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# **BETTER BALANCE: WHY THE SECOND JUDICIAL DISTRICT IN NEW MEXICO SHOULD PRIORITIZE USE OF PRELIMINARY HEARINGS**

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*The New Mexico Constitution guarantees that felony charges shall not be brought against a person prior to either a grand jury indictment or a preliminary hearing finding of probable cause. But in March 2020, due to the COVID-19 pandemic, New Mexico courts were forced to halt the use of grand jury proceedings. As a result, all felony charges brought for the remainder of the year 2020 were vetted through preliminary hearings. Moreover, New Mexico is a unique jurisdiction because it applies the Rules of Evidence in full strength at preliminary hearings. This Comment makes a case for the continued expansion in the use of preliminary hearings even as COVID-19 restrictions ease and grand juries become available again. Acknowledging the necessity to balance the use of preliminary hearings with grand jury proceedings this comment (1) illustrates the contours of both the grand jury and preliminary hearing rights in New Mexico; (2) describes the ongoing tension within the Second Judicial District regarding preliminary hearings and grand juries; (3) surveys states that either prioritize or offer prosecutors the discretion to use preliminary hearings and examines how these states treat the Rules of Evidence; (4) analyzes how the practical benefits of preliminary hearings are viable for both the prosecution and defendants; and (5) addresses how preliminary hearings balance the policy interests of the state with the rights of defendants.*

## **I. INTRODUCTION**

On March 11, 2020, New Mexico Governor Michelle Lujan Grisham declared a state of public health emergency due to the emergence of the COVID-19 in the state of New Mexico.<sup>1</sup> Shortly after, the New Mexico Supreme Court

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1. N.M. Exec. Order 2020-004 (Mar. 11, 2020).

suspended criminal jury trials<sup>2</sup> and eventually required all court appearances to be telephonic or audio-visual.<sup>3</sup> Following approval of individualized court plans by the New Mexico Supreme Court, New Mexico courts were permitted to resume jury trials between June 15, 2020, and July 15, 2020.<sup>4</sup> In November 2020, however, jury trials were suspended again until at least January 1, 2021.<sup>5</sup> Finally, in February 2021, jury trials were permitted to resume in New Mexico.<sup>6</sup> The state of public health emergency in New Mexico has not been lifted and court operations remain presumptively remote. Consequently, the use of grand juries<sup>7</sup> to indict felony charges has ceased statewide. Since the end of March, all felony charges in the Second Judicial District have been brought via preliminary hearing<sup>8</sup> conducted at the Bernalillo County Metropolitan Court. There has been an ongoing tension in the Second Judicial District over how best to initiate felony charges—with the debate hinging on whether the grand jury or the preliminary hearing should be prioritized.<sup>9</sup> As a result of the COVID-19 pandemic, this tension been exacerbated through the forced reliance on preliminary hearings. In due time, the pandemic will end, and courts will return to some form of pre-pandemic normalcy in criminal proceedings. But, after relying solely on preliminary hearings for better part of one year, this county has the opportunity to thoroughly re-evaluate how it handles this stage of criminal proceedings.

This Comment will advocate that the Second Judicial District continue to rely predominantly on preliminary hearings, despite the critique from advocates of the grand jury that New Mexico's practice of using the Rules of Evidence at this stage is too restrictive. Preliminary hearings are a more reliable method to initiate felony charges because they require application and use of the Rules of Evidence. Grand jury proceedings have no such requirement. Part II.A and Part II.B of this Comment examine the background and general contours of the grand jury right and preliminary hearing right, respectively, in the state of New Mexico. Part II.C describes the tension within the Second Judicial District. Part III.A conducts a survey of states that either prioritize or offer prosecutors the discretion to use preliminary hearings to illustrate how unique New Mexico is compared to the rest of the country

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2. N.M. Sup. Ct. Ord. No. 20-8500-002 (Mar. 17, 2020).

3. N.M. Sup. Ct. Ord. No. 20-8500-006 (March 23, 2020).

4. N.M. Sup. Ct. Ord. No. 20-8500-020 (May 28, 2020).

5. N.M. Sup. Ct. Ord. No. 20-8500-039 (Nov. 13, 2020).

6. N.M. Sup. Ct. Ord. No. 20-8500-042 (Dec. 14, 2020).

7. Grand juries are a body of people (the number of which is predetermined by statute) who are summoned to sit for a pre-determined amount of time in ex parte proceedings where they are presented evidence of a crime, both by a prosecutor and sometimes upon the grand jury's own subpoena, to determine whether or not a criminal indictment should be issued based on that evidence. *See Grand Jury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. Preliminary hearings are criminal hearings held before a judge with the singular purpose of determining "whether there is sufficient evidence to prosecute an accused person," *Preliminary Hearing*, BLACK'S LAW DICTIONARY (11th ed. 2019). The terms, "preliminary hearing" and "preliminary examination," are synonymous and have been used interchangeably in New Mexico courts and in broader literature. Although the New Mexico Constitution uses "preliminary examination," this comment will follow the common practice amongst New Mexico courts, which use "preliminary hearing." This phrasing is consistent with the vernacular of attorneys and judges in the state of New Mexico.

9. *See infra* Part II.C.

in its treatment of the Rules of Evidence in preliminary hearings. Part III.B argues for New Mexico's approach to preliminary hearings by analyzing how the practical benefits of preliminary hearings are viable for both the prosecution and for defendants. Finally, Part III.C addresses how preliminary hearings balance the policy interests of the state with the rights of defendants.

## II. BACKGROUND

The New Mexico Constitution guarantees that felony charges will not be brought prior to either a grand jury indictment or a preliminary hearing.<sup>10</sup> Indictments and *informations*<sup>11</sup> both serve the same dual purposes: (1) to inform the accused of the charges against them and (2) inform the court of “the facts alleged so it may determine whether the facts are sufficient to support a conviction.<sup>12</sup> Nonetheless, a defendant may waive these constitutional rights, if they so choose.<sup>13</sup>

### A. The Grand Jury Right in New Mexico

Grand juries, often called the “‘shield and the sword’ of the American criminal justice process,” were carried over from England and adopted by the early settlers.<sup>14</sup> The shield and the sword metaphor stems from the dual function of the grand jury, as both an indicting and an investigative body: the grand jury can shield individuals from unjust or oppressive prosecution when it refuses to issue an indictment, or it can provide a sword that “enables the government to secure convictions” when it utilizes its investigative authority.<sup>15</sup>

Despite their historical roots,<sup>16</sup> grand juries have been the subject of much debate and distrust for many years.<sup>17</sup> The debate over the lingering value of the grand

10. N.M. CONST. art. II, § 14. (“No person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies. . . . No person shall be so held on information without having had a preliminary hearing before an examining magistrate or having waived such preliminary hearing.”)

11. In criminal procedure, an information is a “formal criminal charge made by a prosecutor without a grand-jury indictment.” See *Information*, BLACK’S LAW DICTIONARY (11th ed. 2019). This is also sometimes referred to as a criminal information or a bill of information. *Id.* Information is one of the “three formal legal documents by which a person can be officially charged with a crime.” *Id.* The other two are an indictment and presentment. *Id.*

12. *State v. Blea*, 1973-NMCA-013, ¶ 11, 84 N.M. 595, 506 P.2d 339, 342.

13. See *State v. Padilla*, 2002-NMSC-016, ¶¶ 18–19, 132 N.M. 247, 46 P.3d 1247, 1254.

14. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 8.1(a) (4th ed. 2019) (citing *United States v. Cox*, 342, F.2d 167, 186 n. 1 (5th Cir. 1965)).

15. *Id.* But see *State v. Chance*, 1923-NMSC-042, ¶ 14, 29 N.M. 34, 221 P. 183, 185 (Botts, J., dissenting) (calling the grand jury “a sword for the destruction of our liberties instead of a shield for their protection.”).

16. The historical development of the grand jury prior to the mid-20th century—that is, from the Assize of Clarendon in 1166 to the American colonies to the current state of the grand jury—is beyond the scope of this note. For a historical overview, see LAFAVE, *supra* note 14, at §§ 8.2 (a), 15.1(a). For a focused history of grand juries in New Mexico, see *Buzbee v. Donnelly*, 1981-NMSC-097, ¶¶ 8–30, 96 N.M. 692, 634 P.2d 1244, 1247.

17. See James P. Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor*, 2 N.M. L. REV. 141 (1972), <https://digitalrepository.unm.edu/cgi/viewcontent.cgi>

jury can be summarized in two parts. The first part asks whether historical development and the adoption of the grand jury at the time of the federal constitution secures a place for “the broad investigatory authority of the grand jury and the accusatory framework of American criminal procedure.”<sup>18</sup> The second part asks whether the capacity for independent and broad investigatory authority of grand juries “has been lost with the expansion of the role of police and prosecutor in criminal investigations.”<sup>19</sup>

Critics of grand juries believe that its shielding role was primary, while its investigating role was secondary at the time of the adoption of grand juries into the Bill of Rights.<sup>20</sup> But, over time, these roles have reversed and critics of the grand jury view this as a negative change.<sup>21</sup> Specifically, the broad subpoena power of grand juries stands in contrast to the prosecution’s more traditional and restricted investigative powers—the grand jury may compel the production of evidence through subpoena where the prosecution may not.<sup>22</sup>

Supporters of the grand jury, on the other hand, argue that reverence for the institution of grand jury proceedings is not misplaced; it has served both as a “buffer between the state and the individual,” and as a “watchdog against public corruption” in “its capacity to ferret out criminal activity.”<sup>23</sup> This argument acknowledges the “substantial role” of prosecutors in grand jury investigations, but views this as “a beneficial development that makes the investigatory authority more effective and helps to ensure that it is not misused.”<sup>24</sup>

Perhaps the most poignant critique of the grand jury, as previously alluded to, focuses on the tremendous power of the prosecutor in conducting modern grand juries. Due to the “increased complexity and anonymity” in many cities and the prevalence of potentially criminal conduct going unnoticed or unidentified, the jurors now must rely on the prosecutor to lead the investigation.<sup>25</sup> The prosecutor very well may be the only legal professional in a room full of people who have little to none of the same expertise. Supporters of the grand jury also recognize the extensive role the prosecutor plays in grand juries but see this as a benefit and something that is checked, so to speak, by the veto power of the grand jurors over the prosecutors’ decisions.<sup>26</sup>

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?article=1287&context=nmlr; Chance, 1923-NMSC-042, ¶ 14, 221 P. at 185 (calling the grand jury “a sword for the destruction of our liberties instead of a shield for their protection.”).

