

**PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE
PROPOSAL 2022-002**

January 3, 2022

The Rules of Criminal Procedure for New Mexico State Courts Committee has recommended amendments to Rules 5-106, 5-401, 5-403, 5-409, 6-401, 6-403, 6-409, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401, and 8-403 NMRA and Form 9-303 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:

Jennifer L. Scott, 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 February 3, 2022, 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.

5-106. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Definition of parties.** "Party," as used in this rule, shall mean a defendant, the state, or an attorney representing the defendant or the state. A party may not excuse a judge after the party has requested that judge to perform any discretionary act.

B. **Extent of excuse or challenge.** No judge may be excused from conducting an arraignment or first appearance, setting initial conditions of release, reviewing a lower court's order setting or revoking conditions of release, or presiding over a pretrial detention hearing or a preliminary examination in a case where a pretrial detention motion has been filed. No party shall excuse more than one judge.

C. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

D. **Procedure for excusing a district judge.** The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the later of

- (1) arraignment or the filing of a waiver of arraignment;
- (2) service by the clerk of notice of assignment or reassignment of the case to a judge;

(3) completion of publication of notice of reassignment in the case of a mass reassignment; or

(4) filing of a notice of appeal from a lower court.

E. **Notice of reassignment.** After the arraignment or the filing of a waiver of arraignment, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar [~~web-site~~] website and in two (2) consecutive New Mexico Bar Bulletins. Service of notice by publication is complete on the date printed on the second issue of the Bar Bulletin.

F. **Service of excusal.** Any party electing to excuse a judge shall serve notice of that election on all parties.

G. **Misuse of peremptory excusal procedure.** Peremptory excusals are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group of attorneys believed to be improperly using peremptory excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

H. **Recusal.** No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in [~~any such~~] that action. [~~Upon~~] On receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

I. **Disability during trial.** If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge regularly sitting in or assigned to the court, [~~upon~~] on certifying familiarity with the record of the jury trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury trial, [~~upon~~] on motion of the defendant, a mistrial shall be granted upon disability of the trial judge.

J. **Disability after verdict or finding of guilt.** If by reason of death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform those duties on certifying familiarity with the record of the trial.

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — This rule governs the exercise of the statutory right to excuse the judge before whom the case is pending. *See* NMSA 1978, § 38-3-9. Paragraph B precludes a party

from exercising this right in certain pretrial proceedings, including arraignment and pretrial release and detention hearings. Paragraph B does not prevent a judge from recusing under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

Reassignment of a judge usually occurs in individual cases in which a party has excused the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory recusal may choose to recuse the successor judge. Providing individual notice by mail to every party in each ~~[such case]~~ of those cases is administratively difficult, expensive, and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the Bar Bulletin, on the State Bar's ~~[web site]~~ website, or both.

The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by publication in such a situation—now identified as a “mass reassignment.” The amended rule requires that the specified notice be published on the State Bar's ~~[web site]~~ website for four (4) consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides that a party who has not yet exercised a peremptory recusal may do so within ten (10) days after the date of the second Bar Bulletin.

When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a ~~[portion]~~ part of other judges' ~~[cases]~~ caseloads are assigned to the new judge. When this occurs, if the number of pending cases reassigned from any judge exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may publish ~~[such a]~~ that list in the Bar Bulletin, publish a notice in the Bar Bulletin that directs the reader to the court's ~~[web site]~~ website where such a list will be posted, or post notice on the State Bar's ~~[web site]~~ website.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. ~~[Where]~~ When actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 5-104(B) NMRA (providing that the court may permit an act to be done after a deadline has passed for cause shown). [Adopted by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended for stylistic compliance by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

5-401. Pretrial release.

A. **Hearing.**

(1) **Time.** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) **Right to counsel.** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information ~~concerning~~about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record ~~concerning~~about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~[concerning]~~about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;

~~[(10)]~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

~~[(11)]~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(12)]~~ (13) return to custody for specified hours ~~[following]~~after release for employment, schooling, or other limited purposes;

~~[(13)]~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) Percentage bond. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) Property bond. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5-401.1 NMRA.

(c) Cash or surety bond. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings ~~[regarding]~~about secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of
(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice

(2) ***Written findings ~~[regarding]~~about secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.**

(1) If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

(2) The court may schedule a detention hearing within the time limits set forth in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and defendant when

(a) The defendant is charged with a felony offense

(i) involving the use of a firearm;

(ii) involving the use of a deadly weapon resulting in great bodily harm or death,

(iii) which authorizes a sentence of life in prison without the possibility of parole, or

(b) A public safety assessment tool approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(3) If the prosecutor does not file ~~[an expedited]~~ a motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under this rule and issue an order setting conditions of release.

H. **Case pending in district court; motion for review of conditions of release.**

(1) ***Motion for review.*** If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~[thereupon]~~then released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating ~~the~~ a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

J. **Record of hearing.** A record shall be made of any hearing held by the district court under this rule.

K. **Cases pending in magistrate, metropolitan, or municipal court; petition for release or review by district court.**

(1) ***Case within magistrate, metropolitan, or municipal court trial jurisdiction.*** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

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

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

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

(4) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** ~~Upon~~ On the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court, unless the case is dismissed or a finding of no probable cause is made. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the magistrate, metropolitan, or municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly ~~[transmit]~~send to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

M. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. **Release from custody by designee.** The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody ~~[prior to]~~before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. **Bind over to district court.** For any case that is not within magistrate or metropolitan court trial jurisdiction, ~~[upon]~~on notice to that court, any bond shall be transferred to the district court ~~[upon]~~on the filing of an information or indictment in the district court.

P. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

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

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico

Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142.

This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court’s holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that ~~[such]~~any release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~[prior to]~~before a court appearance, the judge should review the conditions at the defendant’s first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~[as to]~~on whether the defendant can afford to pay all or a ~~[portion]~~part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~[due to]~~because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~[due to]~~because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746

P.2d 1099 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond ~~upon~~on the defendant’s failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant’s financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant’s appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~[where the]~~involving property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant’s appearance, the court may require a cash or surety bond for the defendant’s release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 5-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Paragraph F also requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~[such]~~any supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA. Paragraph G was amended in 2020 to permit the court to automatically schedule a pretrial detention hearing in certain categories of cases. However, ~~[prior to]~~before the hearing, the prosecutor retains the burden of filing an expedited motion for pretrial detention under Rule 5-409 NMRA. If the prosecutor does not file ~~[such]~~that a motion ~~[prior to]~~before the hearing, then the court is to set conditions of release rather than consider detention.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district

court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely ~~[due to]~~ because of financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~[due to]~~ because of inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~[due to]~~ because “the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161”); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief district court judge in a written court order. A person may not be appointed as a designee if ~~[such]~~ the person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~[prior to]~~ before that defendant’s first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court ~~[upon]~~ on notice from the district attorney that an information or indictment has been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in district court with respect to matters of pretrial release. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial release hearing ~~[the court]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R of this

rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

5-403. Revocation or modification of release orders.

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

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

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

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

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

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

D. **Initial hearing.**

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

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

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

E. **Evidentiary hearing.**

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

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

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

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 5-401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~[that there is]~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~[that there is]~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

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

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

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

I. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. ~~[On the written motion of the prosecutor or the defendant, or on the court's own motion, the]~~ The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

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

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

- (1) **Petition; requirements.** The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly
 - (a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;
 - (b) serve a copy on the district attorney; and

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

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

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

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

(i) issue an order affirming the revocation order; or
(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the magistrate, metropolitan, or municipal court.

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

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

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

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

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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 Nos. 20-8300-013 and 20-8300-019, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 ("If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper

set of facts.”); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev’d on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial detention hearing ~~[the court]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

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

The 1975 amendment to Rule 5-402 NMRA makes it clear that this rule may be invoked while the defendant is appealing a conviction. *See* Rule 5-402 NMRA and commentary. [As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

5-409. Pretrial detention.

A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a motion [~~itled “Expedited Motion for Pretrial Detention”~~] for an expedited pretrial detention hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file [~~an expedited~~] a motion for an expedited pretrial detention hearing at any time in [~~both~~] the court where the case is pending [~~and in the district court~~]. The motion shall include the specific facts that warrant pretrial detention and [~~in the event that probable cause has not yet been determined,~~] shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

(1) The prosecutor shall immediately deliver a copy of the motion to

- (a) the detention center holding the defendant, if any;
- (b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

(3) [~~The~~] Except where the court finds no probable cause, the court may not grant or deny the motion for pretrial detention without a hearing.

C. **Case [~~pending~~] initiated in magistrate or metropolitan court.** If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court [~~clerk~~] shall proceed to conduct the defendant’s first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly [~~transmit~~] send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan [~~court’s~~] court shall then close the case and its jurisdiction shall [~~then~~] be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph (I) of this rule.

D. **Case [~~pending~~] initiated in district court.** If a motion for pretrial detention is filed in the district court and an initial finding of probable cause has not been [~~found~~] made under [~~Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA,~~] Rule 5-301 NMRA, Rule 6-203 NMRA, [~~Rule 6-204(B) NMRA,~~] or Rule 7-203 NMRA, [~~or Rule 7-204(B) NMRA,~~] the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the [~~district~~] court finds no probable cause, the [~~district~~] court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny

the motion for pretrial detention without prejudice. If probable cause is found, the court shall proceed to conduct the defendant's first appearance under Rule 5-301(D) NMRA and Rule 5-401(A) NMRA.

E. **Detention pending hearing; warrant.**

(1) **Defendant in custody when motion is filed.** If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.

(2) **Defendant not in custody when motion is filed.** If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant's arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. **[Pretrial] Expedited pretrial detention hearing.** The district court shall hold [a] an expedited hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community. [Upon] On the request of the prosecutor or on the court's own motion, the [district] court shall set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention.

(1) **Time.**

(a) *Time limit.* The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

- (i) the filing of the motion for pretrial detention; or
- (ii) the date the defendant is arrested as a result of the motion for

pretrial detention.

(b) *Time limit for concurrent hearings.* Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days following the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

~~[(b)]~~ (c) *Extensions.* The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court ~~[may]~~ shall extend the time limit for holding the hearing as follows:

- (i) for ~~[up to]~~ three (3) days to five (5) days if in the motion for pretrial detention the prosecutor requests or the [district] court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;
- (ii) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the extension;
- (iii) upon the defendant filing a waiver of the time limit; or

(iv) upon stipulation of the parties.
[~~(e)~~] (d) *Notice.* The court shall promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion.

(2) ***Initial disclosures.***

(a) The prosecutor shall promptly disclose to the defendant prior to the hearing

(i) all evidence that the prosecutor intends to rely on at the hearing, and

(ii) all exculpatory evidence known to the prosecutor.

(b) Except in cases where the hearing is held within two (2) business days after the filing of the motion, the prosecutor shall disclose evidence under this subparagraph at least twenty-four (24) hours before the hearing. At the hearing the prosecutor may offer evidence or information that was discovered after the disclosure deadline, but the prosecutor must promptly disclose the evidence to the defendant.

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

(4) ***Prosecutor's burden.*** The prosecutor must prove by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community.

(5) ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing. The court may make its decision regarding pretrial detention based upon documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof presented at the hearing.

(6) ***Factors to be considered.*** The court shall consider any fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community, including but not limited to the following:

(a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(e) any facts tending to indicate that the defendant may or may not commit new crimes if released;

(f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and

(g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

G. **Order for pretrial detention.** The district court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community. The court shall file findings of the individualized facts justifying the detention as soon as possible, but no later than three (3) days after the conclusion of the hearing.

H. **Order setting conditions of release.** The district court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than three (3) days after the conclusion of the hearing.

I. **Further proceedings in cases initiated in magistrate or metropolitan court.** ~~[Upon completion of the hearing, if the case was pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court an order closing the magistrate or metropolitan court case.]~~ If, following a preliminary examination, the district court finds no probable cause to believe that the defendant has committed a felony offense, the court shall set conditions of release and may remand any remaining misdemeanor charges to the magistrate or metropolitan court for further proceedings.

J. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

K. **Successive motions for pretrial detention and motions to reconsider.** On written motion of the prosecutor or the defendant, the district court may reopen the detention hearing at any time before trial if the court finds that

(1) information exists that was not known to the movant at the time of the hearing or circumstances have changed subsequent to the hearing, and

(2) the information or changed circumstance has a material bearing on whether the previous ruling should be reconsidered.

L. **Appeal.** Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

M. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is

required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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 Nos. 20-8300-013 and 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

Paragraph A — In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in “capital offenses when the proof is evident or the presumption great.” As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed. *See State v. Ameer*, 2018-NMSC-030.

Although this rule does not provide the district court with express sanction authority, the district court retains inherent authority to “impose a variety of sanctions on both litigants and attorneys in order to regulate docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*, 2017-NMSC-017, ¶ 19, 394 P.3d 959 (“Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration.”). “Extreme sanctions such as dismissal are to be used only in exceptional cases.” *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation marks and citation omitted), *modified on other grounds by Le Mier*, 2017-NMSC-017. *Cf.* Rule 5-206 NMRA (providing that an attorney may be subject to appropriate disciplinary action for violating the rule); Rules 5-501(H), 5-502(G), 5-503.2(B), 5-505(B) NMRA (sanctions for discovery violations); Rule 5-511 NMRA (sanctions for burdening a person subject to a subpoena).

Paragraph B — Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant’s arrest under Rule 5-208(D) NMRA.

Under this Paragraph, the prosecutor retains discretion to “obtain[] a neutral determination of probable cause” by either presenting the case to a grand jury or proceeding with a preliminary examination. *See Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176. However, because the district court faces time constraints in setting a preliminary examination if requested, the prosecutor is required to advise the court of the need for such a setting by stating in the motion for pretrial detention whether the prosecutor intends to proceed by grand jury indictment or instead by preliminary examination and the filing of a criminal information.

Paragraph C — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district court, except as provided by Paragraph I. The district court’s exclusive jurisdiction extends to cases that are refiled after dismissal.

Paragraphs C and D — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

Paragraph F — Paragraph F sets forth procedures for pretrial detention hearings. The court must “make three categories of determinations” at a pretrial detention hearing: “(1) which information in any form carries sufficient indicia of reliability to be worthy of consideration, (2) the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial, and (3) whether any potential pretrial release conditions will reasonably protect the safety of others.” *State v. Groves*, 2018-NMSC-006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

Subparagraph ~~[(F)(1)(b)(i)]~~ (F)(1)(c)(i) authorizes an extension of time if the prosecutor requests or the court orders a preliminary hearing to be held concurrently with the detention hearing.

Subparagraph (F)(3) describes the defendant’s rights at the hearing. “[T]he Due Process Clause of the New Mexico Constitution requires that a defendant’s protections at a pretrial detention hearing include ‘the right to counsel, notice, and an opportunity to be heard.’” *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 88, 410 P.3d 201 (quoting *State v. Brown*, 2014-NMSC-038, ¶ 20, 338 P.3d 1276). “Due process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial detention hearing.” *Id.* The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing.

Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified that “neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings.” 2018-NMSC-005, ¶ 110. The court may rely on “credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information” in determining whether the prosecutor has met its burden under Article II, Section 13. *Id.* ¶ 3. In doing so, the court should exercise “sound judicial discretion in assessing the reliability and accuracy of information presented in support of detention, whether by proffer or direct proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion to find proffered or documentary information insufficient to meet the constitutional clear and convincing evidence requirement in the context of particular cases.” *Id.* ¶ 3. Both the prosecutor and the defendant may proceed by proffer at the pretrial detention hearing.

Subparagraph (F)(6) lists factors that the court may consider in assessing whether the prosecutor has met its burden of proving by clear and convincing evidence that the defendant may be likely to pose a threat to the safety of others if released pending trial and whether any potential pretrial release conditions will reasonably protect the safety of others. These factors include the nature and circumstances of the charged offense and the defendant’s history and characteristics. *See State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining that the defendant’s past conduct can help the court assess whether the defendant poses a future threat of danger). In *State v. Ferry*, the Supreme Court explained that “the nature and circumstances of a

defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the [prosecutor's] burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community." 2018-NMSC-004, ¶ 6, 409 P.3d 918. However, the type of offense charged, by itself and without more, will not suffice to meet the prosecutor's burden. See Groves, 2018-NMSC-006, ¶ 33 (discounting the relevance at a detention hearing of "the category or punishability of the charged crime," and recognizing that "the court's focused concern is not to impose punishment for past conduct but instead to assess a defendant's likely future conduct") (citing Torrez, 2018-NMSC-005, ¶ 101. If the prosecutor meets this initial burden, the prosecutor must also demonstrate by clear and convincing evidence that "no release conditions will reasonably protect the safety of any other person or the community." Id. "For example, the [prosecutor] may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases." Id.

Paragraph I — ~~[If the district court issues a detention order under Paragraph G of this rule, the magistrate or metropolitan court cannot release the defendant while the case is pending. The magistrate or metropolitan court should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.]~~ On the transfer of a case to the district court, the magistrate or metropolitan court generally loses jurisdiction under Paragraph C of this rule. A single narrow exception is set out in Paragraph I, whose provisions allow a case to be remanded to the magistrate or metropolitan court only if, after a preliminary hearing, misdemeanor—not felony—charges alone remain, and then at the sole discretion of the district court. A case in which the prosecutor files and subsequently withdraws a motion for pretrial detention cannot be remanded to the magistrate or metropolitan court for further proceedings, unless the case otherwise meets the misdemeanor exception carved out under this paragraph.

Paragraph J — Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Paragraph K — The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 ("District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment." (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

Paragraph L — Either party may appeal the district court's ruling on the detention motion. Under Article II, Section 13, an "appeal from an order denying bail shall be given preference over all other matters." *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d

232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

Paragraph M — Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See* NMSA 1978, § 38-3-9. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

6-401. Pretrial release.

A. Hearing.

(1) **Time.** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) first appearance or arraignment, if the defendant is not in custody.

(2) **Right to counsel.** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to pretrial release; recognizance or unsecured appearance bond. Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant’s personal recognizance or ~~upon~~on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be considered in determining conditions of release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information ~~[concerning]~~about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record ~~[concerning]~~about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-monetary conditions of release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~[concerning]~~about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.

~~[(10)]~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

~~[(11)]~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(12)]~~ (13) return to custody for specified hours ~~[following]~~after release for employment, schooling, or other limited purposes;

[(13)] (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) ***Percentage bond.*** The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) ***Property bond.*** The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 6-401.1 NMRA.

(c) ***Cash or surety bond.*** The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 6-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings ~~regarding~~ about secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) **Written findings ~~[regarding]~~about secured bond.** The court shall file written findings of the individualized facts justifying the secured bond, ~~if any~~, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.** If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 6-409 NMRA.

H. **Motion for review of conditions of release by the magistrate court.**

(1) **Motion for review.** If the magistrate court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) **Review hearing.** The magistrate court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~[thereupon]~~then released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) **Work or school release.** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the magistrate court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) **Subsequent motion for review.** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 6-403 NMRA.

J. **Petition to district court.**

(1) ***Case within magistrate court trial jurisdiction.*** A defendant charged with an offense that is within magistrate court trial jurisdiction may file a petition in the district court for review of the magistrate court's order setting conditions of release under this paragraph only after the magistrate court has ruled on a motion to review the conditions of release under Paragraph H of this rule. The defendant shall attach to the district court petition a copy of the magistrate court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under Rule 5-401(K) NMRA and this paragraph at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the magistrate court,
- (b) serve a copy on the district attorney, and
- (c) provide a copy to the assigned district court judge.

(4) ***Magistrate court's jurisdiction pending determination of the petition.*** ~~Upon~~On the filing of a petition under this paragraph, the magistrate court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the district court petition is pending. The magistrate court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate court.*** The district court shall promptly transmit to the magistrate court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate court.

K. **Expedited trial scheduling for defendant in custody.** The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.

L. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions

of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

M. **Release from custody by designee.** The presiding judge of the magistrate court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 6-408 NMRA. A designee shall release a defendant from custody [~~prior to~~]before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 6-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

N. **Bind over to district court.** For any case that is not within magistrate court trial jurisdiction, [~~upon~~]on notice to the magistrate court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

O. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

P. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

Q. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07-8300, effective January 22, 2008; by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely [~~due to~~]because of financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, *see* Rules 5-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 6-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that ~~[such]~~^a release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~[prior to]~~^{before} a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~[as to]~~^{about} whether the defendant can afford to pay all or a ~~[portion]~~^{part} of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~[due to]~~^{because of} inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~[due to]~~^{because of} financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond ~~[upon]~~^{on} the defendant’s failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant’s financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant’s appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”). A

felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond [~~where the~~]involving property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 6-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the magistrate court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make [~~such~~]the supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13 of the New Mexico Constitution. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the magistrate court must follow the procedures set forth in Rule 6-409 NMRA.

Paragraph H sets forth the procedure for the defendant to file a motion in the magistrate court for review of the conditions of release. Paragraph J sets forth the procedure for the defendant to petition the district court for release or for review of the conditions of release set by the magistrate court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely [~~due to~~]because of financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph K requires the magistrate court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody [~~due to~~]because of inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part [~~due to~~]because of "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time [~~limitations~~]limits within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular

status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph M, a designee must be designated by the presiding magistrate court judge in a written court order. A person may not be appointed as a designee if ~~[such]~~that person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph M and Rule 6-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~[prior to]~~before that defendant's first appearance before a judge.

Paragraph N requires the magistrate court to transfer any bond to the district court ~~[upon]~~on notice from the district attorney that an information or indictment has been filed. *See* Rule 6-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate court of the filing of an information or indictment in the district court).

Paragraph O of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the magistrate court with respect to matters of pretrial release. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial release hearing ~~[the court]~~ is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 6-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 35-3-7. Paragraph Q of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

6-403. Revocation or modification of release orders.

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

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

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

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

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

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

D. **Initial hearing.**

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

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

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

E. **Evidentiary hearing.**

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

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

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

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 6-401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~[that there is]~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~[that there is]~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or

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

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

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

H. **Review of conditions.** If the magistrate court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 6-401(J) NMRA. The defendant may petition the district court immediately ~~upon~~ on the issuance of the magistrate court order and shall not be required to first seek review or reconsideration by the magistrate court. If, ~~upon~~ on disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.

J. **Petition to district court for review of revocation order.** If the magistrate court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5-403(K) NMRA.

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

- (a) file a copy of the district court petition in the magistrate court;
- (b) serve a copy on the district attorney; and
- (c) provide a copy to the assigned district court judge.

(2) **Magistrate court's jurisdiction pending determination of the petition.** ~~Upon~~ On the filing of the petition, the magistrate court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the petition is pending.

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

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

- (i) issue an order affirming the revocation order; or
- (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the magistrate court.

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

(4) ***District court order; transmission to magistrate court.*** The district court shall promptly ~~[transmit]~~ send the order to the magistrate court, and jurisdiction over the conditions of release shall revert to the magistrate court.

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

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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. _____, effective for all cases pending or filed on or after _____.]

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

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial detention hearing ~~[the court]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the magistrate court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. See generally *United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

6-409. Pretrial detention.

A. **Scope.** This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the magistrate and district court while a case is pending in the magistrate court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 6-401 NMRA, under Article II, Section 13 and Rule 5-409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a ~~[written]~~ motion ~~[titled “Expedited Motion for Pretrial Detention”]~~ for an expedited pretrial detention hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a ~~[written-expedited]~~ motion for an expedited pretrial detention hearing at any time in ~~[both]~~ the magistrate court ~~[and in the district court]~~. The motion shall include the specific facts that warrant pretrial detention and ~~[in the event that probable cause has not yet been determined,]~~ shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

C. **Determination of probable cause.** If a motion for pretrial detention is filed in the magistrate court and a probable cause determination has not been made, the magistrate court shall determine probable cause under Rule 6-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. **Determination of motion by district court.** If probable cause has been found, the magistrate court ~~[clerk]~~ shall proceed to conduct the defendant’s first appearance under Rule 6-501 NMRA and thereafter promptly [transmit] send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate ~~[court’s]~~ court shall then close the case and its jurisdiction shall [then] be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Rule 5-409(I) NMRA.

~~[E. — Further proceedings in magistrate court. Upon completion of the hearing, if the case is pending in the magistrate court, the district court shall promptly transmit to the magistrate court an order closing the magistrate court case.]~~

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

Paragraph C — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. [~~Cty.~~] *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — ~~Upon~~ On the filing of a motion for pretrial detention, [~~and~~] a finding of probable cause, and the conducting of the defendant’s first appearance, the magistrate court is deprived of jurisdiction, except as provided in Rule 5-409(I) NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

6-501. Arraignment; first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

- (1) the offense charged;
- (2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;
- (3) the right to bail or the possibility of pretrial detention under Rule 5-401(G) NMRA;
- (4) the right, if any, to the assistance of counsel at every stage of the proceedings;
- (5) the right, if any, to representation by an attorney at state expense;
- (6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;
- (7) the right, if any, to a jury trial;
- (8) in those cases not within the court’s trial jurisdiction the right to a preliminary examination;
- (9) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant’s immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
- (10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
- (11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration

requirement under the Sex Offender Registration and Notification Act, NMSA 1978, Sections 29-11A-1 to -10.

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint, under Rule 6-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Insanity or incompetency.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense," after setting conditions of release, the action shall be transferred to the district court. If a question is raised about the defendant's competency to stand trial, the court shall proceed under Rule 6-507.1 NMRA.

D. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea or waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. **Felony offenses; preliminary examination.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination, and a motion for an expedited pretrial detention hearing has not been filed, the court shall proceed to conduct such an examination in accordance with Rule 6-202 NMRA.

F. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 6-401 NMRA. However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of the initial appearance, not to exceed the time limits in Rule 6-401(A) NMRA, if

(1) The defendant is charged with a felony offense

- (a) involving the use of a firearm;
- (b) involving the use of a deadly weapon resulting in great bodily harm or death;
- (c) which authorizes a sentence of life in prison without the possibility of parole; or

(d) a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(2) The court shall immediately give notice to the prosecutor, the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender, of the circumstances in Subparagraph F(1) above that warrant delaying entry of conditions of release.

(3) If the prosecutor does not file [~~an expedited~~] a motion for an expedited pretrial detention hearing by the date scheduled for the conditions of release hearing, the court shall issue an order setting conditions of release pursuant to Rule 6-401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective

December 15, 2007; as amended by Supreme Court Order No. 18-8300-023, effective for all cases 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; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant’s right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of the defendant’s right to assistance of counsel at every stage of the proceedings and the defendant’s right to be represented by an attorney at state expense if the defendant is indigent. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The defendant may waive counsel so long as the waiver is knowingly, voluntarily, and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 1977-NMSC-111, 91 N.M. 207, 572 P.2d 935; *North Carolina v. Butler*, 441 U.S. 369 (1979).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

7-401. Pretrial release.

A. Hearing.

(1) **Time.** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) first appearance or arraignment, if the defendant is not in custody.

(2) **Right to counsel.** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to pretrial release; recognizance or unsecured appearance bond. Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant’s personal recognizance or ~~upon~~on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be considered in determining conditions of release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme

Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information ~~[concerning]~~about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record ~~[concerning]~~about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~[concerning]~~about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.

~~[(40)]~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

~~[(44)]~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(42)]~~ (13) return to custody for specified hours ~~[following]~~after release for employment, schooling, or other limited purposes;

~~[(43)]~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) ***Percentage bond.*** The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) ***Property bond.*** The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 7-401.1 NMRA.

(c) ***Cash or surety bond.*** The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 7-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings ~~[regarding]~~about secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of
(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) ***Written findings [regarding]about secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.** If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 7-409 NMRA.

H. **Motion for review of conditions of release by the metropolitan court.**

(1) ***Motion for review.*** If the metropolitan court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The metropolitan court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~thereupon~~ then released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the metropolitan court

within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. ***Amendment of conditions.*** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 7-403 NMRA.

J. ***Petition to district court.***

(1) ***Case within metropolitan court trial jurisdiction.*** A defendant charged with an offense that is within metropolitan court trial jurisdiction may file a petition in the district court for review of the metropolitan court's order setting conditions of release under this paragraph only after the metropolitan court has ruled on a motion to review the conditions of release under Paragraph H of this rule. The defendant shall attach to the district court petition a copy of the metropolitan court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under Rule 5-401(K) NMRA and this paragraph at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the metropolitan court,
- (b) serve a copy on the district attorney, and
- (c) provide a copy to the assigned district court judge.

(4) ***Metropolitan court's jurisdiction pending determination of the petition.*** ~~Upon~~On the filing of a petition under this paragraph, the metropolitan court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The metropolitan court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the metropolitan court while the district court petition is pending. The metropolitan court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~send a copy of the notice to the metropolitan court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to metropolitan court.*** The district court shall promptly ~~transmit~~send to the metropolitan court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the metropolitan court.

K. **Expedited trial scheduling for defendant in custody.** The metropolitan court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.

L. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

M. **Release from custody by designee.** The chief judge of the metropolitan court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 7-408 NMRA. A designee shall release a defendant from custody [~~prior to~~]before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 7-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

N. **Bind over to district court.** For any case that is not within metropolitan court trial jurisdiction, [~~upon~~]on notice to the metropolitan court, any bond shall be transferred to the district court [~~upon~~]on the filing of an information or indictment in the district court.

O. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

P. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

Q. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 08-8300-059, effective February 2, 2009; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely [~~due to~~]because of financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142. This rule was amended in

2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, *see* Rules 5-401 NMRA, the Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 7-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that ~~[such]~~the release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~[prior to]~~before a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~[as to]~~about whether the defendant can afford to pay all or a ~~[portion]~~part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~[due to]~~because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~[due to]~~because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond ~~[upon]~~on the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~[where]~~when the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant’s appearance, the court may require a cash or surety bond for the defendant’s release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 7-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the metropolitan court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~[such]~~any supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the metropolitan court must follow the procedures set forth in Rule 7-409 NMRA.

Paragraph H sets forth the procedure for the defendant to file a motion in the metropolitan court for review of the conditions of release. Paragraph J sets forth the procedure for the defendant to petition the district court for release or for review of the conditions of release set by the metropolitan court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely ~~[due to]~~because of financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph K requires the metropolitan court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~[due to]~~because of inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~[due to]~~because of “the stringent time limitations of the Speedy Trial

Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time ~~[limitations]~~limits within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph M, a designee must be designated by the chief metropolitan court judge in a written court order. A person may not be appointed as a designee if ~~[such]~~that person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph M and Rule 7-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~[prior to]~~before that defendant’s first appearance before a judge.

