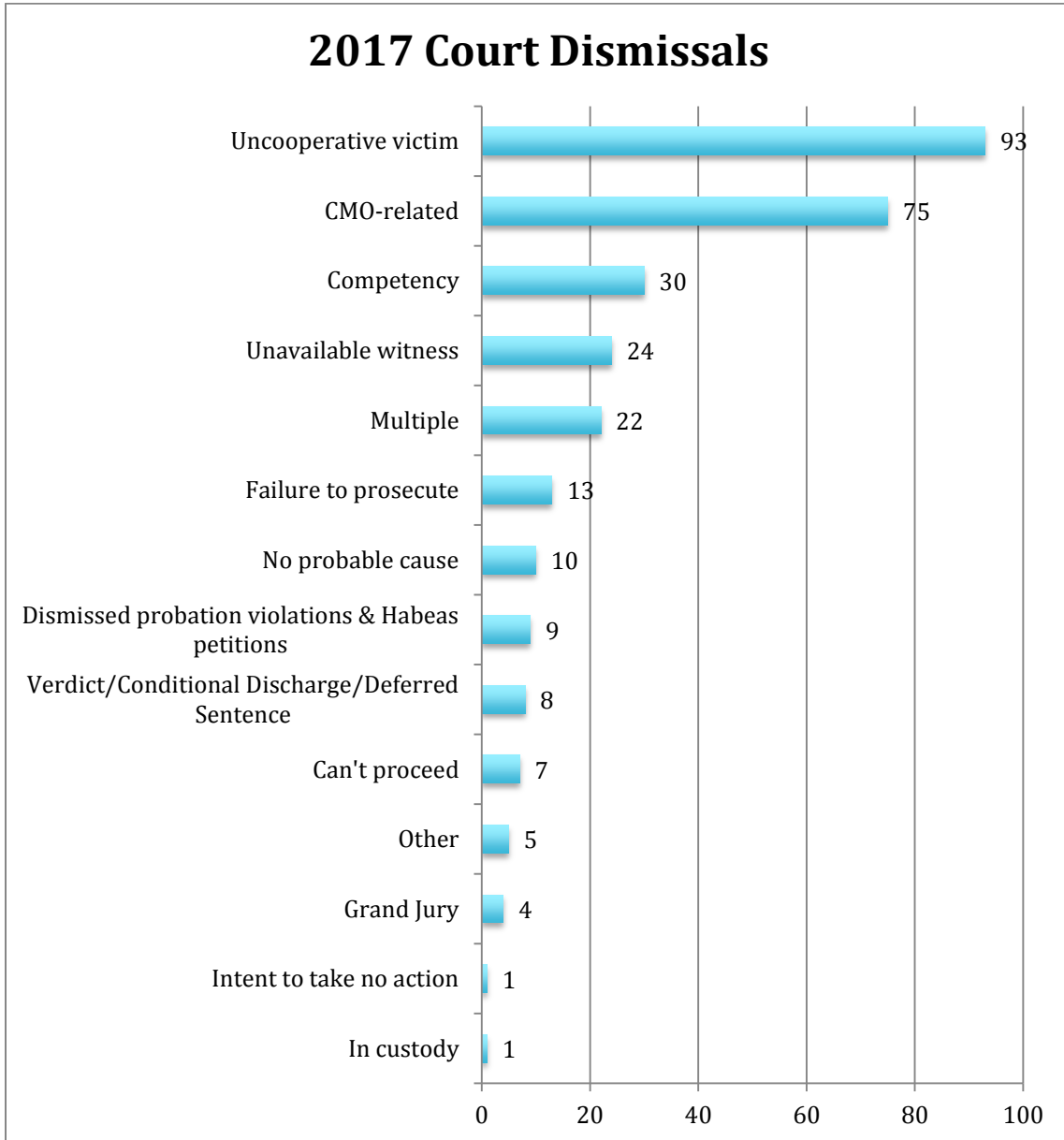
In 2017, the State has dismissed 614 cases for many reasons, including inadequate resources, duplication of cases, lack of cooperation of the victim, the age of the case, and the inability to prove the charges.



The DA's Office has dismissed forty-five (45) cases so far in 2017 for CMO-related reasons, including failure to conduct pretrial interviews, failure to transport, and evidence or witness suppression. Even with the over-inclusive counting, the State dismissed only 4.9% of cases for CMO-related reasons. Sixty-eight (68) cases were

dismissed because witnesses could not be located or were not available, sixty-four (64) because the victim was uncooperative, five (5) because the defendant was not competent, and three (3) cases for which more investigation was needed.

So far in 2017, the Court has initiated 302 dismissals.



The two most significant categories for court dismissals involve unavailable or uncooperative victims and CMO-related dismissals. Ninety-three (93) cases were dismissed because the victim did not cooperate or could not be located and an additional twenty-four (24) cases were dismissed because a witness did not cooperate or was unavailable. In the seventy-five (75) cases dismissed for CMO-related reasons, twenty-three (23) cases were dismissed for failure to transport, two of which had involved the

failure to transport the defendant twice. Again, the Court considered this category broadly and included any case that was dismissed for a conceivably CMO-related reason. Five (5) cases were dismissed for failure to arraign within the prescribed time period and one case was dismissed for failure to assign a track or obtain a scheduling conference. Twenty (20) cases were dismissed for failure to disclose evidence and twenty-three (23) cases were dismissed for failure to arrange for or conduct pretrial interviews. A total of twenty-two (22) cases were dismissed for multiple reasons.

### C. Comparing 2016 and 2017 Dismissals and *Nolle Prosequis*

Comparing the data from 2016 and the partial data from 2017, in most categories, the dismissal rates have remained fairly consistent.<sup>6</sup>

	<b>DC 2016 (977 total)</b>	<b>NP 2016 (1810 total)</b>	<b>Total 2016 (2787 total)</b>	<b>DC 2017 (302 total)</b>	<b>NP 2017 (614 total)</b>	<b>Total 2017 916 (dismissals)</b>
<b>Arraignment</b>	<b>21</b>	<b>0</b>	<b>21 (<math>&lt; 1\%</math>)</b>	<b>6</b>	<b>0</b>	<b>6 (<math>&lt; 1\%</math>)</b>
<b>Transport</b>	<b>34</b>	<b>7</b>	<b>41 (1 %)</b>	<b>23</b>	<b>2</b>	<b>25 (3%)</b>
<b>PTI</b>	<b>46</b>	<b>53</b>	<b>99 (4%)</b>	<b>23</b>	<b>34</b>	<b>57 (6%)</b>
<b>Disclosure</b>	<b>109</b>	<b>7</b>	<b>116 (4%)</b>	<b>20</b>	<b>0</b>	<b>20 (2%)</b>
<b>Multiple</b>	<b>13</b>	<b>25</b>	<b>38 (1%)</b>	<b>22</b>	<b>9</b>	<b>31 (3%)</b>

While the dismissals related to failure to disclose evidence, failure to arraign (transport not cited), and CMO-specific reasons have remained fairly consistent between 2016 and 2017, some categories have increased 2-3% in the last year.

#### 1. *CMO-Related Dismissals Generally*

The purpose of imposing mandatory sanctions for violations of scheduling deadlines was to provide incentive to timely investigate cases, deter dilatory conduct, ensure cases go through the system in a fair and efficient manner, and to provide justice to the accused, victims, and the community in a timely fashion. The goal has always been that most cases would be prepared and ready to go at the charging stage versus the old policy of arrest and charge prior to conducting the investigation. Additional deadlines would provide bench marks for moving toward trial.

During the development and implementation of the CMO, the National Center for State Courts advised that firm and credible hearing and trial dates was one of the five

<sup>6</sup> This chart does not represent all of the dismissal reasons, only those reasons that were highlighted by the *2017 Report*.



most important technical solutions that was incorporated into the CMO. Exhibit 5, at 16-17. Complete and timely discovery enhances the fairness of the adjudication and permits the parties to make realistic decisions about pursuing trial or negotiating a plea agreement. Exhibit 19, American Bar Association *Criminal Justice Discovery Standards*, § 11-1.1(a), commentary at pp. 2-3 (3 ed. 1996) (footnotes omitted). Justice requires timely disposition of allegations against members of the community. See Exhibit 19, § 11-4.1, at p. 67 (“The time limits [for disclosures] should be such that discovery is initiated as early as practicable in the process.”). Justice also requires thorough consideration of the parties’ adherence to the rules and a reasoned decision based on the circumstances. See Exhibit 20, *Order Denying State’s Motion for Reconsideration*, State v. Jose Alfredo Palacios, D-202-CR-2017-0786 (May 3, 2017).

As the Court noted in its December 7, 2015, *Reply to Responses to Requested Modifications to Pilot Case Management Order*, the 2016 and 2017 dismissal review does not suggest that huge numbers of cases are dismissed at arraignment as a result of the CMO because of the time limits or discovery requirements. Exhibit 16, at pp. 2-3. The purpose of the time limit and discovery requirements is to encourage charging those cases that are ready to go to trial—those cases for which the investigation has been completed or largely completed.

The DA’s Office cites as evidence of the need for change in the CMO that there has been an increase in trials and a reduction in the number of cases initiated and adjudicated. A purpose of the CMO, however, was to encourage the filing of cases that were ready to be tried and careful consideration of the charges brought together with the available or likely evidence. In evaluating the sorts of cases that have been dismissed, in subsequent paragraphs, it would appear that the CMO is fulfilling its purpose and weeding out cases that are not yet ready to proceed to trial.

The following is a discussion of cases dismissed because the defendant was not timely arraigned, the defendant was not brought to court to assist in the defense of the charges, witnesses and victims could not be located or would not cooperate, or the State was not ready for trial.

