5-301. Arrest without warrant; probable cause determination; first appearance.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a magistrate, metropolitan, or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier. The court may not extend the time for making a probable cause determination beyond forty-eight (48) hours. Saturdays, Sundays, and legal holidays shall be included in the forty-eight (48) hour computation, notwithstanding Rule 5-104(A) NMRA.

B. **Conduct of determination.** The determination that there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed with sufficient facts to show probable cause for detaining the defendant.

C. **Probable cause determination; conclusion.**

(1) ***No probable cause found.*** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall order the immediate personal recognizance release of the defendant from custody pending trial.

(2) ***Probable cause found.*** If the court finds that there is probable cause that the defendant committed an offense, the court shall make such finding in writing. If the court finds probable cause, the court shall review the conditions of release. If no conditions of release have

been set and the offense is a bailable offense, the court may set conditions of release immediately or within the time required under Rule 5-401 NMRA.

D. **First appearance; explanation of rights.** Upon the first appearance of a defendant before a court in response to summons or warrant or following arrest, the court shall inform the defendant of the following:

(1) the offense charged;

(2) the penalty provided by law for the offense charged;

(3) the right to bail or the possibility of pretrial detention;

(4) the right, if any, to trial by jury;

(5) the right, if any, to the assistance of counsel at every stage of the proceedings;

(6) the right, if any, to representation by an attorney at state expense;

(7) the right to remain silent, and that any statement made by the defendant may be used against the defendant; and

(8) the right, if any, to a preliminary examination.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 13-8300-041, effective for all cases pending and filed on or after December 31, 2013; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020.]

Committee commentary. — Paragraphs A through C of this Rule address probable cause for pretrial detention under the Fourth Amendment to the United States Constitution, rather than

probable cause for prosecution under Article II, Section 14 of the New Mexico Constitution. This rule will govern those cases in which all of the magistrate or metropolitan court judges are unavailable for probable cause determinations or for first appearance proceedings. If a magistrate or metropolitan judge is not available, a district court judge will make probable cause determinations for all persons arrested for felonies or misdemeanors. Since most persons accused of a crime will be taken before a magistrate or metropolitan court for the initial appearance, Rules 6-203 and 7-203 NMRA govern probable cause determinations in the courts of limited jurisdiction.

Under the Fourth Amendment to the United States Constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also* Rule 5-210 NMRA and committee commentary. In *Gerstein*, the Supreme Court explained that when a suspect is arrested and detained without a warrant, there must be a judicial determination of probable cause by a neutral and detached magistrate "promptly after arrest." 420 U.S. at 125. In *Riverside*, the court held:

> Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.
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> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical

> realities. Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.
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> Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process-such as bail hearings and arraignments-may be chosen. Even then, every effort must be made to expedite the combined proceedings.

500 U.S. at 56-58.

There is every reason to believe that the standard set forth in the Riverside decision will be strictly construed by the federal courts. All federal circuit courts except one has held that *Gerstein* requires that the probable cause determination must ordinarily be made within twenty-four hours of arrest. For a discussion of these cases, see the dissenting opinion of Justice Scalia in *Riverside*, 500 U.S. at 63.

A probable cause determination proceeding is not to be confused with a first appearance hearing or a preliminary hearing. The determination of probable cause for detention is not required to be an adversarial proceeding and may be held in the absence of the defendant and of counsel. *See Gerstein*, 420 U.S. at 119-22 (concluding that a probable cause determination does not need to be "accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses").

Prior to amendments in 2013, Paragraph C of this Rule required the court to dismiss the complaint without prejudice if the court found no probable cause. However, as explained supra,

the sole purpose of a probable cause for detention determination is to decide "whether there is probable cause for detaining the arrested person pending further proceedings." *Gerstein*, 420 U.S. at 120 (emphasis added). Accordingly, in 2013, this Rule was amended to clarify that a court should not dismiss the criminal complaint against the defendant merely because the court has found no probable cause for detention.

New Mexico statute also requires that every "accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." NMSA 1978, § 31-1-5(B) (1973). This language was apparently derived from Rule 5(a) of the Federal Rules of Criminal Procedure. *See generally* 1 *Wright, Federal Practice and Procedure*, § 74 (1969).

The committee did not set forth a test for probable cause determinations as this is a matter of developing case law. The test for probable cause determinations under the New Mexico Constitution for arrest and search warrants based upon information from informants is a higher standard than the United States Supreme Court "totality of circumstances" test under the Fourth Amendment of the United States Constitution. *See Massachusetts v. Upton*, 466 U.S. 727, 732 (1984); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). New Mexico has continued to follow the United States Supreme Court decisions of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), out of which was derived a two-pronged test of: (1) revealing the informant's basis of knowledge; and (2) providing facts sufficient enough to establish the reliability or veracity of the informant. *See State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30.

This rule does not attempt to spell out what rights the accused may have in every situation; hence, for example, the rule provides that the accused is told of his right "if any" to a trial by jury.

On the right to a jury trial for criminal contempt, *see Bloom v. Illinois*, 391 U.S. 194 (1968) and *Taylor v. Hayes*, 418 U.S. 488 (1974).

The right to assistance of counsel at every critical stage of the proceeding is fairly clear under New Mexico practice and procedure. *See State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247 ("There is no dispute that a criminal defendant charged with a felony has a constitutional right to be present and to have the assistance of an attorney at all critical stages of a trial. U.S. Const. amends. VI and XIV; N.M. Const. art II, § 14."); *see also* NMSA 1978, § 31-15-10(B) (2001). The only question remaining for the judge handling the first appearance is whether the accused is entitled to representation at state expense. The court must inform a person who is charged with any crime that carries a possible sentence of imprisonment and who appears in court without counsel of the right to confer with an attorney, and, if the person is financially unable to obtain counsel, of the right to be represented by counsel at all stages of the proceedings at public expense. *See* NMSA 1978, § 31-15-12 (1993); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Smith v. Maldonado*, 1985-NMSC-115, ¶ 10, 103 N.M. 570, 711 P.2d 15 (same).

Assuming that the accused is appearing before the court on a felony complaint, the defendant is entitled to be advised of the right to a preliminary hearing to determine probable cause for prosecution. *See* N.M. Const. art. II, § 14.

[As revised, effective November 1, 1991; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending and filed on or after December 31, 2013.]