PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS, AND THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS
PROPOSAL 2022-009

March 7, 2022

The Rules of Criminal Procedure for New Mexico State Courts Committee has recommended amendments to Rules 5-201, 5-302, 6-202, and 7-202 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:

Sally A. Paez, Deputy Clerk of Court
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 April 6, 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.

5-201. Methods of prosecution.

A. **Commencement of prosecution.** A prosecution may be commenced by the filing of[÷]
(1) a complaint;
(2) an information; or
(3) an indictment.

B. **Complaint.** A complaint is a sworn written statement of the facts, the common name of the offense, and, if applicable, a specific section number of New Mexico Statutes which defines the offense. Complaints shall be substantially in the form approved by the court administrator.

C. **Information.** An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. It may be filed only in the district court. Informations shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses on whose testimony the information is based. On completion of a preliminary examination or acceptance of a waiver thereof by the

district court, an information shall be filed within thirty (30) days if a defendant is not in custody, and within ten (10) days if a defendant is in custody. Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.

D. **Indictments.** An indictment is a written statement returned by a grand jury containing the essential facts constituting the offense, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. All indictments shall be signed by the foreman of the grand jury. Indictments shall be substantially in the form prescribed by the court administrator. The names of all witnesses on whose testimony an indictment is based shall appear on the indictment.

[As amended by Supreme Court Order No. 20-8300-008, 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. — The Complaint. This rule governs complaints filed in the district court. In almost all cases a complaint will be filed in the magistrate court and will be governed by Rule 6-201 NMRA. If the complaint charges a petty misdemeanor or misdemeanor, the magistrate will have jurisdiction to try the case. *See* Section 35-3-4A NMSA 1978. If the complaint charges a capital, felonious, or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const., art. 2, § 14. *See State v. Marrujo*, 1968-NMSC-118, 79 N.M. 363, 443 P.2d 856. If the complaint charges a crime which is not within the magistrate court jurisdiction, the magistrate may only[÷]

(1) determine initially if there is probable cause on which to confine the defendant;

(2) advise the defendant of his or her rights at the first appearance;

(3) set and review conditions of release; and

(4) conduct preliminary examinations. *See* Section 35-3-4 NMSA 1978.

Under this rule, Rule 6-201 NMRA, and Rule 7-201 NMRA, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes which defines the offense. Two decisions of the Court of Appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031, cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974), the Court held that the initials "D.W.I." were insufficient to state the common name of the offense. In *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91, the Court held that it is not necessary to charge a specific subsection of the statutes. In both cases the Court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 NMRA of the present magistrate rules governing technical defects in the pleadings. See also Rule 5-204 NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate court followed by either an indictment or a preliminary hearing and

information. Nothing, however, prohibits the prosecution from first filing the information. *See State v. Bailey*, 1956-NMSC-123, 62 N.M. 111, 305 P.2d 725. *See also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). In that event the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. *See* Rule 5-601(C) NMRA and commentary. After the preliminary hearing, the defendant can then be tried on the information filed prior to the preliminary hearing. *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202.

If the prosecution has been commenced by the filing of a complaint in the magistrate court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must conform to the bind-over order of the magistrate. *State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768. It does not have to conform to the complaint which initiated the prosecution in the magistrate court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838.

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield, Criminal Procedure under the Federal Rules § § 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he or she must be prepared to meet; (2) whether he or she is accurately apprised of the charge so as to know if he or she is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States constitution. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-49, 8 L. Ed. 2d 240, 250 (1962). *Compare State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88, with *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

This rule must also be read in conjunction with Rule 5-204 NMRA and Rule 5-205(A) and (B) NMRA. Rule 5-205(A) and (B) identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors, and omissions. In addition, the Court of Appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice due to that failure. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Paragraph C of this rule requires that the information be signed by the district attorney. See N.M. Const., art. II, § 14. This requirement can be met by the signature of an assistant district attorney. *See* Section 36-1-2 NMSA 1978. The constitution also indicates that the information may be filed by the attorney general. *See also* Section 8-5-3 NMSA 1978. The deputy or an assistant attorney general would have the same authority as the attorney general. *See* Section 8-5-5 NMSA 1978.

Section 20 of Article 20 of the New Mexico Constitution contains language which would indicate that the accused must waive an indictment if the state proceeds by information. However, it has been held that Section 14 of Article 2 of the Constitution, the section allowing prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See State v. Flores*, 1968-NMCA-057, 79 N.M. 420, 444 P.2d 605.

For interpretation of the common name and specific statute section provisions of the information, see the discussion of the elements of a complaint, above.