## **2. Failure to Conduct Pretrial Interviews**

It appears that a greater number of cases have been dismissed in 2017 for failure to conduct pretrial interviews. Both court and state dismissals based on pretrial interviews have increased. In 2016, failure to conduct pretrial interviews accounted for 4.7% of court dismissals and 2.9% of *nolle prosequis*. In 2017, failure to conduct pretrial interviews accounted for 7.6% of court dismissals and 5.5% of *nolle prosequis*.

The DA’s Office asserts that an “alarming number of cases” involve the State’s attempt to set up interviews, defense counsel’s unavailability, and subsequent defense requests for dismissal after the deadline passes. *2017 Report* at p. 17. The DA’s Office cites *State v. Michael Ray Chavez*, D-202-CR-2016-03733, as an illustrative example. The defendant in that case was indicted on November 16, 2016, and arraigned on

December 2, 2016. Exhibit 21. The Court entered a track one scheduling order on December 15, 2016, which set the deadlines for pretrial interviews for March 9, 2017, and trial for May 8, 2017. Exhibit 21. The defendant filed a motion to dismiss on March 17, 2017, and alleged that interviews were requested on December 20, 2016, and scheduled for January 9, 2017. Exhibit 21. The interviews were mutually re-scheduled for late February. Exhibit 21. One witness did not appear; another witness was interviewed but had to be stopped when the DA office closed. Exhibit 21. Defense counsel offered to continue the interviews at the public defender's office, but the prosecutor preferred to reschedule. Exhibit 21. The interviews were not rescheduled. Exhibit 21. Defendant requested exclusion of the witnesses who were not interviewed. Exhibit 21.

The State's response to the defendant's motion recited slightly different facts. Exhibit 21. The State explained that defense counsel simply did not appear at the January interview setting and that the prosecutor emailed the defense attorney four days after the February office closure to reschedule. Exhibit 21. The defense attorney replied that she would no longer be on the case, and the State was not notified of the substituted attorney until the day before the pretrial interview deadline. Exhibit 21. The Court granted Defendant's motion, but dismissed the case without prejudice rather than excluding the witnesses. Exhibit 21. One of the charges was brought again by criminal information in D-202-CR-2017-01976, and the defendant entered a plea agreement within days of the filing. Exhibit 21.

In the District Court's review of the 2016 and 2017 cases, the majority of dismissals appear to be related to witnesses who fail to appear or the State's failure to arrange the interviews. See Exhibit 22, *Summary of 2016 and 2017 Court Dismissals Failure to Conduct Pretrial Interviews Chart*. For example, in *State v. Bill Pabloff*, D-202-CR-2015-01200, the defendant made five requests for pretrial interviews, and the State agreed to arrange the interviews but did not. Exhibit 23. Defendant filed a motion to exclude witnesses on November 19, 2015, and the State did not respond. Exhibit 23. The Court considered dismissal with prejudice, but elected to dismiss the case without prejudice by order dated March 14, 2016. Exhibit 23. In *State v. Myles Chris Herrera*, D-202-CR-2016-00305, the parties agreed that dismissal was the appropriate remedy, because the witness interview deadline was not met. Exhibit 24. In other cases, multiple witnesses failed to appear for interviews. See also *State v. Dejohni Madrid*, D-202-CR-2016-02348 (six interviews); *State v. Omar Castillo-Morales*, D-202-CR-2015-02446 (five interviews); *State v. Juan Quiones*, D-202-CR-2015-01773 (nine interviews); *State v. Maria Henderson*, D-202-CR-2015-02171 (five witnesses).

The State also requested the dismissal remedy, as opposed to the exclusion remedy, in many cases. See, e.g., *State v. Omar Castillo-Morales*, D-202-CR-2015-02446; *State v. Skyy Durrell Barrs*, D-202-CR-2015-01965; *State v. Mario Vega*, D-202-CR-2014-00466; *State v. Jesus Antonio Lopez*, D-202-CR-2014-03804; *State v. Richard Gonzales*, D-202-CR-2016-03320; *State v. Eric Daniel Salazar*, D-202-CR-2016-03228; *State v. Willie Alvin Irvin*, D-202-CR-2016-02899; *State v. Britania McNab*, D-202-CR-2016-03015. In other cases, the State filed no response to the defendant's motion to dismiss. See, e.g., *State v. Andre Lucero*, D-202-CR-2015-02551; *State v. Veronica*

*Salazar*, D-202-CR-2016-02535; *State v. Shawnie Alberta Griego*, D-202-CR-2016-02110; *State v. Ashlee Trujillo*, D-202-CR-2016-01733; *State v. Armando Gallegos*, D-202-CR-2016-00327; *State v. Quinn Williams*, D-202-CR-2016-01139; *State v. Jeremy Doral Jackson*, D-202-CR-2016-01807; *State v. Joshua De-Shun Cheese*, D-202-CR-2016-02513; *State v. Alfredo Delgado-Garcia*, D-202-CR-2016-02587; *State v. Tyler Cordova*, D-202-CR-2016-03185; *State v. William Simoneau*, D-202-CR-2016-03258; *State v. Dustin Donald Sherman*, D-202-CR-2016-03351. The State suggests that defense counsel is “gaming” the system. The Court’s review of the dismissals indicates that these cases do not demonstrate intentional delay by defense attorneys in order to trigger dismissal; instead the review of the cases evidences continued difficulties by the State in complying with its obligation to make witnesses available, general difficulties coordinating interviews with witnesses, and difficulties securing witness participation.

### 3. *Failure to Transport or Timely Arraign*

One of the primary concerns of the DA’s Office is dismissals for failure to transport. The number of cases dismissed for failure to transport or timely arraign is fairly small and often involves multiple failures to transport or a lengthy delay of arraignment. This collection of cases does not appear to pose a significant obstacle on the pathway to justice. The DA’s Office cites LR2-111 NMRA and five cases in which it maintains that the Court had the responsibility to transport the defendant from MDC, did not arrange for transportation, and held the DA’s Office responsible.

LR 2-111(A) explains that the prosecutor shall submit a proposed transport order and serve an endorsed copy of the order on the institution so that the order is received at least 21 days before the requested transport. The previous rule, in effect before the start of 2017, similarly required the prosecution to submit proposed transport orders “for all proceedings set at the state’s request and for all trials.” LR2-113(A) NMRA. Under either rule, the State was and is required to submit proposed transport orders for transport from all facilities except MDC. Nevertheless, even in cases in which the defendant was housed at MDC, whether the failure was the fault of the State, the facility, or even the Court, the defendant is entitled to be present and to be timely arraigned.

The 201 cases involving arraignment and transport were divided into three major categories: cases dismissed for failure to arraign within the time period for which transport was cited in the order as the reason (16 dismissals); cases dismissed for failure to arraign for which transport was not cited as the reason in the order (5 dismissals); and cases dismissed for failure to transport at some point after arraignment (7 dismissals). Transport-related reasons were also cited in three cases that were dismissed for “multiple reasons” and two *nolle prosequis*.

<b>Dismissed for failure to arraign (transport cited) (2017)</b>			
<b>Case Name</b>	<b>Case Number</b>	<b>Transfer Location</b>	<b>Number of Missed Transports</b>

State v. Justin Levi Mack	D-202-CR-2017-1490	MDC	1, possibly 2
State v. Justin Alexander Leverette	D-202-CR-2017-1340	MDC	2
State v. Jessica Alonzo	D-202-CR-2016-04016	DOC	1
State v. Edward Gallegos-Garcia	D-202-CR-2017-0364	San Miguel	3
State v. Steve Martinez	D-202-CR-2017-01118	MDC	1
State v. Joshua Strayer	D-202-CR-2017-01109	MDC	1
State v. Jose Alfredo Palacios	D-202-CR-2017-0864	MDC	3
State v. Rene Roland Lobos	D-202-CR-2017-0476	Unknown	1
State v. Cedric Lee	D-202-CR-2017-00158	Federal custody	2
State v. Reydesel Lopez-Ordone	D-202-CR-2016-04004	Federal custody	2
State v. Jospheh Duran	D-202-CR-2016-03801	DOC	1
State v. Joyce Deshilly	D-202-CR-2016-03433	MDC	2
State v. Manuel Chavez	D-202-CR-2016-03044	Unknown	1
State v. Jose Javier Campos-Vargas	D-202-CR-2015-01904	ICE custody/Deported	1
State v. Joshua Michael Strayer	D-202-CR-2016-03887	DOC	3
State v. James Barela	D-202-CR-2016-1138	Federal custody	1

<b>Dismissed for failure to transport (not arraignment) (2017)</b>			
<b>Case Name</b>	<b>Case Number</b>	<b>Location</b>	<b>Proceeding</b>
State v. Angelo Burdex	D-202-CR-2013-04662	Unknown	Trial
State v. Nakya Estrada	D-202-CR-2017-0681	Lea County	Scheduling Conference
State v. Bobby Joel Casarez	D-202-CR-2017-00567	DOC	Scheduling Conference
State v. Jeremy Armstrong	D-202-CR-2016-02770	Lincoln County	Motion Hearing
State v. Eric Gomez	D-202-CR-2016-03734	Guadalupe Cty	Motion Hearing

State v. Jennifer Melendrez	D-202-CR-2016-03532	Sandoval Det. Center	Twice for scheduling conference
State v. Frank Wilson	D-202-CR-2016-04043	Lea County	Twice for scheduling conference

Seven cases were dismissed for “multiple reasons,” and of these cases, three included “failure to transport” as a basis.

<b>Multiple Reasons – Transport (2017)</b>			
<b>Case Name</b>	<b>Case Number</b>	<b>Location</b>	<b>Reasons</b>
State v. Donovan Neha	D-202-CR-2017-01547	Central NM CF	Victim is in DOC custody, no transport order (State prepared an order), missing discovery (after 2 <sup>nd</sup> prelim hearing setting)
State v. Jody Lynn Proctor	D-202-CR-2017-00356	DOC	Failure to provide discovery & failure to transport (with prejudice)---post arraignment
State v. Tiffani Shanell Robinson	D-202-CR-2017-00277	DOC	Failure to provide discovery and failure to transport---post-arraignment

Two *nolle prosequi* dismissals cited failure to transport from federal custody to arraignment: *State v. David Rayford*, D-202-CR-2016-04084 and *State v. Chris Yarnell*, D-202-CR-2016-04169.

