January 24, 2022

MEMORANDUM

TO: Patricia Lundstrom, Chair, Legislative Finance Committee

George K. Munoz, Vice Chair, Legislative Finance Committee

FROM: Raúl Torrez, Second Judicial District Attorney

CC: Governor Michelle Lujan Grisham

House Judiciary Committee

Senate Judiciary Committee

Senate Finance Committee

Legislative Finance Committee

David Abbey, Director, Legislative Finance Committee

Jon Courtney, PhD, Deputy Director Legislative Finance Committee

RE: Response to Status Update on Bernalillo County Crime, Law Enforcement, and Bail Reform

Over the past seven years, police and prosecutors have repeatedly warned policymakers not to open a revolving door for violent criminals, not to create additional procedural obstacles for those of us on the front lines, and not to redesign the criminal justice system without regard for available resources. Those warnings have been repeatedly disregarded by the courts and the legislature and now - to add insult to injury - analysts for the Legislative Finance Committee have produced an inaccurate report which seeks to blame those same front line professionals for

the very systemic failures we have fought so hard to prevent. The criticism of the police and prosecutors in the Status Update on Bernalillo County Crime, Law Enforcement, and Bail Reform, produced by Legislative Finance Committee evaluators, is based on misinformation that is the product of incomplete data, flawed analysis and a troubling failure to ask obvious questions about fundamental changes to court procedure. Not only does the report mislead policymakers and the public about the real conviction rate, declination rate and dismissal rate within the Second Judicial District Attorney's Office, but its utter failure to analyze the competency and sufficiency of pretrial supervision, the catastrophic impact of the Case Management Order (CMO), and the resource implications of eliminating the grand jury also reveals that the analysts have no grasp of criminal procedure or practice.

It is more difficult to keep a dangerous defendant in jail before trial in Bernalillo County than elsewhere in New Mexico because the court relies in part on defective public safety assessments that unfairly skew detention hearings toward release and fail to give judges an accurate picture of dangerousness. In addition, it is more difficult now to initiate a felony case in Bernalillo County than it was in the past because of the systematic reduction of grand jury time which not only severely limits the number of cases that can be initiated, but imposes undue burdens on law enforcement officers and other witnesses who must attend preliminary hearings set, and often reset, on trailing dockets. Finally, it is more difficult to successfully prosecute a felony case in Bernalillo County than in any other judicial district in New Mexico because the CMO imposes unreasonable time constraints and procedural hurdles that result in the release of defendants and the dismissal of their charges on technicalities that would not result in release or dismissal in other districts. In short, the judicial system in Bernalillo County is deeply flawed.

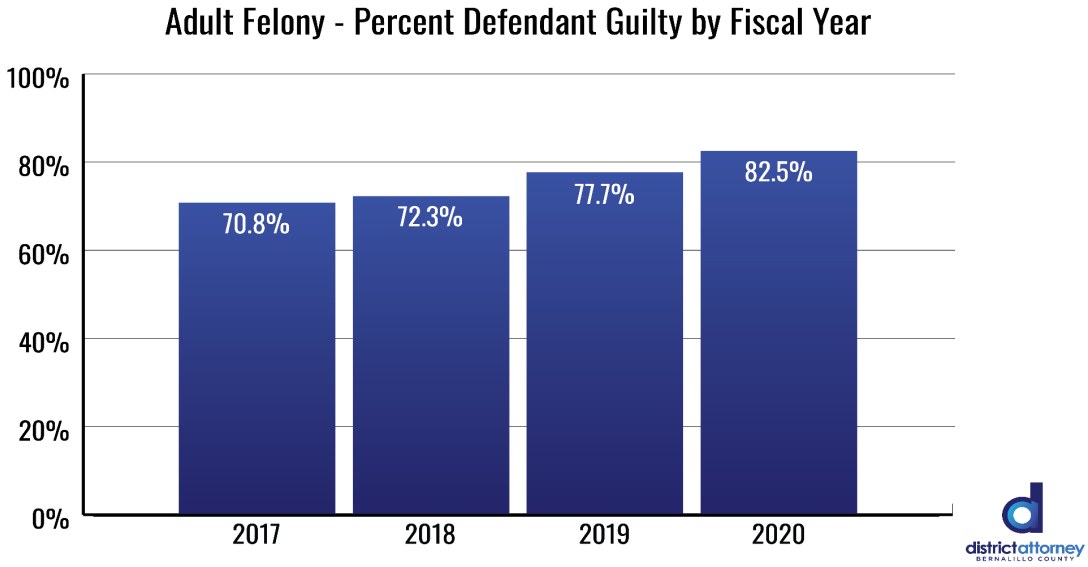
In spite of working within a system that sets them up for failure, the police and prosecutors in Bernalillo County have worked together to overcome the system's unworkable procedures as much as possible. Notably, contrary to what is reported in the Status Update, the conviction rate for the Second Judicial District Attorney's Office exceeds the conviction rates reported by the Bureau of Justice Statistics for large urban counties. The Status Update, however, still faults the police and prosecutors for not having levels of success that the system itself prevents. The police and prosecutors have worked diligently to seek justice and to protect the safety of the community; they will not tolerate being the scapegoats for a broken judicial system. There is simply no question that, without legislative reform to New Mexico's flawed justice system, gun crimes and violence in our communities' streets will continue to spin out of control.

