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

RAÚL TORREZ
DISTRICT ATTORNEY

August 15, 2018

Honorable Members of the Criminal Justice Reform Subcommittee
New Mexico Legislature
Santa Fe, NM 87504

Dear CJRS Members:

I am writing to alert you to the Second Judicial District Court's recent unilateral decision to slash grand jury panels in this jurisdiction and to share my profound concern about how this decision will adversely impact public safety.

As you know, grand jury indictments are and always have been the primary method for prosecutors to initiate new felony cases in Bernalillo County. Grand Jury proceedings are the swiftest, most efficient, and least resource-intensive method of bringing formal felony charges against criminal defendants in New Mexico and indeed around the country. This office's budget and the budgets of our primary law enforcement partners are predicated on our continued access to the grand jury system. Neither the District Attorney's Office nor our law enforcement partners are adequately resourced or structured to handle the enormous logistical challenges presented by *a seventy percent reduction in capacity*.

The district court's first announcement stated that the seventy percent reduction would take place all at once, beginning in October 2018. More recently the district court has indicated informally that it ultimately will make the same reduction in grand jury time, but do so over the course of several months. A staggered implementation will delay the impact on affected stakeholders, but it in no way alleviates the negative effect of the change. Ultimately we believe

this action will lead to a dramatic increase in the number of uncharged felony cases, divert limited police resources away from critical law enforcement activities, adversely impact victims of crime, and further undermine public confidence in the criminal justice system.

Background

We have made extraordinary progress redesigning the Second Judicial District Attorney's Office in the last year and half, compressing the timeline for discovery, standardizing and streamlining our screening process, and aligning our systems with those of our law enforcement partners to improve both the speed and certainty of the criminal justice system. We have also deliberately maximized our use of the grand jury process and doubled the number of charged felony cases in this jurisdiction over the past 12 months. All of these efforts have contributed to *the first sustained drop in crime in 7 years, a trend that began in the Fall of 2017 and continues through the present day.*

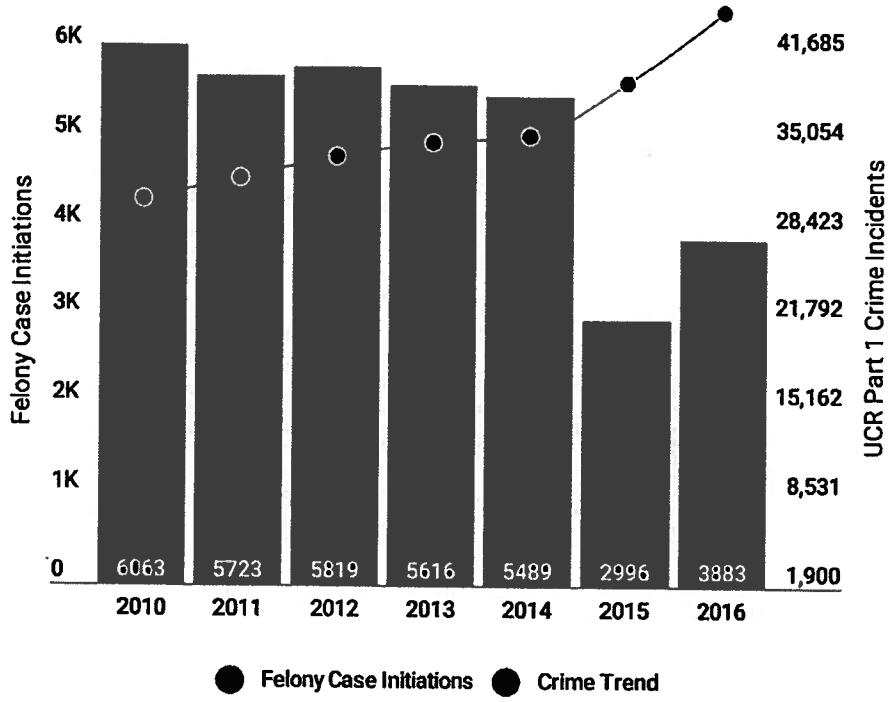
Unfortunately, rather than supporting our efforts to increase felony case initiation and granting our repeated requests to increase the number of grand jury panels, the district court has chosen instead to cut grand jury from 20 days per month to 6 days per month. With little notice and no apparent regard for the financial or logistical challenges this arbitrary decision presents to other stakeholders, the district court has taken it upon itself to eviscerate a process that is enshrined in both the Fifth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution.