The cases were grouped in the same categories for 2016. In total, the Court dismissed twenty-one (21) cases for failure to arraign and did not cite transport as a basis. Fifteen (15) cases were dismissed for failure to transport to arraignment and an additional eighteen (18) cases were dismissed for failure to transport to other settings. Of the cases dismissed for multiple reasons, one case, *State v. Leonardo Urioste*, D-202-CR-2015-03447, included four failures to transport from federal custody (in addition to the failure of the special prosecutor to appear in court) as the reason for dismissal.

<b>Failure to Arraign (transport cited) (2016)</b>			
<b>Case Name</b>	<b>Case Number</b>	<b>Location</b>	<b>Number of Missed Transports</b>
State v. Antonio Perez	D-202-CR-2008-04496	Unknown	4

State v. Julio Lopez	D-202-CR-2015-02385	Valencia County	1 (221 days passed b/w indictment & arraignment)
State v. Steven Trujillo	D-202-CR-2015-03276	Santa Fe County	3
State v. Joel Moreno	D-202-CR-2015-03228	Cibola County	1 (4 months of delay)
State v. Timothy Carrera	D-202-CR-2016-0894	DOC	1
State v. Billy Gross	D-202-CR-2016-01782	Federal custody	1
State v. Ronald Perez	D-202-CR-2016-01721	Valencia	1
State v. Michael D'addio	D-202-CR-2016-03215	DOC	1
State v. Jaime Hernandez	D-202-CR-2016-03193	DOC	1
State v. Shannon Marie McDevitt	D-202-CR-2016-0188	NMWCF	2
State v. Jonathan McKinley Bouldin	D-202-CR-2016-01738	Santa Fe	2 (w/ prejudice)
State v. Miguel Gonzales	D-202-CR-2016-01743	CNM CF	1 (w/ prejudice)
State v. Alicia Ana Larain	D-202-CR-2016-01465	UNM Hosp	2
State v. Leopoldo Fred Reyes	D-202-CR-2016-03525	DOC	2
State v. Larry Romero	D-202-CR-2016-03405	DOC	2

<b>Failure to transport (non-arraignment) (2016)</b>			
<b>Case Name</b>	<b>Case Number</b>	<b>Location</b>	<b>Proceeding</b>
State v. Angelo Burdex	D-202-CR-2013-05540	Unknown	Trial
State v. Alan Mark McClellan	D-202-CR-2014-03780	DOC	2 <sup>nd</sup> Failure to transport for a hearing
State v. Curtis Randolph Franklin	D-202-CR-2016-00960	DOC	Scheduling conference
State v. Archie Manzanares	D-202-CR-2016-02222	DOC	Scheduling conference
State v. Fabian Orlando Baros	D-202-CR-2016-02371	Federal custody	2 Scheduling conferences
State v. Bardo Quintana	D-202-CR-2016-02369	DOC	Scheduling conference

State v. Jonathan Vazquez	D-202-CR-2015-03157	DOC	2 CMO hearings
State v. Joseph Juan Cortez	D-202-CR-2016-00392	DOC	Unknown
State v. Alonso Estrada	D-202-CR-2015-03100	Federal custody	Scheduling conference
State v. Kevin Hoke	D-202-CR-2016-00460	DOC	Scheduling conference
State v. Ruben Palafox	D-202-CR-2016-0565	DOC	Preliminary hearing
State v. Benjamin Maduka	D-202-CR-2016-00877	Torrence	Unknown
State v. Arthur Arguello	D-202-CR-2015-00773	Unknown	2nd FTT for CMO
State v. Jarred Clegg	D-202-CR-2015-02578	BCDF	Trial
State v. Dominic Pacheco	D-202-CR-2016-01245	MDC	Preliminary hearing
State v. Ramon Ruiz	D-202-CR-2016-02737	Unknown	Preliminary hearing
State v. Joel Moreno	D-202-CR-2016-00253	Cibola	Scheduling conference
State v. Kayla Gomez	D-202-CR-2016-03277	Los Alamos	Preliminary hearing

**Failure to arraign (transport not cited) (2016)**

<b>Name</b>	<b>Number</b>	<b>Circumstances</b>
State v. Anthony Patrick Martinez	D-202-CR-2016-03281	Dismissed on 2 <sup>nd</sup> reset
State v. Joshua Dix	D-202-CR-2014-05934	Indicted Dec. 2014, in DOC custody
State v. Daniel Phillip Gallegos	D-202-CR-2015-01688	In DOC custody since 3/15
State v. Julio Lopez	D-202-CR-2015-01429	In Valencia County
State v. Shannon Villegas	D-202-CR-2015-01938	DOC custody; indicted 7/23/15, arraigned 6/17/16
State v. Jeff Brasher	D-202-CR-2015-03173	Lea County; 2nd violation
State v. Richard Julian Castillo	D-202-CR-2015-03064	DOC
State v. Rolando Holguin	D-202-CR-2015-02809	DOC; indicted 10/23/15,

		arraigned 6/17/16
State v. Julio Lopez	D-202-CR-2016-00138	Valencia County; indicted 1/14/16, arraigned 4/15/16
State v. Ernie Estrada	D-202-CR-2016-0623	DOC custody; indicted 2/25/16, in custody since 12/28/14 (with prejudice) (ON APPEAL)
State v. David Griego	D-202-CR-2016-00569	DOC custody; indicted 2/23/16, arraigned 4/29/16
State v. Deven Nieto	D-202-CR-2016-01655	Indicted & arrested 5/31/16, Arraigned 6/10/15
State v. Angel Daniel Perez	D-202-CR-2016-01527	Penitentiary of NM; ON APPEAL
State v. James Edward Dotts	D-202-CR-2016-02197	in MDC
State v. Luis Carlos Arreola-Palma	D-202-CR-2016-02219	in MDC
State v. Joseph Alvarez	D-202-CR-2016-02182	In Jefferson County Jail
State v. Michael Anthony Regenold	D-202-CR-2016-02175	in MDC
State v. Jayson McElroy	D-202-CR-2016-02386	CNM CF
State v. Patrick Pluemer	D-202-CR-2016-02367	Indicted 7/28/16, Arraigned 8/29/16
State v. Jayson Paul McElroy	D-202-CR-2016-2343	CNMCF
State v. Jamie Lee Hernandez	D-202-CR-2015-02796	indicted 10/23/15, in DOC custody, arraigned 4/18/16

Seven cases were dismissed by *nolle prosequi* for failure to transport.

<b><i>Nolle Prosequis for failure to transport (2016)</i></b>		
<b>Case Name</b>	<b>Case Number</b>	<b>Circumstances</b>
State v. Benjamin Sanchez	D-202-CR-2016-04166	Trial pending in federal court and cannot be transported (arraignment) (not re-filed)
State v. Angelo Burdex	D-202-CR-2013-02084	In federal custody and cannot be "writted" to federal custody
State v. Richard Carter	D-202-CR-2013-03504	In federal custody, investigated transport and it was not possible
State v. Nicholas Samuel Wiggins	D-202-CR-2016-02209	In federal custody, not enough time to arrange appearance for prelim hearing (not re-filed)
State v. Francis Jaramillo	D-202-CR-2016-00913	Federal custody, can't transport for arraignment after extensive effort (not re-filed)



State v. Kristopher Andrew Jaramillo	D-202-CR-2016-00126	Federal custody in AZ, can't arrange appearance (arraignment) (not re-filed)
State v. Christopher Theodore Chavez	D-202-CR-2014-01839	Federal custody, won't transport, ready to proceed but can't wait for conclusion of federal case b/c of CMO

**i. Duplicate Defendants**

Some defendants are listed multiple times in the failure to transport charts for different cases. The Court's counting of cases includes each of these defendant's individual cases and thus *overstates* the number of defendants whose cases have been dismissed for failure to transport or timely arraignment. Defendant Angelo Burdex is listed three times in the 2016-2017 charts, for three different 2013 case numbers. A stipulated motion to continue trial was filed in three cases, in which the defendant reported an agreement had been reached on his four pending cases that was contingent on the result of a separate pending federal case. Exhibit 25.

Defendant Joshua Strayer had two cases on the 2017 dismissed for failure to arraign (transport cite) list. In one case, the defendant was not transported for arraignment three times and the case was dismissed in January 2017 after a warning. Exhibit 26. The next case was dismissed after the first failure to transport. Exhibit 26. The State filed a motion to reconsider in that case and argued that it had filed for a transport order in another pending case because this case was not yet indicted. Exhibit 26. The docket, as a result, does not show a transport order and the Court had no way of knowing when the defendant was to be transported. Exhibit 26. In fact, the defendant was transported and available between March 27 and April 3, 2017, but the Court did not set the hearing until April 7, 2017—after the time for arraignment expired. Exhibit 26.

Defendant Jayson McElroy has two cases in the 2016 “failure to arraign, transport not cited” category. In one case, the defendant was indicted on July 27, 2016, and the docket notes his arrest the same day. Exhibit 27. Arraignment was set three times and the case was eventually dismissed without prejudice, though an order to transport was filed for the second setting. Exhibit 27. In the second case, arraignment was noticed twice, but according to the order quashing the bench warrant, the defendant was not arrested until August 31, 2016, which was between the first and second arraignment settings. Exhibit 27. Defendant Joel Moreno was also not transported twice in two separate cases, once for arraignment and once for a scheduling conference. Exhibit 28.