18. LAFAVE, *supra* note 14, at § 8.2(c).

19. *Id.*

20. *Id.*

21. *Id.*; See also Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 3 (2004) (“The Court speaks of the primacy of the grand jury’s function as a ‘shield’ against arbitrary prosecution, when its ‘sword’ function of investigating and charging criminal conduct is almost universally perceived to be the rationale for its continued use.”).

22. Kuckes, *supra* note 21, at 35–36.

23. LAFAVE, *supra* note 14, at § 8.2(c).

24. *Id.*

25. *Id.*

26. *Id.*

In New Mexico, although codified much later than its federal counterpart,<sup>27</sup> the grand jury functions relatively similar to the federal grand jury.<sup>28</sup> For example, in both jurisdictions, the jurors must believe that “the lawful evidence” implies “that an offense against the law has been committed and that there is probable cause to accuse . . . the person named” of committing that offense in order to return an indictment.<sup>29</sup>

There are certain nuances of the grand jury that are especially pertinent to this Comment. These nuances all relate to the procedural integrity of grand jury proceedings. First, despite acknowledging the “necessarily close relationship between the prosecutor and grand jury,” the duty to assemble the grand jury lies only with the district court.<sup>30</sup> The district court may assign staff support within the court to carry out this function, but it may not permit the prosecutor to take over that role.<sup>31</sup> Conversely, the duty of the prosecutor is to act fair and impartial.<sup>32</sup> This includes protecting both the greater public interest in criminal investigations and the rights of the target of the grand jury.<sup>33</sup> In this duty, the prosecutor must “scrupulously refrain from words or conduct that may influence the decision of the grand jury.”<sup>34</sup> Additionally, the grand jury may not be used by the prosecutor as a discovery tactic.<sup>35</sup>

Second, secrecy is integral to the purpose of the grand jury and, other than “those necessarily connected” to the proceedings, there must not be any persons other than the jurors present.<sup>36</sup> Those necessary additional persons include: the prosecutor and their staff, court interpreters, court reporters, security officers, the witness, and the attorney for the target of the grand jury.<sup>37</sup> The attorney for the target of the grand jury, however, may only be present while their client (the target themselves) testifies.<sup>38</sup> While the attorney may advise their client, they may not speak “so that [they] can be heard by the grand jurors or otherwise participate in the proceedings.”<sup>39</sup> The only way for the attorney of the target of the grand jury to *substantively* participate in the proceedings is by submitting “proposed questions and exhibits” to the prosecutor, at

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27. N.M. STAT. ANN. § 31-6-1 (1983).

28. See *Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 30, 96 N.M. 692, 634 P.2d 1244, 1250.

29. N.M. STAT. ANN. § 31-6-10 (1979).

30. *De Leon v. Hartley*, 2014-NMSC-005, ¶ 9, 316 P.3d 896, 899; see also N.M. STAT. ANN. § 31-6-1 (1983).

31. See *De Leon*, ¶ 10–11, 316 P.3d at 899 (holding that permitting a district attorney to take over this role “is to sacrifice any perception that the grand jury is an entity distinct from the prosecutor that is capable of serving as a barrier against unwarranted accusations.”).

32. N.M. STAT. ANN. § 31-6-7(D) (2003).

33. See *State v. Hill*, 1975-NMCA-093, ¶ 14, 88 N.M. 216, 539 P.2d 236, 239.

34. *Id.* ¶ 16, 539 P.2d at 239. See also *Herrera v. Sanchez*, 2014-NMSC-018, ¶¶ 28–30, 328 P.3d 1176, 1185 (holding that prosecutor violated this duty, and essentially gave a closing argument, by expounding “upon the Court’s prescribed jury instructions” and telling the jury how to interpret the Petitioner’s testimony in light of the instructions).

35. N.M. STAT. ANN. § 31-6-9.1 (1979).

36. *Hill*, ¶ 7, 539 P.2d at 238; see also N.M. STAT. ANN. § 31-6-4(B) (2003).

37. N.M. STAT. ANN. § 31-6-4(C) (2003). The target of the grand jury, if indicted, will become the defendant. However, since the target of the grand jury has not yet been indicted on felony charges at this stage, it would be improper to refer to them as the defendant.

38. N.M. STAT. ANN. § 31-6-4(D) (2003).

39. *Id.*

least twenty-four hours prior to beginning of the grand jury proceedings.<sup>40</sup> In line with the spirit of secrecy, any indictments returned by the grand jury “shall not name persons as unindicted coconspirators.”<sup>41</sup>

Third, at this stage, the prosecutor is not required to present evidence that is only “circumstantially or indirectly exculpatory,” just that evidence which directly negates the guilt of the target.<sup>42</sup> To be clear, the prosecution is required to present—if aware—and the jurors are required to weigh, direct evidence which negates the guilt of the target of the grand jury.<sup>43</sup> In the event that the prosecutor does withhold exculpatory evidence, there must be a showing that the target suffered actual prejudice in order to find a violation of due process rights.<sup>44</sup>

Despite the requirement that evidence before the grand jury be “lawful, competent and relevant,” the Rules of Evidence do not apply to grand jury proceedings.<sup>45</sup> Further, the sufficiency of evidence at a grand jury may only be reviewed where bad faith on the part of the prosecution has been shown.<sup>46</sup> This means that an indictment may be returned based solely on hearsay evidence.<sup>47</sup> Thus, despite the intent to only use lawful evidence at grand juries, the structure and rules of grand juries disregards the purpose of the Rules of Evidence to “administer every proceeding fairly” and “the end of ascertaining the truth and securing a just determination.”<sup>48</sup>

## B. The Preliminary Hearing Right in New Mexico

Preliminary hearings serve two overarching purposes: (1) to inform the accused of the crime with which they are charged and (2) to determine whether or not there is probable cause to prosecute the charges.<sup>49</sup> This determination is made by either a magistrate court judge,<sup>50</sup> a metropolitan court judge,<sup>51</sup> or a district court judge.<sup>52</sup> The test at a preliminary hearing is “whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the

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40. *Id.*

41. N.M. STAT. ANN. § 31-6-5 (2003).

42. *State v. Juarez*, 1990-NMCA-021, ¶ 15, 109 N.M. 764, 790 P.2d 1045, 1048 (following the *Buzbee* reading of N.M. STAT. ANN. § 31-6-11(B) as it relates to exculpatory evidence).

43. *See State v. Augustin M.*, 2003-NMCA-065, ¶ 22, 133 N.M. 636, 68 P.3d 182, 188, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48 (explaining N.M. STAT. ANN. § 31-6-11(B)’s departure from common law grand jury doctrine).

44. *See Buzbee v. Donnelly*, 1981-NMSC-097, ¶¶ 80–81, 96 N.M. 692, 634 P.2d 1244, 1258.

45. N.M. STAT. ANN. § 31-6-11(A) (2003).

46. *Id.*

47. *See State v. Gallegos*, 2009-NMSC-017, ¶¶ 9–10, 146 N.M. 88, 206 P.2d 993, 997 (holding that there is no authorization for judicial review of an indictment returned based only on hearsay evidence absent a “showing of prosecutorial bad faith.”).

48. N.M. R. ANN. 11-102.

49. *State v. Rodriguez*, 2009-NMCA-090, ¶ 10, 146 N.M. 824, 215 P.3d 762, 765 cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358 (quoting *State v. Coates*, 1985-NMSC-091, ¶ 7, 103 N.M. 353, 707 P.2d 1163, *abrogated on other grounds by State v. Brule*, 1999-NMSC-026, ¶ 3, 127 N.M. 368, 981 P.2d 782).

50. N.M. R. ANN. 6-202.

51. N.M. R. ANN. 7-202.

52. N.M. R. ANN. 5-302.

accused.”<sup>53</sup> The evidence does not need to sustain a verdict of guilt beyond a reasonable doubt.<sup>54</sup>

Once the judge finds probable cause, the state must file an information that substantially conforms to the bind over order.<sup>55</sup> If the state files an erroneous or insufficient information after bind over, such as one which does not include the proper charges, then the defendant’s due process rights will have been violated and there can be no valid waiver of the defendant’s constitutional right to a preliminary hearing.<sup>56</sup>

Importantly, the preliminary hearing is “not a trial of the person charged with the view of determining his guilt or innocence. The preliminary hearing and the trial are separate and distinct.”<sup>57</sup> There are, however, benefits of a preliminary hearing beyond the legal purpose, such as perpetuating testimony and establishing bail.<sup>58</sup> Nor is discovery—likely the benefit most acknowledged by both prosecutors and defense attorneys due in large part to the value this adds to the progression of a case—a legal objective of a preliminary hearing.<sup>59</sup>

The right to a preliminary hearing was not originally afforded to criminal defendants in the first New Mexico of 1911 but was amended into the Constitution in 1924.<sup>60</sup> This right, however, is not absolute.<sup>61</sup> It is well established law in New Mexico that the *prosecution* may choose to proceed either by indictment or by information; it is not up to the defendant in which forum they would like to challenge the probable cause of felony charges.<sup>62</sup>

Moreover, whether to proceed by grand jury or by information is not at the discretion of the judge.<sup>63</sup> The choice, again, is that of the State.<sup>64</sup> If the State chooses

53. *State v. Garcia*, 1968-NMSC-119, ¶ 6, 79 N.M. 367, 443 P.2d 860, 861.