Without legislative authority, the district court justifies this extraordinary attempt to redesign the criminal justice system in order to save itself approximately $150,000 per year while completely disregarding the fact that it will result in substantially higher costs for every other criminal justice stakeholder. While the district court plays a limited, administrative role in empaneling the grand jury, nothing in our constitutional or statutory scheme grants it the authority to engage in this kind of policymaking without the consent of New Mexico's citizens or their elected representatives. Moreover, its legal rationale neither presents an accurate appraisal of the grand jury's history in this country or its current application in the State of New Mexico.

Crime Increases When Offenders Are Not Charged Quickly

This office receives on average 9,700 felony referrals per year, either by arrest or non-arrest investigations. Although low by national standards, the office historically accepted 58 percent of those referrals for prosecution, resulting in around 5,600 formally-charged felony cases per year. Starting in 2014 and accelerating over the next two years, the criminal justice system in this district withstood significant, overlapping changes, including prior reductions in grand jury panels and implementation of the Case Management Order (CMO). As a result the number of charged felonies declined dramatically: this office initiated 2,996 new cases in 2015 and 3,776 in 2016. (See Figure 1).

Figure 1: Number of Felony Case Initiations per Year and Crime Trend, 2010-2016



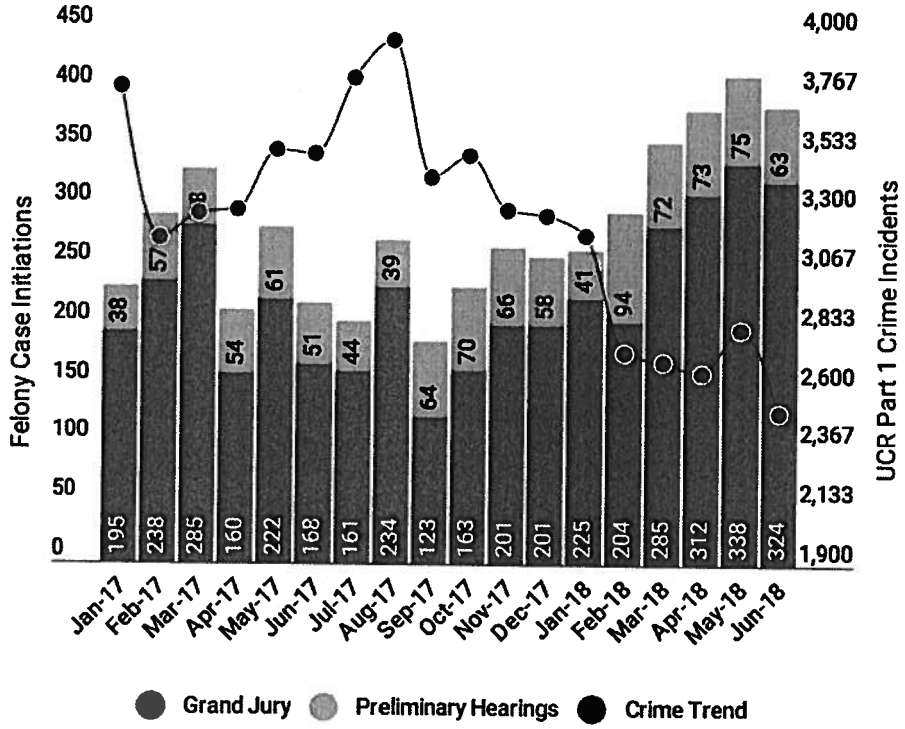
Not surprisingly, as the rate of felony case initiation plummeted, crime in every major statistical category shot up. Property crime rose 21 percent, auto theft went up 54 percent, and violent crime increased by more than 21 percent. Simultaneously, the recidivism rate also went up dramatically, as the number of defendants booked into the Metropolitan Detention Center (MDC) for new felony offenses within 180 days of release for a prior offense jumped from 21% to 28%.