Paragraph N requires the metropolitan court to transfer any bond to the district court ~~[upon]~~on notice from the district attorney that an information or indictment has been filed. *See* Rule 7-202(E)-(F) NMRA (requiring the district attorney to notify the metropolitan court of the filing of an information or indictment in the district court).

Paragraph O of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the metropolitan court with respect to matters of pretrial release. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial release hearing ~~[the court]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 7-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 35-3-7. Paragraph Q of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 08-8300-059, effective February 2, 2009; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

7-403. Revocation or modification of release orders

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

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

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

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

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

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

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

D. Initial hearing.

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

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

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

E. Evidentiary hearing.

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

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

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

(1) continue the existing conditions of release;

(2) set new or additional conditions of release in accordance with Rule 7-401 NMRA; or

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

(a) finds ~~[that there is]~~ either

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

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

(b) finds ~~[that there is]~~ clear and convincing evidence that either

- (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
- (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

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

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

H. **Review of conditions.** If the metropolitan court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 7-401(J) NMRA. The defendant may petition the district court immediately ~~[upon]~~ on the issuance of the metropolitan court order and shall not be required to first seek review or reconsideration by the metropolitan court. If, ~~[upon]~~ on disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The metropolitan court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.

J. **Petition to district court for review of revocation order.** If the metropolitan court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5-403(K) NMRA.

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

- (a) file a copy of the district court petition in the metropolitan court;
- (b) serve a copy on the district attorney; and
- (c) provide a copy to the assigned district court judge.

(2) ***Metropolitan court's jurisdiction pending determination of the petition.*** On the filing of the petition, the metropolitan court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The metropolitan court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the metropolitan court while the petition is pending.

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

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

- (i) issue an order affirming the revocation order; or
- (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~[transmit]~~ send a copy of the notice to the metropolitan court.

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

(4) ***District court order; transmission to metropolitan court.*** The district court shall promptly ~~[transmit]~~ send the order to the metropolitan court, and jurisdiction over the conditions of release shall revert to the metropolitan court.

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

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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. _____, effective for all cases pending or filed on or after _____.]

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

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at a court presiding over a pretrial detention hearing [the court]]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a

probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the metropolitan court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. See generally *United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

7-409. Pretrial detention.

A. **Scope.** This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the metropolitan and district court while a case is pending in the metropolitan court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 7-401 NMRA, under Article II, Section 13 and Rule 5-409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a [written] motion [titled “~~Expedited Motion for Pretrial Detention~~”] and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a [~~written expedited~~] motion for an expedited pretrial detention hearing at any time in [~~both~~] the metropolitan court [~~and in the district court~~]. The motion shall include the specific facts that warrant pretrial detention and [~~in the event that probable cause has not yet been determined,~~] shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

C. **Determination of probable cause.** If a motion for pretrial detention is filed in the metropolitan court and a probable cause determination has not been made, the metropolitan court shall determine probable cause under Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. **Determination of motion by district court.** If probable cause has been found, the metropolitan court [~~clerk~~] shall proceed to conduct the defendant’s first appearance under Rule 7-501 NMRA and thereafter promptly [~~transmit~~] send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The metropolitan [~~court’s~~] court shall then close the case and its jurisdiction shall [~~then~~] be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided under Rule 5-409(I) NMRA.

~~[E. — Further proceedings in metropolitan court. Upon completion of the hearing, if the case is pending in the metropolitan court, the district court shall promptly transmit to the metropolitan court an order closing the metropolitan court case.]~~

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary.

Paragraph C — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. [~~Cty.~~] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 47, 56 (1991).

Paragraph D — [~~Upon~~] On the filing of a motion for pretrial detention, [~~and~~] a finding of probable cause, and the conducting of the defendant’s first appearance, the metropolitan court is deprived of jurisdiction, except as provided in Rule 5-409(I) NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

7-501. Arraignment; first appearance.

A. **Explanation of rights.** [~~Upon~~] On the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

- (1) the offense charged;
- (2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;
- (3) the right to bail or the possibility of pretrial detention under Rule [~~5-401(G)~~] 7-401(G) NMRA;
- (4) the right, if any, to the assistance of counsel at every stage of the proceedings;
- (5) the right, if any, to representation by an attorney at state expense;
- (6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;
- (7) the right, if any, to a jury trial;
- (8) in those cases not within the court’s trial jurisdiction the right to a preliminary examination;
- (9) that, if the defendant pleads guilty or no contest, it may have an effect [~~upon~~] on the defendant’s immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
- (10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [29-11A-1 NMSA 1978].

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint under Rule 7-302, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Defense of insanity.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense," after setting conditions of release, the action shall be transferred to the district court.

D. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea of not guilty or a waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. **Felony offenses; preliminary examination.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination, and a motion for an expedited pretrial detention hearing has not been filed, the court shall proceed to conduct ~~[such an]~~ a preliminary examination in accordance with Rule 7-202 NMRA.

F. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 7-401 NMRA. However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of the initial appearance, not to exceed the time limits in Rule 7-401(A) NMRA, if

- (1) The defendant is charged with a felony offense
 - (a) involving the use of a firearm;
 - (b) involving the use of a deadly weapon resulting in great bodily harm or death;
 - (c) which authorizes a sentence of life in prison without the possibility of parole; or
 - (d) a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(2) The court shall immediately give notice to the prosecutor, the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender, of the circumstances in Subparagraph F(1) above that warrant delaying entry of conditions of release.

(3) If the prosecutor does not file ~~[an expedited]~~ a motion for an expedited pretrial detention hearing by the date scheduled for the conditions of release hearing, the court shall issue an order setting conditions of release pursuant to Rule 7-401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; as amended by Supreme Court Order No. 18-8300-023, effective for all cases 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; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of ~~his~~ the defendant's right to assistance of counsel at every stage of the proceedings and ~~his~~ the defendant's right to be represented by an attorney at state expense if ~~he~~ the defendant is indigent. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The defendant may waive counsel so long as the waiver is knowingly, voluntarily, and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 1977-NMSC-111, 91 N.M. 207, 572 P.2d 935; *North Carolina v. Butler*, 441 U.S. 369 (1979).

[As amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended for stylistic compliance by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

8-401. Pretrial release.

A. Hearing.

(1) **Time.** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) **Right to counsel.** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to pretrial release; recognizance or unsecured appearance bond. Pending trial, the defendant shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information [~~concerning~~]about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record [~~concerning~~]about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify [~~concerning~~]about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.

~~[(10)]~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

~~[(11)]~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(12)]~~ (13) return to custody for specified hours ~~[following]~~after release for employment, schooling, or other limited purposes;

~~[(13)]~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) ***Percentage bond.*** The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph K of this rule.

(b) ***Property bond.*** The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 8-401.1 NMRA.

(c) ***Cash or surety bond.*** The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph K of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 8-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order setting conditions of release; contents.

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct;

(b) advise the defendant of
(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) ***Written findings [regarding/about] secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Motion for review of conditions of release by the municipal court.

(1) ***Motion for review.*** If the municipal court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The municipal court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~[thereupon]~~then released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours, shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court

shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the municipal court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

H. ***Amendment of conditions.*** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 8-403 NMRA.

I. ***Petition to district court.***

(1) ***Defendant must seek review by municipal court before filing petition in district court.*** The defendant may file a petition in the district court for review of the municipal court's order setting conditions of release only after the municipal court has ruled on a motion to review the conditions of release under Paragraph G of this rule. The defendant shall attach to the district court petition a copy of the municipal court order disposing of the defendant's motion for review.

(2) ***Petition; requirements.*** A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the municipal court;
- (b) serve a copy on the prosecutor; and
- (c) provide a copy to the assigned district court judge.

(3) ***Municipal court's jurisdiction pending determination of the petition.*** ~~Upon~~On the filing of a petition under this paragraph, the municipal court's jurisdiction to amend the conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the municipal court while the district court petition is pending. The municipal court's order setting conditions of release shall remain in effect unless and until the district court issues an order amending the conditions of release.

(4) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~send a copy of the notice to the municipal court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(5) ***District court order; transmission to municipal court.*** The district court shall promptly ~~transmit~~send to the municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the municipal court.

J. ***Expedited trial scheduling for defendant in custody.*** The municipal court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of

inability to post a secured bond or meet the conditions of release. The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days.

K. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

L. **Release from custody by designee.** The presiding judge of the municipal court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 8-408 NMRA. A designee shall release a defendant from custody ~~[prior to]~~before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 8-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

M. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

N. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

O. **Judicial discretion; disqualification.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent disqualification of a judge under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; by Supreme Court Order No. 08-8300-047, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely ~~[due to]~~because of financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, *see* Rules 5-401 NMRA, the Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-401 NMRA, and the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 8-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (G)(2), and (G)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that ~~[such]~~ release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~[prior to]~~before a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~[as to]~~about whether the defendant can afford to pay all or a ~~[portion]~~part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~[due to]~~because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~[due to]~~because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond ~~[upon]~~on the defendant’s failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant’s financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant’s appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”).

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~[where the]~~involving property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 8-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the municipal court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~[such]~~any supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G sets forth the procedure for the defendant to file a motion in the municipal court for review of the conditions of release. Paragraph I sets forth the procedure for the defendant to petition the district court for review of the conditions of release set by the municipal court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely ~~[due to]~~because of financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph J requires the municipal court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~[due to]~~because of inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~[due to]~~because of "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph L, a designee must be designated by the presiding municipal court judge in a written court order. A person may not be appointed as a designee if ~~[such]~~that person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph L and Rule 8-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~[prior to]~~before that defendant's first appearance before a judge.

Paragraph M of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the municipal court with respect to

matters of pretrial release. ~~[Like]~~ As with courts in other types of proceedings [where] in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial release hearing [the court] is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *see also United States v. [Marshall] Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

As set forth in Rule 8-106 NMRA, no right to peremptory disqualification exists in the municipal court, but a judge may be recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court No. _____, effective for all cases pending or filed on or after _____.]

8-403. Revocation or modification of release orders.

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

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

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

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

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

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

D. **Initial hearing.**

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

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

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

E. **Evidentiary hearing.**

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

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

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

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 8-401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~[that there is]~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~[that there is]~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

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

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

H. **Review of conditions.** If the municipal court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 8-401(I) NMRA. The defendant may petition the district court immediately ~~[upon]~~ on the issuance of the municipal court order and shall not be required to first seek review or reconsideration by the municipal court. If, ~~[upon]~~ on disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The municipal court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days.

J. **Petition to district court for review of revocation order.** If the municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5-403(K) NMRA.

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

- (a) file a copy of the district court petition in the municipal court;
- (b) serve a copy on the prosecutor; and
- (c) provide a copy to the assigned district court judge.

(2) ***Municipal court's jurisdiction pending determination of the petition.*** ~~Upon~~ On the filing of the petition, the municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the municipal court while the petition is pending.

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

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

- (i) issue an order affirming the revocation order; or
- (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the municipal court.

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

(4) ***District court order; transmission to municipal court.*** The district court shall promptly ~~transmit~~ send the order to the municipal court, and jurisdiction over the conditions of release shall revert to the municipal court.

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

[Approved, effective July 1, 1988; as amended, effective September 1, 1990; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 ("If the court has inherent power to revoke bail of a defendant during trial and pending final

disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev’d on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. ~~[Like]~~ As with courts in other types of proceedings ~~[where]~~ in which the Rules of Evidence do not apply, ~~[at]~~ a court presiding over a pretrial detention hearing ~~[the court]~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the municipal court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after_____.]

9-303. Order setting conditions of release.

[For use with District Court Rule 5-401 NMRA,
Magistrate Court Rule 6-401 NMRA,

Metropolitan Court Rule 7-401 NMRA and
Municipal Court Rule 8-401 NMRA]

STATE OF NEW MEXICO
[COUNTY OF _____]
[CITY OF _____]
_____ COURT
STATE OF NEW MEXICO
[COUNTY OF _____]
[CITY OF _____]

v.

No. _____

_____, Defendant.

ORDER SETTING CONDITIONS OF RELEASE

Release on recognizance or unsecured bond:

It is ordered that the defendant be released from custody [~~upon~~on]:
(*check and complete applicable alternatives*)

- ☐ Personal recognizance.
☐ Unsecured appearance bond of \$ _____.
☐ Third-party custody release to: _____ (individual or organization).

I/We agree to supervise the defendant; to use every effort to assure the defendant's appearance at all scheduled hearings; and to notify the court immediately [~~in the event~~if] that the defendant violates any conditions of release.

Signature of Custodian	Address (city/zip)	Area Code/Telephone #
------------------------	--------------------	-----------------------

Defendant's conditions of release:

The court **FINDS** that the following conditions of release are the least restrictive conditions necessary to reasonably assure the appearance of the defendant as required and the safety of any other person and the community. The defendant shall not violate any federal, state, or local criminal law and shall:

(*complete and check only applicable conditions [~~prior to~~before signature by defendant*)

- ☐ not possess firearms or dangerous weapons;
☐ not return to the location of the alleged incident;
☐ not consume alcohol;
☐ not consume cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;
☐ not buy, sell, consume, or possess illegal drugs;

- ☐ notify the court of any change of address;
- ☐ not leave the (county of _____) (State of _____) without prior permission of the court;
- ☐ maintain contact with the defendant's attorney/seek and consult with an attorney;
- ☐ avoid all contact with the alleged victim or anyone who may testify in this case;
- ☐ have an ignition interlock device installed on any vehicle the defendant may drive; (☐ camera capable ignition interlock device);
- ☐ be on pretrial supervision and abide by all conditions set by the court and by pretrial services;
- ☐ reside at _____ (address) unless otherwise agreed to by the court;
- ☐ submit to drug or alcohol testing [~~upon~~on] the request of _____;
- ☐ not leave the defendant's residence between the hours of _____ p.m. and _____ a.m. without prior permission of the court;
- ☐ maintain employment, or, if unemployed, actively seek employment;
- ☐ maintain or commence an educational program;
- ☐ (other conditions) _____

Release on secured bond:

☐ The court **FINDS** that release on non-monetary conditions will not reasonably assure the appearance of the defendant. In making this determination, the court finds the following particularized factors require imposition of a secured bond in the amount set forth below:

Secured bond of \$_____, secured by:

- ☐ cash at 10 % of total bond.
- ☐ real property bond executed on Form 9-304 NMRA.
- ☐ either 100% cash or a surety bond executed on Form 9-304 NMRA.

Defendant's acceptance of conditions and promise to appear:

I understand the above conditions of release and agree to them.

I understand that the court may have me arrested at any time, without notice, to review and reconsider these conditions.

I understand that my conditions of release may be revoked and I may be charged with a separate criminal offense if I intimidate or threaten a witness, the victim, or an informant, or if I otherwise obstruct justice.

I further understand that my conditions of release may be revoked if I violate a federal, state, or local criminal law.

I agree to appear before the court on _____, at _____ (a.m.) (p.m.) located at _____ and ~~[there]~~after at ~~[such]~~any times and places required in this case by any court.