54. *Id.*

55. *State v. Rodriguez*, 2009-NMCA-090, ¶ 12, 146 N.M. 824, 215 P.3d 762, 765 *cert. denied*, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358. In this context, a bind over order holds a person for trial after the court, through the preliminary hearing, finds “that there is enough evidence to require a trial on the charges,” *see Bind Over*, BLACK’S LAW DICTIONARY (11th ed. 2019).

56. *Rodriguez*, 2009-NMCA-090, ¶ 12, 215 P.3d at 765.

57. *Garcia*, 1968-NMSC-119, ¶ 5, 443 P.2d at 861.

58. *See id.* (noting the purpose of the preliminary hearing is “to determine whether a crime has been committed, the connection the accused has with it thereby informing him of the nature and character of the crime charged, to perpetuate testimony, and to establish bail, if the offense is bailable.”); *see also State v. Archuleta*, 1970-NMCA-131, ¶ 28, 82 N.M. 378, 482 P.2d 242, 247 (referring back to *State v. Garcia*, 1968-NMSC-119, 79 N.M. 367, 443 P.2d 860).

59. *See State v. Burk*, 1971-NMCA-018, ¶ 7, 82 N.M. 466, 483 P.2d 940, 941–42.

60. N.M. CONST. art. II, § 14 (amended 1924).

61. *See State v. Peavler*, 1975-NMCA-037, ¶ 7, 87 N.M. 443, 535 P.2d 650, 653, *rev’d* 1975-NMSC-035.

62. *See Flores v. State*, 1968-NMCA-057, ¶ 5, 79 N.M. 420, 444 P.2d 605, 606 (noting that after the 1925 amendment to N.M. Const. Art. II, § 14, defendants have no right to be charged by a grand jury, but may also be proceeded against by criminal information) (emphasis added); *State v. Vaughn*, 1971-NMSC-015, ¶ 2, 82 N.M. 310, 481 P.2d 98, 99 (discarding defendant’s allegation that the district court did not have jurisdiction over his case because he did not waive his right to be charged by grand jury indictment); *State v. Mosley*, 1968-NMCA-077, ¶ 2, 79 N.M. 154, 445 P.2d 391, 392 (calling defendant’s claim that he was entitled to grand jury “without merit.”).

63. *Williams v. Sanders*, 1969-NMSC-124, ¶ 3, 80 N.M. 619, 459 P.2d 145, 145.

64. *State v. Peavler*, 1975-NMSC-035, ¶ 6, 88 N.M. 125, 537 P.2d 1387, 1389.



to proceed by indictment, then the defendant's right to a preliminary hearing is extinguished.<sup>65</sup> And, where a grand jury has returned a no-bill, the state may still proceed by information.<sup>66</sup> There is no statutory provision limiting prosecutorial authority within these alternative avenues.<sup>67</sup>

Because the magistrate courts and metropolitan courts do not have jurisdiction to try felony charges, the dismissal by either one of these courts of such felony charges at a preliminary hearing does not result in an acquittal.<sup>68</sup> Consequently, a subsequent indictment of the same charges at a district court is not barred nor do any double jeopardy problems arise.<sup>69</sup>

A preliminary hearing is a critical stage as far as it applies to the right to counsel.<sup>70</sup> But, because this is not a phase in which guilt is determined, the right to confront witnesses does not attach at this stage.<sup>71</sup>

As far as appealing a potentially improper preliminary hearing, the rules depend on the whether the error below was procedural or jurisdictional. When a defendant waits until after being convicted to challenge a procedural error in the preliminary hearing stage, there "simply is no adequate remedy available."<sup>72</sup> This is not necessarily the case when the error at the preliminary stage was jurisdictional.<sup>73</sup>

The most important distinctions between grand juries and preliminary hearings for the purposes of this comment are as follows: first, the Rules of Evidence apply at a preliminary hearings, subject only to "any specific exception in the Rules of Criminal Procedure" for the respective court in which the hearing is being held.<sup>74</sup> In both the magistrate courts and the metropolitan courts, there is a small carve-out in the Rules of Evidence for the admission of laboratory analyses of controlled substances or human specimens.<sup>75</sup> This is not the case at a grand jury. Second, grand jury proceedings are generally conducted in secret, whereas preliminary hearings are open to the public. These two differences, along with the prosecutor's discretion to choose between a grand jury or a preliminary hearing when attempting to bring felony charges against an individual, has led to tension in the Second Judicial District

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65. *Id.* ¶¶ 6, 8, 537 P.2d at 1388–89; *see also* State v. Martinez, 1978-NMCA-095, ¶ 7, 92 N.M. 291, 587 P.2d 438, 440–41 (reaffirming the discretion of the state in regards to preliminary hearings in determining that trial court erred in ruling that one of defendant's convictions was barred by the statute of limitations); State v. Ergenbright, 1973-NMSC-024, ¶¶ 9, 10, 84 N.M. 662, 506 P.2d 1209, 1211 (holding that despite the filing of a complaint and scheduling of a preliminary hearing before an indictment was returned by a grand jury, the defendant still was not entitled to a preliminary hearing); State v. Salazar, 1970-NMCA-056, ¶ 2, 81 N.M. 512, 469 P.2d 157, 157–58 (same).

66. State v. Isaac M., 2001-NMCA-088, ¶ 8, 131 N.M. 235, 34 P.3d 624, 627.

67. *Id.*

68. *See* Peavler, 1975-NMSC-035, ¶ 5, 88 N.M. 125, 537 P.2d 1387, 1388.

69. *See id.*

70. Neller v. State, 1968-NMSC-130, ¶ 15, 79 N.M. 528, 445 P.2d 949, 953.

71. State v. Lopez, 2013-NMSC-047, ¶¶ 18–19, 314 P.3d 236, 240–41.

72. State v. Perez, 2014-NMCA-023, ¶¶ 4–6, 318 P.3d 195, 197 (quoting State v. Bent, 2012-NMSC-038, ¶ 21, 289 P.3d 1225).

73. *See* State v. Chacon, 1957-NMSC-030, ¶ 10, 62 N.M. 291, 301 P.2d 230, 232 (holding that defendant who pled guilty based only on a criminal complaint, not on a probable cause determination or a grand jury indictment, was denied New Mexico constitutional requirements and, therefore, his sentence must be reversed and remanded).

74. N.M. R. ANN. 5-302(B)(5). *See also* N.M. R. ANN. 6-202(B)(5); N.M. R. ANN. 7-202(B)(5).

75. *See* N.M. R. ANN. 6-608, 7-608.

between the Second Judicial District Court and the District Attorney over how best to balance the use and timing of these two procedures.

### C. Tension within the Second Judicial District

Tension within the Second Judicial District regarding the proper balance for initiating felony charges took on a new ardor in July 2018 when the Second Judicial District Court denied Second Judicial District Attorney Raul Torrez's erstwhile request for additional grand jury panels.<sup>76</sup> Rather than increasing grand jury allotment, the Court reduced grand jury time to from five days per week to six days per month: these six days were to be in the form of one grand jury panel per month, which would meet one day per week plus an additional day twice per month.<sup>77</sup> This change necessarily forced the increase in use of preliminary hearings,<sup>78</sup> in order to keep up with the number of felony charges in the district. The brunt of the preliminary hearing schedule did not fall onto the Second Judicial District Court, however. In January 2018, following a modification to the preliminary hearing rules by the New Mexico Supreme Court, the Bernalillo County Metropolitan Court began scheduling preliminary hearings.<sup>79</sup>

In making this decision, Second Judicial District Court cited consistency with "appropriate utilization of stake holder and public resources, the fact that Metropolitan Court automatically sets all new cases for preliminary hearing, District Court's additional preliminary hearing time, best practices, and the schedules currently in place in other New Mexico judicial districts."<sup>80</sup>

In response, District Attorney Raul Torrez wrote a letter to the Criminal Justice Reform Subcommittee in the New Mexico Legislature expressing his "profound concern about" the Second Judicial District Court's "unilateral decision to slash grand jury panels," noting, specifically, a concern "about how this decision [would] adversely impact public safety."<sup>81</sup> This letter describes grand jury proceedings as "the swiftest, most efficient, and least resource-intensive method of bringing formal felony charges."<sup>82</sup> It further describes preliminary hearings as lacking practicality due, in large part, to the application of the Rules of Evidence.<sup>83</sup> The theory here being that applying the Rules of Evidence will "necessarily involve

76. Letter from Nan Nash, C.J., Second Jud. Dist. Ct., & Charles Brown, J., to Raul Torrez, Dist. Att'y, Second Jud. Dist. (July 20, 2018) (on file with author) [hereinafter Letter from Nash].