In light of these data, the DA's Office has focused intensely on improving our internal

processes to ensure timely screening and case initiation. Accordingly, we placed a premium on maximizing the efficiency of our most reliable method for initiating new cases: the grand jury. As noted positively in the LFC's recent report, Review of the Criminal Justice System in Bernalillo County, *we doubled the number of grand jury indictments over the past year* by redesigning our scheduling process and working with the Albuquerque Police Department to obtain expedited discovery.

As a result of these efforts, and our continued focus on high impact offenders, this office has significantly reduced the felony backlog that accumulated during the previous three years and made substantial progress in shortening the time it takes from intake to initiation. More importantly however, the community has experienced the first month over month drop in crime in over seven years, *a trend that began in the Fall of 2017 and continues through the present day.* (See Figure 2).

Figure 2: Number of Felony Case Initiations per Month and Crime Trend, Jan. 2017 - June 2018



This is no coincidence. Available data support what should already be a self-evident connection between the felony case filing rate and overall crime and recidivism. Indeed, the mere

act of initiating a felony case in a timely manner—particularly for high impact, repeat offenders—has a profound deterrent effect. Conversely, failing to formally charge new felony cases or, as was the case from 2014 to 2016, failing to initiate *thousands* of felony cases, has the opposite effect. Indeed, of all the post-arrest variables within the criminal justice system, the relative speed and efficiency of new felony filings appears to have the most immediate impact on aggregate crime. This of course aligns with the prevailing theory of criminal deterrence, which holds that improving the speed and certainty of the criminal justice system is the most reliable way to enhance public safety.

The District Court's Rationale Does Not Accurately Reflect the History of the Grand Jury in this Country or Current Practice in the State of New Mexico

In New Mexico, "it is the District Attorney who is elected by the people of this state to decide [the] very question of what charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico." *State v. Brule*, 1999-NMSC-026, ¶ 14. The New Mexico Constitution establishes that felony charges must be brought "on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general." N.M. Const. art. II, § 14. While felony cases also may be initiated through the preliminary hearing process, the Constitution does not prefer one method of charging over another. "There is nothing to indicate an intention that any citizen has a vested right to be charged by one method, to the exclusion of the other. Its provisions are in the alternative, without express limitations as to either, and we think it was the intention that either the indictment or information should be available, and that either might be resorted to in case the other should not be available, or for any cause break down during the progress of the prosecution." *State v. Isaac M.*, 2001-NMCA-088, ¶ 8 (quoted authority omitted).

District court judges may convene grand juries when they deem it necessary, but they do not have the authority to dictate how felony cases should be initiated. The New Mexico Supreme Court repeatedly has held that the manner of felony charging is a matter within the constitutional discretion of the prosecutor. "[T]he State can choose whether to proceed by indictment or information." *State v. Peavler*, 1975-NMSC-035, ¶ 6. In the present situation, however, by

limiting access to the grand jury to such a great extent, the district court has usurped the prosecutor's exclusive decision. The district court has threatened to phase out the grand jury because it prefers charging by information. When the Constitution and New Mexico law leave it up to the prosecutor to choose the method of case initiation, however, the district court's preference should be irrelevant.

The district court justifies its actions with a short-sighted and incomplete version of history and a survey of the practice in other jurisdictions. The court observes that the grand jury arose in medieval England, implying that the procedure is outdated and should be abandoned. What the district court selectively omits, however, is that the Fifth Amendment of the U.S. Constitution guarantees to all persons in the United States that they will not be held to answer for a capital or infamous crime "unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. Whether or not the Grand Jury Clause in the United States Constitution applies directly to the States through the Fourteenth Amendment, it cannot be denied that grand juries are of foundational importance in the American criminal justice system.

