

1 **5-403. Revocation or modification of release orders.**

2 A. **Scope.** In accordance with this rule, the court may consider revocation of the  
3 defendant's pretrial release or modification of the defendant's conditions of release

4 (1) if the defendant is alleged to have violated a condition of release; or

5 (2) to prevent interference with witnesses or the proper administration of  
6 justice.

7 B. **Motion for revocation or modification of conditions of release.**

8 (1) The court may consider revocation of the defendant's pretrial release or  
9 modification of the defendant's conditions of release on motion of the prosecutor or on the court's  
10 own motion.

11 (2) The defendant may file a response to the motion, but the filing of a response  
12 shall not delay any hearing under Paragraph D or E of this rule.

13 C. **Issuance of summons or bench warrant.** If the court does not deny the motion on  
14 the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the  
15 interests of justice may be better served by the issuance of a bench warrant. The summons or bench  
16 warrant shall include notice of the reasons for the review of the pretrial release decision.

17 D. **Initial hearing.**

18 (1) The court shall hold an initial hearing as soon as practicable, but if the  
19 defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is  
20 detained if the defendant is being held in the local detention center, or no later than five (5) days  
21 after the defendant is detained if the defendant is not being held in the local detention center.

22 (2) At the initial hearing, the court may continue the existing conditions of  
23 release, set different conditions of release, or propose revocation of release.

1           (3)     If the court proposes revocation of release, the court shall schedule an  
2 evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

3           E.     **Evidentiary hearing.**

4           (1)     **Time.** The evidentiary hearing shall be held as soon as practicable. If the  
5 defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the  
6 initial hearing.

7           (2)     **Defendant's rights.** The defendant has the right to be present and to be  
8 represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The  
9 defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance  
10 of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by  
11 proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not  
12 be used against the defendant at trial except for impeachment purposes or in a subsequent  
13 prosecution for perjury.

14          F.     **Order at completion of evidentiary hearing.** At the completion of an evidentiary  
15 hearing, the court shall determine whether the defendant has violated a condition of release or  
16 whether revocation of the defendant's release is necessary to prevent interference with witnesses  
17 or the proper administration of justice. The court may

18           (1)     continue the existing conditions of release;

19           (2)     set new or additional conditions of release in accordance with Rule 5-401  
20 NMRA; or

21           (3)     revoke the defendant's release, if the court

22           (a)     finds that there is either

1 (i) probable cause to believe that the defendant committed a  
2 federal, state, or local crime while on release; or

3 (ii) clear and convincing evidence that the defendant has  
4 willfully violated any other condition of release; and

5 (b) finds that there is clear and convincing evidence that either

6 (i) no condition or combination of conditions will reasonably  
7 ensure the defendant's compliance with the release conditions ordered by the court; or

8 (ii) revocation of the defendant's release is necessary to prevent  
9 interference with witnesses or the proper administration of justice.

10 An order revoking release shall include written findings of the individualized facts  
11 justifying revocation.

12 G. **Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation  
13 and consideration of information at any hearing under this rule.

14 H. **Review of conditions.** If the court enters an order setting new or additional  
15 conditions of release, the defendant may file a motion to review the conditions under Rule 5-  
16 401(H) NMRA. If, upon disposition of the motion, the defendant is detained or continues to be  
17 detained because of a failure to meet a condition imposed, or is subject to a requirement to return  
18 to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA  
19 and Rule 12-204 NMRA.

20 I. **Expedited trial scheduling for defendant in custody.** The district court shall  
21 provide expedited priority scheduling in a case in which the defendant is detained pending trial.  
22 On the written motion of the prosecutor or the defendant, or on the court's own motion, the court

1 shall hold a status review hearing in any case in which the defendant has been held for more than  
2 one (1) year.

3 J. **Appeal.** If the court revokes the defendant's release, the defendant may appeal in  
4 accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The appeal shall be heard in an  
5 expedited manner. The defendant shall be detained pending the disposition of the appeal.

6 K. **Petition for review of revocation order issued by magistrate, metropolitan, or**  
7 **municipal court.** If the magistrate, metropolitan, or municipal court issues an order revoking the  
8 defendant's release, the defendant may petition the district court for review under this paragraph.