77. *Id.*

78. *See id.*

79. *See* N.M. Sup. Ct. Ord. No. 17-8300-016 (Nov. 1, 2017). As of November 23, 2020, however, in all cases at Metropolitan Court where the District Attorney has filed a motion for pretrial detention and probable cause for such arrest has been determined, the Metropolitan Court shall transfer the motion for pretrial detention to the District Court and jurisdiction of the Metropolitan Court shall terminate. *See* N.M. Sup. Ct. Ord. No. 20-8300-021 (Nov. 20, 2020) and N.M. R. ANN. 7-409.

80. Letter from Nash, *supra* note 76.

81. Letter from Raul Torrez, Dist. Att'y, Second Jud. Dist., to Members of the Crim. Just. Reform Subcomm., N.M. Legis. (Aug. 15, 2018), <https://www.nmlegis.gov/handouts/CJRS%20082418%20Item%204%20Update%20from%20the%20Second%20Judicial%20District%20Attorney%20Office.pdf> [hereinafter Letter from Torrez].

82. *Id.*

83. *Id.*

more witnesses and significantly increase the time it takes to reach a probable cause finding.”<sup>84</sup>

This exchange between the Second Judicial District Court and the Second Judicial District Attorney happened just days after the New Mexico Legislative Finance Committee (“LFC”) completed an extensive report reviewing the criminal justice system in Bernalillo County.<sup>85</sup> The report, “Program Evaluation: Review of the Criminal Justice System in Bernalillo County,” contextualizes the crime spike in Bernalillo County between 2010 and 2017.<sup>86</sup> It specifically notes that the city of Albuquerque outpaced all other New Mexico cities during this timeframe.<sup>87</sup> The LFC, in compiling this report, interviewed and interacted with the various criminal justice stakeholders in Bernalillo County, including the courts and the Second Judicial District Attorney’s Office.<sup>88</sup> This report proffers recommendations based on an extensive analysis of the individual and cooperative characteristics of the police force, the judiciary, and incarceration in Bernalillo County. These recommendations are rather broad and include sweeping statements like, “the Administrative Office of the Courts should increase current oversight efforts to include adopting and reporting on evaluation requirements for all specialty courts.”<sup>89</sup> Although useful for a macro-level perspective of what Bernalillo County should strive for with regard to improving the criminal justice system, the final recommendations themselves do not offer tangible ideas of *how* to get to that end goal. The real value in this report, at least for the purposes of this Comment, lies in the discussion of previous and ongoing reform efforts of the judiciary.

Two specific aspects of this report, which acknowledge reform efforts of the judiciary, are of particular importance for this Comment. First, is the Case Management Order (“CMO”) from the New Mexico Supreme Court from 2015, codified under Local Rule 2-400, which applies only to proceedings in Second Judicial District Court and aimed to drastically reduce the backlog in cases in Bernalillo County.<sup>90</sup> Second, is the “The Bridge” process at the Second Judicial District Attorney’s office in which “multiple staff (e.g., attorneys, leadership, pre-prosecution program staff), discuss cases on the docket for the day and apply rubrics to decide” issues like pretrial detention, discovery needs, and at which level these cases will be prosecuted.<sup>91</sup> These two reform efforts feed back into one another to

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84. *Id.*

85. Legis. Fin. Comm., *Program Evaluation: Review of the Criminal Justice System in Bernalillo County*, ##-18-05 (2018), [https://www.nmlegis.gov/Entity/LFC/Documents/Program\\_Evaluation\\_Reports/Review%20of%20the%20Criminal%20Justice%20System%20in%20Bernalillo%20County.pdf](https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Review%20of%20the%20Criminal%20Justice%20System%20in%20Bernalillo%20County.pdf) [hereinafter LFC Report].

86. *Id.* at 7, 10.

87. *Id.* The report describes general 1.5 percent drop in crime in the state from 2014-2016, but a 26 percent *increase* in Albuquerque during that same time. But, the report also notes that four cities—Belen, Taos, Gallup, and Española—all had higher total crime rates than Albuquerque in 2016.

88. Letter from David Abbey, LFC Dir. to Arthur W. Pepin, Chair, Bernalillo Cnty Crim. Just. Coordinating Council (July 10, 2018), [https://www.nmlegis.gov/Entity/LFC/Documents/Program\\_Evaluation\\_Reports/Review%20of%20the%20Criminal%20Justice%20System%20in%20Bernalillo%20County.pdf](https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Review%20of%20the%20Criminal%20Justice%20System%20in%20Bernalillo%20County.pdf).

89. LFC Report, *supra* note 85, at 2.

90. *Id.* at 35; N.M. Loc. R. 2-400.

91. LFC Report, *supra* note 85, at 64–65.

influence what is perhaps the most important aspect of the LFC report: the persistent discussion about timeliness of cases.<sup>92</sup> The takeaway from this type of research is that the longer it takes to dispose of a case—whether by dismissal, plea, or otherwise—conviction rates decrease.<sup>93</sup> As will be developed further below, the way in which cases are initiated impacts the time it takes to dispose of cases.

Time and conviction rates are of the utmost importance to the Second Judicial District Court and the Second Judicial District Attorney.<sup>94</sup> And, *how* a felony case is initiated is integral to the ultimate disposition and time frame of many cases. The importance of timeliness, of course, is not limited to the court or prosecutors. But, with regard to the tension between grand jury proceedings and preliminary hearings, timeliness has been a central component of this argument.<sup>95</sup>

In 2019, there was another set of letters circulating on this subject.<sup>96</sup> These letters generally presented the same arguments as the 2018 letters, but this time they reached the Supreme Court of New Mexico.<sup>97</sup> Of note, the Second Judicial District Court’s highlighted the importance of frontloading cases in the form of preliminary hearings in order to refrain from wasting judicial resources with cases that will eventually be dismissed via *nolle prosequi*<sup>98</sup> and to reduce high mistrial rates by screening the quality of cases and evidence before they are presented to juries.<sup>99</sup> Ultimately, the Supreme Court of New Mexico acknowledged the importance of this issue, but said that this issue was “more appropriate for review, discussion, and resolution by the [Bernalillo County Criminal Justice Coordinating Council]”<sup>100</sup> at that time.<sup>101</sup>

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92. See generally *id.* at 36.

93. See *id.* at 36.

94. See Letter from Torrez, *supra* note 81.

95. See Letter from Nash, *supra* note 76; Letter from Torrez, *supra* note 81.

96. See Letter from Tim Keller, Mayor, Albuquerque and Raul Torrez, Dist. Att’y, Second Jud. Dist. to Judith K. Nakamura, C.J., Sup. Ct. N.M. (on file with author) [hereinafter Letter from Keller]; Letter from Stan Whitaker, C.J., Second Jud. Dist. Ct., to Judith K. Nakamura, C.J., Sup. Ct. N.M. (May 22, 2019), [https://seconddistrictcourt.nmcourts.gov/uploads/files/SJDC/SliderLinkFiles/SJDC\\_Prelim\\_Letter.pdf](https://seconddistrictcourt.nmcourts.gov/uploads/files/SJDC/SliderLinkFiles/SJDC_Prelim_Letter.pdf) [hereinafter Letter from Whitaker]; Letter from Judith K. Nakamura, C.J., Sup. Ct. N.M. to Tim Keller, Mayor of Albuquerque and Raul Torrez, Dist. Att’y, Second Jud. Dist. (May 31, 2019) (on file with author) [hereinafter Letter from Nakamura].

97. See Letter from Keller, *supra* note 96; Letter from Whitaker, *supra* note 96; Letter from Nakamura, *supra* note 96.

98. A *nolle prosequi* (Latin for “not to wish to prosecute”) occurs when the prosecutor abandons the case, see *Nolle Prosequi*, BLACK’S LAW DICTIONARY (11th ed. 2019). This does not prevent the charges from being refiled as it is not the equivalent of an acquittal or a dismissal with prejudice. *Id.*

99. Letter from Whitaker, *supra* note 96.

100. The Bernalillo County Criminal Justice Coordinating Council (“BCCJCC”) was established in 2013 but has not regularly met with all of the criminal justice system partners consistently represented during that time. See LFC Report, *supra* note 85.

101. Letter from Nakamura, *supra* note 96.

### III. ANALYSIS

#### A. Survey of Preliminary Hearings and the Rules of Evidence

In lieu of a full national survey, this Comment will focus on twenty-one jurisdictions in which the prosecution has the capability to prioritize preliminary hearings over grand juries.<sup>102</sup> These jurisdictions are Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and Wyoming. In these jurisdictions, the choice of proceeding with an indictment or information is available to the prosecution in the same manner as it is in New Mexico. This means that because there are no statutory or case law barriers in the choice of the prosecution to proceed by either indictment or information, the prosecution gets to make this choice.<sup>103</sup> Essentially, in the surveyed states, prosecutor has the sole discretion to decide *how* to bring felony charges.