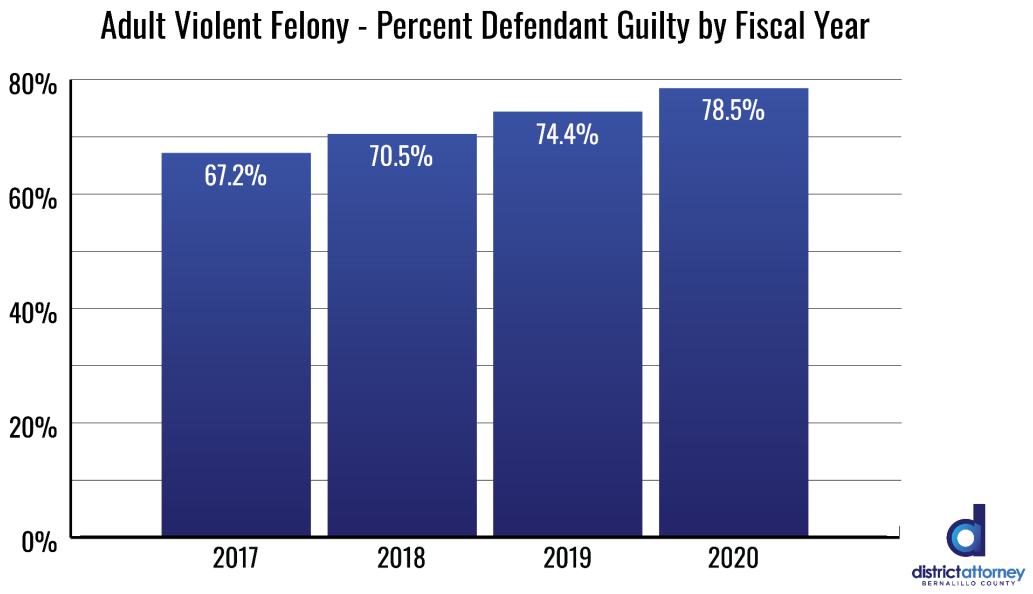
I. Conviction Rate Analysis

Prosecutors have a unique role in the criminal justice system. They do not serve as zealous advocates for their clients like most lawyers, such as criminal defense attorneys. Nor are they impartial decision-makers like judges. They are instead ministers of justice that advocate for the people of New Mexico while also ensuring that criminal defendants are afforded their constitutional rights and that any determination of guilt is based on sufficient evidence. Because of this unique role, the performance of a prosecutor ought not to be measured by conviction rates. Prosecutors must be unhampered in their ability to evaluate the strength of the evidence, to dismiss cases for a lack of probable cause or a constitutional violation that would prevent conviction, and to divert non-dangerous offenders to alternatives to incarceration. Prosecutors also must be able to pursue difficult cases to protect the safety of crime victims and the community. Measuring a prosecutor's success by conviction rates establishes a dangerous incentive to focus on more easily provable crimes, such as drug offenses, at the expense of harder to prove violent offenses, such as domestic violence and sexual assault.

The impropriety of measuring prosecutorial success by conviction rates is widely known and has been previously shared with LFC. The Status Update, however, disregards this principled approach and criticizes the Second Judicial District Attorney's Office for what it calls a low conviction rate. Even if this were a proper measure of prosecutorial success, the Status Update's numbers are completely wrong.

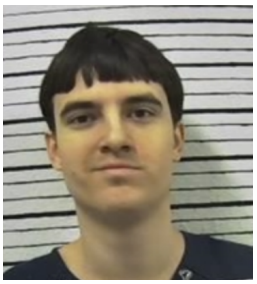
In FY20 the figures for felony defendants charged by the Bernalillo County District Attorney's Office were 82.5% convicted, 16.4% dismissed, and 0.2% acquitted. For felony defendants charged with a violent crime in Bernalillo County in FY20, the numbers for violent felony defendants were 78.5% convicted, 20.6% dismissed, and 0.3% acquitted.





Contrary to the findings set forth in the LFC's Status Update on Bernalillo County Crime, Law Enforcement, and Bail Reform, conviction rates did not "remain flat" or "decline" between 2017 and 2020 but instead increased every year, culminating in an overall conviction rate of 82.5% for all felony defendants and 78.5% for violent felony defendants. Rather than obtaining this information directly from the agency in question, it appears that LFC analysts extrapolated declination and conviction information from data provided by third parties. Unfortunately, this method prevented them from recognizing either cases that were dismissed in state court in order to be refiled and prosecuted by our office in federal court or, more consequentially, defendants with multiple pending felonies (an ever-increasing population in the wake of bail reform) whose cases are resolved by way of a consolidated plea agreement. As demonstrated in multiple real-world examples set forth below, there are a number of defendants who are in prison today but whose conviction rates in the LFC's report would somehow be less than 100%.

An accurate assessment of conviction rates includes a guilty plea or guilty verdict for any of the counts charged, as well as consolidated pleas in which a defendant pleads guilty to one or more counts in one or more cases and another case is dismissed as part of the agreement.



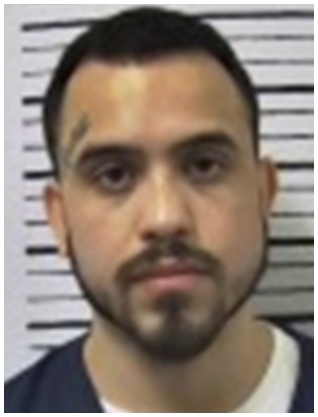
Real-world examples:

Defendant Drake Bickett committed residential burglary in 2018. In another case, Bickett committed second degree murder, conspiracy to commit murder and tampering with evidence. The State resolved both cases pursuant to a consolidated plea agreement which dismissed the residential burglary case in exchange for a prison sentence ranging from 24 - 30 years in prison. Although data obtained from District Court may show that 50%

of the cases against this defendant did not result in conviction, he is in fact 100% convicted and will remain behind bars for more than two decades.

Defendant Jesus Cabral was charged with aggravated assault with a deadly weapon and possession of a controlled substance in early 2019. Mr. Cabral was later indicted for multiple aggravated stalkings and arsons that occurred between late 2018 and early 2019, resulting in three felony cases.

In August of 2019, Mr. Cabral entered a guilty plea to two counts of aggravated stalking, aggravated assault and arson. The possession of a controlled substance case was dismissed in its entirety, per the plea agreement. Mr. Cabral will nonetheless serve 10 years in prison under this consolidated plea.



Defendant Jerred Holguin was charged in four separate cases over a four month span with receiving or transferring a stolen motor vehicle, armed robbery, aggravated assault and an open count of murder.

Holguin pled no contest to second degree murder, aggravated assault, receiving or transferring a stolen motor vehicle and possession of a controlled substance. One of the defendant's four cases was dismissed as part of a consolidated plea. Unreconciled court data would have policymakers believe that our conviction rate as to Mr. Holguin is 3 out of 4, or 75%, despite the fact that Holguin was sentenced to 21 and 1/2 years.

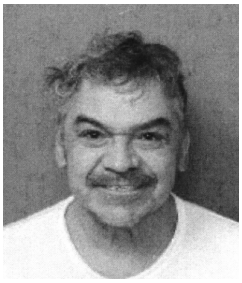
II. Declination & Dismissal Analysis

The Status Update claims that the Second Judicial District Attorney's Office declines 50% of violent felonies and dismisses 40% of the remaining violent felony cases. These numbers, once again, are seriously inflated. Furthermore, the Status Update incorrectly identifies the reason for most declinations and makes no attempt to explain the reasons for dismissal. Of the violent felony cases referred to the District Attorney's Office in 2021, approximately 37% were declined. Of those declinations, about two-thirds were declined for lack of cooperation from victims or necessary witnesses. Early in these cases, before they were initiated, the District Attorney's Office identified that a lack of victim or witness cooperation would prevent the State from being able to establish guilt beyond a reasonable doubt. Among the violent felony cases that are initiated, about 20% – nowhere close to 40% – are dismissed by prosecutors or the court, and the most common reason for dismissal is the lack of cooperation from victims or a necessary

witness. At this stage of a case, however, lack of cooperation is often more a function of the burdens placed on victims and witnesses by the system than from not wanting the defendant to face charges.