9 (1) ***Petition; requirements.*** The petition shall include the specific facts that  
10 warrant review by the district court and may include a request for a hearing. The petitioner shall  
11 promptly

12 (a) file a copy of the district court petition in the magistrate,  
13 metropolitan, or municipal court;

14 (b) serve a copy on the district attorney; and

15 (c) provide a copy to the assigned district court judge.

16 (2) ***Magistrate, metropolitan, or municipal court's jurisdiction pending***  
17 ***determination of the petition.*** Upon the filing of the petition, the magistrate, metropolitan, or  
18 municipal court's jurisdiction to set or amend conditions of release shall be suspended pending  
19 determination of the petition by the district court. The case shall proceed in the magistrate,  
20 metropolitan, or municipal court while the petition is pending.

21 (3) ***District court review.*** The district court shall rule on the petition in an  
22 expedited manner.

1 (a) Within three (3) days after the petition is filed, the district court shall  
2 take one of the following actions:

3 (i) issue an order affirming the revocation order; or

4 (ii) set a hearing to be held within ten (10) days after the filing  
5 of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or  
6 municipal court.

7 (b) If the district court holds a hearing on the petition, at the conclusion  
8 of the hearing the court shall issue either an order affirming the revocation order or an order setting  
9 conditions of release in accordance with Rule 5-401 NMRA.

10 (4) *Transmission of district court order to magistrate, metropolitan, or*  
11 *municipal court.* The district court shall promptly transmit the order to the magistrate,  
12 metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the  
13 magistrate, metropolitan, or municipal court.

14 (5) *Appeal.* If the district court affirms the revocation order, the defendant may  
15 appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

16 L. **Judicial discretion; disqualification and excusal.** Action by any court on any  
17 matter relating to pretrial release or detention shall not preclude the subsequent statutory  
18 disqualification of a judge. A judge may not be excused from reviewing a lower court's order  
19 revoking conditions of release unless the judge is required to recuse under the provisions of the  
20 New Mexico Constitution or the Code of Judicial Conduct.

21 [As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-  
22 046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme  
23 Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as

1 amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or  
2 after February 1, 2019; as amended by Supreme Court Order Nos. 20-8300-013 and 20-8300-019,  
3 effective for all cases pending or filed on or after November 23, 2020.]

4 **Committee commentary.** — The 2017 amendments to this rule clarify the procedure for  
5 the court to follow when considering revocation of the defendant’s pretrial release or modification  
6 of the defendant’s conditions of release for violating the conditions of release. In *State v. Segura*,  
7 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to  
8 afford the defendant notice and an opportunity to be heard before the court may revoke the  
9 defendant’s bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-  
10 009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If  
11 the court has inherent power to revoke bail of a defendant during trial and pending final disposition  
12 of the criminal case in order to prevent interference with witnesses or the proper administration of  
13 justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”);  
14 *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are  
15 separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate  
16 arrest, revocation, or modification if violated. Such conditions of release are intended to protect  
17 the public and keep the defendant in line.”), *rev’d on other grounds*, 2004-NMSC-001, 134 N.M.  
18 768, 82 P.3d 939.

19 Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation  
20 hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of proceedings where the  
21 Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible “for  
22 assessing the reliability and accuracy” of the information presented. *See United States v. Martir*,  
23 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge

1 “retains the responsibility for assessing the reliability and accuracy of the government’s  
2 information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J.  
3 Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court  
4 to determine whether a pretrial detention order may be supported in an individual case by  
5 documentary evidence, proffer, one or more live witnesses, or other forms of information the court  
6 deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So  
7 long as the information which the sentencing judge considers has sufficient indicia of reliability to  
8 support its probable accuracy, the information may properly be taken into account in passing  
9 sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43,  
10 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should  
11 focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643  
12 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability  
13 lacked probative value).

14 Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a  
15 judge who is reviewing a lower court’s order setting or revoking conditions of release. *See* NMSA  
16 1978, § 38-3-9. Paragraph L of this rule does not prevent a judge from being recused under the  
17 provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s  
18 own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

19 The 1975 amendment to Rule 5-402 NMRA makes it clear that this rule may be invoked  
20 while the defendant is appealing a conviction. *See* Rule 5-402 NMRA and commentary.

21 [As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed  
22 on or after July 1, 2017.]