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102. There are three broad classifications for how states indict felony charges: indictment jurisdictions, limited indictment jurisdictions, and option states. LAFAVE, *supra* note 14, at §§ 14–15. There are eighteen jurisdictions plus the District of Columbia and the federal criminal justice system that fall under the indictment jurisdiction classification, meaning they only allow serious charges (i.e. felony charges), to be brought against a person if they are indicted by a grand jury. *Id.* §§ 14.2(a-1) n.16.320, 15(d). These eighteen jurisdictions are: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* All but one of these jurisdictions have either statutory or court-rule provisions granting the right to a preliminary hearing, but the grand jury is the primary means to bring felony charges. *Id.* § 14.2(a-1) n.16.320. Maine, specifically requires prosecution by indictment. *Id.* The four limited indictment jurisdictions are: Florida, Louisiana, Minnesota, and Rhode Island. *Id.* §§ 14.2(d) n.46, 15(e). In these jurisdictions, only capital crimes or life imprisonment must be brought by grand jury indictment. *Id.* Thus, there is an implied reliance on preliminary hearings in the limited indictment jurisdictions. Finally, there are twenty-eight states that allow felony charges to be brought either by criminal information or by indictment. *Id.* §§ 14.2(a-1) n.16.330, 15(g). These twenty-eight jurisdictions are Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, Wisconsin, and Wyoming. There are some states, too, which do not fit neatly into any, or just one, of the above categorizations. Four states—Arkansas, Indiana, Minnesota, and Vermont—no longer provide for preliminary hearings. *Id.* §§ 14.2(a-1) n.16.70, n.16.80, n.16.100, n.16.110. As a result, probable cause must be analyzed in other ways like a *Gerstein* hearing, via summons, or by an omnibus hearing after charges have been filed. *Id.* A *Gerstein* hearing is the court’s review of the police officers’ determination that probable cause exists to detain an arrestee. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). An omnibus hearing is an early-stage hearing in which the court “is interested in ensuring that discovery is being conducted properly, that any necessary evidentiary hearings have been schedule, and that all issues ripe for decision have been decided,” *see Hearing*, BLACK’S LAW DICTIONARY (11th ed. 2019). Further, there is inconsistency in the use of preliminary hearings in the option states. In Connecticut, for example, preliminary hearings are limited to capital offenses or those eligible for life-imprisonment. LAFAVE, *supra* note 14, at § 14.2(d) n.46.70. There are five more states which restrict the right of prosecutor to bypass a grand jury either by “barring prosecutor access” (Utah, Pennsylvania, and Nebraska) or by “providing that the defendant is entitled to a preliminary hearing” even when a grand jury indictment has been returned (Oklahoma and Wisconsin). *Id.* §§ 14.2(d) n.16.470–n.16.490.

103. This is not to say that there are no practical, political, or financial barriers, but a thorough exploration of these is beyond the scope of this Comment.

1. *Three Approaches to Applying the Rules of Evidence at Preliminary Hearings*

State courts employ one of three approaches in their application of the Rules of Evidence in preliminary hearings—lax, moderate, or strict. States’ (including states outside the scope of this survey) different approaches to the Rules of Evidence in preliminary hearings are inconsistent. Furthering this inconsistency, there are a few states that do not fit neatly into any category. In actuality, each state’s treatment of the Rules of Evidence in a preliminary hearing is best considered as a spectrum from permissive of evidence to restrictive of evidence. But, this type of grouping—lax, moderate, or strict—aids in analysis.

First, the lax approach is used by the largest number of jurisdictions, both within the subset of states considered for this Comment and beyond. This approach follows the federal system which does not apply the Rules of Evidence to preliminary hearings in criminal cases.<sup>104</sup> Again, these states are not all uniform. Generally, these states allow a finding of probable cause to be based in whole or in part on hearsay.<sup>105</sup> Some states specify that the prosecution must demonstrate some level of reliability, thereby allowing the court discretion in how to weigh hearsay evidence.<sup>106</sup> Colorado, for example, gives more general discretion by allowing the court to “temper the rules of evidence in the exercise of sound judicial discretion.”<sup>107</sup> In another direction, Hawaii’s penal code disallows objections at this stage to evidence based on it being unlawfully obtained.<sup>108</sup>

In between these lax and the moderate approaches lies Louisiana, which applies the Rules of Evidence but only with “limited applicability” as well as a broad hearsay exception.<sup>109</sup>

The moderate approach applies the Rules of Evidence to preliminary hearings, with exceptions for certain categories of evidence.<sup>110</sup> Within this survey, these states are Arizona,<sup>111</sup> California,<sup>112</sup> Idaho,<sup>113</sup> Kansas,<sup>114</sup> Nevada,<sup>115</sup> Oregon,<sup>116</sup> and South Dakota.<sup>117</sup> Most commonly, the exceptions are for hearsay<sup>118</sup> or for

104. FED. R. EVID. 1101(b); *see also* COLO. R. EVID. 1101(d), ILL. R. EVID. 1101(b)(3); IOWA R. 5.1101(c)(4); MD. R. REV. 5-101(b)(7); MONT. R. REV. 101(c)(3); WASH. R. EVID. 1101(c); WYO. R. EVID. 1101(b)(3).

105. N.D. R. CRIM. P. 5.1(a).

106. IOWA R. 2.2(4)(b).

107. COLO. R. CRIM. P. 5(a)(4)(II).

108. HAW. R. PENAL P. 5(c)(4).

109. LA. C. E. ART. 1101(B)(4).

110. *See* LAFAVE, *supra* note 14, at § 14.4(b).

111. ARIZ. R. EVID. 1101(b); ARIZ. R. CRIM. P. 5.4.

112. CAL. EVID. C. ANN. § 300; CAL. PENAL C. ANN. §§ 872, 872.5.

113. IDAHO R. EVID. 101(d); IDAHO CRIM. R. 5.1(b).

114. *State v. Cremer*, 234 Kan. 394, 398–99 (1983); KAN. STAT. ANN. § 22-2902 (2010).

115. NEV. REV. STAT. § 47.020 (2017); NEV. REV. STAT. § 171.196(6) (2015).

116. OR. REV. ST. § 135.173 (1981).

117. S.D. CODIFIED LAWS § 23A-4-6 (1979).

118. *See, e.g.*, ARIZ. R. EVID. 1101(b); ARIZ. R. CRIM. P. 5.4; CAL. EVID. C. ANN. §300; CAL. PENAL C. ANN. §§ 872, 872.5; IDAHO R. EVID. 1101(d); IDAHO CRIM. R. 5.1(b); KAN. STAT. ANN. § 22-2902 (2010); OR. REV. ST. § 135.173 (1981).

“evidence obtained by police methods that would lead to suppression at trial.”<sup>119</sup> But, there are also exceptions for the best evidence rule.<sup>120</sup>

Across the states with hearsay exceptions, there is no blanket hearsay allowance. Arizona is the most permissible within this class, allowing hearsay in the form of reports of experts, documentary evidence absent a proper foundation, and “witness testimony about another person’s declarations if such evidence is cumulative or if there are reasonable grounds to believe that the declarant will be personally available for trial.”<sup>121</sup> Oregon follows behind by allowing hearsay where “it would impose an unreasonable hardship” to obtain the “primary source of the evidence,” so long as the witness offers sufficient information as to the primary source’s reliability and how, if possible, the information was obtained from them.<sup>122</sup> Other variations of hearsay exceptions allow hearsay only as to law enforcement officer testimony<sup>123</sup> or where the alleged victim of a felony is under the age of thirteen.<sup>124</sup> In Nevada, the hearsay exception applies to charges where the alleged victim of a sexual offense is under the age of sixteen, the alleged victim of child abuse is under the age of sixteen, or the alleged victim is a victim of an act of domestic violence which resulted in “substantial bodily harm.”<sup>125</sup>

In between the moderate and the strict approaches is Florida. Nowhere do the court rules specify how stringent or how liberal the Rules of Evidence shall be applied in this state, but there is clear case law holding that probable cause based solely on hearsay evidence is impermissible.<sup>126</sup> The reasonable inference is that there is some discretion given to the court to temper the rules, but there are no clear exceptions.

The final and most restrictive group requires evidence presented at preliminary hearings to be legally admissible with only the most narrow hearsay exception for certain types of forensic or administrative reports.<sup>127</sup> In New Mexico, the codified Rules of Evidence do not list preliminary hearings as an exception to these rules, thus necessitating their use at this stage.<sup>128</sup> The one carve out in New Mexico only allows for admission of laboratory analyses of controlled substances or human specimens during a preliminary hearing at the Metropolitan Court or magistrate courts.<sup>129</sup> This exception does not appear in the Rules of Criminal Procedure for the District Courts.<sup>130</sup> Similarly, in Michigan, the court may include

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119. LAFAVE, *supra* note 14, at § 14.4(b); *see e.g.*, IDAHO R. EVID. 1101(d); IDAHO CRIM. R. 5.1(b); S.D. CODIFIED LAWS § 23A-4-6 (1979).

120. CAL. PENAL C. ANN. § 872.5.

121. ARIZ. R. CRIM. P. 5.4(c)(1)-(c)(3).

122. OR. REV. ST. § 135.173 (1981).

123. IDAHO CRIM. R. 5.1(b).

124. KAN. STAT. ANN. § 22-2902(3) (2010).

125. NEV. REV. STAT. § 171.196(6) (2015).

126. FLA. R. CRIM. P. 3.133(b)(5); *Perry v. Bradshaw*, 43 So.3d 180, 181 (Fla. 4th Dist. Ct. App. 2010) (reaffirming *Evans v. Seagraves*, 922 So.2d 318, 321-22 (Fla. 1st Dist. Ct. App. 2006) which found that “from the evidence” means that hearsay alone cannot be the basis of a finding of probable cause).

127. *See People v. Woodland Oil Co.*, 153 Mich.App. 799, 804, 396 N.W.3d 541, 543 (1986) (holding that probable cause inquiries require the magistrate to consider only legally admissible evidence).