64.4%
Of Declinations Due to Victim Cooperation

One of these burdens is testimony at preliminary hearings. In the past, felony cases in Bernalillo County were initiated by the grand jury in proceedings that require only a limited number of law enforcement witnesses and often do not require the testimony of victims and civilian witnesses. Through a concerted effort, the Second Judicial District Court began reducing grand jury time and shifting to preliminary hearings shortly after the District Attorney's Office received an increase in legislative funding. Because preliminary hearings are more resource-intensive, this shift in judicial policy effectively negated the legislature's funding decision. It also made the system far more burdensome for civilian and law enforcement witnesses. Preliminary hearings take place on a trailing docket, which means that civilian witnesses must appear at the initial docket time and wait, potentially all day, for their case to be called. If the defendant fails to appear, the case is reset, and they must appear again on even shorter notice and wait once more until their case is called. These witnesses must take time off work or pay for daycare, and even though these witnesses are ordered by the court to appear and their testimony is necessary to establish probable cause, they receive no compensation, unlike witnesses who appear in federal court. The procedure necessarily imposes a particular hardship on low-income individuals. It is therefore no surprise that case initiation through preliminary hearings not only consumes more time and resources but results in fewer cases being initiated due to witness unavailability.

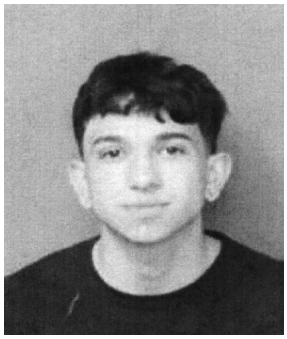


Real-world example:

Defendant Stephen Casias was charged with a DWI 7th offense in March 2021. The primary law enforcement officer went on military leave through Dec. 31, 2021. The State attempted to set up several PTIs with the officer but he was unable to appear due to his military leave. The case was unprosecutable because of the PTI deadline which the CMO imposed.

Another burden that victims and witnesses must confront is the pretrial interview process. Unlike almost every other state, where victims and witnesses have the choice to refuse to be interviewed before trial, the Rules of Criminal Procedure require pretrial interviews. But the process is even more burdensome in Bernalillo County. In all other judicial districts, the parties conduct pretrial interviews only with important witnesses and typically relatively soon before trial. In Bernalillo County, the case management order has resulted in interviews of almost all witnesses, including records custodians and peripherally involved law enforcement officers. In

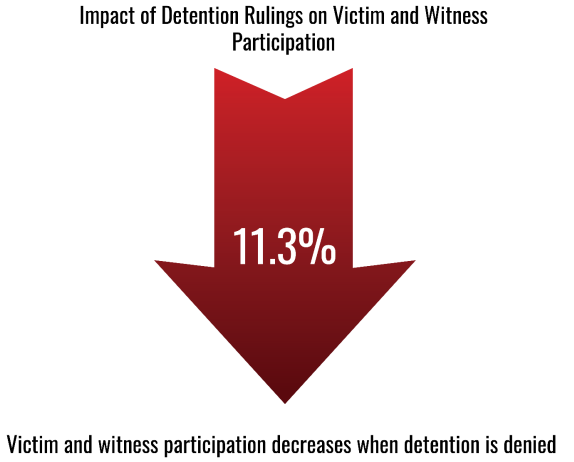
addition, the CMO imposes deadlines for conducting interviews earlier in the case. If a witness or victim is not available for an interview by the deadline, the case can be dismissed or the witness excluded from testifying at trial. Many dismissals that appear to be based on a lack of witness or victim cooperation are actually a direct result of the CMO.

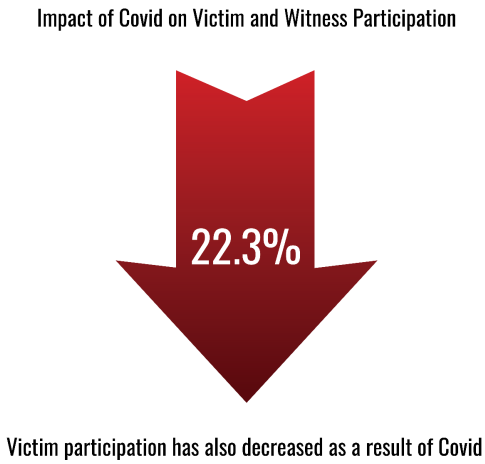


Real-world example:

Defendant Eugene Lucero was charged with aggravated battery, auto burglary, conspiracy to commit auto burglary, larceny and unlawful carrying of a firearm. The victim in this case had concerns continuing with the prosecution because he feared retaliation against his family and he was away in the military. The victim would not participate in an interview because he did not want to put his family in danger while he was away on military leave. The case was dismissed because the PTI could not be completed by the CMO deadline.

The willingness and ability of victims and witnesses to participate is impacted by the burdens imposed and the signals sent by the criminal justice system. We see victim and witness participation drop when judges deny motions to detain (PDMs). In these instances, victims express disbelief at these pretrial release decisions. They are often afraid and discouraged knowing the defendant is released in the community. In fact, victim and witness participation drops by 11% when detention motions are denied.





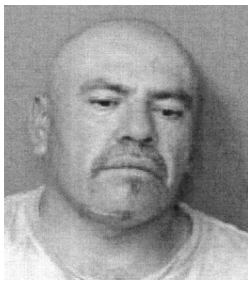
Similarly, the pandemic has created additional challenges for victim and witness cooperation. With society experiencing lockdowns and fear of infection and court cases taking longer to resolve, victim and witness participation has dropped by over 20% since the pandemic began regardless of whether detention was granted.

These declination and dismissal statistics do not, and should not, include cases declined for federal prosecution. The District Attorney's Office has referred hundreds of cases involving dangerous and violent defendants to the United States Attorney's Office because federal judges provide greater protection to public safety by detaining dangerous defendants and because the federal judicial system, unlike the CMO, is not designed to result in a large number of procedural dismissals by imposing arbitrary deadlines and other unnecessary procedural hurdles.