Contrary to the district court's suggestion, the grand jury remains the predominant process for charging felonies in the United States. The district court's own sources support this. For example, the district court relies on Professor LaFave's treatise to claim that the grand jury is not used in "the vast majority of jurisdictions in the United States." But, in fact, Professor LaFave explains that eighteen states *require* grand jury indictments to charge a felony, as does the federal system, and in another twenty-eight states the prosecution may proceed by indictment or information. 4 Wayne R. LaFave, *Criminal Procedure* § 14.2(c), at 337; § 14.2(d), at 341. In these jurisdictions, "the vast majority . . . hold open the possibility of bypassing the preliminary hearing by obtaining an indictment prior to the scheduled hearing. *Id.* at 342.

Arguing that preliminary hearings are superior to grand jury proceedings the district court analogizes New Mexico to four other specific jurisdictions—Connecticut, Pennsylvania, Missouri, and Oregon. The analogy fails. In Connecticut, probable cause hearings are required only for crimes carrying a penalty of life imprisonment or death; all other felonies may be charged without a preliminary hearing. *See* Conn. Const. art. I, § 8 (as amended by art. XXIX). In Pennsylvania, there is no constitutional right to a probable cause hearing; "the prosecutor's

decision to file an information is sufficient to require a citizen to stand trial." *Commonwealth v. McClelland*, 165 A.3d 19, 24-33 (Pa. Super. Ct. 2017). And though Pennsylvania presently requires preliminary examinations by rule, hearsay is admissible at those hearings, and the reviewing judge does not assess the weight and credibility of the evidence, *Commonwealth v. Sunderland*, 2018 Pa. Super. Unpub. Lexis 1383, at *13-14 (Pa. Super. Ct. May 1, 2018); in other words, Pennsylvania preliminary hearings involve a completely different standard and procedure from preliminary hearings in New Mexico.

Further, the district court relies on a single Missouri legislator's attempt to amend the Missouri Constitution, which allows charging by indictment; the 2016 proposal never received a vote in the legislature and never went to the voters. In Oregon, one district attorney sought to shift charging from indictment to information, but as shown by the news article cited by the district court he did so in opposition to a new statutory requirement to provide defendants with a transcript of the grand jury proceeding. The local public defender opposed this initiative because it would require additional staffing and would result in a lack of preparation time for defense attorneys. New Mexico does not have the same problem that served as the impetus for this initiative because New Mexico has long required the making of a record of grand jury proceedings. NMSA 1978, § 31-6-8 (1983). Moreover, the practice in Oregon is a matter within the discretion of the district attorney, not the court; other district attorneys in Oregon have chosen to charge exclusively by indictment. *See* 4 LaFave § 14.2(d), at 343 n.54. In sum, even in its own cited examples the district court can find no logic behind forcing the State to initiate charges through preliminary hearings instead of grand jury proceedings.

Perhaps more importantly, by its inaccurate account of other jurisdictions, the district court largely ignores the history and importance of the grand jury in New Mexico. The drafters of the New Mexico Constitution originally provided for felony charging *only* by grand jury presentment or indictment. It was not until 1925 that the voters added the alternative of charging felonies by information following a preliminary examination. But the grand jury remained such a bedrock feature of criminal justice in New Mexico that the voters at that time also added a new paragraph in Article II, Section 14 establishing grand jury procedures. By comparison, Article II, Section 14—even in its present form—does not address preliminary examination procedures.

Since 1925, the voters have amended Article II, Section 14 only with respect to the required number of signatures for citizen-petitioned grand jury. The Constitution therefore declares that charging by indictment and information are on equal footing, as New Mexico appellate courts have held.