Defendant Archie Manzanares also had two cases, failure to transport to a non-arraignment setting (D-202-CR-2016-0222) and failure to arraign (transport not cited) (D-202-CR-2016-03098). The State has appealed one of Archie Manzanares's dismissed cases on the transport issue. The matter is currently pending on the Court of Appeals' general calendar, and it is therefore inappropriate to engage in close analysis at this time. The Court notes, however, that the process for challenging the effect of the CMO is working—the Court of Appeals, and perhaps the Supreme Court, will interpret the rule and provide guidance as to its proper application.

Defendant Julio Lopez has three cases on the 2016 lists. One case was dismissed for failure to arraign (transport cited) and two cases were dismissed for failure to arraign (transport not cited). In the first, the defendant was in state custody in Valencia county and 221 days passed between indictment and arraignment. Exhibit 29. Judge Loveless dismissed the case without prejudice, in line with Judge Zamora’s findings in the other two cases. Judge Zamora noted that 305 days and 92 days had passed between indictment and arraignment in those two cases. Exhibit 29.

The DA’s Office used the Julio Lopez case as an example of the Court’s inconsistency in applying the sanction rules, because Judge Chavez, in a fourth case, denied the defendant’s motion to dismiss for failure to timely arraign and that case proceeded to resolution. Exhibit 29. The DA’s Office also pointed to this case as a failure to arraign because of the Court’s schedule, not due to failure to transport. Defendant was indicted in the three cases that were dismissed on May 28, 2015 (arraigned April 15, 2016), September 9, 2015 (arraigned April 15, 2016), and January 14, 2016 (arraigned April 15, 2016). In one of the dismissed cases, the prosecutor explained that defendant’s date of birth was incorrect in the Sandoval County case, so the office could not locate him. According to Odyssey records, the defendant was subsequently successfully arraigned in January 2017, November 2016, September 19, 2016, and twice in August 2016. *See* D-202-CR-2017-00212; D-202-CR-2016-3534; D-202-CR-2016-2717; D-202-CR-2016-2580; D-202-CR-2016-02195. Additional charges were filed in March 2017, in case D-202-CR-2017-01139, but they do not appear related to the earlier cases and were dismissed by the State, with prejudice, “in the interests of justice.”

**ii. Failure to Transport from Other Jurisdictions**

The DA’s Office cited five cases in which the charges against a defendant were dismissed based on the failure to transport the defendant from another jurisdiction. In fact, most failure-to-transport cases involve facilities other than MDC and are therefore “out of jurisdiction.” The DA’s Office argues that the more appropriate remedy to dismissal without prejudice is “simply resetting the hearing for a later time” because dismissal without prejudice allows “defendants to avoid facing the charges against them simply because they already are incarcerated or facing charges in another jurisdiction.” *Report*, at p. 8. The Court, however, is paying attention to all aspects of each defendant’s case—including the array of other charges facing that defendant and the likelihood that if certain charges are dismissed, the defendant will stay in custody to answer to other charges, thereby giving the State an opportunity to re-charge when it is ready. Chronic failure to transport must be addressed, however, because the failure can lead to intolerable stretches of time between indictment and arraignment and numerous re-settings waste the resources of all involved agencies.

Turning to the specific cases cited by the State in its *2017 Report*, in the *State v. Anthony Patrick Martinez*, D-202-CR-2016-03281, the case was dismissed at the second arraignment setting to which the defendant was not transported. Exhibit 30. No transport order appears on the docket. Exhibit 30. On the same day the case was dismissed without

prejudice, the case was re-indicted on different charges stemming from the same date of incident. See *State v. Anthony Patrick Martinez*, D-202-CR-2016-03522; Exhibit 30. The defendant entered a plea agreement in April 2017. Exhibit 30.

Similarly, in the case of *State v. Reydesel Lopez-Ordone*, D-202-CR-2016-04004, arraignment was set twice, the defendant was not transported, and the case was dismissed on January 30, 2017. Exhibit 31. No transport order was filed on the docket. Exhibit 31. This was the second time this case had been brought. In the first case, the State proceeded by criminal information, filed on September 23, 2015. The case was set for preliminary hearing four times but was not called. In the *nolle prosequi* dated December 7, 2015, the State noted that the Court could not hear the case and it would proceed by indictment. The grand jury returned an indictment a year later, on December 7, 2016. The charges do not appear to have been re-filed.

In the case of *State v. Jonathan McKinley Bouldin*, D-202-CR-2016-01738, also cited by the DA's Office, arraignment was set three times and the defendant was not transported from DOC custody. Exhibit 32. A transport order was filed on the docket for the third setting, but not the first or the second. It does not appear that the State brought the charges again.

The defendant in *State v. Nakya Lucia Estrada*, D-202-CR-2017-00681, was arraigned on March 6, 2017, but was apparently sometime afterward taken into Lea County Detention Facility custody. Exhibit 33. The State filed no transport order to bring the defendant to the mandatory scheduling conference and the case was dismissed. The charges have not been re-filed in the Second Judicial District, but other charges remain pending against her in Lea County (D-506-CR-2016-00785) and in Bernalillo County Metropolitan Court (T-4-FR-2017-001679).

The DA's Office included one of the *McElroy* cases (though two were dismissed for failure to arraign), D-202-CR-2016-02343, for which arraignment was set three times and the defendant was not transported. Exhibit 27. The defendant was indicted on July 27, 2016, and arrested the same day. Exhibit 27. An order to transport was filed on the docket after the first arraignment setting. Exhibit 27. No order of transport appears on the docket for the first or third settings. Exhibit 27. On some occasions, the State is able to keep track of the defendant and file the required paperwork and other times, the State fails to meet its obligation and file the transport order—even if the State has previously demonstrated that it knows where the defendant is located.

### **iii. Court's Arraignment Scheduling**

The DA's Office maintains that the Court schedules arraignments outside the proscribed time limits and then dismisses cases for failure to timely arraign. The DA's Office cites five cases as examples, including the *Julio Lopez* case. As set forth above, the Julio Lopez cases were complex and involved a lengthy delay between indictment

and arraignment, as well as an indication that some prosecutors knew where the defendant was housed but other prosecutors were not able to locate him.

The case of *State v. Ruben Palafox*, D-202-CR-2015-02898, was similarly complex. The defendant was indicted on November 2, 2015, and the Court issued a notice of arraignment on November 3, 2015, for a November 16, 2015 hearing. Exhibit 34. No transport order was filed, defendant did not appear, and the case was dismissed on November 16, 2015. Exhibit 34. The case was re-filed on February 23, 2016, as D-202-CR-2016-00565. Exhibit 34. This second case was dismissed on March 18, 2016, also for failure to transport after arraignment was re-set twice. The State filed a transport order for the second, but not the first arraignment setting. Exhibit 34. The case was again re-filed by criminal information on July 8, 2016, in case number D-202-CR-2016-02106. Exhibit 34. That case was dismissed on August 10, 2016, because the victim did not appear at the preliminary hearing. Exhibit 34.

*State v. Michael Edward Tyner*, D-202-CR-2016-04242, was indicted on December 30, 2016, and on January 11, 2017, was set for a January 13, 2017 arraignment. Exhibit 35. Originally the arraignment was set for January 6, 2017, within the seven-day period, but arraignment was reset due to a court closure. Exhibit 35. On January 24, 2017, the case was dismissed for failure to arraign within seven days. Exhibit 35. The case was re-indicted on March 28, 2017, D-202-CR-2017-1147, and disposed by plea agreement on May 12, 2017. Exhibit 35.

In *State v. Deven Nieto*, D-202-CR-2016-01655, the Defendant was indicted on May 31, 2016, for an incident that occurred on May 14, 2016. Exhibit 36. The defendant was arrested and in custody as of June 1, 2016. Exhibit 36. On June 6, 2016, the Court noticed arraignment for June 10, 2016, and on that day, the Court dismissed the case because arraignment was not held within the prescribed time period. Exhibit 36. The case was re-indicted on October 25, 2016, under case number D-202-CR-2016-03470, and was dismissed by *nolle prosequi* on March 27, 2017, because the victim recanted. Exhibit 36.

The defendant in *State v. Patrick Bryan Pluemer*, D-202-CR-2016-2367, was indicted on July 28, 2016. Exhibit 37. The Court cancelled the warrant, based on the defendant's acceptance into Veteran's Court, on August 5, 2016. Exhibit 37. On August 16, 2016, the Court noticed arraignment for August 29, 2016, at which time the Court dismissed the case for failure to timely arraign—without any reference to any failure by the State. Exhibit 37. The case was partially re-filed by criminal information on September 13, 2016, in D-202-CR-2016-02990, and disposed by plea on September 15, 2016. Exhibit 37.

Three cases, involving Michael Tyner, Deven Nieto, and Patrick Pluemer, appear to have been exactly as the DA's Office set forth—the Court set the arraignment outside the prescribed time period. The State was not blamed or held responsible for the dismissals, but the rule does not permit exceptions for the Court's failure to timely set arraignment. The dockets further do not reflect that the State pointed out the errors or

requested an earlier setting. In the current system, the Court enters a presentment order on the day the charges are filed, and the arraignment date is calculated from the date of the presentment order (completed by the DA's Office). If the date on the presentment order is incorrect, the subsequent arraignment scheduling is also incorrect. Although this problem is associated with an extremely small number of cases, the Court has been working with the DA's Office on a new procedure to address the scheduling "problem," by which the State selects its own arraignment date for a particular case when the charges are filed.

#### 4. *Discovery Violations*

2017 has seen a fairly significant reduction in dismissals based on failure to disclose evidence. In 2016, these dismissals accounted for 4% of all dismissals and in 2017, that number has dropped to approximately 2%. The CMO currently requires the State to certify at arraignment that "all discovery in the possession of the state or relied upon in the investigation leading to the bind-over order, indictment or information has been provided to the defendant[.]" LR2-308(C)(2). Rule LR2-308(D) addresses initial disclosures, due at arraignment or five days after an arraignment waiver, as well as the continuing duty to disclose additional information within five days of receipt of that information. Evidence is deemed to be in the possession of the State "if such evidence is in the possession or control of any person or entity who has participated in the investigation or evaluation of the case." LR2-308(D)(4).

