

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
FOR THE DISTRICT COURTS
PROPOSAL 2019-009**

March 4, 2019

The Rules of Criminal Procedure Committee has recommended amendments to Rule 5-208 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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

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

~~B. **Form for 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. It shall command that the defendant be arrested and brought before the court.~~

~~C. **Form for 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 court administrator.~~

~~D. **Basis for warrant.** The court may issue a warrant for arrest upon an indictment or a sworn written statement of the facts showing probable cause for issuance of a warrant. The showing of probable cause shall be based upon 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 he may produce, provided that such additional evidence shall be reduced~~

~~to writing and supported by oath or affirmation. The court also may permit a request for an arrest warrant by any method authorized by Paragraph F of Rule 5-211 NMRA for search warrants and may issue an arrest warrant remotely provided that the requirements of Paragraph F of Rule 5-211 NMRA and this rule are met.]~~

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 upon 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 upon 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, provided that such 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 provided that 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.

(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. _____, effective _____.]

Committee Commentary. — When a criminal action is docketed in [the] 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 A of Rule 6-204 adds to Paragraph A of this rule by indicating a preference for the use of summons when practicable. See also, Section 31-1-6 NMSA 1978.]

[Paragraphs B and C of this rule were derived from Rule 4(c) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 27172 (1974).]

Paragraph [D] 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 [(1967). See also, commentary to Rule 5-209 NMRA.]

Paragraph [D] 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); ~~and~~ 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 [~~Ct. App. 1975~~].

Paragraph [D] 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.

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. _____, effective

_____.]

Law Offices of
Michael L. Stout

910 Lake Tahoe Court
Las Cruces, NM 88007
(575) 524-1471
(575) 647-0408 (Fax)

New Mexico Board Recognized
Trial Specialist in Criminal Law

SUPREME COURT OF NEW MEXICO
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April 3, 2019

APR - 3 2019

Re: Proposed Rule 5-208 (Proposal 2019-009)



Dear Mr. Moya,

In one respect the proposed amendment to 5-208 is quite welcome because a preference for a summons has been a long time coming. On the other hand, the amendment does not go far enough to complete its aspiration because of its lack of standards.

Arrest warrants are greatly over-used, so the "preference for summons" is good to incorporate from lesser courts. The problem is that the exception swallows the preference while giving no standards for invoking the exception.

That "the court shall issue a summons" is clear and promising, but the clarity evaporates in the next phrase, "**unless in its discretion, the court finds that the interests of justice would be better served by the issuance of a warrant . . .**". The vagueness of this language makes the preference almost meaningless and certainly unenforceable. It also is ripe for abuse that results in unnecessary incarceration of a person charged. This is compounded by the arrestee having to wait to see a magistrate to be released per New Mexico's new rules.

The "preference" should be changed to a "presumption", certainly a clearer legal standard. Regardless of that initial term, however, the exception to it must have a standard other than "discretion" and "interests of justice".

I suggest that the standard for issuance of a warrant be made similar to that for release conditions i.e. flight risk or danger. If the arrestee is alleged to be a flight risk or danger

a warrant could appropriately issue. If the person is not a flight risk or danger, there is no reason a summons would not be effective to bring the defendant before the court.

Note that while the commentary states that the proposal incorporates magistrate Rule 6-204, it does not include that court's requirement that there be "good cause" shown to issue a warrant. Thus, the proposed district court rule is actually weaker than the magistrate rule that requires "good cause".

I applaud the committee for suggesting that a summons be preferred. However, I urge the Court to:

1. presume (rather than prefer) the use of a summons in many more cases,
2. incorporate clear standards for invoking the exception to a summons, the warrant (in addition to probable cause),
3. Have the standards for a warrant be similar to the standards for release conditions, i.e. the arrestee poses a flight risk or danger if not arrested.

Thank you for your consideration of my suggestions.

Respectfully,

A handwritten signature in black ink, appearing to read "M. Stout", with a stylized flourish extending to the right.

Michael L. Stout

New Mexico
CRIMINAL DEFENSE LAWYERS ASSOCIATION

PO Box 8324
Santa Fe, NM 87504
505.992.0050
www.nmcdla.org

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Joey D. Moya, Clerk
New Mexico Supreme Court
P O Box 848
Santa Fe, New Mexico 87504-0848

April 3, 2019

Dear Mr. Moya,

As the President of the New Mexico Criminal Defense Lawyers Association (NMCDLA), I am submitting the following comments on proposed rule changes 2019-003, 005, 009, and 011.

Proposal 2019-003 - Mandatory joinder of delinquent acts in delinquency proceedings [Rule 10-212 NMRA]

NMCDLA strongly supports mandatory joinder in delinquency proceedings. Piecemeal prosecutions of juveniles should be clearly prohibited in the rules of procedure.

Proposal 2019-005 - Juror questionnaires [Forms 4-602C and 9-513C NMRA]

Jury selection is the most important part of trial. Parties must be allowed to gather as much information as needed from potential jurors to determine potential bias and to use preemptory strikes.

NMCDLA does not support removing any information gathering from juror questionnaires. NMCDLA is especially concerned with the proposal to eliminate the following questions, which will impede the parties' ability to get relevant information from jurors and slows down the jury selections process:

14) What other jobs have you had?

This information is frequently relevant to jury selection especially when a potential juror's former job involved social work, medical care, therapy, and/or working with drug/alcohol addiction.

19 & 20) Questions about spouses and children.

Information about a person's spouse and children helps parties uncover potential connections the juror might have with a witness or someone else connected to the case.

SUPREME COURT OF NEW MEXICO
FILED

APR - 3 2019



27) Have you or any member of your immediately family been the victim of a crime?

If a close family member has been a victim of a crime, that is information both sides need. Frequently potential jurors with those experiences have bias either against the defendant or the prosecution. This information frequently leads to follow up questions in jury selection that reveals bias.

34) Is there any reason you could not serve as a juror?

This is the only open question on the form that freely calls for jurors to express any bias. It frequently leads to successful cause excusals. It is very important to allow jurors to express bias on a form, rather than requiring they do so in a public jury selection.

Proposal 2019-009 - Preference for summons [Rule 5-208 NMRA]

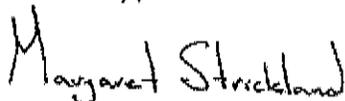
NMCDLA supports a preference for summons when practicable, especially for lower level offenses where there has been no probable cause determination, like there is in felony cases.

Proposal 2019-011 - Life without the possibility of release or parole procedures [New Rule 5-705 NMRA]

NMCDLA supports these procedural protections for defendants facing life without the possibility of parole, the highest penalty one can face in New Mexico Courts.

Please feel free to contact me with any questions.

Sincerely,



Margaret Strickland, President
575-523-4321
margaret@lawfirmnm.com