I understand, that if I fail to appear as required, my bond, if any, may be forfeited, and I may be prosecuted and sent to [jail] [the penitentiary] for the separate offense of failure to appear. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly ~~[in the event]~~if I change the address indicated below.

Date of signature

Defendant's signature

Date of release

Time of release

Cell phone number

Alternate phone number

Email address

Mailing address (include city, state, and zip code)

Physical address (include city, state, and zip code)

Judicial approval of conditions:

Judge's signature

USE NOTES

(Do not print use notes on pre-printed forms)

This form was revised in 2017 in conjunction with amendments to Rules 5-401, 6-401, 7-401, and 8-401 NMRA. These rules require the court to file written findings of the individualized facts justifying any secured bond as soon as possible, but no later than two (2) days after the conclusion of the pretrial release hearing. Judges are encouraged to enter their written findings on this order at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~[such]~~any supplemental findings in a separate document within two days of the conclusion of the hearing.

If a surety provides bond for the defendant, Form 9-304 NMRA must also be completed. If a third party custodian is named, the third-party custodian agreement must also be completed and signed.

[Approved, effective September 1, 1990; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] FW: [attorney_list-grp] OUT-OF-CYCLE PUBLICATION OF PROPOSED AMENDMENTS TO SUPREME COURT RULES OF PRACTICE AND PROCEDURE

J. Michael Thomas <JThomas@da.state.nm.us>

Mon, Jan 3, 2022 at 4:11 PM

Reply-To: jthomas@da.state.nm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Hello,

On page 23, committee commentary Paragraph J, misspells "justice" as "juhstice"

J. Michael Thomas

Deputy District Attorney

13th Judicial District Attorney's Office – Cibola County

700 E. [Roosevelt Ave. #30](#)

[Grants, NM 87020](#)

(505) 285-4627 (office)

(505) 269-6143 (cell)

JThomas@da.state.nm.us

From: supjls <supjls@nmcourts.gov>

Sent: Monday, January 3, 2022 3:48 PM

To: NM Supreme Court Email Notification List <attorney_list-grp@nmcourts.gov>

Subject: [attorney_list-grp] OUT-OF-CYCLE PUBLICATION OF PROPOSED AMENDMENTS TO SUPREME COURT RULES OF PRACTICE AND PROCEDURE

NOTICE OF OUT-OF-CYCLE PUBLICATION FOR COMMENT

PROPOSED AMENDMENTS TO SUPREME COURT RULES OF PRACTICE AND PROCEDURE

Pursuant to Rule 23-106.1(C) NMRA, the rule proposals summarized below have been recommended for out-of-cycle publication for comment. If you would like to view and comment on the proposed amendments summarized below before they are submitted to the Supreme Court for final consideration, you may view the proposals and submit comments electronically through the Supreme Court's website at <https://supremecourt.nmcourts.gov/supreme-court/opinions-rules-and-forms/rules-and-forms/open-for-comment/>, or send comments by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837, or by mail to

Jennifer L. Scott, Clerk

New Mexico Supreme Court

P.O. Box 848

Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before February 3, 2022, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

Rules of Criminal Procedure for State Courts Committee

Proposal 2022-001 – Appeals from the Metropolitan Court

[Rules 1-073, 2-705, 3-701, 3-704, 3-706, 3-708, 5-827, 7-611, 7-702, and 7-703; and New Rules 3-706.1, 3-706.2, 7-703.1, and 12-609 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes the adoption of new rules and rule amendments to address the procedure for appealing a decision of the Metropolitan Court to the District Court or the Court of Appeals. The proposed rule changes include amendments to the Rules of Criminal Procedure for the Metropolitan Courts, the Rules of Criminal Procedure for the District Courts, the Rules of Civil Procedure for the Magistrate Courts, the Rules of Civil Procedure for the Metropolitan Courts, the Rules of Civil Procedure for the District Courts, and the Rules of Appellate Procedure. The proposal is intended to implement House Bill 279 (2019), which amended NMSA 1978, Section 34-8A-6, in part to provide that on-record DUI, domestic violence, and civil cases (except cases under the Uniform Owner-Resident Relations Act) are appealed directly to the Court of Appeals, not the district court.

Proposal 2022-002 – Pretrial Release & Detention

[Rules 5-106, 5-401, 5-403, 5-409, 6-401, 6-403, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401, and 8-403 NMRA; and Form 9-303 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes amendments to the rules and forms that address pretrial release and detention procedures in the district, magistrate, metropolitan, and municipal courts. Among other things, the proposed amendments would clarify the circumstances under which the district court may return jurisdiction to the magistrate or metropolitan court following a pretrial detention hearing, would require the court to conduct a status review hearing within a certain time frame for a defendant held in custody pending trial, and would clarify some of the provisions that address the district court's authority to conduct concurrent preliminary examination and pretrial detention hearings.

Jennifer L. Scott

Chief Clerk of Court

New Mexico Supreme Court

P.O. Box 848

Santa Fe, NM 87504-0848

nmsupremecourtclerk@nmcourts.gov

(505) 827-4860

1/4/22, 7:46 AM

New Mexico State Judiciary Mail - [nmsupremecourtclerk-grp] FW: [attorney_list-grp] OUT-OF-CYCLE PUBLICATION OF PROPO...

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New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 01/03/2022, 4:19 pm

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Mon, Jan 3, 2022 at 4:19 PM

Reply-To: "clodfvs@nmcourts.gov" <clodfvs@nmcourts.gov>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov

Your Name: Fred Van Soelen

Phone
Number: 575-742-7510

Email: clodfvs@nmcourts.gov

Proposal
Number: 2022-002

Comment: In the Committee Commentary to Rule 5-401:

"The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond [where the]involving property belongs to the defendant or other unpaid surety."

It would be clearer grammatically to have the word "that" between "property belongs" in the last sentence. As in "property that belongs".



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on Proposed Out of Cycle Rule Changes - Rule 5-401(L)

1 message

Burrill, Jennifer <Jennifer.Burrill@lopdm.us>

Tue, Jan 4, 2022 at 12:51 PM

Reply-To: jennifer.burrill@lopdm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Jennifer L. Scott, Clerk New Mexico Supreme Court

nmsupremecourtclerk@nmcourts.gov

Ms. Scott, please accept the following comments on the proposed change to Rule 5-401(L):

5-401(L)

The requirement of a status hearing is a welcome addition, however prior to the constitutional change to bail, the constitution required a due process status hearing every 60 days when a person was held without bond. While 5-401 does not address preventative detention cases, the circumstances are similar in that it pertains to people who remain in custody awaiting trial because they can't post a bond or meet the conditions of release. Sixty (60) days is a more appropriate timeframe to ensure that district attorney and defense counsel are complying with all discovery deadlines, so that the person is not needlessly stripped of their liberty while the parties are failing to aggressively pursue the criminal case.

Just today, the court dismissed the case against my client Michael Montoya (D-101-CR-2021-80) who had been held in custody since his arrest after finding that the district attorney had failed to produce the alleged victim to the crime for eight (8) months and had had no contact with the other civilian witness during the pendency of this case, but failed to inform the court of this fact until the jury was seated in the hallway of the courthouse. The witnesses were not the only problem in the case. The district attorney disclosed scientific fingerprint evidence that was completed May 17, 2021 on December 29, 2021, three (3) days before trial, showing that the Santa Fe Police department had mislabeled evidence and that at least one officer concealed evidence during their pretrial interview. The only evidence against my client, in an attempted robbery with a machete, was that on that same day he was wearing blue pants and tan work boots. For this he was stripped of his liberty for eleven (11) months. The district attorney did file a preventative detention motion that was denied, however because he was homeless and could not produce a valid address for the court, which would have allowed him to be placed on the electronic monitoring bracelet, he was forced to stay in jail for eleven (11) months.

Status hearings should be set every 60 days when someone is held in custody due to an inability to post bond or meet the conditions of release. Had this been done in Michael's case, the case would have been dismissed months ago. Holding the hearing at twelve (12) months fails to weed out cases where the State has failed to produce the evidence it based the criminal charges on, clogging the court's docket, and needlessly denying people their liberty.

Finally, this change to the rule does not articulate factors for the court to consider at the status hearing or the purpose of the hearing. My concern is that such a hearing requires only the presence of the parties, serving no real purpose other than to update the court. If this is your goal, I am opposed to adding another required hearing that fails to advance resolution of the criminal case. It would be more appropriate to label the status hearing a due process hearing if the goal is a review of the steps taken to protect a person's constitutional rights while they are being held in jail awaiting trial. At this hearing the court could have two options if it found that the State has not been mindful of the defendant's constitutional rights, release from custody or dismissal.

Jennifer Burrill

*Law Office of the Public Defender
Supervising Attorney, Santa Fe Trial Division
301 North Guadalupe, Suite 101
Santa Fe, New Mexico 87501
Direct line – 505-395-2880
Paralegal, Avalita – 505-395-2851*



NEW MEXICO
LAW OFFICES OF THE
PUBLIC DEFENDER

"The most odious of all oppressions are those which mask as justice." – Justice Robert Jackson



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on Proposed Out of Cycle Rule Changes - Rule 5-106

1 message

Burrill, Jennifer <Jennifer.Burrill@lopdm.us>

Tue, Jan 4, 2022 at 11:26 AM

Reply-To: jennifer.burrill@lopdm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Jennifer L. Scott, Clerk New Mexico Supreme Court
nmsupremecourtclerk@nmcourts.gov

Ms. Scott, please accept the following comments on the proposed change to Rule 5-106:

Rule – 5-106

The preventative detention hearings have the possibility of striping a person's liberty for years without the district attorney being required to call witnesses or present any evidence. By removing a person's ability to excuse a judge from the preventative detention hearing, who may have extensive prior dealings with them, greatly increases the opportunity for injustice to occur.

Persons charged with a crime should have the opportunity to exercise their one excusal at the preventative detention hearing, understanding that an excusal at this point would prevent them from excluding any trial judge assigned to the case.

Jennifer Burrill

*Law Office of the Public Defender
Supervising Attorney, Santa Fe Trial Division
301 North Guadalupe, Suite 101
Santa Fe, New Mexico 87501
Direct line – 505-395-2880
Paralegal, Avalita – 505-395-2851*



NEW MEXICO
LAW OFFICES OF THE
PUBLIC DEFENDER

"The most odious of all oppressions are those which mask as justice." — Justice Robert Jackson



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 01/04/2022, 3:50 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Tue, Jan 4, 2022 at 3:50 PM

Reply-To: "david.overstreet@qwestoffice.net" <david.overstreet@qwestoffice.net>

To: supjdm@nmcourts.gov, supjls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov

Your
Name: David Overstreet

Phone
Number: 575.439.5425

Email: david.overstreet@qwestoffice.net

Proposal
Number: 2022-002

Comment: With regard to Municipal Court Rule 8-401 NMRA, the changes regarding the standard non-monetary conditions of release seems to align with current New Mexico law. However, the proposed form 9-303 includes the standard provision that "The defendant shall not violate any federal, state, or local criminal law and shall..." Since cannabis is still illegal under federal law, it might still provide a basis for an allegation that possession, even with a certification from a licensed medical practitioner, violated the conditions of release.



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 01/05/2022, 8:01 am

1 message

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Wed, Jan 5, 2022 at 8:01 AM

Reply-To: "graham.dumas@lopdm.us" <graham.dumas@lopdm.us>

To: supjdm@nmcourts.gov, supjls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov

Your
Name: Graham Dumas

Phone
Number: 505-835-2243

Email: graham.dumas@lopdm.us

Proposal
Number: 2022-002

Comment: I appreciate the provision in 5-401(L) and 5-409(J) for a status review for defendants held over one year, but respectfully suggest that this review should occur earlier to avoid unnecessarily long detentions.

The clarification in 5-409(I) is helpful to address rare cases where no probable cause is found for any felony. However, removing the extant language regarding the order of termination in lower-court matters may cause confusion as to which court retains jurisdiction after a pretrial detention motion hearing, but before indictment or bind-over. Conforming the proposed language and to the prior version of paragraph I would be the most clear.

Finally, I thank the Court for declining to include rebuttable presumptions of detention in Rule 5-409. These suggestions are not supported by evidence and would likely contradict Art. II, sec. 13, of the constitution.



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on Proposed Out of Cycle Rule Changes - Rule 5-409

1 message

Burrill, Jennifer <Jennifer.Burrill@lopdm.us>

Wed, Jan 5, 2022 at 12:53 PM

Reply-To: jennifer.burrill@lopdm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Jennifer L. Scott, Clerk New Mexico Supreme Court
nmsupremecourtclerk@nmcourts.gov

Ms. Scott, please accept the following comments on the proposed change to Rule 5-409:

5-409(B) Support the identification of grand jury or preliminary hearing in the motion, despite believing that all preventative detention cases should require a public preliminary hearing. Allowing proffered evidence combined with secret grand jury proceedings, allows a person to be stripped of their liberty for years without the State presenting any evidence they committed the crime alleged. Several States including....

5-409(F) In all preventative detention cases the preliminary hearing should be held first, with the preventative detention hearing following the preliminary hearing. This eliminates the need for the court to rely on unsubstantiated proffered evidence when making its findings on the preventative detention motion and provides the defendant time to actually meet with defense counsel and prepare a defense to the allegations and preventative detention motion.

Under the proposed rule, the defendant is the only one not able to request a combined hearing. Why? Any party should be able to request a combined hearing, assuming the district attorney has not previously obtained a grand jury indictment.

5-409(F)(1)(b) This addition to the rule needlessly complicated the process. It would be much simpler and provide more due process to the defendant if the court required combined preliminary hearings and preventative detention hearings, adopting the preliminary hearing 10 day deadline. The proposed rule adopts an 8 to 10 day range and expands the extension time line by 2 days without guaranteeing the protections of a preliminary hearing. Since preliminary hearings are required to

be held within 10 day a combined hearing with the 10 day time frame provides not only judicial efficiency, but also allows the parties sufficient time to prepare their evidence and arguments so that the court can make an informed decision rather than rubber stamping the police report that is proffered by the State.

5-409(F)(4) & (G) The change clearly represents the *Groves* factors and clarifies in the rule that the State must meet both prongs of the analysis for a person to be preventatively detained.

5-409(I) This is a welcome change that lessens the burden on the district court dockets, when the only charges remaining are misdemeanors.

5-409(J) The requirement of a status hearing is a welcome addition, however prior to the constitutional change to bail, the constitution required a due process status hearing every 60 days when a person was held without bond. Sixty (60) days is a more appropriate timeframe to ensure that district attorney and defense counsel are complying with all discovery deadlines, so that the person is not needlessly stripped of their liberty while the parties are failing to aggressively pursue the criminal case.

Finally, this change to the rule does not articulate factors for the court to consider at the status hearing or the purpose of the hearing. My concern is that such a hearing requires only the presence of the parties, serving no real purpose other than to update the court. If this is your goal, I am opposed to adding another required hearing that fails to advance resolution of the criminal case. It would be more appropriate to label the status hearing a due process hearing if the goal is a review of the steps taken to protect a person's constitutional rights while they are being held in jail awaiting trial. At this hearing the court could have two options if it found that the State has not been mindful of the defendant's constitutional rights, release from custody or dismissal.

