

1 **7-202. 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 in the metropolitan court 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 metropolitan 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 7-
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 7-104 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 witness required by the
21 prosecution or the defendant.

1 (4) ***Cross-examination.*** The witness 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 exception in the Rules of Criminal Procedure for the Metropolitan Courts.

6 C. **Recording of examination.** A recording shall be made of the preliminary
7 examination. If the defendant is bound over for trial in the district court, the recording shall be
8 filed with the clerk of the district court with the bind-over order. Any party may request a duplicate
9 of the recording from the district court within six (6) months following the preliminary
10 examination.

11 D. **Findings of court.**

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

16 (2) If the only remaining charges are within metropolitan court trial
17 jurisdiction, the court shall either conduct an arraignment immediately on the remaining charges
18 or shall hold an arraignment within the time limits set forth in Rule 7-506(A) NMRA, and the case
19 shall then proceed under the Rules of Criminal Procedure for the Metropolitan Courts.

20 (3) If the court finds that there is probable cause to believe that the defendant
21 committed one or more offenses not within metropolitan court trial jurisdiction, it shall bind the
22 defendant over for trial in the district court. All misdemeanor offenses charged in the complaint
23 shall be included in the bind-over order.

1 E. **Transfer to district court.**

2 (1) If the defendant is bound over for trial by the metropolitan court, the district
3 attorney shall file the following with the metropolitan court:

4 (a) a copy of the information filed in the district court; and

5 (b) if an order is entered by the district court extending the time for
6 filing an information, a copy of such order.

7 (2) When a copy of the information filed in district court is filed in the
8 metropolitan court, the metropolitan court shall at that time transfer the metropolitan court record,
9 along with the bind-over order, to the district court.

10 (3) If an information is not timely filed in the district court in accordance with the
11 requirements of Rule 5-201(C), the metropolitan court, upon motion or of its own initiative, shall
12 dismiss the charges without prejudice within two (2) days of the expiration of the applicable filing
13 deadline.

14 F. **Effect of indictment.** If the defendant is indicted prior to a preliminary examination
15 for the offense pending in the metropolitan court, the district attorney shall forthwith advise the
16 metropolitan court and the metropolitan court shall take no further action in the case, provided that
17 any conditions of release set by the metropolitan court shall continue in effect unless amended by
18 the district court.

19 G. **Bail bond.** Unless the defendant is discharged, the metropolitan court shall retain
20 jurisdiction over the defendant and the bond until an information or indictment is filed in the
21 district court or until twelve (12) months after the preliminary examination, whichever occurs first.

22 If the defendant is bound over for trial by the metropolitan court or indicted, the metropolitan court

1 shall transfer any bond to the district court. Unless the proceedings are remanded to the
2 metropolitan court, all further action relating to the bond shall be taken in the district court.

3 [As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by
4 Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after
5 December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases
6 pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-
7 8300-008, effective for all cases pending or filed on or after December 31, 2020.]

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

15 Article II, Section 14 of the New Mexico Constitution guarantees that the state cannot
16 prosecute a person for a “capital, felonious or infamous crime” without filing either a grand jury
17 indictment or a criminal information. If the state is going to proceed by criminal information, the
18 defendant is entitled to a preliminary examination. *See* N.M. Const. art. II, § 14. At the preliminary
19 examination, “the state is required to establish, to the satisfaction of the examining judge, two
20 components: (1) that a crime has been committed; and (2) probable cause exists to believe that the
21 person charged committed it.” *State v. White*, 2010-NMCA-043, ¶ 11, 148 N.M. 214, 232 P.3d
22 450.

1 If the court dismisses a criminal charge for failure to comply with the time limits in
2 Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal
3 is without prejudice, and the state may later prosecute the defendant for the same offense by filing
4 either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M.
5 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d
6 1387 (explaining that, following dismissal of an indictment, “the State can choose whether to
7 proceed by indictment or information”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M.
8 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude
9 “multiple attempts to show probable cause” because “it is settled law that jeopardy does not attach
10 pretrial”). *Cf. Fed. R. Crim. P. 5.1(f)* (“If the magistrate judge finds no probable cause to believe
11 an offense has been committed or the defendant committed it, the magistrate judge must dismiss
12 the complaint and discharge the defendant. A discharge does not preclude the government from
13 later prosecuting the defendant for the same offense.”).

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

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

1 of this rule is not intended to be a comprehensive list of the defendant’s rights at the preliminary
2 examination.

3 First, *Lopez* did not alter the prosecution’s duty to provide discovery, as available, to the
4 defendant. *See Mascarenas*, 1969-NMSC-116, ¶ 14 (holding that if the state is going to call a
5 witness to testify at the preliminary examination, then the defendant has a right to inspect any prior
6 statements or reports made by such witness that are in the possession of the prosecution). However,
7 the defendant’s right to discovery prior to the preliminary examination is limited to what is
8 available and in the prosecutor’s immediate possession. For example, the defendant does not have
9 a right to discover a laboratory report that has not been prepared and is not ready for use at the
10 preliminary examination.

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

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

- 1 [Adopted by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or
- 2 after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all
- 3 cases pending or filed on or after December 31, 2017.]