128. N.M. R. ANN. 11-1101 (2012).

129. N.M. R. ANN. 6-608; N.M. R. ANN. 7-608.

130. N.M. R. ANN. 5-302.

evidence which would be deemed inadmissible at trial absent a custodian of records or the author of a report in order to lay a proper foundation for the chain of custody.<sup>131</sup> Finally, while Rhode Island makes a carve out in their Rules of Evidence for grand jury proceedings there is no carve out for preliminary hearings, thus requiring the Rules of Evidence to be applied the their full extent at this stage.<sup>132</sup>

### **B. Practical Benefits of Preliminary Hearings Apply to Both Prosecution and Defense**

New Mexico, although clearly in the minority, has the better approach to preliminary hearings because it raises the bar for cases that proceed beyond this stage. The approach of the more lax states conceivably allows cases to move through preliminary hearings much like they do through the grand juries—more quickly and with less scrutiny given to the strength of the evidence at this stage. Still, there are important benefits—including early screening of cases, discovery, preservation of testimony, and preparation for future impeachment of witnesses—that come out of preliminary hearings. These benefits are useful to both the defense and the prosecution in a criminal case. Specifically, the states with hearsay exceptions are able to reduce the number of witnesses that they need to call at a preliminary hearing in order to establish probable cause.<sup>133</sup> And, there are instances in which a witness is needed to establish personal knowledge of certain evidence, such as testimony of a child victim rather than the investigating officer,<sup>134</sup> in order to establish the necessary elements of a crime to meet the probable cause standard. These are cases where the high bar that Rules of Evidence require a preliminary hearing to meet will make a grand jury a much simpler way to indict felony cases. Nonetheless, the New Mexico’s approach to preliminary hearings affords these important benefits and best balances constitutional rights.

Before looking at each of these benefits, one more note about the benefit of a stricter approach to preliminary hearings with respect to a defendant’s constitutional rights is necessary. Constitutional rights can be thought of as the floor of protection afforded to defendants in criminal proceedings. The right to confrontation, for example, is continually found to be one of the most foundational protections against the “principal evil” of “*ex parte* examinations as evidence against the accused.”<sup>135</sup> The ultimate goal of the right to confrontation is to “safeguard the rights of the people” by avoiding untrustworthy and malicious prosecutions based on hearsay.<sup>136</sup> However, according to both federal precedent and New Mexico state

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131. MICH. COMP. LAWS § 766.11b (2014) (allowing reports of field testing of controlled substances, certified copies of court or governmental agency orders, reports kept in the ordinary course of law enforcement business, reports by law enforcement or other public agents concerned with forensic science, laboratory results, medical results, arson investigations, and autopsy results; does not allow police investigative reports in this exception); MICH. R. EVID. 1101(b)(8) (allowing hearsay to prove “ownership, authority to use, value, possession, and entry” of property).

132. See R.I. REV. R. 101; R.I. DIST. R. CRIM. P. 5.

133. See *supra* Part III.A.1; Letter from Torrez, *supra* note 81; Letter from Keller, *supra* note 96.

134. See *infra* Part III.C.2.

135. Crawford v. Washington, 541 U.S. 36, 50 (2004).

136. *Id.*



precedent, confrontation is a right that does not attach until trial.<sup>137</sup> This distinction (of confrontation as a trial right) is consistent with the fact that probable cause is lower standard of proof. At a preliminary hearing, determining guilt is not an issue.<sup>138</sup> The sole question, rather, is one of probable cause to prosecute.<sup>139</sup> Consequently, the entire floor of rights afforded to defendants at trial do not necessarily need to apply at this stage, a fact which should mollify the concerns that preliminary hearings function exactly the same as trials do, a common concern of opponents to the application of the Rules of Evidence at preliminary hearings.<sup>140</sup>

However, applying the Rules of Evidence at this stage requires that preliminary hearings conform, in some way, to the higher standards that will be required at trial. In this sense, just as the constitution acts as the foundation for protection of certain rights, the Rules of Evidence may act as the means of implementing that protection. How New Mexico conducts preliminary hearings—with very few cut-outs to the Rules of Evidence—necessarily requires that the foundation of a trial have a higher level of reliability than states where there is no check on the evidence introduced at a preliminary hearing. Thus, the benefits discussed below have been put through a more stringent test prior to a case getting to a trial on the merits.

### 1. *Preliminary Hearings Function as Early Screening Devices*

Screening is the primary purpose of this hearing,<sup>141</sup> and in going through this process the judge, as fact finder, acts as a check on the power of the prosecution to bring charges against an individual suspected of committing a crime. In performing this screening function, the judge is not required to view the evidence presented through the lens of reasonable doubt, but is required to view the evidence with an eye toward determining whether there is probable cause to prosecute the defendant, asking whether there is a reasonable probability that a crime was committed by this individual.<sup>142</sup> Limiting the inquiry at this stage to probable cause allows the judge to perform an independent evaluation of the viability of each case.<sup>143</sup>

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137. See *State v. Lopez*, 2013-NMSC-047, ¶ 21, 314 P.3d 236, 241.

138. See *State v. Masters*, 1982-NMCA-166, ¶ 5, 99 N.M. 58, 653 P.2d 889, 890 (“The preliminary hearing is not a trial on the merits with a view of determining defendant’s guilt or innocence . . . Only a reasonable probability that a crim was committed by the accused need be shown.”); *Lopez*, 2013-NMSC-047, ¶ 9, 314 P.3d at 239 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987)).

139. See *Masters*, 1982-NMCA-166, ¶ 5, 653 P.2d at 890 (“The preliminary hearing is not a trial on the merits with a view of determining defendant’s guilt or innocence. . . . Only a reasonable probability that a crime was committed by the accused need be shown.”); *Lopez*, 2013-NMSC-047, ¶ 9, 314 P.3d at 239.

140. Compare *Lopez*, 2013-NMSC-047, ¶ 21, 314 P.3d at 241 (holding that the confrontation right does not apply at preliminary hearings) with *Neller v. State*, 1968-NMSC-130, ¶ 15, 79 N.M. 528, 445 P.2d at 953 (holding that preliminary hearings are a critical stage of criminal proceedings and that counsel must be made available at this stage).

141. *State ex. rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶ 6, 124 N.M. 375, 950 P.2d 818, 820.

142. See *Masters*, 1982-NMCA-166, ¶ 5, 653 P.2d at 890 (“The preliminary hearing is not a trial on the merits with a view of determining defendant’s guilt or innocence . . . Only a reasonable probability that a crim was committed by the accused need be shown.”).

143. See *Vescovi-Dial*, 1997-NMCA-126, ¶ 5, 950 P.2d 818, 820; see also *Madrid v. State*, 910 P.2d 1340, 1343 (Wyo. 1996) (“[T]he true constitutional purpose of the preliminary hearing . . . is to obtain a

The acknowledgement of the need to screen all felony charges that may progress through the court system is not unique to the preliminary hearing: it is the same rationale that supports grand jury proceedings.<sup>144</sup> The key difference, however, is that the preliminary hearing puts that responsibility in the hands of an impartial arbiter rather than in the same hands that bring the charges in the first place.

Both proponents and critics of preliminary hearings support of their arguments regarding the screening value of preliminary hearings with data. This data is usually in the form of how many cases, in a certain time frame, that are brought via preliminary hearing reach the question of probable cause; how many of those are bound over; and how many are dismissed.<sup>145</sup> But, this type of data is not the most reliable source<sup>146</sup> to determine whether or not preliminary hearings are advantageous to criminal proceedings as a whole. This is because such a broad focus on the rate of cases bound over versus rate of cases dismissed fails to take into account numerous issues, like scheduling, witness availability, and a defendant's choice to waive the hearing. Each of these issues greatly affects the outcome of a preliminary hearing.<sup>147</sup>

The variety of factors that influence how a case will proceed are simply too complex to place in a few broad categories. Additionally, the sole focus on high level data fails to follow up with the cases that proceed beyond a bind over order, which moves a case forward in district court. If the tactic for reducing crime is to swiftly hold alleged perpetrators accountable, then perhaps a better number to focus on is the number of convictions versus dismissals and/or acquittals that occur after a felony case is bound over to district court.<sup>148</sup> Obtaining numerous bind over orders offers an appearance of successfully reducing crime, but if very few of these bound over cases result in a conviction, then that success rate is duplicitous. The concern lingers: how successful is either method for bringing felony charges if the cases that proceed to trial are too weak to sustain a conviction?

There are similarly many variables affecting the result of a grand jury<sup>149</sup>—a grand jury indictment is not an automatic voucher of the strength of that case. But, the independent review of a case by the judge at a preliminary hearing lends to the trustworthiness of this process as a screening technique. Even more, the Bernalillo County Metropolitan Court is a court of limited jurisdiction.<sup>150</sup> So, once a felony case goes through preliminary hearing at this court, the judges no longer have jurisdiction to hear it.<sup>151</sup> Untangling a judge from a case after this stage further bolsters the

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determination by a neutral, detached fact finder that there is probable cause to believe a crime has been committed and that the defendant committed it.”).

144. See *supra* Part II.A and II.B.

145. See, e.g., Letter from Nash, *supra* note 76; Letter from Torrez, *supra* note 81; Letter from Whitaker, *supra* note 96.

146. Compare Letter from Torrez, *supra* note 81 (stating that fifty percent of preliminary hearings fail due to witness availability) with Letter from Whitaker, *supra* note 96 (illustrating through pie chart that forty-three percent of the fifty percent failure rate was due to *nolle prosequi* by the prosecutor).

