

1 **5-302. Preliminary examination.**

2 A. **Time.**

3 (1) ***Time limits.*** A preliminary examination shall be scheduled and held within
4 a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no
5 later than sixty (60) days if the defendant is not in custody, of whichever of the following events
6 occurs latest:

7 (a) the first appearance;

8 (b) if an evaluation of competency has been ordered, the date an order
9 is filed finding the defendant competent to stand trial;

10 (c) if the defendant is arrested for failure to appear or surrenders in this
11 state for failure to appear, the date the arrest warrant is returned to the court;

12 (d) if the defendant is arrested for failure to appear or surrenders in
13 another state or country for failure to appear, the date the defendant is returned to this state;

14 (e) if the defendant has been placed in a preprosecution diversion
15 program, the date a notice is filed in the district court stating that the preprosecution diversion
16 program has been terminated for failure to comply with the terms, conditions, or requirements of
17 the program; or

18 (f) if the defendant is arrested upon a bench warrant for failure to
19 comply with conditions of release or if the defendant's pretrial release is revoked under Rule 5-
20 403 NMRA, the date the defendant is remanded into custody, provided that in no event a
21 preliminary examination shall occur later than required by any of the events in Subparagraph
22 (A)(1) of this rule.

1 (2) ***Extensions.*** Upon a showing of good cause, the court may extend the time
2 limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not
3 consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only upon a
4 showing on the record that exceptional circumstances beyond the control of the state or the court
5 exist and justice requires the delay. The time enlargement provisions in Rule 5-104 do not apply
6 to a preliminary examination.

7 (3) ***Dismissal without prejudice.*** If a preliminary examination is not held
8 within the time limits in this rule, the court shall dismiss the case without prejudice and discharge
9 the defendant.

10 B. **Procedures.** If the court determines that a preliminary examination must be
11 conducted, the following procedures shall apply.

12 (1) ***Counsel.*** The defendant has the right to assistance of counsel at the
13 preliminary examination.

14 (2) ***Discovery.*** The prosecution shall promptly make available to the defendant
15 any tangible evidence in the prosecution's possession, custody, and control, including records,
16 papers, documents, and recorded witness statements that are material to the preparation of the
17 defense or that are intended for use by the prosecution at the preliminary examination. The
18 prosecution is under a continuing duty to disclose additional evidence to the defendant as such
19 evidence becomes available to the prosecution.

20 (3) ***Subpoenas.*** Subpoenas shall be issued for any witnesses required by the
21 prosecution or the defendant.

1 (4) **Cross-examination.** The witnesses shall be examined in the defendant's
2 presence, and both the prosecution and the defendant shall be afforded the right to cross-examine
3 adverse witnesses.

4 (5) **Rules of Evidence.** The Rules of Evidence apply, subject to any specific
5 exceptions in the Rules of Criminal Procedure for the District Courts.

6 C. **Record of examination.** A record shall be made of the preliminary examination. If
7 requested, the record shall be filed with the clerk of the district court within ten (10) days after it
8 is requested.

9 D. **Findings of court.**

10 (1) If, upon completion of the examination, the court finds that there is no
11 probable cause to believe that the defendant has committed a felony offense, the court shall dismiss
12 without prejudice all felony charges for which probable cause does not exist and discharge the
13 defendant as to those offenses.

14 (2) If the court finds that there is probable cause to believe that the defendant
15 committed an offense, it shall bind the defendant over for trial.

16 E. **Remand for preliminary examination.** ~~Upon~~ Unless a motion for pretrial
17 detention has been filed, upon motion and for cause shown, the court may remand the case to the
18 magistrate or metropolitan court for a preliminary examination.

19 [As amended, effective June 1, 1999; as amended by Supreme Court Order No. 14-8300-020,
20 effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme
21 Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31,
22 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or
23 filed on or after November 23, 2020.]

1 **Committee commentary.** — This rule governs preliminary examinations held in the
2 district court. Most preliminary examinations will be held by the magistrate or metropolitan court
3 and will be governed by Rule 6-202 NMRA or Rule 7-202 NMRA. The magistrate and
4 metropolitan court rules are substantially identical to this rule.

