New Mexico
CRIMINAL DEFENSE LAWYERS ASSOCIATION

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March 6, 2020

Justice Edward Chavez
P.O. Box 92662
Albuquerque, NM 87199-2662

Dear Justice Chavez,

I am writing on behalf of the New Mexico Criminal Defense Lawyers Association (NMCDLA) regarding the proposals to amend the current rules of criminal procedure related to pre-trial release. Upon close examination of the data and the proposed revisions to the rules, it becomes clear that there is insufficient evidence to support any of the changes contemplated. In fact, all evidence that a problem exists with the current procedural framework is merely anecdotal.[1]

As a starting point, the proposed changes to the rules are based on the erroneous assumption that the state cannot detain sufficient numbers of people pre-trial under the current system. The data tells us a different story. We detain far more people than necessary to effectuate public safety concerns. At the last Ad Hoc Committee Meeting on Pre-Trial Detention, we learned that Washington D.C. detains 5% of its pre-trial population, while Bernalillo County holds approximately 30%. Washington D.C.'s new criminal activity rate during the pre-trial phase is only 12% as compared with Bernalillo's 18%. These numbers clearly demonstrate how the current rules in New Mexico allow for more pre-trial detention than is necessary to effectuate public safety goals. Efforts to reduce crime are better spent elsewhere than on pre-trial detention.

Although the numbers of people detained pre-trial remain high in New Mexico, elected officials still come under considerable public pressure to lock more and more people up. This political reality incentivizes local district attorneys to file as many detention motions as possible within the resources available to them. It also places enormous pressure on judges who are seen to be soft on crime when they repetitively deny motions which do not meet the evidentiary burden required for their success. Still, the failure rate for filed motions in Bernalillo County is almost 50%.

The Second Judicial District Attorney's Office overtly recognizes this political pressure when it advocates the elimination of pro-tem judges from the detention process. The DA's data demonstrate that 65% of detention motions are denied by pro-tem judges as compared to a 49.5% overall denial rate. The pro-tem judges in the Second Judicial District are retired District

[1] NMCDLA believes the rules could be improved to limit the number of people subjected to preventative detention, but also recognizes there is little public appetite for such changes at the current time. Once more data is captured over the next year, NMCDLA expects these "release" arguments will be made with robust evidentiary support.

Court Judges and the most seasoned jurists on the bench. They are free to rule according to the law and the facts and without consideration of negative media coverage.

The Constitutional Amendment was written with this in mind as it specifically requires a prosecutor, not the Court, to be the initiator of detention motions. The prosecutor is the one who has access to the accused's criminal history, knows the theory of the case and has presumably spoken with the investigating officers and witnesses. The Courts are necessarily limited in their knowledge of the case. This is especially true in rural parts of the state where prosecutors are frequently absent at first appearances and thus, the record is not supplemented with oral arguments. Forcing the Court to assume the role of an advocate would impermissibly interfere with the Court's role as an independent arbitrator. The realities of political pressure alongside the role of the Court demonstrate why there is constitutionally created insulation requiring the prosecuting authority to bring and litigate the detention proceedings. NMCDLA believes the law and the facts should be considered without reference to politics and as such we fundamentally disagree with the District Attorney on this point.

NMCDLA also disagrees with proposals to create rebuttable presumptions for certain categories of crimes. The data does not support such presumptions for felony offenses. Instead, statistics provided at the Committee meeting demonstrate that new criminal activity during the pre-trial period was larger for misdemeanor offenders than for serious violent offenders.[2] Rebuttable presumptions are therefore better described as an emotional response to violent crime rather than an evidence-based approach. As such, these considerations are better reserved for the sentencing phase of a case rather than the pre-trial period.

NMCDLA also opposes the excusal provision advocated by the District Attorneys. This proposal will inject unnecessary delay and potential gamesmanship into the detention litigation process. In rural areas the excusal of two potential judges would make detention litigation impossible to administer in a timely fashion. This would reflect negatively on the Courts when participants and courtroom spectators are told of a court date and time and then show up to an empty courtroom. Additionally, this provision conflicts with the central concept underpinning the excusal rules—that they do not currently apply to arraignment proceedings.

One important consideration regarding pre-trial detention often left aside in this debate is the length of time it takes to bring a case to trial. Many of the perceived problems associated with pre-trial release disappear once a case is brought to adjudication. In other words, the problems associated with pre-trial detention are directly proportional to the length of time it takes to complete the case. Therefore, NMCDLA believes the considerable efforts to reduce stagnant dockets in Bernalillo County have improved the system and reduced the negative effects of pre-trial detention. But these efforts should continue with the goal of reducing the average length of time for the adjudication of a felony offense from the six months seen in Bernalillo County to the eighty days seen in Washington D.C. (Of course, the realities of a truly expedited trial setting would also require the indigent defense system to be properly funded.) The reduction in the time to bring a case to trial would have more positive impact on the system than any other single variable.

The decision to detain an individual is effectively the same as sentencing that person to jail for a significant time. Sentenced individuals, however, have the benefit of due process rights such as discovery, effective counsel, and a trial prior to losing their liberty. Preventative detention hearings have none of the time, resources, or procedural benefits of a trial, and as such, detention decisions should be made sparingly. NMCDLA opposes changes in the rules that seek to expand the numbers of people subjected to what amounts to pre-trial punishment.

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[2] Even though the data on new criminal activity is inapplicable to rebuttable presumptions, it is informative as to how we can better use our resources to reduce crime. Understanding which people are in need of greater services will assist the criminal justice system in proper placement, improve success rates and lower new criminal activity.

Rule 5-403

Although Rule 5-403 did not appear part of the Committee's initial mandate, NMCDLA does suggest a minor change to this rule. A large part of the overuse of pre-trial detention comes from technical violations of conditions of release and non-willful failures of pre-trial supervision. As more people are subjected to pre-trial service supervision, the more acute this problem becomes. NMCDLA therefore respectfully requests Rule 5-403 be adapted to meet this new landscape in the following way:

5-403 F (ii) clear and convincing evidence that the defendant has willfully violated a substantive condition of release [previously stated as "any other condition of release"]

NMCDLA further suggests the commentary to the rule would reflect an acknowledgement that conditions of release should not act as a gateway to punish people who genuinely suffer from addiction to drugs or alcohol.

In summary, NMCDLA believes the current rules should remain unchanged unless there is sufficient data to support the proposal. Our judiciary is capable of making difficult decisions about pre-trial detention within the current procedural framework. Although the data and statistics do not support a significant "catch and release" problem in New Mexico, some elected officials will always use this narrative to pursue political objectives. NMCDLA urges the Supreme Court to guard against the injection of such politics into the criminal justice system and instead to wait until a more robust data set emerges over the next 12 months. The narrative may change to support further reducing the net of people subjected to detention rather than expanding it. Most importantly, we believe the data will show that reallocating incarceration resources to proper behavioral health and mental health interventions will improve our community's safety and reduce crime.

Sincerely,

Richard Pugh
President New Mexico Criminal Defense Lawyers Association (NMCDLA)

Matthew Coyte
Past President *New Mexico Criminal Defense Lawyers Association (NMCDLA)*