Jennifer Burrill

*Law Office of the Public Defender
Supervising Attorney, Santa Fe Trial Division
301 North Guadalupe, Suite 101
Santa Fe, New Mexico 87501
Direct line – 505-395-2880
Paralegal, Avalita – 505-395-2851*



NEW MEXICO
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New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 01/19/2022, 10:24 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Wed, Jan 19, 2022 at 10:24 AM

Reply-To: "wolfgang.bomgardner@lopdm.us" <wolfgang.bomgardner@lopdm.us>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov

Your
Name: Wolfgang Bomgardner
Phone
Number: 5053693610
Email: wolfgang.bomgardner@lopdm.us
Proposal
Number: 2022-002

Comment: First, I wanted to commend the Courts on declining to propose any presumptions that defendants should be held pretrial. The presumption of innocence is a bedrock of the adversarial process, and the Courts should continue to uphold this principle.

5-401

There should be definitive deadlines set. A status conference should be required sooner than after 12 months. Definitive deadlines within a year ensure efficient, fair, and speedy administration of the criminal legal process. Without those deadlines, cases languish when they should be resolved. This clogs court dockets and traps innocent people in jail.

5-409

A, B

Prosecutors should be required to commit to a grand jury or preliminary hearing. This ensures the Court knows what sort of setting is required. It also ensures that defense attorneys know how to prepare and counsel clients.

C

The clarification that there must be a finding of probable cause by a judge or magistrate seems like it will be helpful if some judicial officials are not doing what is required of them.

F

The prelim should happen within 8 days. The State has the burden of proving that there is probable cause justifying deprivation of liberty. 8 days has proven sufficient time for the state to contact the police to learn the allegations involved in a case.



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Proposal 2022-022

1 message

Kelly, Anne <akelly@nmag.gov>

Thu, Feb 3, 2022 at 9:02 AM

Reply-To: akelly@nmag.gov

To: nmsupremecourtclerk@nmcourts.gov, Jennifer Scott <supjls@nmcourts.gov>

Good morning, Ms. Scott.

Attached please find a letter with public comments on Proposal 2022-002.

All the best,
Anne

--

M. Anne Kelly
Chief Deputy Attorney General for Criminal Affairs
Office of the New Mexico Attorney General
(505) 717-3505 (office)
(505) 318-7929 (cell)

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Letter to NMSC re Proposal 2022-002 – Pretrial Release & Detention (2).pdf

199K

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

February 3, 2022

Jennifer L. Scott, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
Via email only to nmsupremecourtclerk@nmcourts.gov

Re: Proposal 2022-002 – Pretrial Release & Detention

Dear Ms. Scott,

I wish to submit public comment to the proposed amendments to the Supreme Court's Rules of Practice and Procedure, specifically to Proposal 2022-002, published January 3, 2022.

- 1. The proposed requirement that prosecutors show a “likely” specific threat to the safety of others in addition to the existing requirement that no release conditions will reasonably protect the safety of the community is an additional burden not contemplated by current law.**

The proposed revision to Rule 5-409(F)(4) includes an additional requirement for pretrial detention, that the “prosecutor must prove by clear and convincing evidence that *the defendant is likely to pose a threat to the safety of others if released pending trial*” (emphasis added) in addition to the requirement that no release conditions will reasonably protect the safety of any other person or the community.

Moving the threshold for pretrial detention from reasonable protection of the community to actually demonstrating a *probability* of threat to others pushes the prosecutor's burden to a higher and nearly untenable burden of predicting future behavior. However, in describing the task set for prosecutors, our Supreme Court highlighted that courts consider “the extent to which” the information, in any form, reviewed by the Court “would indicate that a defendant *may be likely* to pose a threat to the safety of others if released pending trial.” *State ex rel. Torrez v. Whitaker*,

2018-NMSC-005, ¶ 100, 410 P.3d 201 (emphasis added). This language does not currently require a specific determination of probabilities or likelihoods of specific future threats, but is instead stated as the potential for harm to the safety of others (*i.e.*, may be likely to pose a threat). This requirement is already codified in the existing rule. Supplementing it in the direction beyond what has been stated by precedent needlessly erodes the purpose of the pretrial detention constitutional amendment by departing from precedent and limiting the efficacy of a court's ability to consider the danger posed by violent criminal actors. Changing the language-when we have Supreme Court precedent elucidating the meaning of the current language-would only cause confusion at the district court level.

2. The proposals requiring status hearings for people held in custody over one year require additional guidelines.

Proposed Rules 5-401(L), 5-403(I), and 5-409(J) would require trial courts to conduct a "status review hearing" in any case in which a defendant has been in custody for more than one year. The proposed Committee Commentary provides clarification as to the purpose of these hearings -"to determine how best to expedite a trial in the case."

I respectfully submit that the mandatory review hearings need structure beyond that contained within the aforementioned proposed commentary. For example, it should be explained whether a reviewing court is mandated at these hearings to review its prior decision concerning pretrial detention or revocation of conditions of release and, if so, the criteria for review.

3. The proposal requiring the State to specify how it intends to establish probable cause needs clarification.

Proposed Rule 5-409(B) would require the State in its pretrial detention motion to:

specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

While the proposed Committee Commentary clarifies that this addition is meant to alleviate "time constraints" in setting a multitude of potentially unnecessary preliminary hearings, the rules should contain a clarification that the good faith statement mandated by Rule 5-409(B) in no way limits a State's discretion to, in good faith, later pursue a different path towards prosecution, and that there should be no penalty for deviating from the initially stated course.

4. Courts cannot order the State to charge a defendant by way of a preliminary hearing held concurrently with a pretrial-detention hearing.

Proposed Rule 5-409(F)(b) says that a trial court can order a detention hearing to be held concurrently with a preliminary hearing “if the prosecutor requests *or the court on its own motion orders* the expedited pretrial detention hearing and preliminary examination to be held concurrently...” (emphasis added).

This proposed addition impinges upon prosecutorial discretion by limiting the method by which the State might initiate a criminal prosecution. *See State v. Isaac M.*, 2001-NMCA-088, ¶ 15, 131 N.M. 235 (explaining prosecutorial discretion and instances in which a court might limit that concept); *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176 (stating that a prosecutor can seek a probable-cause determination by way of a grand jury indictment or a preliminary hearing). For instance, if the State wishes to charge a defendant by way of grand jury, but a court instead orders a concurrent detention/preliminary hearing, the State’s discretion necessarily gives way to that court’s directive. This is contrary to law. *See* Rule 5-201 NMRA (explaining the three ways the State, not a district court, may commence a criminal prosecution).

Respectfully,

A handwritten signature in black ink, appearing to read "M Anne Kelly".

M. Anne Kelly
Chief Deputy Attorney General
akelly@nmag.gov



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Bernalillo County Metropolitan Court's Comments on Proposals 2022-001 and 2022-002

1 message

Alesia Cappon <metranc@nmcourts.gov>

Thu, Feb 3, 2022 at 9:33 AM

Reply-To: metranc@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Cc: Artie Pepin <aocawp@nmcourts.gov>

Good morning,

Please see attached comments on Appeals from the Metropolitan Court and Pretrial Release and Detention from Bernalillo County Metropolitan Court Chief Judge Maria I. Dominguez.

Respectfully,

Alesia Cappon

--

Alesia Cappon

Deputy General Counsel

Office of the General Counsel

Bernalillo County Metropolitan Court

401 Lomas Blvd. NW (87102)

Albuquerque, NM 87103

Phone: (505) 841-8258

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Ltr to Jennifer Scott-NMSC comment on Proposal(s) 2022-001 and 2022-002 2-3-22.pdf

195K



Chambers of
Judge Maria I. Dominguez
Chief Judge
Metropolitan Court
Division VI

State of New Mexico
Bernalillo County
Metropolitan Court

401 Lomas Blvd NW
Albuquerque, New Mexico 87102
Telephone (505) 841-8289
Fax (505) 222-4806

February 3, 2022

VIA EMAIL

Jennifer L. Scott, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: NM Supreme Court Seeking Comment on
Proposal 2022-001-Appeals from the Metropolitan
Court [Rules 1-073, 2-705, 3-701; 3-704; 3-706; 3-
708; 5-827, 7-611; Rule 7-702 and 7-703, NMRA
and New Rules 3-706.1, 3-706.2 7-703.1, and 12-609
NMRA]; *Proposal 2022-002*-Pretrial Release &
Detention [Rules 5-106, 5-401, 5-409, 6-401, 6-403,
6-501, 7-401, Rule 7-403, Rule 7-409, 7-501, 8-401
and 8-403; and Form 9-303 NMRA]

Dear Ms. Scott:

On behalf of the Metropolitan Court, we appreciate the opportunity to comment on the Rules regarding Appeals from the Metropolitan Court and Pretrial Release & Detention.

1. *Proposal 2022-001*-Appeals from the Metropolitan Court Rules 1-073, 2-705, 3-701, 3-704, Rule 3-706, Rule 3-708, 5-827, 7-611, 7-702 and Rule 7-703 NMRA and New Rules 3-706.1, 3-706.2 7-703.1 and 12-609 NMRA

Proposal 2022-001 is intended to implement House Bill 279 (2019), which amended NMSA 1978, Section 34-8A-6, in part to provide that on-record driving while under the influence of intoxicating liquor or drugs ("DUI"), domestic violence, and civil cases (except for civil cases under the Uniform Owner Resident Relations Act) are appealed directly to the Court of Appeals, and all cases where the Metropolitan Court is not a court of record are appealed to the District Court. As to Rule 1-073 NMRA, it would be helpful if the committee commentary could clarify for practitioners what is meant by a "de novo appeal" as opposed to a "de novo trial." Section 34-8A-6(C) NMSA 1978 provides that in civil cases where the Metropolitan Court is not a court of record, "The appeal shall be de novo." Conversely, Section 39-3-1 NMSA 1978 provides, "All appeals

from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law.” While the annotations to Section 39-3-1 NMSA 1978 refer litigants to Section 34-8A-6 NMSA 1978 for appeals from Metropolitan Court, as there are so many self-represented litigants, particularly in civil actions, we think it would be helpful to clarify in the committee commentary to the rule what is meant by an appeal de novo or a de novo review as opposed to a trial de novo, and in particular, how these standards of review correspond with the requirements of Section 39-3-1 NMSA.

2. *Proposal 2022-002-Pretrial Release & Detention Rules 5-106, 5-401, 5-409, 6-401, 6-403, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401, 8-403 and Form 9-303 NMRA*

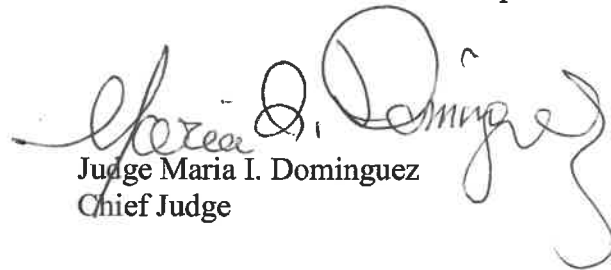
Bernalillo County Metropolitan has identified a concern about the proposed amendment to Subsection B of Rules 5-409, 6-409 and 7-409 NMRA that requires the movant to, “Specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and to expedited pretrial detention hearing be held concurrently.”

Grand Jury proceedings are to remain secret until the Indictment is returned by the grand jury. *See* NMSA 1978, §31-6-1, et. seq. “The grand jury is an ancient institution. It has always been venerated and highly prized in this country. It has been regarded as the shield of innocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. These blessings accrue from the grand jury because its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it. It has been the practice for more than two hundred years for its investigations to be in private, except that the district attorney and his assistant are present. Secrecy is the vital requisite of grand jury procedure.” *State v. Hill*, 1975-NMCA-093, ¶ 7. “It is most important that the secrecy of the grand jury be maintained. For centuries grand jury sessions have been surrounded by a cloak of seclusion and secrecy that has been jealously guarded and preserved as the only means of insuring that the jury be permitted the freedom of action necessary for a vigorous and effective discharge of its duties.” *Baird v. State*, 1977-NMSC-067, ¶ 7. “The reasons for this ancient policy are many. Among them are: promoting freedom in the disclosure of crime; preventing coercion of grand jurors through outside influences and intimidation, thus allowing a freedom of deliberation and expressions of opinion which would otherwise be impossible; prohibiting the safety and anonymity of witnesses, thus encouraging the greatest possible latitude in their voluntary testimony; preventing forewarning to those whose criminal conduct has been uncovered; and protecting the good names of persons considered by the grand jury but not indicted.” *Id.* ¶ 8. For this reason, the Court recommends that the any reference to the grand jury be stricken from Subsection B of Rules 5-409, 6-409 and 7-409 NMRA. It should instead read: “The motion shall include the specific facts that warrant pretrial detention and shall specify whether the state is requesting that the preliminary examination and the expedited pre-trial detention hearing be held concurrently.” The reference to grand jury in the respective Committee Commentaries that references Paragraph B should also be removed.

Jennifer L. Scott, Clerk
New Mexico Supreme Court
February 3, 2022
pg. 3

Bernalillo County Metropolitan has identified a concern about the proposed amendment to Subsection C of Rules 5-409, 6-409 and 7-409 NMRA that requires the magistrate or metropolitan court proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or 7-501 NMRA before it sends to the district court clerk a copy of the motion for pretrial detention and its jurisdiction is terminated. This directive is inconsistent with the purpose of first appearance, which is to determine probable cause and set conditions of release. Customarily, the judges of Metropolitan Court, upon the filing of an Expedited Motion for Pretrial Detention, are not proceeding with the first appearance, as the probable cause has occurred separately, and only the District Court may grant or deny the prosecutor's motion to preventatively detain the defendant or impose conditions of release, and only after a hearing. For this reason, the Court recommends that Subsection C of Rule 5-409, 6-409 and Rule 7-409 NMRA remain unchanged.

We appreciate the opportunity to share these concerns and our suggestions for changes. As always, please feel free to contact us if you wish to discuss these matters further or if we can provide any additional information.



Judge Maria I. Dominguez
Chief Judge

cc: Judges of the Metropolitan Court
Robert Padilla, Court Executive Officer
Arthur W. Pepin, Director, Administrative Office of the Courts



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 02/03/2022, 3:29 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 3, 2022 at 3:29 PM

Reply-To: "coamrh@nmcourts.gov" <coamrh@nmcourts.gov>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name: Michelle Haubert

Phone Number: 5056035744

Email: coamrh@nmcourts.gov

Proposal Number: 2022-002

Comment: Comments submitted on behalf of DACA.
Part 1 of 2.

Upload: [DACA-Comments-to-Proposed-Amendments-to-Pretrial-Detention-Rule.docx](#)



DACA-Comments-to-Proposed-Amendments-to-Pretrial-Detention-Rule.docx

14K

DIVISION OF APPELLATE COURT ATTORNEYS COMMENTS TO PROPOSED RULE AMENDMENTS

Rule 5-409(F)

The proposed amendment to Rule 5-409(F) extends the time for holding a pretrial detention hearing when the prosecutor requests or the district court orders that the pretrial detention hearing and preliminary examination proceed concurrently.

Proposed Amendment to Rule 5-409(F)(1)(b) provides that a combined hearing shall be held no less than 8 days and no more than 10 days after the triggering event. This extends the time for holding pretrial detention hearing by 3-5 days.