5 Under Subparagraph (A)(2), the district court may extend the time limits for holding a
6 preliminary examination if the defendant does not consent only upon a showing of exceptional
7 circumstances beyond the control of the state or the court. “‘Exceptional circumstances,’ . . . would
8 include conditions that are unusual or extraordinary, such as death or illness of the judge,
9 prosecutor, or defense attorney immediately preceding the commencement of the trial; or other
10 circumstances that ordinary experience or prudence would not foresee, anticipate, or provide
11 for.” *See* Committee commentary to Rules 6-506 and 7-506 NMRA.

12 Article II, Section 14 of the New Mexico Constitution guarantees that the state cannot
13 prosecute a person for a “capital, felonious or infamous crime” without filing either a grand jury
14 indictment or a criminal information. If the state is going to proceed by criminal information, the
15 defendant is entitled to a preliminary examination. *See* N.M. Const. art. II, § 14. At the preliminary
16 examination, “the state is required to establish, to the satisfaction of the examining judge, two
17 components: (1) that a crime has been committed; and (2) probable cause exists to believe that the
18 person charged committed it.” *State v. White*, 2010-NMCA-043, ¶ 11, 148 N.M. 214, 232 P.3d
19 450.

20 If the court dismisses a criminal charge for failure to comply with the time limits in
21 Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal
22 is without prejudice, and the state may later prosecute the defendant for the same offense by filing
23 either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M.

1 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d
2 1387 (explaining that, following dismissal of an indictment, “the State can choose whether to
3 proceed by indictment or information”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M.
4 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude
5 “multiple attempts to show probable cause” because “it is settled law that jeopardy does not attach
6 pretrial”). *Cf. Fed. R. Crim. P. 5.1(f)* (“If the magistrate judge finds no probable cause to believe
7 an offense has been committed or the defendant committed it, the magistrate judge must dismiss
8 the complaint and discharge the defendant. A discharge does not preclude the government from
9 later prosecuting the defendant for the same offense.”).

10 Discharging the defendant means relieving the defendant of all obligations to the court that
11 originated from a criminal charge. Thus, to discharge a defendant the court must release the
12 defendant from custody, relieve the defendant of all conditions of release, and exonerate any bond.

13 In *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236, the Supreme Court held that a
14 defendant does not have a constitutional right of confrontation at the preliminary
15 examination, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to
16 the extent *Mascarenas* held otherwise. Paragraph B of this rule was amended in 2014 to clarify
17 that *Lopez* did not affect the other rights and procedures that apply to preliminary
18 examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B
19 of this rule is not intended to be a comprehensive list of the defendant’s rights at the preliminary
20 examination.

21 First, *Lopez* did not alter the prosecution’s duty to provide discovery, as available, to the
22 defendant. *See Mascarenas*, 1969-NMSC-116, ¶ 14 (holding that if the state is going to call a
23 witness to testify at the preliminary examination, then the defendant has a right to inspect any prior

1 statements or reports made by such witness that are in the possession of the prosecution). However,
2 the defendant’s right to discovery prior to the preliminary examination is limited to what is
3 available and in the prosecutor’s immediate possession. For example, the defendant does not have
4 a right to discover a laboratory report that has not been prepared and is not ready for use at the
5 preliminary examination.

6 Additionally, the Rules of Evidence remain generally applicable to preliminary
7 examinations, subject to specific exceptions for certain types of evidence not admissible at
8 trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the “Rules of Evidence generally govern
9 proceedings in preliminary examinations” but explaining that Rule 6-608(A) NMRA of the Rules
10 of Criminal Procedure for Magistrate Courts “provides a specific exception to our hearsay rule for
11 admissibility” of certain types of written laboratory reports).

12 The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-
13 examine the state’s witnesses. Thus, although Rule 6-608(A) may permit the state to use a
14 laboratory report at a preliminary examination in magistrate court without calling the laboratory
15 analyst as a witness, the defendant retains the right “to call witnesses to testify as to the matters
16 covered in such report.” Rule 6-608(B); accord Rule 7-608(B) NMRA. And the preliminary
17 examination remains “a critical stage of a criminal proceeding” at which “counsel must be made
18 available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

19 Paragraph E of this rule was added in 1980. The contents of this paragraph were formerly
20 found in Paragraph C of Rule 5-601.

21 [Amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on
22 or after December 31, 2014; amended by Supreme Court Order No. 17-8300-016, effective for all
23 cases pending or filed on or after December 31, 2017.]