The Status Update correctly observes that "[l]ow conviction rates compromise the certainty of justice," as do increases in procedural dismissals and lack of victim cooperation. These systemic problems, however, are the fault of the CMO and bail reform, not a lack of collaboration between prosecutors and the police. Indeed, it is through the extraordinary collaborative efforts of the police and prosecutors that conviction rates in Bernalillo County increased from 2017 to 2020 despite the procedural obstacles imposed by the CMO and bail reform. If there is to be blame for the failures of the current system, it should be placed where it belongs.

III. Case Management Order Impact

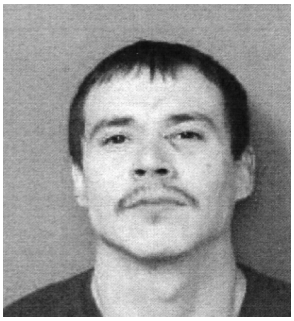
The Status Report also attempts to compare the conviction rate in Bernalillo County from 2011 to 2020, but doing so compares apples to oranges. The Status Update identifies the case management order and bail reform as "likely" contributors to a lower conviction rate in Bernalillo County, but this is a gross understatement. It is a certainty that these watershed procedural changes resulted in fewer convictions and more dismissals. The case management order, in particular, was *designed* to result in more dismissals because it was implemented in order to reduce the backlog of cases that judges in the Second Judicial District had allowed to grow out of control. The system was simply not capable of resolving all of those cases on their merits. The New Mexico Supreme Court was aware of that reality and consciously chose to implement procedural rules that favored dismissals over resolving cases on their merits as a means of controlling the docket. The District Attorney's Office cannot be expected to achieve 2011's conviction rate today unless policymakers are prepared to return the system to the way it existed in 2011. One of many examples highlights a present system designed to promote procedural failure over trials on the merits.



Real-world example:

Defendant Leonel Gutierrez was charged with two counts of trafficking. A scheduling order (per the CMO) was issued by the Court on Sept. 2, 2021. The scientific evidence deadline was then set for Sept. 5, 2021, only three days after the scheduling order was issued, thereby making compliance impossible.

Unsurprisingly, the conviction rate suffered with the implementation of the case management order. It dropped again with bail reform in 2017. The Status Update correctly identifies fewer plea bargains as one product of bail reform but ignores the combined impact of the CMO and bail reform. In cases with strong evidence of guilt, defendants in custody have an incentive to plead guilty early in a case in order to limit the amount of incarceration they face and begin serving their sentences and earning good time. When those same defendants are released, however, they have every incentive under the CMO to delay the resolution of the case on the merits and to attempt to manufacture a procedural dismissal.



Real-world example:

Defendant Terry Sheppard came into the system in December of 2020 with an aggravated battery against a household member case. In February 2021, Sheppard waived the preliminary hearing which transferred the case from Metro to District Court. Sheppard was not in custody, which required him to be arraigned within 15 days of the District Court transfer, making that date in March 2021. The Court sent a notice to both the State and defense attorney to appear at the arraignment in March of 2021. The defense counsel raised a motion to dismiss because of an "untimely arraignment." At the reset arraignment, the judge dismissed the case for untimely arraignment despite the Court having unilateral control over scheduling cases for arraignment. The Court set the arraignment outside the deadlines required under LR2-308 and punished the State by dismissing the case.

Bail reform impacted conviction rates in yet another way. Under bail reform, the vast majority of defendants are released pending trial, even in cases involving violence. The victims and witnesses to violent crimes know about a defendant's release. Further, disclosure requirements under the CMO provide a defendant with the addresses and email addresses of victims and witnesses. Bail reform, combined with the CMO, therefore fosters a judicial system in which there is a greater opportunity for witness intimidation and fear of retaliation, whether based on a defendant's overt conduct or simply the means for such conduct to occur. The CMO's requirement of pretrial interviews subtly reinforces these fears.

Real-world example:

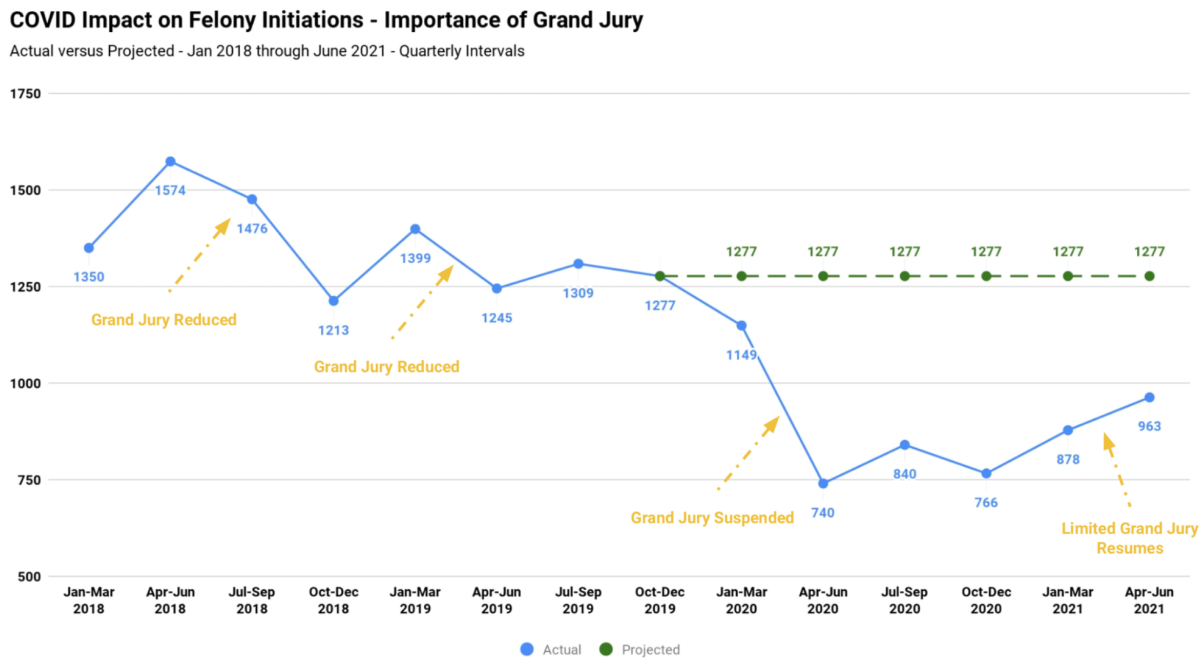
Defendant Dominique Molina was charged with aggravated assault and three counts of child abuse. The State filed a preventative detention motion which was denied and the defendant was placed on a GPS monitor. Molina's defense attorney filed a motion to remove the GPS monitor which the court granted. Once the GPS was removed, Molina picked up a new case, battery against a household member. Defense filed subpoenas for pretrial interviews