Proposed Amendment to Rule 5-409(F)(1)(c) provides, under the heading **Extensions**, that a district court SHALL extend the time period as follows:

for ~~up to~~ three (3) days to five (5) days if in the motion for pretrial detention the prosecutor requests or the [district] court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

By including this language in both Rule 5-409(F)(1)(b) and Rule 5-409(F)(1)(c), this could lead to confusion as to whether an additional extension of time beyond the time provided in Rule 5-409(F)(1)(b) is required.

DACA suggests either deleting Rule 5-409(F)(1)(c) OR adding a cross-reference for clarification, such as:

for ~~up to~~ three (3) days to five (5) days, as provided in Subparagraph (F)(1)(b), if in the motion for pretrial detention the prosecutor requests or the [district] court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

Rule 5-409(G)

The proposed amendment to Rule 5-409 allowing for and/or encouraging preliminary examinations and pretrial detention hearings be held concurrently, creates some concern regarding timely and appropriate appellate review. Given the expedited nature of appellate review in pretrial detention cases, specificity in the district court's order aids in ensuring, not only timely, but meaningful and accurate appellate review. DACA suggests requiring the district court to identify the specific evidence or information that it relied on to support the individualized findings necessary for pretrial detention. We believe this will assist in timely and meaningful review of all pretrial detention decisions.

In addition, we suggest when a concurrent hearing is held that the district court be required to separate out the evidence it relied on in support of its determination of probable cause from the evidence or information it relied on in supporting its pretrial detention determination. In addition to the reasons articulated above, this suggestion is based on the fact that the Rules of Evidence are applied differently to probable cause and pretrial detention determinations. Rule 5-302(B)(5) Preliminary Examinations states that the Rules of Evidence generally apply, while Rule 5-409(F)(5) Pretrial Detention provides that the Rules of Evidence do not apply to the presentation and consideration of information at a pretrial detention hearing. Thus, evidence or information that may be permissible to support a pretrial detention determination may not be allowed to support the probable cause determination.

DACA suggests revising Rule 5-409(G) as follows:

G. **Order for pretrial detention.** The district court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community. The order shall contain findings of the individualized facts and the evidence or information relied on in establishing that the defendant is likely to pose a threat to the safety of others if released pending trial and the evidence or information relied on in establishing that no release conditions will reasonably protect the safety of any other person or the community. The order justifying the detention must be filed as soon as possible, but no later than three (3) days after the conclusion of the hearing. When the preliminary examination and pretrial detention hearing are held concurrently, the district court order shall separately identify the evidence relied on in finding probable cause that the defendant has committed a felony offense.

Please see accompanying Word document for track changes.



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 02/03/2022, 3:32 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 3, 2022 at 3:32 PM

Reply-To: "coamrh@nmcourts.gov" <coamrh@nmcourts.gov>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name: Michelle Haubert

Phone Number: 5056035744

Email: coamrh@nmcourts.gov

Proposal Number: 2022-002

Comment: Comments for DACA attached.
Part 2 of 2.

Upload: [Proposed-Amend.-5-409-PFC-1.3.22_DACA-Cmt-Final.docx](#)



Proposed-Amend.-5-409-PFC-1.3.22_DACA-Cmt-Final.docx

34K

5-409. Pretrial detention.

A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a motion [~~itled “Expedited Motion for Pretrial Detention”~~] for an expedited pretrial detention hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file [~~an expedited~~] a motion for an expedited pretrial detention hearing at any time in [~~both~~] the court where the case is pending [~~and in the district court~~]. The motion shall include the specific facts that warrant pretrial detention and[, in the event that probable cause has not yet been determined,] shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

(1) The prosecutor shall immediately deliver a copy of the motion to

- (a) the detention center holding the defendant, if any;
- (b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

(3) ~~[The]~~ Except where the court finds no probable cause, the court may not grant or deny the motion for pretrial detention without a hearing.

C. **Case ~~[pending]~~ initiated in magistrate or metropolitan court.** If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court ~~[clerk]~~ shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly ~~[transmit]~~ send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan ~~[court's]~~ court shall then close the case and its jurisdiction shall ~~[then]~~ be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph (I) of this rule.

D. **Case ~~[pending]~~ initiated in district court.** If a motion for pretrial detention is filed in the district court and an initial finding of probable cause has not been ~~[found]~~ made under ~~[Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA,]~~ Rule 5-301 NMRA, Rule 6-203 NMRA, ~~[Rule 6-204(B) NMRA,]~~ or Rule 7-203 NMRA, ~~[or Rule 7-204(B) NMRA,]~~ the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the ~~[district]~~ court finds no probable cause, the ~~[district]~~ court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause is found, the court shall

1 proceed to conduct the defendant's first appearance under Rule 5-301(D) NMRA and Rule 5-
2 401(A) NMRA.

3 E. **Detention pending hearing; warrant.**

4 (1) **Defendant in custody when motion is filed.** If a detention center receives
5 a copy of a motion for pretrial detention, the detention center shall distribute the motion to any
6 person designated by the district, magistrate, or metropolitan court to release defendants from
7 custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-
8 408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release
9 a defendant pursuant to such designation is terminated upon receipt of a detention motion until
10 further court order.

11 (2) **Defendant not in custody when motion is filed.** If the defendant is not in
12 custody when the motion for pretrial detention is filed, the district court may issue a warrant for
13 the defendant's arrest if the motion establishes probable cause to believe the defendant has
14 committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention
15 under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege
16 sufficient facts, the court shall issue a summons and notice of hearing.

17 F. **[~~Pretrial~~] Expedited pretrial detention hearing.** The district court shall hold [~~a~~]
18 an expedited hearing on the motion for pretrial detention to determine whether any release
19 condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the
20 safety of any other person or the community. [~~Upon~~] On the request of the prosecutor or on the
21 court's own motion, the [~~district~~] court shall set the matter for a preliminary examination to be
22 held concurrently with the motion for pretrial detention.

23 (1) ***Time.***

(a) *Time limit.* The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

(i) the filing of the motion for pretrial detention; or
(ii) the date the defendant is arrested as a result of the motion for pretrial detention.

(b) *Time limit for concurrent hearings.* Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days following the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

~~(b)~~ (c) *Extensions.* The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court ~~may~~ shall extend the time limit for holding the hearing as follows:

(i) for ~~up to~~ three (3) days to five (5) days, as provided in Subparagraph (F)(1)b). if in the motion for pretrial detention the prosecutor requests or the ~~[district] court on its own motion orders~~ a preliminary hearing to be held concurrently with the detention hearing;

(ii) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the extension;

(iii) upon the defendant filing a waiver of the time limit; or

(iv) upon stipulation of the parties.

1 ~~[(e)]~~ (d) *Notice.* The court shall promptly schedule the hearing and
2 notify the parties of the hearing setting within one (1) business day after the filing of the motion.

3 (2) ***Initial disclosures.***

4 (a) The prosecutor shall promptly disclose to the defendant prior to the
5 hearing

6 (i) all evidence that the prosecutor intends to rely on at the
7 hearing, and

8 (ii) all exculpatory evidence known to the prosecutor.

9 (b) Except in cases where the hearing is held within two (2) business
10 days after the filing of the motion, the prosecutor shall disclose evidence under this subparagraph
11 at least twenty-four (24) hours before the hearing. At the hearing the prosecutor may offer evidence
12 or information that was discovered after the disclosure deadline, but the prosecutor must promptly
13 disclose the evidence to the defendant.

14 (3) ***Defendant's rights.*** The defendant has the right to be present and to be
15 represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The
16 defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance
17 of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by
18 proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not
19 be used against the defendant at trial except for impeachment purposes or in a subsequent
20 prosecution for perjury.

21 (4) ***Prosecutor's burden.*** The prosecutor must prove by clear and convincing
22 evidence that the defendant is likely to pose a threat to the safety of others if released pending trial

1 and that no release conditions will reasonably protect the safety of any other person or the
2 community.

3 (5) ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the
4 presentation and consideration of information at the hearing. The court may make its decision
5 regarding pretrial detention based upon documentary evidence, court records, proffer, witness
6 testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof
7 presented at the hearing.

8 (6) ***Factors to be considered.*** The court shall consider any fact relevant to the
9 nature and seriousness of the danger to any person or the community that would be posed by the
10 defendant's release and any fact relevant to the issue of whether any conditions of release will
11 reasonably protect the safety of any person or the community, including but not limited to the
12 following:

13 (a) the nature and circumstances of the offense charged, including
14 whether the offense is a crime of violence;

15 (b) the weight of the evidence against the defendant;

16 (c) the history and characteristics of the defendant;

17 (d) the nature and seriousness of the danger to any person or the
18 community that would be posed by the defendant's release;

19 (e) any facts tending to indicate that the defendant may or may not
20 commit new crimes if released;

21 (f) whether the defendant has been ordered detained under Article II,
22 Section 13 of the New Mexico Constitution based on a finding of dangerousness in another
23 pending case or was ordered detained based on a finding of dangerousness in any prior case; and

(g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

G. **Order for pretrial detention.** The district court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community. The ~~court order~~ shall ~~file contain~~ findings of the individualized facts and the evidence or information relied on in establishing that the defendant is likely to pose a threat to the safety of others if released pending trial and the evidence or information relied on in establishing that no release conditions will reasonably protect the safety of any other person or the community. The order justifying the detention must be filed as soon as possible, but no later than three (3) days after the conclusion of the hearing. When the preliminary examination and pretrial detention hearing are held concurrently, the district court order shall separately identify the evidence relied on in finding probable cause that the defendant has committed a felony offense.

H. **Order setting conditions of release.** The district court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than three (3) days after the conclusion of the hearing.

1 I. **Further proceedings in cases initiated in magistrate or metropolitan**
2 **court.** [~~Upon completion of the hearing, if the case was pending in the magistrate or metropolitan~~
3 ~~court, the district court shall promptly transmit to the magistrate or metropolitan court an order~~
4 ~~closing the magistrate or metropolitan court case.~~] If, following a preliminary examination, the
5 district court finds no probable cause to believe that the defendant has committed a felony offense,
6 the court shall set conditions of release and may remand any remaining misdemeanor charges to
7 the magistrate or metropolitan court for further proceedings.

8 J. **Expedited trial scheduling for defendant in custody.** The district court shall
9 provide expedited priority scheduling in a case in which the defendant is detained pending trial.
10 The court shall hold a status review hearing in any case in which the defendant has been held for
11 more than one (1) year.

12 K. **Successive motions for pretrial detention and motions to reconsider.** On written
13 motion of the prosecutor or the defendant, the district court may reopen the detention hearing at
14 any time before trial if the court finds that

15 (1) information exists that was not known to the movant at the time of the
16 hearing or circumstances have changed subsequent to the hearing, and

17 (2) the information or changed circumstance has a material bearing on whether
18 the previous ruling should be reconsidered.

19 L. **Appeal.** Either party may appeal the district court order disposing of the motion for
20 pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district
21 court order shall remain in effect pending disposition of the appeal.

22 M. **Judicial discretion; disqualification and excusal.** Action by any court on any
23 matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of

a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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 Nos. 20-8300-013 and 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. —

Paragraph A — In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in “capital offenses when the proof is evident or the presumption great.” As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed. *See State v. Ameer*, 2018-NMSC-030.

Although this rule does not provide the district court with express sanction authority, the district court retains inherent authority to “impose a variety of sanctions on both litigants and attorneys in order to regulate docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*, 2017-NMSC-017, ¶ 19, 394 P.3d 959 (“Where discovery violations inject needless delay into the proceedings,

1 courts may impose meaningful sanctions to effectuate their inherent power and promote efficient
2 judicial administration.”). “Extreme sanctions such as dismissal are to be used only in exceptional
3 cases.” *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation
4 marks and citation omitted), *modified on other grounds by Le Mier*, 2017-NMSC-017. *Cf.* Rule 5-
5 206 NMRA (providing that an attorney may be subject to appropriate disciplinary action for
6 violating the rule); Rules 5-501(H), 5-502(G), 5-503.2(B), 5-505(B) NMRA (sanctions for
7 discovery violations); Rule 5-511 NMRA (sanctions for burdening a person subject to a
8 subpoena).

9 **Paragraph B** — Paragraph B permits the prosecutor to file a motion for pretrial detention
10 at any time. The prosecutor may file the motion at the same time that the prosecution requests a
11 warrant for the defendant’s arrest under Rule 5-208(D) NMRA.

12 Under this Paragraph, the prosecutor retains discretion to “obtain[] a neutral determination
13 of probable cause” by either presenting the case to a grand jury or proceeding with a preliminary
14 examination. See *Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176. However, because
15 the district court faces time constraints in setting a preliminary examination if requested, the
16 prosecutor is required to advise the court of the need for such a setting by stating in the motion for
17 pretrial detention whether the prosecutor intends to proceed by grand jury indictment or instead by
18 preliminary examination and the filing of a criminal information.

19 **Paragraph C** — Under Paragraph C, the filing of a motion for pretrial detention deprives
20 the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district
21 court, except as provided by Paragraph I. The district court’s exclusive jurisdiction extends to cases
22 that are refiled after dismissal.

1 **Paragraphs C and D** — Federal constitutional law requires a “prompt judicial
2 determination of probable cause” to believe the defendant committed a chargeable offense, before
3 or within 48 hours after arrest, in order to continue detention or other significant restraint of
4 liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause
5 does not relieve the prosecutor from proving the grounds for pretrial detention by clear and
6 convincing evidence.

7 **Paragraph F** — Paragraph F sets forth procedures for pretrial detention hearings. The
8 court must “make three categories of determinations” at a pretrial detention hearing: “(1) which
9 information in any form carries sufficient indicia of reliability to be worthy of consideration, (2)
10 the extent to which that information would indicate that a defendant may be likely to pose a threat
11 to the safety of others if released pending trial, and (3) whether any potential pretrial release
12 conditions will reasonably protect the safety of others.” *State v. Groves*, 2018-NMSC-006, ¶
13 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

14 Subparagraph [(F)(1)(b)(i)] (F)(1)(c)(i) authorizes an extension of time if the prosecutor
15 requests or the court orders a preliminary hearing to be held concurrently with the detention
16 hearing.

17 Subparagraph (F)(3) describes the defendant’s rights at the hearing. “[T]he Due Process
18 Clause of the New Mexico Constitution requires that a defendant’s protections at a pretrial
19 detention hearing include ‘the right to counsel, notice, and an opportunity to be heard.’” *State ex*
20 *rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 88, 410 P.3d 201 (quoting *State v. Brown*, 2014-
21 NMSC-038, ¶ 20, 338 P.3d 1276). “Due process requires a meaningful opportunity to cross-
22 examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial
23 detention hearing.” *Id.* The defendant shall be entitled to appear and participate personally with

1 counsel before the judge conducting the detention hearing, rather than by any means of remote
2 electronic conferencing.

3 Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention
4 hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified
5 that “neither the United States Constitution nor the New Mexico Constitution categorically
6 requires live witness testimony at pretrial detention hearings.” 2018-NMSC-005, ¶ 110. The court
7 may rely on “credible proffers and other summaries of evidence, law enforcement and court
8 records, or other nontestimonial information” in determining whether the prosecutor has met its
9 burden under Article II, Section 13. *Id.* ¶ 3. In doing so, the court should exercise “sound judicial
10 discretion in assessing the reliability and accuracy of information presented in support of detention,
11 whether by proffer or direct proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion
12 to find proffered or documentary information insufficient to meet the constitutional clear and
13 convincing evidence requirement in the context of particular cases.” *Id.* ¶ 3. Both the prosecutor
14 and the defendant may proceed by proffer at the pretrial detention hearing.