In 2016, the Court dismissed 109 cases for failure to abide by the scheduling order, discovery violations, lost evidence, or failure to disclose evidence. Of the thirteen cases dismissed for multiple reasons, evidence (8) involved discovery violations or failure to disclose. The State dismissed seven (7) cases because the evidence was not disclosed. Considering all of these evidence-related bases for dismissal, 125 cases were dismissed by the State or the Court in 2016 for failures to produce evidence in some form.

Looking closely at some of those 2016 dismissals, the failure to disclose is often related to evidence that was created as part of the initial investigation: lapel videos, victim or witness statements, or search warrants. Thus, this discovery should have been immediately available to be turned over. *See State v. Patricia Torrez*, D-202-CR-2015-02395; *State v. Shiloh Daukei*, D-202-CR-2016-01928; *State v. Jesus Urias-Gonzales*, D-202-CR-2016-01920 (lapel videos disclosed two days before trial); *State v. Auro Munoz-Cazal*, D-202-CR-2016-01858; *State v. James Vigil*, D-202-CR-2016-02249; *State v. Kenneth Marquez*, D-202-CR-2016-01100; *State v. Michael Yarborough*, D-202-CR-2016-00948; *State v. Savannah Phillips*, D-202-CR-2015-02550; *State v. Melvin Andrew Romero*, D-202-CR-2015-02459; *State v. Lawrence Frey*, D-202-CR-2015-01288 (lapel video not produced until 13 days before docket call); *State v. Arturo Lugo-Aguirre*, D-202-CR-2013-04913; *State v. Kenneth Martinez*, D-202-CR-2013-0699. In other cases, the failure to disclose involves missing medical or cell phone records or 911 call logs, which are often collected later in the investigation. *See State v. Steve Keator*, D-202-CR-2015-01590; *State v. Amber Romero*, D-202-CR-2015-03388. A couple cases note difficulties of communication between the prosecutor and the investigating officer. *See State v. Patrick Chavez*, D-202-CR-2016-01863; *State v. Yvonne Carbajal*, D-202-CR-

2016-0743. Some cases were dismissed based on the failure to investigate whether particular evidence existed at all. *See State v. Eloy Anthony Maldonado*, D-202-CR-2016-01848; *State v. Joseph Anthony Sandoval*, D-202-CR-2015-02995; *State v. James M. Williams*, D-202-CR-2014-05743.

The Court rarely dismisses a case for failure to disclose at arraignment. Even when sanctioned, the sanction is often something other than dismissal such as admonishment or financial sanctions. The State is often given extensions and additional opportunities to provide the information to the defendant so that both parties can be prepared for trial. Timely disclosures are essential so that the parties can assess the evidence and make informed decisions about whether to plea or proceed to trial. Regardless of the CMO, the DA has a constitutional and ethical obligation to disclose evidence to an individual accused of a crime.

[T]he primary purpose of pretrial procedures is to achieve the constitutional goal of a fair determination of every criminal charge. At the same time, the standard recognizes that promptness in reaching a determination is an element of fairness. By emphasizing that all types of dispositions—whether by diversion, plea, or trial—should be fair and expeditious, the standard recognizes that most criminal cases are disposed of without trial, and that discovery procedures should promote the fairness of those dispositions.

Subparagraph (ii) identifies the need to provide the defendant with information sufficient to form the basis for an informed plea. The informed plea is crucial to the integrity of the criminal justice system because a guilty plea waives the defendant's rights to remain silent, to be tried by an impartial jury, to be confronted with the prosecution witnesses, and to present a defense.

On a more practical level, a defendant who is ill-informed about the circumstances of the case may make judgments that are costly to the individual as well as to the system. An overly optimistic view of the evidence may lead to a wasteful trial, while an unduly pessimistic view of the evidence may lead to a premature plea that is subsequently challenged. The finality of guilty pleas is particularly important because a substantial majority of all cases are resolved by plea.

Exhibit 20, American Bar Association *Criminal Justice Discovery Standards*, § 11-1.1(a), commentary at pp. 2-3 (3 ed. 1996) (footnotes omitted).

In 2017, twenty (20) cases have been dismissed by the Court and zero cases dismissed by the State, for failure to disclose evidence. In *State v. Jaime Anthony Valdez*, D-202-CR-2017-0451, the case was dismissed when the State acknowledged that it had insufficient information to locate and provide missing discovery, twenty days after the deadline set at the scheduling conference. Exhibit 38. The Court noted that it did not

dismiss at the February 20, 2017, arraignment, when the State could not provide discovery, and did not dismiss until the State could not provide the discovery at the March 28, 2017 hearing. Exhibit 38.

The Court, in the case of *State v. Renaissance Persinger*, D-202-CR-2016-04077, entered an order explaining that the State twice ordered the lapel video from the Albuquerque Police Department in December 2016, but Albuquerque Police Department did not respond. Exhibit 39. The defendant represented that the lapel video contained statements from witnesses, video of the scene, the condition of the alleged victim, and potentially statements made by the defendant. Exhibit 39. The video was mentioned in the police report and listed as “tagged” into evidence. Exhibit 39. The video was not available at arraignment or the scheduling conference. As a result, the case was dismissed without prejudice. Exhibit 39.

In the February 20, 2017 order dismissing *State v. Deven Nieto*, D-202-CR-2016-03846, the Court noted the State had the lapel videos in its possession since August 2016 but did not disclose them or request an extension. Exhibit 40. The case was indicted on November 28, 2016, and arraigned on February 3, 2017 (after the defendant failed to appear at the first arraignment setting on December 9, 2017). Exhibit 40. In *State v. Delano Whitney*, D-202-CR-2016-02530, the State failed to provide video recordings until two days before trial. Exhibit 41. In *State v. Richard Anthony Gallegos*, D-202-CR-2015-01931, the case was dismissed after the Court entered an order requiring the State to disclose a belt tape on or before August 17, 2015, and by the date of the order—November 10, 2016—the State had not complied. Exhibit 42.

The DA’s Office maintains that dismissals at arraignment due to failure to disclose evidence are “staggering.” Review of the 2016 and 2017 dismissals does not support a “staggering” number of dismissals. No data is provided to support a “staggering” increase in dismissals due to discovery violations. If anything, the data supports the notion that the Court has perhaps been too forgiving of the DA’s failure to abide by its constitutional and ethical obligations to disclose evidence. It is likely that dismissals due to discovery violations increased after the CMO because, prior to the CMO, the Court viewed *Harper* to prevent dismissals for all but the most flagrant and intentional violations. It does not appear from the 2016 and 2017 cases that the Court “more often than not will simply dismiss a case.”

Two of the three cases specifically cited by the *2017 Report* at p. 15 were dismissed in 2015 under LR2-400. In *State v. Joseph Billy Garcia*, D-202-CR-2015-00061, the incident occurred on November 17, 2014, the defendant was indicted on January 7, 2015, and as of arraignment on February 2, 2015, no lapel videos were produced. Exhibit 43. This felon-in-possession case was not re-filed, but the defendant was charged again for a different crime—possession of a controlled substance—on March 10, 2015. Exhibit 43. The second case was dismissed by *nolle prosequi* on February 11, 2016, because a suppression motion was granted—unrelated to the CMO. Exhibit 43.

The DA's Office also cites *State v. Theodore Koziatek*, D-202-CR-2015-01046. In *Koziatek*, the case was dismissed at arraignment because the State failed to produce 911 recordings and CADs at arraignment. Exhibit 44. The State filed a motion to reconsider and explained that at arraignment, the State had received the evidence and was in the process of copying it to provide to the defendant, but the Court refused to re-call the case. Exhibit 44. On May 29, 2015, the Court denied the motion to reconsider. Exhibit 44. The case was re-indicted on June 6, 2015. Exhibit 44; *Compare* Indictment dated April 16, 2015 *with* Indictment dated June 6, 2015.

The DA's Office also cites *State v. Dino Casias*, D-202-CR-2016-01369, in which the defendant was charged by criminal information on May 5, 2016, and an amended criminal information was filed on June 22, 2016. Exhibit 45. At arraignment, the defendant informed the Court that lapel videos had not been received and the Court dismissed the case. Exhibit 45. The State filed a motion to reconsider, and set forth that at arraignment, the State had requested the Court to require the defendant to file a written motion, so that the State could have an opportunity to investigate whether the discovery had been provided. Exhibit 45. After the dismissal, the State discovered that the discovery had been provided, contrary to the defendant's statement at the arraignment. Exhibit 45. The Court reinstated the case, and it was eventually resolved by plea agreement. Exhibit 45.

The *2017 Report* also cites to a number of cases in which it is alleged that the Court failed to examine the legitimacy of the defendant's claims for dismissal and "reflexively jump[ed] to the ultimate 'cure' of simply dismissing the case." *2017 Report* at pp. 15-16. The DA's Office cites *State v. Terri Eagleman*, D-202-CR-2014-02553, with the parenthetical "District court grants oral motion to dismiss when defense counsel says he cannot get surveillance video to play." *2017 Report* at p. 15. In *Eagleman*, the defendant was indicted on June 4, 2014, for shoplifting. Exhibit 46. Defendant was arraigned on June 23, 2014. Exhibit 46. On December 4, 2015, the defendant filed a motion to dismiss because surveillance videos had not been produced. Exhibit 46. On January 14, 2016, the Court entered an order requiring the State to produce the surveillance videos. Exhibit 46. The case was dismissed on Defendant's oral motion, with prejudice, on January 28, 2016, because the State "indicated it cannot proceed with prosecution of this matter[.]" Exhibit 46. If the State in the *2017 Report* is correct, and the case was dismissed because the defendant could not open or play the videos, that dismissal resulted from the State's previous failure to produce the videos for eighteen months prior to the dismissal order.