147. See generally LAFAVE, *supra* note 14, at § 14.

148. See Letter from Nash, *supra* note 76.

149. See *supra*, Part II.A.

150. See N.M. R. ANN. 7-103(A).

151. N.M. R. ANN. 7-202(E); N.M. Sup. Ct. Ord. No. 20-8300-021 (Nov. 20, 2020); N.M. R. ANN. 7-409. See also *State v. Martinez*, 1978-NMCA-095, ¶ 5, 92 N.M. 291, 587 P.2d 438, 439.

independence of this type of review. The disposition of a preliminary hearing will not positively or adversely affect a judge's caseload.

Three functions—the opportunity for discovery, preservation of testimony, and preparation for future impeachment—which are inbuilt in preliminary hearings, may also be collateral benefits of this process.<sup>152</sup> Importantly, these practical benefits can be useful to both the prosecution and defense in a later criminal trial. But, they cannot be invoked in replacement of the primary purpose of the preliminary hearing, which is to determine whether or not there is probable cause that a criminal offense has been committed.<sup>153</sup>

## 2. *Discovery*

Discovery, “an inevitable by-product” of a preliminary hearing, is more overtly beneficial to the defendant.<sup>154</sup> The defendant has the benefit of learning more about the strength of the charges against them, key witnesses and the credibility of those witnesses, and weaknesses in their own defense.<sup>155</sup>

The discovery benefits to the prosecution, however, are twofold. First, there will be the same ability for the prosecution to obtain discovery in a preliminary hearing in which the defendant also puts forth evidence. If the defendant examines their own witnesses or if the defendant themselves testifies, then prosecution will be clued into weaknesses or aspects of this case that were previously unknown to them. This is an opportunity to gain discovery earlier than usual. Second, through the presentation of its own evidence in this adversary format, the prosecution has the opportunity to do some reverse discovery. By putting witnesses on the stand and subjecting them to cross-examination, the prosecution will be able to test its witness's credibility prior to putting them in front of a jury. If the witness is unbearably problematic, then the need to offer a better plea deal may become apparent.<sup>156</sup> Similarly, a witness may be deemed credible, but the prosecution may find non-fatal holes in their case that must be addressed prior to trial. These discovery benefits become all the more clear and useful through the rigor of cross-examination. For example, the rigor of cross-examination is not readily available this early in a case except at a preliminary hearing and it not available at any point during a grand jury.

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152. *State ex. rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶ 6, 124 N.M. 375, 950 P.2d 818, 820.

153. *See id.* ¶¶ 1, 7, 950 P.2d at 818–19, 820 (denying State's petition for a writ of mandamus to compel a preliminary hearing in order to preserve certain witness's testimony despite the defendant's waiver).

154. *Madrid v. State*, 910 P.2d 1340, 1343 (Wyo. 1996).

155. *See State v. Burk*, 1971-NMCA-018, ¶ 7, 82 N.M. 466, 483 P.2d 940, 941–42.

156. The intricacies of plea bargaining at these early stages is out of the scope of this Comment, but for an analysis of the potentially severe impact of a guilty plea. *See generally* Colleen Cullen, *Mo' Money, Fewer Problems: Examining the Effects of Inadequate Funding on Client Outcomes*, 30 GEO. J. LEGAL ETHICS 675 (2017).

### 3. Preserving Testimony

Key to the benefit of preserving testimony for later use,<sup>157</sup> is that “Confrontation Clause concerns erode” with the attachment of cross-examination.<sup>158</sup> Thus, where former testimony was obtained at a preliminary hearing, the issue at a later trial over admitting that testimony will not be concerned with whether the opponent actually cross-examined the witness, but rather whether they had a similar motive and opportunity to do so.<sup>159</sup> Chances are that the opponent had a similar motive and opportunity to cross-examine the witness because of the linear nature between a preliminary hearing and a trial on the merits.

In fact, New Mexico uses a *per se* rule when confronted with this issue—”absent extraordinary circumstances” the motive to cross-examine a witness at a preliminary hearing is similar to the motive to cross-examine that witness at trial.<sup>160</sup> In *State v. Gonzales*, the New Mexico Supreme Court held that despite the relevant issue changing between the preliminary hearing and trial (from a theory of self-defense to a theory of identification), there was still similar motive to cross-examine the then unavailable witness.<sup>161</sup> This decision made at trial rests upon the key fact that the defendant was able to cross-examine the witness, but elected not to do so.<sup>162</sup> This case clearly illustrates this benefit as tilted toward the prosecution and, in fact, the majority of New Mexico case law on this issue relates to the unavailability of a prosecution witness.<sup>163</sup>

Witness cooperation is a major factor in the ability of the prosecution to successfully move forward with felony charges.<sup>164</sup> But, the ability to utilize former testimony offers one solution to this larger chronic issue. The preliminary hearing, however, can function as a one method of combatting this issue; preserving testimony at a preliminary hearing can stabilize a case early on so that loss of a witness later on does not automatically result in a dismissal. This type of early preservation of evidence in felony cases will, in turn, add to the strength of cases as

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157. Admitting former testimony in New Mexico as substantive evidence is done under N.M. R. ANN. 11-804(A) and N.M. R. ANN. 11-804(B)(1). The process has been analyzed countless times and is beyond the scope of this Comment. For a clear and digestible description of the process, see Pamela Grace Candelaria, *Criminal Procedure—Curbing Prosecutorial Power—Right to Waive Preliminary Hearings Remains Within Discretion of Defendant—State Ex Rel. Whitehead v. Vescovi-Dial*, 29 N.M. L. REV. 445, 451–53 (1999). For a more general discussion of preservation of testimony at preliminary hearings with regards to the Confrontation Clause, see LAFAYE, *supra* note 14, at § 14.1(d).

158. Candelaria, *supra* note 157, at 452.

159. *State v. Ricks*, 122 Idaho 856, 861–62 (1992) (“[D]etermination of the adequacy of opportunity to conduct meaningful cross-hearing focuses primarily not on the practical realities facing counsel at the preliminary hearing . . . but rather upon the scope and nature of the opportunity for cross-hearing permitted by the court. Accordingly, a decision by counsel not to cross-examine at a prior hearing or to do so only to a limited extent, no matter how much practical sense the decision makes, does not appear to affect adequacy of opportunity.”).

160. *State v. Gonzales*, 1992-NMSC-003, ¶ 16, 113 N.M. 221, 824 P.2d 1023, 1026, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

161. *Id.* ¶ 20, 824 P.2d at 1029.

162. *Id.*

163. See, e.g., *State v. Lopez*, 2011-NMSC-035, 150 N.M. 179, 258 P.3d 458.

164. LFC Report, *supra* note 85, at 44–45.

they progress through trial. Such strengthening should also assist in reducing the rate of dismissal and acquittal for strong cases.

Witness cooperation at the preliminary hearing stage can also be a problem and failure to address this issue will undermine any efforts that work toward better use of the expanded preliminary hearing time. Two consequences of Bernalillo County Metropolitan Court conducting preliminary hearings for over two years are that (1) the scheduling nuances are constantly being addressed, re-evaluated, and re-worked and (2) because there are two judges who routinely preside over preliminary hearings, their practice has become more standardized.<sup>165</sup> Additionally, as of November 23, 2020, in all cases pending at the Bernalillo County Metropolitan Court where an expedited motion for pretrial detention has been filed and the court finds probable cause for detaining the defendant, the jurisdiction of the Bernalillo County Metropolitan Court will terminate and the Second Judicial District Court “shall acquire exclusive jurisdiction over the case.”<sup>166</sup> Thus, balancing the spread of cases between the Bernalillo County Metropolitan Court and the Second Judicial District Court presumably will allow for better scheduling and docket management practices, which will positively affect the ability of the Second Judicial District Attorney to communicate and create stronger witness cooperation at this stage.

#### 4. *Preparing for Future Impeachment*

Another “incidental by-product” of preliminary hearings is the ability to use testimony preserved at this stage to impeach in a future trial.<sup>167</sup> As it relates to the defendant, this benefit is limited to the extent that they have the appropriate foresight necessary to cross-examine on issues that will later become critical for impeachment.<sup>168</sup> On the other hand, the fact that preliminary hearings must happen so quickly lends to the likelihood that a witness has not been prepared as thoroughly as they would be for trial.<sup>169</sup> The potential that there will be more material with which they can be impeached is higher at this point.<sup>170</sup> That same forward thinking is necessary in the event that the prosecution cross-examines the defendant or a defense witness at this stage. More commonly, however, the limiting factor for the prosecution is just that—there are typically fewer opportunities for the state to cross-examine at a preliminary hearing.<sup>171</sup> Where the prosecution has preserved good testimony by a witness who is struggling on direct examination at trial, the testimony

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165. N.M. R. ANN. 7-202; N.M. Sup. Ct. Ord. No. 17-8300-016 (Nov. 1, 2017).

166. N.M. Sup. Ct. Ord. No. 20-8300-021 (Nov. 20, 2020); N.M. R. ANN. 5-301; N.M. R. ANN. 5-409; N.M. R. ANN. 7-409; N.M. R. ANN. 7-501.

167. *State v. Woods*, 723 S.W.2d 488, 505 (Mo. Ct. App. 1986) (holding that trial court did not err in rejecting admission of preliminary hearing testimony into evidence to then impeach the witness because on cross-hearing there was no specific statement or equivocation about a prior statement made by the witness).

168. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (“[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-hearing of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at trial.”).

169. *Candelaria*, *supra* note 157, at 451–52.

170. *Id.*

171. *See id.*

from the preliminary hearing may be used—and may be very helpful—to refresh that witnesses recollection.