The district court also disregards the procedural protections afforded to grand jury targets in New Mexico. The Legislature amended the grand jury statutes in 2003 to assure "reliable indictment[s]" through "a fair presentation of the evidence upon which the State asks the grand jury to indict," *Jones v. Murdoch*, 2009-NMSC-002, ¶ 2, and this Court has repeatedly reinforced this protection by "prevent[ing] prosecutorial abuse of the structural protections that safeguard the grand jury's ability to perform its constitutional function." *State v. Martinez*, 2018-NMSC-031, ¶ 27 (quoted authority omitted). The district court's attempt to amend the New Mexico Constitution by administrative fiat is thus not only undemocratic but in conflict with this Court's supervisory role over the procedures that govern the charging of crimes in New Mexico.

Preliminary Hearings As They Currently Exist Are Not A Viable Alternative to Grand Jury Proceedings in Large, Urban Jurisdictions

The current rules governing preliminary hearings in New Mexico prevent that process from being an effective alternative to the grand jury in large, urban jurisdictions like Bernalillo County. While it is true that there is an opportunity to resolve low-level felony cases when the defendant, the victim and all relevant law enforcement personnel are present for the hearing, it is also true that because of the number of required participants preliminary hearings have the highest failure rate of any of court proceeding we currently attend. In fact, over the first six months of the newly created preliminary hearing process in Metropolitan Court, *64% of scheduled preliminary hearings fail to take place or reach the question of probable cause.*

As a primary matter, even in theory, the district court's argument about the qualitative superiority of preliminary hearings over grand jury proceedings fails. Quite apart from being a recognized best practice, "[t]he actual effectiveness of the preliminary hearing screening in achieving [its desired] ends is a matter of dispute." 4 LaFave § 14.1(a), at 309. The district court has not and cannot show that preliminary hearings somehow lead to more constitutionally sound results than grand jury proceedings. As such, even if preliminary hearings were as manageable as

grand jury settings—which as set forth below they plainly are not—there is no theoretical reason for the prosecutor to always choose one over the other.

Theory aside, the lack of practicality is the true failing of preliminary hearings in Bernalillo County. Although this Court has recognized that a criminal defendant has no constitutional right to confront and cross-examine witnesses at a preliminary hearing, *State v. Lopez*, 2013-NMSC-047, ¶ 26, the practice in this district is to allow full, trial-like examination of all witnesses. Further, Rule 5-302(B)(5) NMRA provides that the Rules of Evidence, including hearsay rules, apply in preliminary hearings. Notably, "[o]nly a handful of states require full application of the rules of evidence" at a preliminary examination. 4 LaFave § 14.4(d), at 382. New Mexico's decision to follow the minority view means that, compared to a grand jury proceeding, a preliminary hearing will necessarily involve more witnesses and significantly increase the time it takes to reach a probable cause finding. Preliminary hearings also are set on trailing dockets, so the numerous law enforcement officers (who are often on overtime) and other witnesses for *all* scheduled cases must appear at the beginning of the docket and wait around—sometimes all afternoon or even all day—for their case to be called.

Dramatically exacerbating this problem, preliminary hearings actually occur—that is, result in a substantive outcome of probable cause, no probable cause, waiver, plea, or other resolution—less than half the time in Bernalillo County. More than half the time these hearings have to be reset because a party or witness fails to appear, the court runs out of time in the day, or some other procedural interruption arises. Most commonly preliminary hearings are aborted because the defendant fails to appear, accounting for 55 percent of failed settings. Civilian witness failures to appear account for another 8 percent of failed settings. And issues pertaining to competency, discovery, or administrative issues account for 15 percent of failed settings.