In *State v. Lisa Garber*, D-202-CR-2015-03119, the case was dismissed because the State failed to produce all notes and photos "as directed by the Court." Exhibit 47. Previously, the State had not provided disclosures at arraignment and the Court ordered the State to provide the requested discovery by the scheduling conference. Exhibit 47. In the ensuing 18 days, the State did not provide the discovery. The *2017 Response* states only that the defendant could have examined the evidence at any time pursuant to a speed order. The DA's Office offers this case as an example of having had "little meaningful



opportunity to respond.” The State, however, was ordered to produce the information, did not comply with the Court’s order, and did not offer an explanation.

The defendant in *State v. Lily O’Farrell*, D-202-CR-2015-02748, was indicted on October 20, 2015. According to the defendant, no discovery had been provided as of January 11, 2016. Exhibit 48. The State did not file a response, and the Court held a hearing on January 21, 2016. Exhibit 48. The Court entered an order dismissing the case on the same day. Exhibit 48. The case was not re-filed. Exhibit 48.

In *State v. Joseph Hirschfield*, D-202-CR-2016-01504, the defendant was indicted on May 16, 2016, and arraigned on May 31, 2016. Exhibit 49. The case was dismissed on July 15, 2016, because the State had failed to produce lapel videos on the date of arraignment or at the scheduling conference on July 12, 2016, six weeks later. Exhibit 49. Before the case was dismissed, the defendant was charged with another crime, which was also dismissed for failure to abide by the CMO—in that case, failure to provide pretrial interviews. Exhibit 49. A third case was charged in March 2017 for a drug possession charge that pre-dated the original indictment in D-202-CR-2016-01054, but that case was dismissed by *nolle prosequi* due to witness unavailability. Exhibit 49. Four other cases are currently pending against the defendant, but the original charges have not been brought again by the State. Exhibit 49.

The DA’s Office last cites *State v. Vivian Sisneros*, D-202-CR-2016-03564, and describes the case as “[d]ismissed because lapel videos not disclosed, even though State demonstrated that video had never been tagged into evidence and had been deleted by officer.” *2017 Report*, at p. 16. In *Sisneros*, the defendant was indicted on November 2, 2016, and arraigned on November 14, 2016. Exhibit 50. The defendant filed a motion to suppress on November 28, 2016. Exhibit 50. In the motion, the defendant quoted the police report as stating that the officer recorded the entire incident on the digital recorder, and another officer reported tagging in his lapel camera footage into evidence. Exhibit 50. The recordings were not disclosed. Exhibit 50. The State, in its response brief, acknowledged that the prosecutor failed to notice an email from law enforcement on the date of arraignment, indicating that disclosures were ready for pick up on that day. Exhibit 50. The State attached the recordings to its response brief and requested the “least harsh sanction” but did not identify its desired sanction. Exhibit 50. The Court dismissed the case. Exhibit 50. The case was not re-filed.

The DA’s Office posits that these failures to disclose could have been resolved by “a simple discussion between the parties and a reasonable amount of time.” *2017 Report*, at p. 16. The DA’s Office provides no basis for this supposition. The State controls when a case is filed and thereby controls when the discovery in its possession will need to be turned over to the individual who has been accused of a crime. In many cases, the State was given additional time, beyond arraignment, to turn over the discovery and it did not. In some cases, the State was *ordered* to turn over the discovery and it did not. In other cases, the State had the evidence available when the case was dismissed, but did not re-file the charges. The DA’s Office does not explain why removing the sanction from the CMO will result in greater compliance or why a discussion between the parties will result

in disclosure when orders of the Court and rules demanding disclosure have not been completely successful in achieving the necessary disclosures.

Although the failure-to-disclose dismissals have decreased in 2017 thus far, problems continue to arise from poor communication between the DA's Office and the Albuquerque Police Department. The Court's review of dismissals indicates the Court often waits far beyond arraignment to dismiss a case with discovery problems. Further, the question arises: why are some dismissed cases re-filed and others are not? Cases can clearly be successfully re-filed if the absent discovery is obtained, such as in *Koziatek*, in which the new case was re-indicted almost immediately. Additionally, improper dismissals—those in which the Court is misled about the status of discovery—are not without remedy, such as in the *Casias* case wherein the Court granted a motion to reconsider. Other cases have utilized the appeals process. With respect to the difficulty obtaining evidence from law enforcement, it is not clear how alleviation of the current deadlines will solve that problem or smooth the flow of information.

## 5. *Scheduling Conferences*

In 2016, thirteen (13) cases were dismissed for failure to have a scheduling conference. One case was dismissed in 2017 solely for failure to have a scheduling conference. It is clear that dismissal for failure to hold a scheduling conference is fairly unusual.

The defendant in *State v. Matt Swalwell*, D-202-CR-2013-03136, was indicted for seven counts on July 1, 2013, and went to trial in February 2016. The jury hung on three counts, one count was dismissed by directed verdict, two counts were severed, and a final count was dismissed by *nolle prosequi*. Exhibit 51. After the trial, the State took no action to take the severed counts or hung counts to trial. Exhibit 51. Eventually, the Court set a scheduling conference for July 28, 2016. Exhibit 51. The Court dismissed the remaining counts on the defendant's motion for failure to commence scheduling conference. Exhibit 51. The charges were not re-filed.

The court re-set the scheduling conference four times in *State v. Matthew Martin Sanchez*, D-202-CR-2013-04239. Exhibit 52. The defendant's competency was evaluated and the defendant was determined to be competent in February 2014. Exhibit 52. The parties stipulated to a continuance of the scheduling conference until June 2014. Exhibit 52. The notice of the June hearing was returned undeliverable to defendant, but the hearing was reset for July. Exhibit 52. The parties stipulated to vacate the July hearing and it was reset for September. Exhibit 52. Another notice to the defendant was returned undeliverable. Exhibit 52. No action was taken until the matter was assigned to the special calendar in February 2015 and after that, no action was taken until the prosecutor withdrew in June 2015 and a new prosecutor was substituted in July 2015. Exhibit 52. A new scheduling conference was set for August 2015 and the case was dismissed. Exhibit 52. The charges were not re-filed.

The scheduling conference was not held for sixteen months after indictment in *State v. Ernesto Joe Gallegos*, D-202-CR-2014-02353, because the defendant was in federal custody. Exhibit 53. In *State v. Christine Lucero*, D-202-CR-2014-02833, the defendant was indicted on June 18, 2014, and the case moved along until it was assigned to a CMO calendar in February 2015. Exhibit 54. After that, counsel was substituted, but nothing else happened until April 7, 2016, when the Court dismissed the case for failure to schedule. Exhibit 54. *State v. Antoinette Werito*, D-202-CR-2014-02893 followed a similar trajectory, as did *State v. James Gaebelein*, D-202-CR-2014-02959 (cited by the DA's Office) and *State v. Alfredo Delgado-Garcia*, D-202-CR-2014-02669. Exhibit 55. See also *State v. Dominic Schuler*, D-202-CR-2015-2603 (delay of 138 days between arraignment and scheduling conference); *State v. Tommy Hutchinson*, D-202-CR-2015-02589 (delay of 60 days between arraignment and scheduling conference); *State v. Roberto Lino-Reyes*, D-202-CR-2015-03348 (137 days elapsed between arraignment and dismissal for failure to request scheduling conference); *State v. Pascha Dean Eagle Tail*, D-202-CR-2016-00796 (175 days between arraignment and stipulated dismissal for failure to hold scheduling conference); *State v. Justin Lollis Edwards*, D-202-CR-2016-02781 (73 days delay between arraignment and dismissal).

The case of *State v. Wesley Townes*, D-202-CR-2016-00383, presented slightly different circumstances. Exhibit 56. The defendant failed to appear at the scheduling conference and was arrested and held in custody. Exhibit 56. After the arrest, the State failed to request a new scheduling conference within thirty days and the Court dismissed the matter, noting that it is "the State's duty to bring a defendant to trial." Exhibit 56. The charges were not re-filed.

The DA's Office cites *State v. Maria Andrade-Pina*, D-202-CR-2015-00479, and *State v. Gaylan Marie Crayton*, D-202-CR-2016-02503. The *Andrade-Pina* case was dismissed December 23, 2015. The defendant was indicted on February 12, 2015, and arraigned on March 2, 2015. Exhibit 57. The DA's Office notes that the case was dismissed even though the State twice requested a scheduling conference. *2017 Report*, at p. 12. The first request, however, was October 20, 2015, and the second request was December 10, 2015. Exhibit 57. The first request for hearing occurred 232 days after arraignment.

*Crayton* was the only 2017 dismissal for failure to hold a scheduling conference. In *Crayton*, the defendant was indicted on August 10, 2016, and a waiver of arraignment was filed on August 25, 2016. Exhibit 58. The scheduling conference was noticed for February 24, 2017, 183 days after arraignment. Exhibit 58. According to the defendant's motion to dismiss, the defendant was initially arrested on this matter on September 6, 2015, and released on September 8, 2015, ROR. Exhibit 58. The Court dismissed the case on February 14, 2017. The charges were not re-filed.

These cases involved unusual circumstances and generally extraordinary delay. Fourteen cases out of thousands hardly constitutes a pattern that justifies abolishing or severely watering down the provisions of the CMO. Eliminating the 30-day scheduling conference requirement would not have changed the outcome in most of these cases and

the DA's Office fails to explain why so many of these charges were not brought again, if they were otherwise ready to proceed to trial.

## **6. *Deferred Sentence and Conditional Discharges***

The Court dismisses cases for reasons other than sanctions or lack of evidence, including completion of a deferred sentence or satisfaction of the terms of a conditional discharge.

