5-208. Issuance of warrant for arrest and summons.

A. **Time.** On the docketing of any criminal action, the court may issue a summons or arrest warrant.

B. **Preference for summons.** The court shall issue a summons, unless in its discretion, the court finds that the interests of justice would be better served by the issuance of a warrant and if the requirements of Paragraph C of this rule are met.

C. **Basis for warrant.** The court may issue a warrant for arrest on an indictment or a sworn written statement of the facts showing probable cause for issuance of the warrant. The showing of probable cause shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, but the additional evidence shall be reduced to writing and supported by oath or affirmation. The court may also permit a request for an arrest warrant by any method authorized by Rule 5-211(F) NMRA for search warrants and may issue an arrest warrant remotely if the requirements of Rule 5-211(F)[~~NMRA~~] and this rule are met.

D. **Form.**

(1) **Warrant.** The warrant shall be signed by the court and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged and shall command that the defendant be arrested and brought before the court. The warrant may set [~~conditions of release~~] bond for the defendant only for:

(a) penalty assessment misdemeanor charges; or

(b) traffic code misdemeanor charges, except for:

(i) driving under the influence of intoxicating liquor or drugs, contrary to NMSA 1978, Section 66-8-102[~~NMSA 1978~~]; and

(ii) operating a motorboat while under the influence of intoxicating liquor or drugs, contrary to NMSA 1978, Section 66-13-3[~~NMSA 1978~~].

(2) **Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the Supreme Court.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024; as amended by Supreme Court Order No. S-1-RCR-2023-00007, effective for all cases pending or filed on or after December 31, 2026.]

Committee commentary. — When a criminal action is docketed in a magistrate or metropolitan court by the filing of a complaint, either Rule 6-204 NMRA or Rule 7-204 NMRA, which are substantially identical to this rule, will govern the procedure.

Paragraph C of this rule requires a written showing of probable cause before an arrest warrant may be issued. The constitutional basis for this requirement is Article II, Section 10 of the New Mexico Constitution, although that provision does not expressly mention arrest warrants. *Cf. State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

Paragraph C of this rule codified case law allowing the issuance of a warrant on probable cause based on hearsay evidence. This provision was taken from Rule 4(b) of the Federal Rules of Criminal Procedure. *See* 48 F.R.D. 553, 55860 (1970); 62 F.R.D. 27172 (1974). Neither the proposed federal rule nor this rule attempts to establish what constitutes probable cause based on hearsay as that determination can only be made on a case by case basis, taking into account the unlimited variation and sources of information and the varying reliability of the information received by the affiant from others. 62 F.R.D. 271, 27374 (1974). The fact that the information may involve double hearsay does not mean that the affidavit fails to provide probable cause. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

Paragraph C was amended in 2012 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 5 211(F) and the related committee commentary for more information.

Paragraph D was amended in 2024 to prevent release of defendants arrested on warrants before the defendant's first appearance or other hearing, with exceptions for penalty assessment misdemeanor charges and certain traffic code misdemeanor charges.

In 2019, this rule was amended to incorporate language from rules governing the courts of limited jurisdiction, which express a preference for the use of a summons when practicable. *See* Rule 6-204 NMRA; Rule 7-204 NMRA; Rule 8-203 NMRA.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]