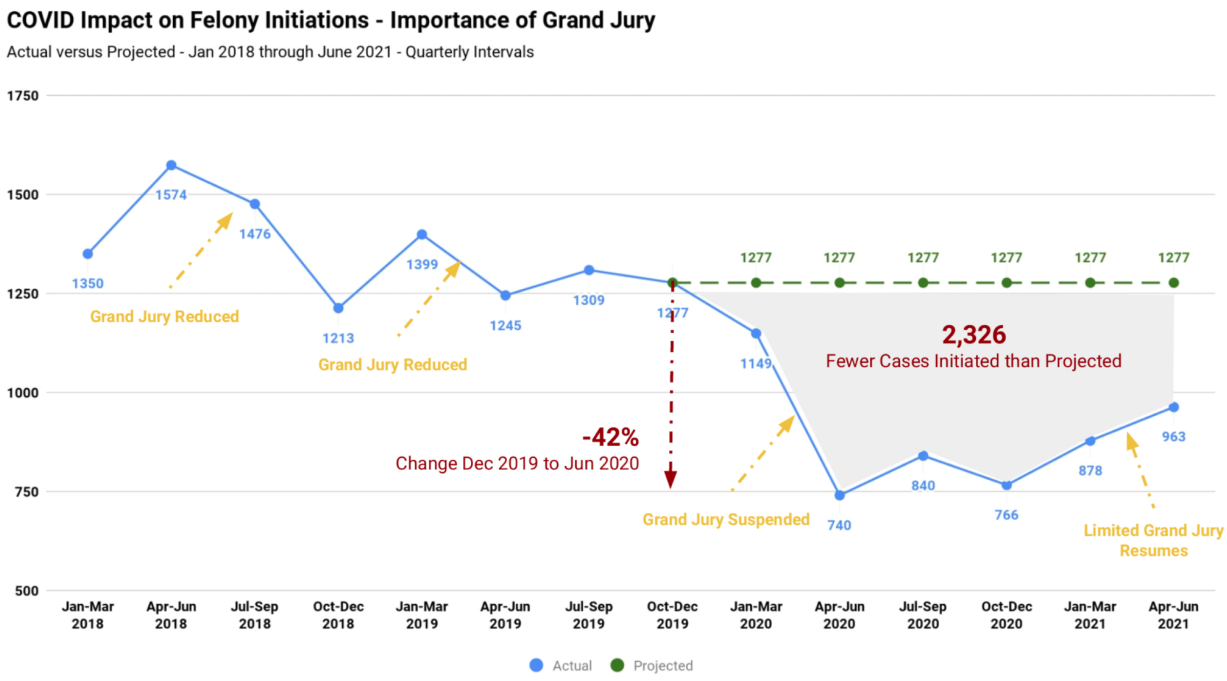
(PTIs) for a 7 year old and a 10 year old minor. The minors were afraid to do PTIs and the State did not see them as essential witnesses, so the State moved to quash the subpoena. The judge denied the motion to quash and required that the minors be interviewed, retraumatizing the children and their mother.

IV. Grand Jury

In 2018, shortly after the District Attorney's Office received an increase in legislative funding, the Second Judicial District Court announced its intention to limit grand jury availability by 70% and to shift to preliminary hearings instead. Despite our office's requests for an increase in grand jury availability, the Court moved forward in implementing this shift. We warned that cutting the grand jury would impose massive burdens on law enforcement officers by taking them away from patrolling the streets, result in a system-wide drain on resources, and reduce the number of felons brought to justice. Our warnings were ignored. The resulting decrease in grand jury time and increase in reliance on preliminary hearings had the precise consequences we predicted. Police officers were stuck in courtrooms waiting for trailing dockets instead of protecting community safety. Civilian witnesses were required to appear in droves only for defendants to fail to appear and completely waste the civilians' time. And the time and resources required for a preliminary hearing docket prevented the State from initiating countless felony cases.

Unfortunately, the pandemic has presented a case study in the public safety effect of completely eliminating the grand jury. The graphics below show quarterly felony initiations from January 2018 through June 2021. With each change in the availability of grand jury, we see a corresponding reduction in case initiation. The period of time during which the grand jury was completely suspended shows how significant grand jury availability is to initiating cases at volume. Projecting the initiation figures immediately before the grand jury suspension, we see that over 2,000 cases fewer than expected were initiated. Constriction of the flow at case initiation necessarily means that, despite our success in securing convictions of defendants with initiated cases, fewer defendants will be sent to prison, as the Status Update indicates.





We agree that swiftness and certainty are the primary deterrents of criminal activity. The ability to swiftly and certainly initiate cases and the pretrial detention of dangerous individuals are essential components of this deterrence.

V. Pretrial Release Without Presumptions

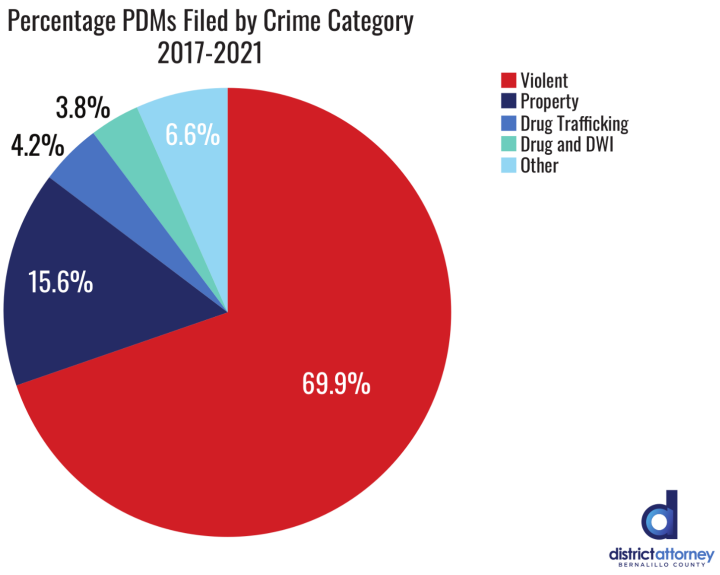
In 2016, the people of New Mexico adopted the amendment to Article II, Section 13 that permits pretrial detention. The actual constitutional language did not appear on the ballot. The people instead overwhelmingly voted in favor of a summary of the provision that promised to "protect community safety by granting courts new authority to deny release on bail pending trial for dangerous defendants in felony cases." Five years later, the promise of safer streets remains largely unfulfilled, and the mission of community safety has now become a minority view.

There have been too many painful instances in which denied motions to detain were followed by released defendants committing new crimes while pending trial. These instances are a wake-up call and should be a motivation for change.