As part of the plea bargaining process and under certain circumstances, the parties can agree to suspend a criminal sentence until the defendant completes a period of probation. If the defendant successfully completes probation, the court may dismiss the charges and the sentence. If the defendant violates the terms of his or her probation in any way, the Court may order the defendant to serve the sentence in full. This process is called a “deferred sentence.”

A conditional discharge is similar to a deferred sentence, but a defendant who receives a conditional discharge is not convicted of the crime. For certain offenses, the defendant pleads guilty or no contest to the charges, but no conviction is entered unless the defendant violates the terms of the conditional discharge.

In 2016, the Court dismissed 369 cases as a result of the defendant successfully completing a conditional discharge or a deferred sentence. The State dismissed by *nolle prosequi* 46 cases because the defendant completed pre-prosecution probation and an additional two cases generally because supervision was completed. As a result, of the total 2787 cases dismissed in 2016, 417—or 15%—were dismissed because the defendant successfully completed probation.

In 2017 thus far, the Court dismissed two cases based on completion of probation for a deferred sentence or a conditional discharge. The State filed a *nolle prosequi* in one case specifically related to a conditional discharge. The State filed *nolle prosequis* in a number of other circumstances related to early resolution: pre-prosecution plea agreements (10), restitution paid by the defendant (3), and counseling or drug treatment sought by the defendant (1).

## **7. *Win by Default***

The United States Supreme Court has explained that district attorneys are not ordinary parties to lawsuit but instead

a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. 78, 88 (1935). The American Bar Association explains that, “The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.” Exhibit 59, American Bar Association, *Criminal Justice Standards for the Prosecution Function*, §3-1.2, at p. 2 (4th Ed.); *see also Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quoting La. State Bar Ass’n, Articles of Incorporation, Art. 14, § 7 (1985)). According to the “aspirational” standards of the National District Attorney’s Association,

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

Exhibit 60, National District Attorney’s Association, *National Prosecution Standards* at p. 2 (3d ed.).

To that end, prosecutors have special duties under the New Mexico Rules of Professional Conduct, including the requirement (1) to only prosecute charges that the prosecutor knows are supported by probable cause; (2) to make reasonable efforts to assure the accused knows of the right to counsel and knows how to obtain counsel; (3) to timely disclose to the defendant all known evidence that “tends to negate the guilt” of the defendant or mitigate the offense; (4) to refrain from unnecessary prejudicial public comment; and (5) to promptly disclose new evidence that “creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” Rule 16-308 NMRA. The criminal proceeding is not about a “win” for either side, but instead a satisfactory evidentiary showing that the accused person is actually the person who committed a crime. Moreover, courts have special obligations to ensure that speedy and prompt resolution of criminal cases; timely justice benefits defendants, victims, and the community at large.

The DA’s Office maintains the CMO has resulted in criminal defendants “winning by default” and has encouraged defense attorneys to take no action and instead wait for the prosecutors to miss an arbitrary deadline, which will result in dismissal. Review of the dismissed cases does not show inaction on the part of defense attorneys and often demonstrates difficulties the prosecutors are having with disclosing the evidence that supports the charges, ensuring that the defendant is present at hearings, moving the case forward, and securing interviews with necessary witnesses. These dismissals are not a “win” for any party—and neither is a conviction a “win” for the DA’s Office. *See Exhibit 59*, *Criminal Justice Standards for the Prosecution Function*, § 3-1.3 (“The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.”).

A conviction is a determination by a jury that the evidence proved the accused

guilty beyond a reasonable doubt. A court dismissal is not a “loss” for the DA’s Office. A court dismissal is generally an acknowledgement that the case is not yet ready to be brought to the jury and that more time is needed to sort out the immense complexities that are often involved with orchestrating a criminal prosecution. *Criminal Justice Standards for the Prosecution Function*, § 3-5.4, at p. 25 (“After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.”).

The DA’s Office argues that dismissals for discovery issues are not criminal justice reform and cites four cases involving defendant Nicholas Tanner that were dismissed. *2017 Report*, at pp. 17-18. Mr. Tanner had six cases pending in the time period cited by the DA’s Office. *State v. Tanner*, D-202-CR-2014-03784 (shoplifting, attempted receipt of stolen property); *State v. Tanner*, D-202-CR-2014-3884 (non-residential burglary); *State v. Tanner*, D-202-CR-2014-03976 (shoplifting); *State v. Tanner*, D-202-CR-2014-03989 (possession of a controlled substance); *State v. Tanner*, D-202-CR-2014-04374 (unlawful taking of a motor vehicle, battery against a household member); and *State v. Tanner*, D-202-CR-2015-00491 (shoplifting).

<b>Tanner Cases</b>		
<b>Case Number</b>	<b>Important Dates</b>	<b>Reason for Dismissal</b>
D-202-CR-2014-03784	8/12/14 Indictment 8/18/14 Arraignment 2/9/15 Mt Dismiss 2/9/15 Dismissal	Failure to provide discovery at arraignment
D-202-CR-2014-03884	8/15/14 Indictment 8/22/14 Arraign 10/29/14 Nolle	Best interests of justice
D-202-CR-2014-03976	8/21/14 Indictment 9/2/14 Arraignment 2/2/15 Mt Dismiss 2/2/15 Dismissal	Failed to provide lapel videos, belt tapes, recorded statements, prior criminal history, CADs, surveillance videos, a complete witness list
D-202-CR-2014-03989	8/22/14 Indictment 8/29/14 Arraignment 1/20/15 Nolle	Insufficient time to complete chemical testing
D-202-CR-2014-04374	9/12/14 Indictment 9/22/14 Arraignment 3/19/15 Dismissal	Failure to produce three videos collected by police before the scheduling conference
D-202-CR-2015-00491	2/13/15 Indictment 2/20/15 Arraignment 3/17/15 Dismissal	Failure to provide initial disclosures

In the *2017 Report*, the DA's Office does not cite the two cases that the State dismissed by *nolle prosequi* and additionally does not note whether Mr. Tanner was in custody during the pendency of these cases. Mr. Tanner has had four additional cases filed against him since the last case cited by the DA's Office, in addition to a motion for preventive detention, which was granted. Exhibit 61. Three of the other current cases are stayed for competency determinations.

The CMO did not cause Mr. Tanner to commit additional crimes any more than the State's decision to dismiss two cases by *nolle prosequi* caused him to commit more crimes. The State must disclose the evidence it intends to use to prove the charges against a defendant, and in three of the four dismissals, the State failed to turn over evidence within four to five months of arraignment. Extension of the time period or elimination of a meaningful consequence if the time period expires will not cure the problems with the State's failure to disclose evidence that it should have in its possession at the time the crime is charged.

The State implicitly realizes the benefit of dismissal every time it uses the *nolle prosequi* process. The *nolle prosequi* process allows the State an out when it cannot proceed further for any reason. The defendant is required to continue to retain a defense attorney and "start over," but the criminal justice process sometimes requires a "re-set" so as not to run afoul of procedural requirements. In some instances, the State uses these very procedures as leverage to encourage plea negotiations. Numerous cases are filed by criminal information and then dismissed with the intention of proceeding to grand jury if the defendant will not accept a plea agreement. This procedure uses the resources of the Court and both parties, but is acceptable and permissible under the rules.

The DA's Office maintains that the State must "start over" if cases are dismissed without prejudice, that resources are expended to re-indict cases, and the involved parties must "reinvest the time they already have spent for no good reason." *2017 Report*, at p. 18. The State is not required to empanel a grand jury to indict cases, but may instead proceed via criminal information process. The effort to "start over" should be greatly reduced by the work that has already been done, or that should have been done, during the pendency of the first case. The remedy of dismissal without prejudice is designed to impose the least burden: no evidence is excluded and the parties may continue forward.

To achieve "moving forward" after a case has been dismissed, the Court created an expedited track for cases that were dismissed for violations of the CMO and have been re-filed. The Court set up a special preliminary hearing calendar for just this purpose; it set aside two days each week whereby the DA's Office could bring to preliminary hearing any cases dismissed because of the CMO. The DA's Office declined to use this expedited track claiming the office could not identify which cases had been dismissed based on the CMO and because many of those cases are not being re-filed. The DA's Office insists that the CMO has failed to reduce the backlog of cases but instead shifted the backlog to the DA's Office because the CMO deadlines require the State to delay indicting more and more cases until "information is fully gathered and ready to be

produced at arraignment.” *2017 Report*, at p. 20. The CMO, however, was only ever going to decrease backlog generally if deadlines were imposed and enforced such that cases efficiently moved through the system at every stage. No experience or evidence suggests that removing the deadlines will promote the efficient use of resources or time.

## 8. *Plea Deadlines*

The number of cases that are resolved by pleas has not generally significantly dropped since the introduction of the new calendar in 2015.<sup>7</sup> The number of trials has increased, primarily because cases are moving through the system faster and there was a backlog of cases to be tried, but the number of cases resolved by plea remains high. The DA’s Office maintains that plea deadlines are so strictly enforced that “the parties have no choice but to proceed to trial if no plea is reached before the deadline.” *2017 Report*, at p. 20. No support, however, is provided by the DA’s Office to link the plea deadline to an alleged reduced number of plea agreements and an increase of trials.

Plea deadlines are critical to successful operation of the CMO both because they allow the Court to determine which trials will go forward and how to provide judicial coverage to ensure all trials are heard, and because they allow the Court to control jury costs. Moreover, the CMO provides the judge with some flexibility to extend plea deadlines; that flexibility has been used by the judges to extend plea deadlines where appropriate under the specific circumstances. Some judges also allow the parties to submit an unsigned, but agreed-to, plea agreement by the plea deadline so long as they represent as officers of the Court they have reached an agreement.

The research has shown that firm deadlines encourage plea agreements because the parties know that the case will move forward for either side without delay if deadlines are not met.