The passage of time between the three main events at issue—the incident which spurred criminal charges, the preliminary hearing, and the trial—must not be underestimated either. Very commonly, a witness’s memory of the event will “soften” over time and there is a greater risk that subsequent testimony will have some inconsistencies or that a witness will be unable to recall the matter entirely.<sup>172</sup> But, where the testimony has been preserved at a preliminary hearing, it may be used later to “soft” impeach one’s own witness<sup>173</sup> or to refresh their recollection.<sup>174</sup> Further, if the witness tries to wiggle out of their prior statement and maintain current inconsistencies, it may be admitted as substantive evidence.<sup>175</sup>

As seen, these practical benefits of preliminary hearings are applicable to both the prosecution and the defense in a criminal case. The importance of screening cases before they get to trial allows both parties to evaluate the strength of their side of the case and to determine how to proceed, whether by plea or trial. If a case does proceed to trial, then the discovery that was conducted during the preliminary hearing will help the parties prepare for trial, the preserved testimony will available if a witness becomes unavailable, and that testimony can help both parties where the need arises for future impeachment.

### C. Preliminary Hearings Balance Policy Interests

#### 1. Punishing Crime in an Open and Transparent Forum

The Second Judicial District Attorney has a policy interest to look at the crime rates in Bernalillo County from a solutions-oriented mindset. Where there are clear trends with respect these crime rates, it is the incumbent on a prosecutor—as an elected official—to look for and prioritize lasting resolutions. The crime spike in Albuquerque between 2010 and 2017 is an example of a clear trend and it was a focal point when District Attorney Raul Torrez took office.<sup>176</sup> The Second Judicial District Attorney’s Office continually acknowledges that one of its top priorities in addressing existing crime and deterring future crime centers on “swiftness of response and certainty of punishment.”<sup>177</sup>

But, a pitfall of focusing on speedy prosecutions is the risk that such haste will result is sloppy convictions. This is no small matter. Preliminary hearings are only available for defendants charged with felony crimes in New Mexico.<sup>178</sup> Felonies

172. LAFAVE, *supra* note 14, at §§ 14.1(c), 14.1(c) n.42.

173. N.M. R. ANN. 11-607 (“Any party, including the party that called the witness, may attack the witness’s credibility.”).

174. N.M. R. ANN. 11-612; *see also* State v. Bazan, 1977-NMCA-011, ¶ 17, 90 N.M. 209, 561 P.2d 482, 485 (quoting 3 Weinstein’s Evidence, para 612[01] (1975) (“Anything may be used to revive a memory—’a song, a scent, a photograph, all allusion, even a past statement know to be false’ . . . ‘The only question is whether in fact it is genuinely calculated to revive the witness’ recollection.”)).

175. N.M. R. ANN. 11-613(B). *See also* State v. Astorga, 2015-NMSC-007, ¶¶ 33–35, 343 P.3d 1245, 1256–57 (describing the distinction between and how to use a prior statement just for impeachment and using a prior statement “as substantive proof of the matter asserted in the prior statement.”).

176. *See, e.g.*, LFC Report, *supra* note 85, at 73; Letter from Torrez, *supra* note 85.

177. LFC Report, *supra* note 85, at 73; *see also* Letter from Torrez, *supra* note 85.

178. N.M. CONST. Art. II, § 12.

carry a penalty of no less than one year of incarceration.<sup>179</sup> Criminal convictions bring with them a host of what scholars term “collateral consequences,” in addition to direct consequences like incarceration.<sup>180</sup> These consequences include lost wages, a permanent bar from certain types of employment, damaging effects to interpersonal and familial relationships, denial of housing, denial of welfare assistance, and being subjected to additional fees flowing from post-incarceration supervision.<sup>181</sup> So, the effect of a felony conviction—beyond the potential to deprive an individual of their liberty for a significant period of time—dramatically alters the course of an individual’s life. This is a tremendous power, not to be underestimated. So, it is imperative that a conviction occurs only in cases where it is warranted.

Thus, the ability of preliminary hearings to screen cases so early in their life cycle can help move more viable cases through the system and remove cases that are inappropriate with which to proceed. More importantly, because preliminary hearings in New Mexico apply the Rules of Evidence, the screening of cases is much more stringent and, ideally, illuminating as to the potential for conviction, the possibility of a plea, or the need to dismiss. This is different than in a grand jury where the strength of the evidence has not been tested anywhere as intensively. This form of early screening offers one way to conserve already scarce judicial resources.<sup>182</sup> But, where such charges and a subsequent conviction are in the interests of justice, it is vital that the prosecution does this in the most process-focused and constitutional manner possible in order to reduce the likelihood of reversal on appeal.

Finally, unlike grand jury proceedings, preliminary hearings are held in a public forum.<sup>183</sup> One of the longest running critiques of grand jury proceedings centers on their practice of secrecy.<sup>184</sup> Improving public confidence in prosecutorial power goes hand in hand with the ultimate goal of a large-scale reduction in crime.<sup>185</sup> The very nature of preliminary hearings offers the opportunity for the Second Judicial District Attorney to aide in demystifying the criminal process and, over time, improving the confidence of the general public in the ability of the judiciary to represent the interests of the people.

## 2. *Instances Where Preliminary Hearings May Not Be Viable*

One caveat to the advantage of applying the Rules of Evidence at preliminary hearings, however, centers on two types of criminal offenses that are particularly challenging to vet through the preliminary hearing process. And, their lack of compatibility with this proceeding is usually not a reflection of the strength of the charges, but on the complexity of the cases and the individuals involved. First,

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179. N.M. STAT. ANN. § 30-1-6 (1963).

180. See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625 (2018).

181. See Hoskins, *supra* note 180, at 626–28.

182. See generally LFC Report, *supra* note 85.

183. See *supra* Part II.A and Part II.B.

184. See generally Shannon, *supra* note 17; Kuckes, *supra* note 21.

185. See Richard Pugh & Nick Hart, *Judges Right to Curb Grand Juries*, ALBUQUERQUE JOURNAL, (June 8, 2019), <https://www.abqjournal.com/1325703/judges-right-to-curb-grand-juries.htm>; see generally LFC Report, *supra* note 85.

white collar crimes tend to require so much foundation be laid in order to admit any documents into evidence that going through a preliminary hearing would require just as much preparation and witness participation as an actual trial.<sup>186</sup> In this sense, the common characterization of preliminary hearings as “mini-trials,” is rather accurate.<sup>187</sup>

Second, sex crimes and domestic violence cases—especially those where the alleged victim is a minor—that go through a preliminary hearing would likely require the alleged victim to testify multiple times. This can be traumatic<sup>188</sup> and could have an adverse effect on later proceedings. New Mexico does have legislation to protect victims,<sup>189</sup> but that legislation cannot protect them from a vigorous cross-exam in acknowledgement of the defendant’s Confrontation right.

Two solutions exist in New Mexico to address these problems. First, grand juries are still a viable option and the Second Judicial District Attorney has the discretion to funnel these cases through that route.<sup>190</sup> Second, New Mexico could adopt legislation to further protect young victims. Nevada has carved out an exception for just such victims.<sup>191</sup> The Nevada legislature created a hearsay exception which applies to charges where the alleged victim of a sexual offense is under the age of sixteen, the alleged victim of child abuse is under the age of sixteen, or an act of domestic violence which resulted in “substantial bodily harm to the alleged victim.”<sup>192</sup> This is a solution that New Mexico should take seriously as it would maintain the integrity of preliminary hearings, but also acknowledge the policy interests in victim’s rights.

#### IV. CONCLUSION

The key differences between grand juries and preliminary hearings are the application, or lack thereof, of the Rules of Evidence and whether these proceedings are held in public or in private. Further, New Mexico has a unique and rigorous approach to preliminary hearings, as evidenced in the preceding survey, which offers an array of practical benefits to both the prosecution and defense. These benefits include early screening of cases, the availability of discovery, preservation of testimony for future use, and preparation for future impeachment. In addition to these practical benefits, preliminary hearings balance the policy interests of the prosecution with the constitutional rights of defendants. The uniqueness, strengths, and nuances in how the state of New Mexico conducts preliminary hearings will continue to inform the Second Judicial District’s discussion of the best manner to initiate felony cases. The grand jury, on the other hand, is noted for its benefit in indicting certain crimes that simply may not be practical to indict via a preliminary

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186. See generally 5 WHITE COLLAR CRIME § 38 (2d. ed 2020).

187. Letter from Torrez, *supra* note 85.

188. See Paul. G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH L. REV. 1373, 1434 (1994).

189. See N.M. STAT. ANN. 31-26-4 (1999).

190. See *supra*, Part II.C (discussing the Second Judicial District Attorney’s Office’s “Bridge” process).

191. NEV. REV. STAT. § 171.196(6) (2015).

192. *Id.*



hearing. This tension is likely to remain a prevalent topic as the Second Judicial District continues to pursue valuable and overdue reform efforts, working toward the ultimate goal of reducing crime rates in Bernalillo County.

Concern and discussion about the crime rates in New Mexico are nothing new. But macro-level problems often require solutions that span subject-matter, that are creative, and that are different than historical practice. A greater reliance on preliminary hearings will allow grand jury time to be reserved for crimes that are simply not viable at a preliminary hearing—such as white collar crimes, or sex crimes and domestic violence cases where the alleged victim is a child. Preliminary hearings, though, offer the opportunity for the Second Judicial District Attorney's Office to instill a greater public confidence in the criminal process, to balance the policy interests of the state in drastically combatting crime while acknowledging the rights of criminal defendants, and to productively screen and support the viable cases that move through the criminal justice system. New Mexico may be an outlier in how it conducts preliminary hearings, but this practice is just what is needed to create better outcomes in the criminal justice system.