Rebuttable presumptions may not be a complete solution to the problem, but we are convinced — as are other bail reform jurisdictions — that they will make our community safer. The failure to adopt them will break the trust New Mexicans placed in the courts when they voted for public safety in 2016.

A. Who do we move to detain

Since January 1, 2017 our office has opened approximately 44,000 new adult felony referrals. In that time period, our office has only sought to detain 4,267 defendants in 5,153 cases, or approximately 12% of adult felony referrals. Our office's approach to determining when to seek detention has been measured and deliberate, with an emphasis on detaining dangerous individuals. There is no dispute that our office's motions to detain overwhelmingly target individuals charged with violent crimes.



Our emphasis on violent crimes is in line with the will of the voters and conforms to New Mexico's legal framework regarding pretrial detention. Unlike other jurisdictions that have implemented bail reform, New Mexico's constitutional amendment in 2016 only authorized detention on the grounds of dangerousness. Other bail reform jurisdictions recognize three grounds for pretrial detention, namely, dangerousness, obstruction of justice, and flight risk.

	New Mexico's Incomplete Detention Scheme *Article II Sec. 13*	New Jersey's Comprehensive Detention Scheme *NJSA § 2A:162-18*
Dangerousness	"... no release conditions will reasonably **protect the safety of any other person of the community**..."	"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure... **the protection of the safety of any other person or community**..."
Failure to Appear	✗	"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible **defendant's appearance in court**..."
Obstruction	✗	"... no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure... the eligible **defendant will not obstruct** or attempt to obstruct the criminal justice process…"

B. Rebuttable Presumptions are Needed to Inform Detention Decisions

When New Mexico decided to participate in bail reform in 2016, it used the federal government and New Jersey as a model. Critically, however, New Mexico failed to implement a key component of both jurisdictions. The federal government uses rebuttable presumptions to identify the most dangerous offenders whose pretrial detention is necessary to protect public safety. New Jersey, like Bernalillo County, uses a risk assessment tool, but unlike New Mexico, New Jersey pairs the risk assessment tool with a risk management scheme that identifies the offenses that pose the greatest risk to public safety in much the same way as the federal government's rebuttable presumptions. New Mexico's decision to use a risk assessment tool in isolation, without an accompanying risk management system, provides judges with distorted information.

The problem is both clear and alarming. The public safety assessment in Bernalillo County scores a defendant's risk of committing new criminal activity and failing to appear for court, yet this instrument barely distinguishes between violent and non-violent crime and does not distinguish between degrees of violent crime at all. In other words, an individual charged with first degree murder is scored the same as one charged with a low-level felony assault. A prior conviction of misdemeanor battery is treated the same as a prior conviction of murder.

Defendants charged with violent and disturbing crimes are frequently scored low on the assessment with a recommendation of release on their own recognizance while low-level offenders charged with possessing drugs or criminal trespass are frequently scored high on the assessment with a recommendation of detain even though there is no evidence of dangerousness. It is a shell game to call this instrument "evidence-based."

Even the people who created the public safety assessment recognize this gap in the tool's methodology. The Advancing Pretrial Policy & Research Center's guidance states that "a person with no criminal history but charged with a first-degree violent offense may score very low on the PSA; without any additional information, the grid might place the person on the lowest level of pretrial release, resulting in little monitoring, if any." (https://advancingpretrial.org/guide/guide-to-the-release-condition-matrix/). For examples such as this, the Advancing Pretrial Policy & Research Center notes that "[s]ome jurisdictions also want their Release Conditions Matrix to reflect additional information, such as the seriousness or type of charge and/or unique circumstances about a case." The following are real world examples of these known gaps in the tool's methodology.

The following defendants illustrate how the Arnold Tool, when implemented improperly, yields illogical recommendations that place the public at risk. On January 6, 2020, Daniel Espinosa and Anthony Gallegos were evaluated using the Arnold framework. As you can see from the scoring sheet below, Mr. Espinosa clearly has a substance abuse disorder and a significant history of failing to appear (FTA) for low level property and drug offenses. Despite his lack of violence or history of using a weapon, the tool recommended his detention due his FTA history and the high likelihood of committing a new crime. At the same time, the same instrument recommended ROR (release on his own recognizance) for Anthony Gallegos, a man who was accused of punching his girlfriend more than 100 times, slamming her head into a concrete floor, strangling her, and threatening her with a gun. Rather than being rare events, these counterintuitive recommendations are a daily occurrence and a clear example of the type of "evidence-based" scoring currently guiding District Court practices in the Second Judicial District.

Daniel Espinosa

1/6/2020

Charges: Possession of a Controlled Substance, Paraphernalia
History: *No* violent felonies; property & misdemeanor cases (not current)
Arnold Tool Recommendation: Detain

Pretrial Services

Public Safety Assessment - Court Report 1/7/2020 7:32:29 AM

Name: Daniel Espinosa | Case Number: T-4-FR-2020-000092 | PID: 8081646
YOB: 1983 | PSA Assessment Date: 1/7/2020 | Arrest Date: 1/6/2020

New Violent Criminal Activity Flag: No

New Criminal Activity Scale: 0 1 2 3 4 5 6

Failure to Appear Scale: 0 1 2 3 4 5 6

Charge(s):	Count(s)	Statute	Degree
Possession of a Controlled Substance - Felony	1	30-31-23	Felony
Possession of Drug Paraphernalia (PA)	1	30-31-25.1(A)&(C)	Petty Misdemeanor

Recommendations: **(Y) DETAIN if const. reqs. met OR RELEASE with max conditions**

Notes:

Failure to Appear Scale \ New Criminal Activity Scale	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	(A) ROR	(B) ROR				
FTA 2	(C) ROR	(D) ROR	(E) ROR-PML1	(F) ROR-PML3	(G) ROR-PML4	
FTA 3		(H) ROR-PML1	(I) ROR-PML2	(J) ROR-PML3	(K) ROR-PML4	(L)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA 4		(M) ROR-PML1	(N) ROR-PML2	(O) ROR-PML3	(P) ROR-PML4	(Q)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA 5		(R) ROR-PML2	(S) ROR-PML2	(T) ROR–PML3	(U)DETAIN if const. reqs. met OR RELEASE with max conditions	(V)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA6				(W)DETAIN if const. reqs. met OR RELEASE with max conditions	(X)DETAIN if const. reqs. met OR RELEASE with max conditions	***(Y)DETAIN if const. reqs. met OR RELEASE with max conditions***