In this reality, it is vitally important for the court (especially all judges and staff) to create the expectation that a scheduled hearing, conference, or trial setting will not only occur when set, but will substantially contribute to the progress of the case toward disposition. When that expectation is commonplace, lawyers will prepare in earnest for the event, cases will resolve earlier, and the court and parties will have more time to concentrate on the smaller number of complex and problematic cases that require more preparation and attention.

....

Because most cases are disposed by plea or settlement, reasonably firm trial dates will produce earlier pleas and settlements as well as encourage

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<sup>7</sup> The number of pleas in cases that were assigned to the special calendar was lower, but that universe of cases, assigned to the special calendar because of their age, often involved unusual circumstances or extreme delays.



trial preparation in cases that cannot be resolved by other means. National research shows firm hearing and trial dates are associated with shorter times to disposition in felony cases.

....

In 1982, court researchers studying the pace of litigation in a series of trial courts concluded that case delay and the speed of disposition for both civil and criminal cases was not singularly conditioned by court structure, resources, procedures, caseload, or trial rate. Rather, speed and backlog were largely determined by the established expectations, norms, practices, and informal rules of behavior of judges and attorneys. In other words, court systems become accustomed to a given pace of litigation. In courts where the practitioners expected cases to be resolved in a timely manner, they were resolved faster. Expectations for timeliness were associated with the degree of timeliness.

Exhibit 5, at pp. 16-18. These are the reasons that the CMO was initially adopted and the structured and enforceable deadlines were included.

Defendants are further unable to meaningfully assess the benefits of a plea agreement if the evidence on which the State intends to rely has not yet been disclosed. Anecdotally, the reasons that defense attorneys are waiting longer and longer to engage in plea agreements is because the conviction rate at trial is low (44% according to the DA's Office<sup>8</sup>) and because prosecutors appear to have fairly little authority to engage in negotiations early on in the process.

The DA's Office maintains that defense attorneys are "gaming" the system and simply waiting for prosecutors to violate the CMO and for the cases to be dismissed. This argument presupposes that the prosecutors will likely not be prepared to take a case to trial and will not be able to meet the deadlines. This argument also assumes that a defendant benefits tremendously from charges that are dismissed without prejudice. The charges can be, and often are, quickly re-filed. The charging, or re-charging, decision is completely within the discretion of the DA's Office.

## **VIII. CONCLUSIONS: A NEED FOR A COMMUNICATIONS PLAN AND THE QUESTION OF ALLOCATION OF RESOURCES**

The Court's analysis of the data contained herein suggests that: (1) the CMO is working; it has led to cases being brought to disposition more efficiently and fairly; (2) dismissals by the Court often occur after repeated failures by the DA's Office to comply with deadlines; (3) most dismissals, whether by the DA or the Court, are not CMO related; (4) most dismissals are without prejudice and the case can be re-filed when the

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<sup>8</sup>See <https://www.abqjournal.com/993742/da-torrez-to-reduce-prosecutions-focus-on-worst-offenders.html>

DA's office is ready to proceed; and, (5) the underlying discovery and witness problems that existed prior to the implementation of the CMO continue to exist and cases continue to be brought into the justice system prior to being adequately investigated by the DA's office.

Discussions at the "CMO workshops" revealed that discovery problems primarily center around the DA's Office obtaining evidence from the Albuquerque Police Department ("APD"). LOPD indicated it sees very few problems with discovery in cases involving either State Police or the Bernalillo County Sheriff's Office; those problems are generally limited to cases in which APD is the investigating agency. The Court has repeatedly asked both APD and the DA's Office for more information regarding the barriers to exchanging information; it does not appear that either office entirely understands the breakdown in communication. The Court has suggested moving to an "open-file" system such as is used in other jurisdictions and suggests that this general topic—establishing better communication and the exchange of information between APD and the DA's Office—would be a useful topic to address at the CJCC. This inefficient exchange of information, however, cannot be solved by changes to the CMO.

In fact, the Court's review of the cases indicates that despite the sanctions provision of the CMO, the Court has granted numerous extensions of discovery deadlines in 2016 and 2017, often to address discovery problems arising from the failure of APD and the DA's Office to exchange information. The reasonable conclusion to be drawn from the continued failures to disclose evidence and locate and make available witnesses is not that the deadlines should be extended or that sanctions should be loosened, but rather that stricter deadlines and stricter Court adherence to those deadlines is warranted.

Many of the problems identified in the 2017 *Report* appear to be largely related to how the DA's Office chooses to allocate resources and identify priorities. The DA's Office acknowledges that reformation of policies and procedures within the office is necessary. 2017 *Report*, at p. 21. The Court has nevertheless noted a reduction in the use of many prosecution tools, including the Early Plea Program, specialty courts, and the criminal information/preliminary hearing process.

Further, a review of defendants placed on pretrial services at felony first appearance indicates that only approximately 10% of defendants on pretrial services have their case indicted or bound over within the sixty-day time limit. Exhibit 62. After the expiration of the 60-day time limit (or 10-day, depending on the applicable time limit), the case must be dismissed pursuant to Rule 7-202. This means that many cases are being dismissed prior to the case even coming under the purview of the CMO, which is a waste of resources—not only the resources of the DA's Office, but also of LOPD and the courts, which operate pretrial services.

The Court has further observed in recent months that the DA Office's priority in its allocation of resources appears to be on filing pretrial detention motions. As of August 22, 2017, the State filed 348 pre-indictment motions for pretrial detention, all of which require an expedited hearing. Exhibit 63. This requires a great deal of resources

from all of the justice partners. The Court currently holds detention hearings for between four and eight hours, five days a week. Each of those hearings requires Court personnel, a DA, and someone from the LOPD.

Of those 432 motions, 187 have been granted (43%). Exhibit 63. Many of these motions are filed on defendants who have low Public Safety Assessment risk scores or defendants who have other charges and are already subject to conditions of release that could be modified or revoked, rather than resorting to preventive detention motions. Other motions are withdrawn immediately prior to or at the hearing or are on cases that the DA's Office later *nolles*, fails to indict within 10-days, or pleas to a misdemeanor. Still other motions are filed on cases where a defendant is already incarcerated—and will not be released prior to trial in the current case—in a facility such as the Department of Corrections or in the federal system. The Court is not suggesting that the DA's Office should fail to exercise its authority to bring pretrial detention motions in appropriate cases; the Constitutional Amendment provides an important mechanism that can be used by the DA's Office to help ensure community safety. It does, however, appear that the DA's Office could more effectively allocate resources by instituting a better review of the cases on the front-end of the process.

The Court is willing to assist with moving cases through the system and toward resolution. The solution, however, cannot be to loosen schedules and relax deadlines. Each criminal justice partner must play its role to the best of its ability and must allocate its scarce resources in such a manner to reach the common goals of community safety and individual justice for both victims and defendants.

## **IX. CMO REVISIONS**

As previously stated, the Court does not believe the CMO needs to be modified at this time. In an effort to be a collaborative member of the justice community, the Court conducted this lengthy analysis to consider the concerns raised by the DA's Office's *2017 Report*—requiring hundreds of hours—as well as engaging in an extended dialogue with the other members of the CJCC over the course of many in-person meetings and telephone discussions.

After considering the input and concerns of the various justice partners, the Court has agreed not to oppose certain modifications of the CMO and offers a modification of its own, should the New Mexico Supreme Court choose to modify the CMO.

### **A. COURT'S PROPOSED MODIFICATION TO THE CMO— EXPEDITED SCHEDULING OF TRIALS FOR PERSONS DETAINED PURSUANT TO RULE 5-409 NMRA**

Rule 5-409 provides for “expedited” scheduling of trials for persons detained pending trial. That Rule, however, does not specify how “expedited” should be determined. The Court suggests that the CMO be modified to include language requiring a judge to consider the detained status of the defendant when setting cases on a trial track.

As the CMO is a case management order, which specifically deals with the scheduling of cases for trial, the Court believes such an inclusion is appropriate.

Specifically, the Court suggests LR2-308 be modified to read:

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

(a) the complexity of the case, starting with the assumption that most cases will qualify for assignment to track 1; and

(b) the number of witnesses, time needed reasonably to address any evidence issues, and other factors the court finds appropriate to distinguish track 1, track 2, and track 3 cases; and

(c) whether the defendant is preventatively detained pursuant to a 5-409 motion, and if such a motion has been granted, the case will be set on the most expedited track as is reasonable after considering (a) and (b) in this section.

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(G)(4)(c) *Track 3; deadlines for commencement of trial and other events.* For track 3 cases, the scheduling order shall have trial commence within four hundred fifty-five (455) days of arraignment, the filing of a waiver of arraignment, or other applicable triggering event identified in Paragraph H, whichever is the latest to occur, except that no case may be set past three hundred and sixty-five days (365) where the defendant is preventatively detained pursuant to a 5-409 motion absent a request by defense counsel. The scheduling order shall also set dates for other events according to the following requirements for track 3 cases:

## **B. CMO CHANGES PROPOSED BY OTHER PARTIES**

The Court has tentatively agreed not to oppose certain other changes proposed by the parties. To date, the Court has only been given written versions of those changes by the DA's Office. LOPD has verbally proposed certain changes that the Court may not find objectionable, but has not provided a detailed written version of the changes.

At the last "CMO Workshop," held on September 8, 2017, the justice partners reviewed and discussed the DA's Office's latest proposed revisions. The Court

tentatively agreed to certain changes based on revisions the DA's Office indicated it would make. The DA's Office's representative indicated they would circulate the finalized proposed revisions on Monday, September 11, 2017. After not receiving those revisions, the Court followed-up by email on September 14, 2017, and was told that the revisions would be circulated shortly. The Court received a draft of changes on September 21, 2017, via email, but did not receive the final proposed revisions until the same day as the date of this document, September 26, 2017. The Court is therefore unable at this point to comment on the proposed revisions. This memorandum will be updated when the Court has a chance to review the changes received today. It also plans to address any proposed changes by LOPD.