15 Subparagraph (F)(6) lists factors that the court may consider in assessing whether the
16 prosecutor has met its burden of proving by clear and convincing evidence that the defendant may
17 be likely to pose a threat to the safety of others if released pending trial and whether any potential
18 pretrial release conditions will reasonably protect the safety of others. These factors include the
19 nature and circumstances of the charged offense and the defendant’s history and
20 characteristics. *See State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining that the
21 defendant’s past conduct can help the court assess whether the defendant poses a future threat of
22 danger). In *State v. Ferry*, the Supreme Court explained that “the nature and circumstances of a
23 defendant’s conduct in the underlying charged offense(s) may be sufficient, despite other evidence,

1 to sustain the [prosecutor’s] burden of proving by clear and convincing evidence that the defendant
2 poses a threat to others or the community.” 2018-NMSC-004, ¶ 6, 409 P.3d 918. However, the
3 type of offense charged, by itself and without more, will not suffice to meet the prosecutor’s
4 burden. See Groves, 2018-NMSC-006, ¶ 33 (discounting the relevance at a detention hearing of
5 “the category or punishability of the charged crime,” and recognizing that “the court’s focused
6 concern is not to impose punishment for past conduct but instead to assess a defendant’s likely
7 future conduct”) (citing *Torrez*, 2018-NMSC-005, ¶ 101. If the prosecutor meets this initial burden,
8 the prosecutor must also demonstrate by clear and convincing evidence that “no release conditions
9 will reasonably protect the safety of any other person or the community.” *Id.* “For example, the
10 [prosecutor] may introduce evidence of a defendant’s defiance of restraining orders; dangerous
11 conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of
12 witnesses, victims, or victims’ family members; or inability or refusal to abide by conditions of
13 release in other cases.” *Id.*

14 **Paragraph I** — ~~[If the district court issues a detention order under Paragraph G of this~~
15 ~~rule, the magistrate or metropolitan court cannot release the defendant while the case is pending.~~
16 ~~The magistrate or metropolitan court should, however, issue a release order if the state files a~~
17 ~~voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3)~~
18 ~~or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.] On the transfer of a case to the district~~
19 court, the magistrate or metropolitan court generally loses jurisdiction under Paragraph C of this
20 rule. A single narrow exception is set out in Paragraph I, whose provisions allow a case to be
21 remanded to the magistrate or metropolitan court only if, after a preliminary hearing,
22 misdemeanor—not felony—charges alone remain, and then at the sole discretion of the district
23 court. A case in which the prosecutor files and subsequently withdraws a motion for pretrial

detention cannot be remanded to the magistrate or metropolitan court for further proceedings, unless the case otherwise meets the misdemeanor exception carved out under this paragraph.

Paragraph J — Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Paragraph K — The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 (“District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment.” (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

Paragraph L — Either party may appeal the district court’s ruling on the detention motion. Under Article II, Section 13, an “appeal from an order denying bail shall be given preference over all other matters.” *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

Paragraph M — Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See* NMSA 1978, § 38-3-9. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; 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. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



**New Mexico
Courts**

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on Proposed Changes to Rule 5-409 NMRA

1 message

Brett Loveless <albdbri@nmcourts.gov>

Thu, Feb 3, 2022 at 3:42 PM

Reply-To: albdbri@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Dear Ms. Scott,

Please find enclosed comments on the proposed changes to Rule 5-409 NMRA.

Thank you for your attention to this matter.

Brett R. Loveless
District Court Judge, Div. III



Letter.Comments.Proposed.Changes.Rule.5-409.1.pdf

157K



State of New Mexico
Second Judicial District

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February 3, 2022

Jennifer L. Scott, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Re: *Comments on Proposed Changes to Rule 5-409 NMRA*

Dear Ms. Scott:

The Criminal Division of the Second Judicial District Court (the “Second” or “District Court”) appreciates the New Mexico Supreme Court’s (the “Court”) opportunity to provide comments on the proposed changes to Rules 5-409 and 6-409 NMRA. The Second has conducted approximately 1,500 preventive detention hearings under the amended Pretrial Detention Rules since November 23, 2020; our judges have conducted more than 6,000 preventive detention hearings since the amendment to the New Mexico Constitution was passed. The Second was also a participant on the various Pretrial Ad Hoc Committees and has participated in discussions regarding potential changes to the Rules. We are hopeful that our experience will provide valuable input.

The Second has identified certain portions of the amended Rules which it suggests could be revised or clarified going forward, as follows:

1. Comments on 5-409(C).

This section of the Rule divests the magistrate or metropolitan court of jurisdiction upon the filing of a motion for pretrial detention.

C. Case initiated in magistrate or metropolitan court. If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court shall then close the case and its jurisdiction shall be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph (I) of this rule.

The Second suggests that this section, the commentary related to this section, and the corresponding provisions in Rules 6-409(D) and 7-409(D) NMRA, be changed to include language that the jurisdiction of the magistrate or metropolitan court only be divested if the prosecutor requests, or the district court decides, that the detention motion and the preliminary hearing be held together. *See proposed changes* to Rule 5-509(F) NMRA.

Given the number of detention motions filed in District Court, the resulting number of preliminary hearings, and Covid-19 trial backlog, the Second suggests that the preliminary hearings should revert back to the magistrate or metropolitan court for further proceedings, including hearings on revocation of conditions of release until the case is bound over for trial after a preliminary examination.

Preliminary hearings are usually held in magistrate and metropolitan courts, which exist, in part, as a mechanism for addressing felony first appearances and screening felony charges prior to the case coming to a district court. District courts should be primarily courts for the disposition of felony cases. Approximately 1,200 to 1,400 motions for pretrial detention are filed in the Second per year and approximately half of those motions are granted. The Second schedules preliminary hearings on most of those cases, except where the district attorney notifies the court that it intends to proceed *via* grand jury. For example, in calendar year 2021, the Second scheduled approximately 1,100 preliminary examinations in District Court, approximately half of which had to be scheduled within ten days. While some of these settings will result in a waiver of preliminary hearing, those hearings still have to be calendared and take up space on dockets that could otherwise be allocated to other matters. The change in jurisdiction in the Rule therefore shifted a significant portion of the initial processes onto district courts, leaving less resources for their primary function—the resolution of felony cases.

Moreover, once a motion has been denied or withdrawn, the matter is no longer considered expedited and there is no need for the preliminary hearing to remain in district court as an expedited matter. The Second therefore suggests that it is especially true that the preliminary hearing should proceed in front of the Metropolitan Court when the pretrial detention motion is denied, withdrawn, or dismissed by the prosecution through a *nolle prosequi*. An alternative to allowing District Court to remand all preliminary hearings where the detention motion and the preliminary hearing are not heard concurrently, would be to allow District Court to remand preliminary hearings to Metropolitan Court in instances where the detention motion is denied, withdrawn, or dismissed by the prosecution through a *nolle prosequi*.

If the language to Subsection C is changed as suggested, the Second also suggests that the language of Subsection F be changed to include notice from the district court to the magistrate or metropolitan court if the district court is setting a preliminary hearing concurrently with the pretrial detention hearing. If the language in Subsection C is changed as suggested, District Court also suggests changing the new proposed commentary to Paragraphs C and I.

2. Comments on 5-409(F)(1)(b) and (c)(i).

This section of the Rule sets forth the mandatory time limits for cases in which the preliminary examination and detention hearing will be heard together.

(b) Time limit for concurrent hearings. Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days following the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

(c) Extensions. The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court shall extend the time limit for holding the hearing as follows:

(i) for three (3) days to five (5) days if in the motion for pretrial detention the prosecutor requests or the court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing[.]

First, as an initial matter, the Second suggests that subsection (c)(i) is unnecessary and could result in confusion given the addition of subsection (b). Subsection (c)(i) could be interpreted to give an additional three to five days past the eight to ten days already provided for in subsection (b), resulting in a defendant being held eleven to fifteen days before a hearing is conducted.

Second, while District Court has been a proponent of provisions that encourage the preliminary examination and detention hearing to be held together in the past, and such provisions were discussed at the various Ad Hoc Committees on Pretrial Release, it is concerned that experience has now shown that extending the amount of time a defendant may be held on a detention motion pending hearing may be problematic. Since the implementation of the Constitutional Amendment, District Court has granted approximately one-half of detention motions. This percentage has remained remarkably stable, only varying by a couple of percentage points each year. By requiring district courts to hold any defendant for an additional three to five days at the prosecutor's request (or District Court's decision), the unintended consequence is that defendants who would otherwise be released from jail within five days would be held, potentially doubling the time a defendant is held on cases where the motion will be denied. This is concerning, especially given the research that says holding defendants who do not need to be detained longer increases recidivism. This could also have a significant impact on the jail population at a time when jails are understaffed and facing Covid-19 issues because defendants who would have normally been released on day four or five after the detention hearing may be held until day ten after a preliminary examination.

One possible solution to the issue of creating a wider net and keeping more defendants in jail longer might be to make this language discretionary rather than mandatory and allow district courts to determine how much, if any, additional time is necessary when holding the preliminary examination with the detention hearing. In some cases, such as complex cases where there are multiple witnesses that are necessary for the preliminary hearing, eight to ten days would likely be necessary. In other instances, it would be possible for the court to hold the hearings earlier.

3. Commentary to Rule 5-409(C).

Paragraph C — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district court, except as provided by Paragraph I. The district court's exclusive jurisdiction extends to cases that are refiled after dismissal.

The clause depriving magistrate or metropolitan courts of jurisdiction is addressed in section (1) of this memorandum.

The commentary above states that a district court's exclusive jurisdiction extends to cases that are refiled after dismissal. The Second suggests that this wording is unclear as the transfer of a detention motion from Metropolitan Court to District Court triggers the opening of a new PD case. It could therefore either mean that: (1) a district court's exclusive jurisdiction applies when a detention motion is dismissed and a new detention motion is filed—triggering a new PD case; or (2) if any case—CR or PD—is dismissed where a detention motion was filed, then a refile of a Metropolitan Court FR case would automatically trigger District Court's exclusive

jurisdiction, regardless of whether a new detention motion is filed in the new FR case. The latter reading would again move cases that are no longer expedited—cases in which there might not have even been a detention motion filed—to district courts for preliminary examination.

Miscellaneous Comments.

1. The potential impact of legislative action.

While the Second does not take any position on House Bill 5 currently before the New Mexico Legislature, District Court notes the potential impact of that Bill (or similar bills) on District Court's resources—specifically, the increase that “rebuttable presumptions” would have on dockets at District Court. If House Bill 5, or a similar bill, passes, based on the analysis so far put forward by ISR and LFC of only Section A (and excluding Section B) of that Bill, it appears there will be a net increase of several hundred motions per year, assuming the State filed motions on only 65-70% of the cases that would qualify for “rebuttable presumptions.” Under the current system for Rule 5-409, that would also therefore proportionately increase the number of preliminary examinations that District Court would be required to schedule and hear. That, in turn, would negatively impact the number of trials the Second can schedule at a time when district courts are attempting to address the backlogs arising from Covid-19.

Moreover, although the Second takes no position on its constitutionality, if House Bill 5 passes, then given federal case law on “rebuttable presumptions” and due process, it might also require that the right to an “expedited” trial could mean trials in cases where detention was granted would have to be scheduled for trial within a few months. Federal courts have held that it is, in part, the right to a speedy trial in federal court—generally 70 days unless waived by defendant or in limited exceptions—that makes the impact of the federal detention rules on a defendant's due process rights acceptable. The implications of the federal case law may have to be considered. However, in the Second, which arguably has the tightest trial deadlines in New Mexico because of LR2-308 NMRA, detained defendants in relatively straightforward cases still do not generally go to trial in non-pandemic times until they have been in-custody for around six to eight months.

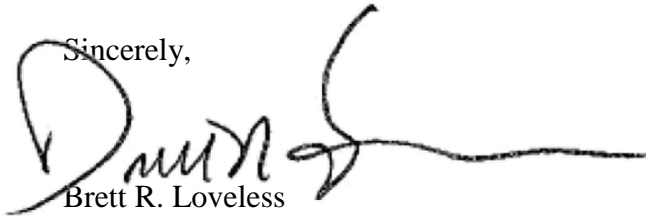
From a resource standpoint, the Second does not have the judicial officers or staff to increase detention hearings and preliminary examinations by close to one-quarter or one-third, schedule expedited trials in detention cases in a manner that is likely to comply with minimal federal constitutional requirements, and also address Covid-19 backlogs. We therefore ask that the

Jennifer L. Scott
February 3, 2022
Page 6

Supreme Court consider what comes out of the legislative session and those resource issues before making a final decision on revisions to Rule 5-409.

Thank you for your consideration and the opportunity to offer input regarding proposed changes to Rule 5-409.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett R. Loveless", with a long horizontal flourish extending to the right.

Brett R. Loveless
Presiding Criminal Judge
Second Judicial District Court



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments proposed revisions to Pretrial Detention Rules 5-409 and 6-409 NMRA

1 message

James Hudson <rosdjmh@nmcourts.gov>

Thu, Feb 3, 2022 at 3:52 PM

Reply-To: ros d j m h @ n m c o u r t s . g o v

To: nmsupremecourtclerk <nmsupremecourtclerk@nmcourts.gov>

Ms. Scott,

Please see the attached comments from the Judges of the Fifth Judicial District.

Thanks,

Jim Hudson

James M. Hudson

District Court Judge

Fifth Judicial District

P.O. Box 1776

Roswell, NM 88202

Phone: (575) 624-0859

Fax: (575) 624-7503



5JDC Comments Pretrial Detention 2.3.2022.pdf

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FIFTH JUDICIAL DISTRICT COURT
Chaves County, New Mexico

JAMES M. HUDSON
District Judge

P.O. Box 1776
Roswell, New Mexico 88202
Phone: (575) 624-0859

January 31, 2022

Via Email Only

(nmsupremecourtclerk@nmcourts.gov)

Ms. Jennifer Scott
New Mexico Supreme Court
P. O. Box 848
Santa Fe, New Mexico 87504

Re: Comments proposed revisions to Pretrial Detention Rules 5-409 and 6-409 NMRA

Dear Ms. Scott:

I am writing on behalf of all the District and Magistrate Judges of the Fifth Judicial District. We write to express our concerns about the proposed revisions to the pretrial detention rules, specifically Rules 5-409 and 6-409 NMRA (Pretrial Detention Rules).

At a time when District Courts are being directed to deal with caseload issues caused by the pandemic, the proposed revisions will only perpetuate an unnecessary transfer of workload and responsibility from the Magistrate Courts to the District Courts. This will only make addressing the pandemic caseload issues more difficult.

We believe the proposed revisions continue unnecessary changes that were previously enacted. Those previous revisions unnecessarily transferred obligations traditionally and efficiently handled by the Magistrate Courts and imposed them on

the already overloaded District Courts. The new proposed revisions do nothing to address that problem and simply perpetuate it. The Pretrial Detention Rules continue to disrupt the ability of District Courts to manage their dockets and continue to deprive the Magistrate Judges of functions they have historically handled efficiently.