Anthony Gallegos

1/6/2020

Charges: Aggravated Battery (household member), Aggravated Assault (deadly weapon), Abandonment of a Child
Incident details: Punched girlfriend >100 times, slammed her head on a concrete floor, strangled her, and threatened her with gun
Arnold Tool Recommendation: ROR

Pretrial Services

Public Safety Assessment - Court Report 1/7/2020 7:50:37 AM

Name: Anthony Gallegos | Case Number: T-4-FR-2020-000016 | PID: 8721878
YOB: 1995 | PSA Assessment Date: 1/7/2020 | Arrest Date: 1/6/2020

New Violent Criminal Activity Flag: No

New Criminal Activity Scale: 0 1 2 3 4 5 6

Failure to Appear Scale: 0 1 2 3 4 5 6

Charge(s):	Count(s)	Statute	Degree
Aggravated Battery (household member)	1	30-3-16	Felony
Aggravated Assault (Deadly Weapon)	1	30-3-2(A)	4th Degree Felony
Abandonment of a Child (No Death or Great Bodily Harm)	1	30-6-1(B)	Misdemeanor

Recommendations: **(E) ROR - PML 1**

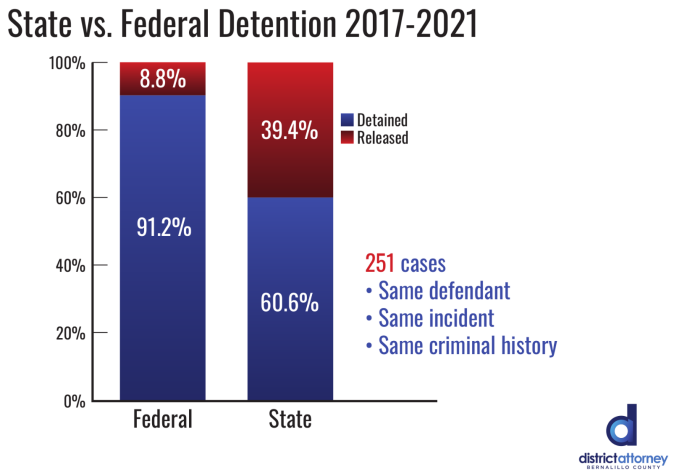
Notes:

Failure to Appear Scale \ New Criminal Activity Scale	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	(A) ROR	(B) ROR				
FTA 2	(C) ROR	(D) ROR	***(E) ROR-PML1***	(F) ROR-PML3	(G) ROR-PML4	
FTA 3		(H) ROR-PML1	(I) ROR-PML2	(J) ROR-PML3	(K) ROR-PML4	(L)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA 4		(M) ROR-PML1	(N) ROR-PML2	(O) ROR-PML3	(P) ROR-PML4	(Q)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA 5		(R) ROR-PML2	(S) ROR-PML2	(T) ROR–PML3	(U)DETAIN if const. reqs. met OR RELEASE with max conditions	(V)DETAIN if const. reqs. met OR RELEASE with max conditions
FTA6				(W)DETAIN if const. reqs. met OR RELEASE with max conditions	(X)DETAIN if const. reqs. met OR RELEASE with max conditions	(Y)DETAIN if const. reqs. met OR RELEASE with max conditions

Other jurisdictions understand that pretrial detention is about managing risk. At its core, pretrial detention is about predicting future behavior. Judges do not have "evidence" that a particular defendant will or will not commit another crime while on pretrial release because the future event has not yet happened. They must rely on the nature and circumstances of the offense and an offender's history to decide whether a defendant is dangerous and to predict whether the defendant is likely to reoffend. Managing risk and deciding how much risk is acceptable is fundamentally a value judgment. The voters made this value judgment by adopting a constitutional provision that allows judges to detain dangerous offenders. While it is true, as stated in the Status Update, that it is impossible to eliminate all risk, the voters decided to eliminate the risk posed by the most dangerous offenders in our system.

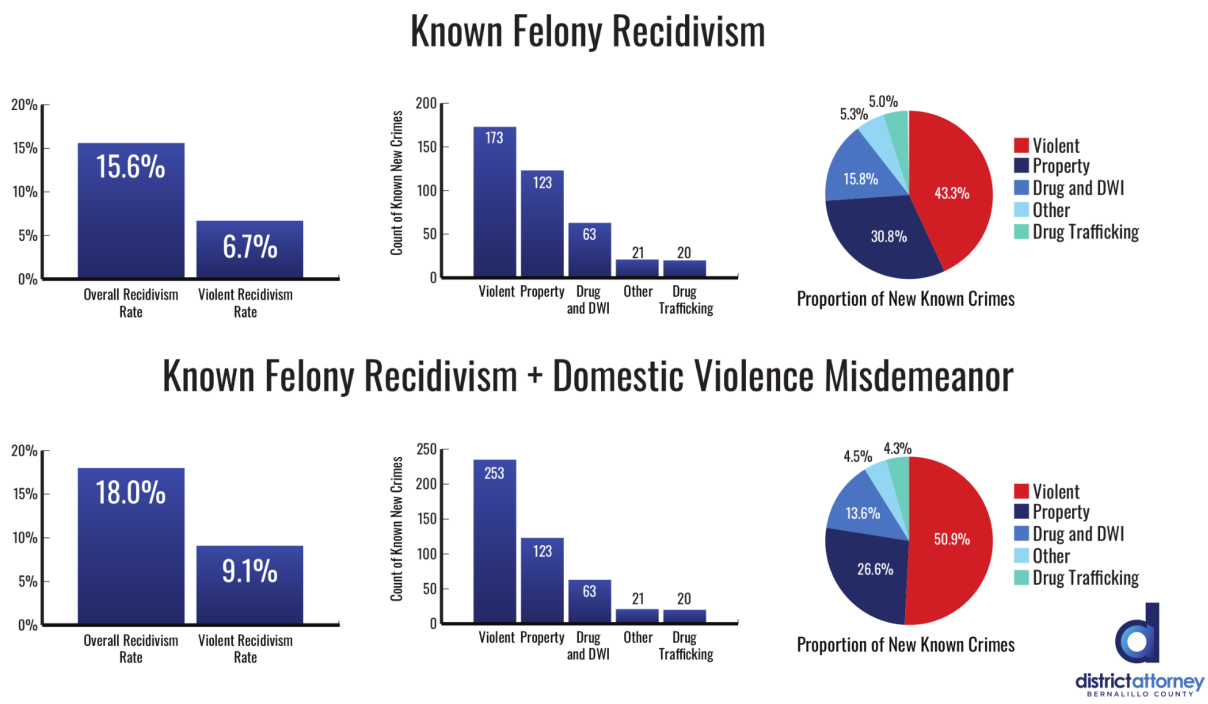
As the voice of the people, the legislature can ensure that state court judges understand the degree of risk the public is willing to accept by identifying the most dangerous offenses and offenders, just as other jurisdictions have done by statute. Rebuttable presumptions mean that a defendant will be presumptively detained when there is probable cause to believe the defendant committed one of several enumerated dangerous offenses, committed an offense in a particularly risky manner, or has a particularly risky history, subject to the presumption being rebutted. These provisions do not shift the burden of persuasion to the defendant. Instead, the defendant bears a burden of production, meaning the defendant must introduce some proof of why the defendant should not be detained. As a result, these provisions serve to inform judges about general risks associated with certain charges or classes of defendants without limiting judicial discretion or imposing an undue burden on defendants.