The following process illustrates the norm of preliminary hearings in Bernalillo County. This office subpoenas law enforcement officers and victims of crime to attend preliminary hearings only to have the hearing vacated because the defendant fails to appear. A bench warrant is then issued for the defendant and then, *if* the defendant is apprehended by law enforcement at some indeterminate point in the future, we start over again subpoenaing witnesses. In the second instance witnesses often receive very little notice because, unlike the first setting, this second

subsequent hearing must occur within 10 days because the defendant is now in custody. As a result, even though they were present and ready to testify at the first setting, if the law enforcement officer is unable to attend the *second* scheduled preliminary hearing because of other public safety duties, or the victim cannot get off work, find transportation, or secure childcare, the defendant is either released or the case is dismissed outright. In short, contrary to the district court's vague assertions about testing evidence, the preliminary hearing process is more a test of scheduling and logistics, a fact demonstrated by the fact that *fifty percent of preliminary hearings fail due to witness availability.*

Of course the reliability of preliminary hearings could be substantially improved by modifications to the rules of criminal procedure to bring the practice in line with the federal system and a majority of states that do require full evidentiary probable cause hearings. Indeed, by simply permitting the admissibility of hearsay and loosening the foundational requirements for the admission of other forms of evidence, the State could dramatically reduce the number of civilian witnesses and law enforcement personnel that would be required to attend preliminary hearings. This, in turn, would reduce the logistical burden of scheduling (and rescheduling) multiple witnesses, substantially reduce the time it takes to conduct a hearing, and eliminate the prospect that a case cannot move forward simply because a victim of crime cannot secure transportation, child care or take time off of work.

But no such changes to criminal procedure rules are contemplated and the criminal justice stakeholders are stuck with the byzantine process as it currently exists. This process fails to inspire public confidence in the criminal justice system and sends an unambiguous signal to defendants, namely, that the system is not properly structured to respond with swiftness and certainty to felony crime.

The District Court's Cost Analysis is Distorted

In further support for its plan, the district court offers that, by cutting grand jury time by 70 percent, it will save itself $150,000 per year. This rationalization should be of particular concern to the members of the CJRS. Quite apart from the fact that this bit of mid-budget cycle accounting is unnecessary—the district court does not indicate that its grand jury budget has

been reduced—it ignores the enormous cost impact that cutting grand jury time will have on other criminal justice stakeholders, including all law enforcement agencies, the Metropolitan Court, this office, and the Law Office of the Public Defender.

As illustrated above, given the considerable human resources and time involved, preliminary hearings are much more expensive to conduct overall than grand jury proceedings. 4 LaFave § 14.1(b), at 316 ("The preliminary hearing . . . imposes significant burdens on witnesses and is a costly use of the time of prosecutors, defense counsel, and magistrate."). While the district court may save a few dollars by not paying grand jurors, the other stakeholders will pay tenfold more in the aggregate for the district court's savings. The financial consequences to the system as a whole are obvious. The district court's suggestion that it can save itself $150,000 a year by cutting grand jury is short-sighted considering the millions of dollars that the other stakeholders will be forced to spend following a new procedure.

The district court's true motivation for its decision is revealed in its second paragraph: "As you know, the Second Judicial District Attorney's Office ... received the lion's share of criminal justice resources during this past legislative session." The court also refers to "the high number of pretrial detention motions filed by" this office. Neither increased funding for this office nor our use of preventative detention motions to protect public safety are relevant to the standard established in Article II, Section 14 and it is improper for the district court to justify its decision on those grounds.

Conclusion

Acting without due consideration of the costs to other stakeholders or the impact to victims of crime is not the appropriate way to "reform" the criminal justice system or rebuild the community's faith in its reliability. We have already endured numerous systemic changes over the last several years, most of which were undertaken without ever conducting a comprehensive review of the costs borne by stakeholders outside the judiciary or a detailed examination of the various rule changes that would be necessary to ensure successful outcomes. This latest proposal will be a costly setback to the progress we have just started to make in this district.

Respectfully yours,

Raúl Torrez
DISTRICT ATTORNEY

Cc: Executive Director Artie Pepin - Administrative Office of the Courts
Mayor Tim Keller - City of Albuquerque
Senator Richard Martinez - Chair of the Senate Judiciary Committee
Representative Gail Chasey - Chair of the House Judiciary Committee
Chief Judge Nan Nash, Second Judicial District Court