We continue to maintain that the Pretrial Detention Rules must be revised to provide that Magistrate Court jurisdiction is not terminated upon the filing of a motion for pretrial detention and that the Magistrate Courts retain jurisdiction and are obligated to conduct preliminary hearings. Magistrate Courts have traditionally conducted preliminary hearings. That is one of their essential purposes in felony criminal cases. Their dockets are arranged to handle preliminary hearings within the time periods required. In addition, the attorneys for the District Attorney's Office and Public Defender have the preliminary hearing dates in Magistrate Court staffed and are able to conduct the hearings efficiently and expeditiously. The filing of a motion for pretrial detention in District Court, under the current rules, necessarily disrupts the Court's dockets by substantially increasing the District Court's workload and interfering with the Court's docket. We provided input and objected to the changes when they were proposed. We now have the benefit of experience and our fears and concerns have proven to be valid. Each of our judges could give examples of the way that the preliminary hearing requirement has affected the public through canceled hearings and trials.

Under the prior rules, the District Court could hear the motion for pretrial detention without substantial disruption of their dockets. After the hearing the matter was then remanded to the Magistrate Court. This process worked and it worked well. The process of remanding to Magistrate Court did not need to be changed. Now, in addition to hearing the motion for pretrial detention, District Court must rearrange their dockets to conduct preliminary hearings as well. Due to the nature of the charges, these are exactly the types of cases where preliminary hearings are not usually waived. Generally, these are complex cases, and preliminary hearings can easily last one or more days. When this happens, the District Court must vacate all trials and hearings previously scheduled. We do not have the luxury of divisionalized courts that have numerous Judges to handle the cases. If competency

is raised, then the Court must also hear all matters relating to competency, creating a further burden.

Motions for pretrial detention and the required preliminary hearings must be given hyper-priority over every other type of case that we, as non-divisionalized general jurisdiction judges, handle. For example, they must be given priority over jury trials for defendants held in pretrial detention, other criminal and civil jury trials, domestic violence cases, child abuse cases, and every other case. This denies access to justice for parties when their cases are canceled at the last minute and rescheduled for much later because the court must hear both the pretrial detention and preliminary hearing. This prioritization upsets a delicate balancing of dockets that has been created over years whereby the different courts and divisions share lawyers, court personnel and work with detention centers to accommodate interlocking schedules.

The procedure for pretrial detention was working and did not need to be revised, at least in the Fifth District. The Courts developed a system that permits the efficient handling of pre-trial detention hearings and the magistrate courts routinely handle the preliminary hearing quickly and efficiently. Our Magistrates have tailored their dockets to set aside time each week to handle such hearings within time limits and they do so ably and efficiently. In contrast, District Judge dockets are filled with a variety of hearings which must be rescheduled on short notice or we would need to set preliminary hearings at odd hours, late into the night or even on weekends. Such practice would put additional burden on the working professionals that support our work such as clerks, bailiffs, court monitors and security staff.

An important consideration that appears to be overlooked is the impact that the changes have had on the ability of the wider public to access the justice system in an orderly, efficient and timely manner. With the prioritization of these matters over all other matters, the public may find their hearings rescheduled on short notice, longer waits to address their cases, and may have to deal with significant delays while pre-trial detentions are dealt with. We believe that it is important to consider the impact of the requirement of District Courts to conduct preliminary hearings has on undermining the perception the public has on the availability of justice to them.

In conclusion, we believe the system was working well prior to the changes relating to the loss of jurisdiction of the Magistrate Court and the requirement that District Courts conduct preliminary hearings. The current proposed changes to the Pretrial Detention Rules merely perpetuate a change that was unnecessary and that has created numerous inefficiencies. At a minimum, the Pretrial Detention Rules should not terminate Magistrate Court Jurisdiction, and Magistrate Courts should be the courts that conduct preliminary hearings. Changing the rules back to the prior process will help to avoid significant negative impact on the Courts, the administration of justice and the negative public perception of the ability to efficiently manage our dockets. Thank you for your consideration.

Very truly yours,

A handwritten signature in blue ink, appearing to read "James M. Hudson", with a long, sweeping horizontal stroke extending to the right.

James M. Hudson
District Judge

In accord: All District and Magistrate Judges of the Fifth Judicial District Court



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 02/03/2022, 4:50 pm

1 message

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Thu, Feb 3, 2022 at 4:50 PM

Reply-To: "tyler.mccormick@lopdm.us" <tyler.mccormick@lopdm.us>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your
Name: Tyler McCormick

Phone
Number: 575-541-3193

Email: tyler.mccormick@lopdm.us

Proposal
Number: 2022-002

Comment: In regards to proposed change in NMRA 5-401(L): As an assistant public defender, the status conference is a good thing for our defendants, as it helps remind the Courts that in custody clients be given preference and expedited trial settings, and ensures the parties move along quickly in these matters.

NMRA 5-409 (B): Is a welcome change, as it would assist the Courts in determining how the State intends to bring the Case to the Court, and would allow all the parties to prepare appropriately, instead of the State not being responsible for that decision until the absolute deadline for a Preliminary hearing or Grand Jury Proceeding. I think this helps the parties think beyond the immediate hearing to help plan and execute a more efficient judicial process.

NMRA 5-409 (F)(4) The new proposed standard is too vague, and shifts the burden to the Defendant to prove his not likely to be a danger to the community. Requiring the Defendant to disprove that he is not likely to be a future threat to the safety of the community requires a Defendant to have a crystal ball, and permits the Court to have too broad a discretion as to what constitutes "safety of the community".



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 02/03/2022, 4:52 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 3, 2022 at 4:52 PM

Reply-To: "adolfo.mendez@da2nd.state.nm.us" <adolfo.mendez@da2nd.state.nm.us>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name: Adolfo Mendez & James Grayson

Phone Number: 5056819543

Email: adolfo.mendez@da2nd.state.nm.us

Proposal Number: 2022-002

Comment: comment attached

Upload: [5-409-Proposed-Rule-Change-Comment-02-03-2022.pdf](#)



5-409-Proposed-Rule-Change-Comment-02-03-2022.pdf

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February 3, 2022

TO: Jennifer L. Scott, Clerk
New Mexico Supreme Court

FROM: Adolfo Mendez, Chief of Policy and Planning
James Grayson, Chief Deputy District Attorney

**RE: Public Comment on Out-of-Cycle Pretrial Detention Rule Change Proposed on
January 3, 2022**

Introduction

The proposed amendments fail to address a fundamental flaw in New Mexico's pre-trial detention scheme. Unfortunately, they also include unrealistic, unnecessary and burdensome procedural steps that will adversely impact victims, witnesses, and law enforcement officers, which further strain our agency's resources.

As a general comment regarding the court's rule and policy making process, it is unfortunate that the court does not include an analysis of the fiscal, resource, and public safety impact of its proposed changes. Unlike the legislature, which includes an impact analysis for any proposed statutory change, the court blinds itself to the implications of its rule changes. Historically, significant court rule and policy changes, such as the Case Management Order (CMO) or the Second Judicial District Court's reduction of grand jury access, have had the effect of negating the legislative public safety appropriations by needlessly requiring more labor-intensive procedures. These more labor-intensive procedures have taken law enforcement officers off the street and added burdens to victims of crimes, certainly adversely impacting public safety. This adverse impact reveals a disconnect between the court's policymaking and legislative appropriations, and the impact is amplified with out-of-cycle proposals such as this. When the Court engages in rule- and policy-making, we urge the Court to conduct an independent cost and crime impact analysis of the proposed changes. Making the costs and impacts of proposed changes known would give agencies an opportunity to request the necessary appropriations to implement the changes and mitigate the effects on crime.

5-409 Proposed Changes

A. Continued Missing Guidance for Judges

The proposed changes do not provide guidance regarding the utilization of a pretrial risk assessment tool. The Arnold Foundation's pretrial assessment tool (PSA) is currently used in Bernalillo County. The tool's creators recognize this gap in the PSA's methodology. The Advancing Pretrial Policy & Research Center's guidance states that "a person with no criminal history but charged with a first-degree violent offense may score very low on the PSA; without any additional information, the grid might place the person on the lowest level of pretrial release, resulting in little monitoring, if any."¹ For examples such as this, the Advancing Pretrial Policy & Research Center notes that "[s]ome jurisdictions also want their Release Conditions Matrix to reflect additional information, such as the seriousness or type of charge and/or unique circumstances about a case." New Jersey, for example, addresses this known gap in the PSA by adding a step to evaluate the current charges and to have that evaluation reflected in the PSA final recommendation. See steps 1 through 5 of New Jersey's approach below.

Pretrial Release Recommendation Decision Making Framework (DMF) [March 2018]

Process for Identifying the Pretrial Release/Detention Recommendation

Step 1: Complete the PSA to generate the FTA scale, NCA scale, and NVCA flag.

Step 2: Determine if any current charge is subject to life imprisonment:

- Murder or felony murder (N.J.S.A. 2C:11-3a(1),(2) or (3))
 - Aggravated sexual assault (N.J.S.A. 2C:14-2a(1))
 - Human trafficking (N.J.S.A. 2C:13-8a(2) or (3))
 - Tampering/damage involving nuclear electric generating plant (N.J.S.A. 2C:17-7)
 - Nuclear electric generating plant; damaging/tampering with equipment which results in death (N.J.S.A. 2C:17-8)
 - Leader of narcotics trafficking network (N.J.S.A. 2C:35-3)
 - Terrorism (N.J.S.A. 2C:38-2a(1), (2), (3) or (4))
 - Producing/possessing chemical weapons, biological agents or nuclear or radiological devices (N.J.S.A. 2C:38-3a)
 - Leader of firearms trafficking network (N.J.S.A. 2C:39-16)
- If yes, the final recommendation is No Release Recommended.
 - If no, continue to Step 3.

¹ <https://advancingpretrial.org/guide/guide-to-the-release-condition-matrix/>

Step 3: Determine if the PSA generated a score of 6 on the FTA scale and/or NCA scale.

- If yes, the preliminary recommendation is No Release Recommended, and proceed to Step 10.
- If no, continue to Step 4.

Step 4: Determine if there is an NVCA flag and one of the current charges is violent.

- If yes, the preliminary recommendation is No Release Recommended, and proceed to Step 10.
- If no, continue to Step 5.

Step 5: Determine if any current charge is:

- Escape (N.J.S.A. 2C:29-5a)
 - Aggravated manslaughter or manslaughter (N.J.S.A. 2C:11-4a(1) or (2), 2C:11-4b(1) or (2))
 - Aggravated sexual assault (N.J.S.A. 2C:14-2a(2)(a), (b) or (c), 2C:14-2a(3) through (7))
 - Sexual assault (N.J.S.A. 2C:14-2b, 2C:14-c(1))
 - First degree robbery (N.J.S.A. 2C:15-1a(1),(2) or (3))
 - Carjacking (N.J.S.A. 2C:15-2a(1),(2),(3) or (4))
 - Prohibited weapons and devices – sawed-off shotgun (N.J.S.A. 2C:39-3b)
 - Possession of weapon for unlawful purpose (N.J.S.A. 2C:39-4b, 2C:39-4c)
 - Unlawful possession of a weapon (N.J.S.A. 2C:39-5a, 2C:39-5f)
 - Possession of firearm on school property w/o permission (N.J.S.A. 2C:39-5e(1))
 - Certain persons not to have weapons (N.J.S.A. 2C:39-7a, 2C:39-7b(1), (2) or (3))
 - Weapons—manu/transport/disp/defacement (N.J.S.A. 2C:39-9a, 2C:39-9b, 2C:39-9e, 2C:39-9g)
 - Transport firearms into state for unlawful sale/transfer (N.J.S.A. 2C:39-9i)
- If yes, the final recommendation is No Release Recommended.
 - If no, continue to Step 6.

The additional steps ensure that the PSA does not result in absurd recommendations that shock the public’s conscience and shake its confidence in the judiciary. We have repeatedly advocated that the PSA recommendation should be detention for defendants entering the system on the following most grievous offenses:

- murder;
- first or second degree felony human trafficking of a child;
- first degree felony abuse of a child;
- sexual exploitation of a child constituting at least a second degree felony
- a “serious violent offense” statutorily defined under Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978;
- a felony offense during which a firearm was brandished pursuant to Section 31-18-16 NMSA 1978 or during which a firearm was discharged; or
- a felony offense during which great bodily harm was inflicted as defined in Section 30-1-12 NMSA 1978 or that caused the death of a person.

Using these enumerated crimes to include the steps performed in New Jersey in the PSA process would provide consistent guidance to judges in carrying out their evaluation of pretrial detention motions.

B. Proposed Changes to 5-409(B) and (F) Add Unnecessary Burdens to Public Safety

The proposed changes to 5-409(B) and (F) are unrealistic, unnecessary and burdensome procedural steps that will adversely affect victims and law enforcement. Motions to detain are filed in advance of a defendant's first felony appearance (FFA). At that point in time, the district attorney's office has barely had an opportunity to screen a case for the filing of a detention motion and certainly has not had a sufficient opportunity to screen a case for purposes of deciding whether to charge by grand jury or preliminary examination. Additional considerations, with information unavailable by the FFA, are required to determine the method of case initiation.

Further, the proposed language to allow the court to set a detention hearing and preliminary hearing concurrently on its own motion raises two serious concerns. First, different evidentiary rules apply for detention hearings and preliminary examinations. If the court were to concurrently set these hearings an additional and unnecessary burden would be placed on victims, witnesses, and law enforcement officers to attend an earlier setting. Indeed, the purpose of having a ten-day rule for preliminary examinations is to give the magistrate an opportunity to determine whether a defendant should be held in custody. In light of this purpose now being served by a pretrial detention hearing, the Court should *increase*, not reduce, the amount of time to conduct a preliminary examination in order to foster victim and witness attendance at the hearing and cause less interference with law enforcement's ability to patrol the streets. This proposal adds a layer of logistical challenges that are unnecessary. Consequently, the language appears to be proposed only to make the work of detaining dangerous individuals and initiating their cases more difficult. Were the evidentiary rules of the grand jury to apply to preliminary hearings, which we have previously proposed, much of the logistical issues would be resolved and more detention hearings and preliminary examinations could be conducted concurrently.

That potential solution, however, would not address the second serious concern with this proposed language. Giving the court the ability to select the method of initiation improperly invades the purview of the prosecutor to choose how to proceed. By rule, the Court is attempting to substitute its policy preference over that of the duly elected district attorney, eliminating the prosecutor's discretion to "either present the case to a grand jury... or proceed with a preliminary examination." *See Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176. The Court's foray into such policymaking is troubling, especially, as noted at the outset, when the Court is oblivious to the resource and public safety impacts of its policy choices. We strenuously object to these changes.

C. 5-409 Committee Commentary on Paragraph F

The Court proposes to add commentary to Paragraph F that goes beyond the Court's current holdings, as indicated by the signal used for the citation, and interprets existing law as

foreclosing the possibility that the type of offense charged, without more, would be sufficient to establish the State's burden. This issue should be addressed in the course of litigation. It is not the role of committee commentary to make new law. Further, the Legislature is presently considering bills that would create rebuttable presumptions. Neither the Court nor the committee should suggest any pre-judgment about the validity of such legislation. Having commentary on this subject while those bills are being debated in the Legislature could only cause confusion about whether the commentary is meant to address the meaning of existing law, which does not currently provide for rebuttable presumptions, or instead is meant to pre-judge the constitutionality of a statute creating rebuttable presumptions.