Bernalillo County's experience with pretrial detention demonstrates the need for this missing guidance. In 251 cases, our office has moved to detain the same defendant for the same incident in both state and federal court. The federal court detained those individuals 91.2% of the time, while the state court detained only in 60.6% of the cases. The stark difference in outcomes, based on the same defendant and the same evidence, shows the need to refine the evaluation of dangerousness in state court.

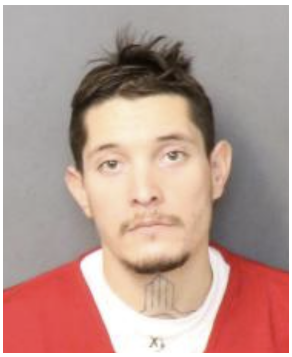


C. Denied Motions to Detain Too Often Result in Foreseeable Crime

Releasing defendants that should be detained has tragic real-life consequences for the victims of violent crime. Judges in the Second Judicial District have denied over 2,500 pretrial detention motions since January 1, 2017, releasing 2,361 defendants our office determined to be dangerous. Among this population of defendants, we see them commit new known felonies while on pretrial release at a rate of 15.6% (400) overall, with 6.7% (173) committing violent felonies. If we add misdemeanor domestic violence into the new known cases, the figures jump to 18% (480) and 9.1% (253), respectively.



Two caveats make these figures especially concerning. First, these recidivism rates are based on new known cases. As the Status Update rightly points out, crime reporting and clearance of reported crime are low nationally and in Bernalillo County. Using national reporting figures for violent crimes, known violent crimes are approximately one-fifth of actual violent criminal incidents. Accordingly, the 253 new known violent cases in Bernalillo County are only a small proportion of the actual violent criminal incidents experienced by our community. The second caveat is that these figures only represent new known cases during the pendency of the case in which we sought detention. In other words, these are new known cases in a very short period of time.



Real-world examples:

Jacob Montoya was charged on June 19, 2021, for multiple felony offenses including felon in possession of a firearm, receiving/transferring a stolen motor vehicle and possession of methamphetamine. On June 25, 2021, the District Court in Bernalillo County denied the State's motion to detain Montoya, placing him instead on GPS monitoring. Thereafter, Montoya failed to appear for his preliminary hearing on August 17, 2021 and the battery on his GPS location monitoring device went dead on August 25, 2021.

Based on multiple reports from law enforcement agencies it appears that Montoya went on a violent crime spree in three adjacent counties within the month of November, including an armed robbery in Sandoval County on November 14, 2021, and an armed robbery in Santa Fe County on November 26, 2021. According to criminal complaints submitted by Santa Fe County Sheriff's Office, Torrance County Sheriff's Office and New Mexico State Police, Montoya fled from law enforcement at a high rate of speed after the armed robbery in Santa Fe County and crossed into Torrance County where he fired multiple shots at law enforcement before being taken into custody. Police found two firearms, and other items that link him to the November 14 robber, at the time of his arrest.

Luis Chaparro was charged with shooting at or from a motor vehicle and criminal damage to property in January of 2020, and he was recently convicted of this crime. While he was out on pretrial release he committed first degree murder and aggravated battery with a deadly weapon when he shot at two strangers and killed one of them. The random stranger who was murdered would have still been alive if his pretrial release motion had been granted.

It is important here to note a fundamental flaw in the Status Update's analysis of offenses committed by individuals on pretrial release. The Status Update cites a December 2021 report from UNM's Institute of Social Research (ISR) on pretrial release outcomes. That report evaluates *all* individuals on pretrial release, *not* the set of individuals our office has sought to detain. The report refers to defendants in 15,134 cases who were not in custody pending trial. Again, as noted above, our office has only sought detention in 5,153 cases since January 1, 2017. ISR's figure necessarily includes all felony defendants, including very low risk individuals, that our office did not seek to detain. ISR's methodology improperly minimizes the impact of these dangerous defendants by dividing known re-offenses by a larger denominator that includes individuals we never sought to detain. Unfortunately, the Status Update's reliance on ISR's report repeats this misrepresentation.

Alarmingly, based on ISR's count of 757 of new known violent cases among all individuals on pretrial release, the very small population of 2,361 defendants we sought to detain but who were released accounts for one-third of those new known violent offenses. Had the court's granted our motions to detain at a higher rate, the number of new known offenses would have been significantly lower.

VI. Essential Questions Left Unaddressed by the LFC

One of the alarming aspects of the Status Update on Bernalillo County Crime, Law Enforcement, and Bail Reform, produced by Legislative Finance Committee evaluators, is the report's complete indifference to asking basic questions about the competency and sufficiency of the current system of pretrial supervision in Bernalillo County. A comprehensive review of this important public safety topic should at least attempt to ask the following questions:

1. What's the failure to appear (FTA) rate in Metropolitan Court and the Second Judicial District Court?
2. How many defendants are currently out of custody with multiple felony cases?
3. How many defendants does each pretrial services officer supervise?
4. What does "supervision" actually mean? How often do they confirm residence, employment or compliance? How many failures to comply before they recommend revocation of conditions?
5. How many times do judges place felony defendants back into the community even after they have violated their conditions of release?
6. Has the revocation rate for felons who have violated their conditions of release changed over time? How does the revocation rate compare to other jurisdictions?
7. What steps does the Court take to locate defendants who fail to appear in court? If they notify law enforcement about a defendant's failure to appear, how timely is that notification and what level of detail is provided to law enforcement?
8. Do local law enforcement agencies have sufficient capacity to apprehend fugitives and engage in proactive community policing?
9. Why did District Court fail to supervise the highest risk defendants (those placed on GPS monitors) on nights and weekends for so long?
10. Why has the District Court refused to provide historical GPS data to police and prosecutors, particularly in light of the high rate of unsolved crimes in the community?