The Indictment. For the law governing the grand jury procedure and return of indictments, *see* Section 31-6-1 NMSA 1978 et seq. The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. *See e.g., Cutnose*, 1974-NMCA-130. The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a complaint in the magistrate court. *See State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387; *State v. Ergenbright*, 1973-NMSC-024, 84 N.M. 662, 506 P.2d 1209; *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). This practice was recognized by the Supreme Court in the adoption of Rule 6-202(E) NMRA, which provides that if the defendant is indicted prior to the preliminary examination, the magistrate shall take no further action.

[As amended by Supreme Court Order No. 20-8300-008, 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_____.]

5-302. Preliminary examination.

A. **Time.**

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

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

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

[~~(c)~~] (d) if the defendant is arrested [for failure to appear] or surrenders [in this state for failure to appear] on any warrant, the date the [arrest warrant] defendant is returned to the court;

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

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

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

(2) ***Extensions.*** [~~Upon~~] On a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only [~~upon~~] on a showing on the record that exceptional circumstances beyond the control of the state or the

court exist and justice requires the delay. An extension for exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 5-104 NMRA do not apply to a preliminary examination.

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

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

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

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

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

(4) ***Cross-examination.*** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses. The court may under compelling circumstances allow witnesses to appear by two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.

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

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

D. **Findings of court.**

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

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

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

[As amended, effective June 1, 1999; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 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 _____.]

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

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

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

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

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

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

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

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the "Rules of Evidence generally govern proceedings in preliminary examinations" but explaining that Rule 6-608(A) NMRA of the Rules of Criminal Procedure for Magistrate Courts, which has since been recompiled and amended as Rule 6-202.1 NMRA, "provides a specific exception to our hearsay rule for admissibility" of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state's witnesses. Thus, although [Rule 6-608(A)] Rules 5-302.1, 6-202.1, and 7-202.1 NMRA may permit the state to use a laboratory report at a preliminary examination in magistrate court without calling the laboratory analyst as a witness, the defendant retains the right "to call witnesses to testify as to the matters covered in such report." Rule 6-608(B); accord Rule 7-608(B) NMRA. And the preliminary examination remains "a critical stage of a criminal proceeding" at which "counsel must be made available to the accused." *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

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

Subparagraph B(4) of this rule allows for witnesses to appear by audio-visual communication under compelling circumstances. For the purposes of this Subparagraph, compelling circumstance may include a witness who resides out of state or is too ill or injured to appear in person. The judge in these proceedings will have the discretion to decide what rises to the level of compelling circumstances for witnesses requesting to appear by audio-visual communication.

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

6-202. Preliminary examination.

A. **Time.**

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

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

[~~(b)~~] (c) if an evaluation of competency has been ordered, the date an order is filed in the magistrate court finding the defendant competent to stand trial;

[~~(c)~~] (d) if the defendant is arrested [~~for failure to appear~~] or surrenders [~~in this state for failure to appear~~] on any warrant, the date the [~~arrest warrant~~] defendant is returned to the court;

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

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

(f) [~~if the defendant is arrested upon a bench warrant for failure to comply with~~] the date the conditions of release [~~or if the defendant's pretrial release is~~] are revoked or modified under Rule 6-403 NMRA[~~, the date the defendant is remanded into custody, provided that in no event a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule~~] that result in the defendant's continued detention or release.

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

(3) ***Dismissal without prejudice.*** If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant. A dismissal under this subparagraph shall not prevent the prosecution from proceeding either by indictment or criminal information in the district court.

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

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

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

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

(4) ***Cross-examination.*** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses. The court may under compelling circumstances allow witnesses to appear by two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.

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

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

D. **Findings of court.**

(1) If, [~~upon~~] on completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice all felony charges for which probable cause does not exist and discharge the defendant as to those offenses. A finding of no probable cause shall not prevent the prosecution from proceeding either by indictment or criminal information filed in the district court.

(2) If the only remaining charges are within magistrate court trial jurisdiction, the court shall either conduct an arraignment immediately on the remaining charges or shall hold an arraignment within the time limits set forth in Rule 6-506(A) NMRA, and the case shall then proceed under the Rules of Criminal Procedure for the Magistrate Courts.

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

E. **Transfer to district court.**

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

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

(b) if an order is entered by the district court extending the time for filing an information, a copy of [~~such~~] that order.

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

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

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

G. **Bail bond.** Unless the defendant is discharged, the magistrate court shall retain jurisdiction over the defendant and the bond until an information or indictment is filed in the district court or until twelve (12) months after the preliminary examination, whichever occurs first. If the defendant is indicted or an information is filed, the magistrate court shall transfer any bond to the district court. Unless the proceedings are remanded to the magistrate court, all further action relating to the bond shall be taken in the district court.

[As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective _____.]

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

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

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

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

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

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

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

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

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

Subparagraph B(4) of this rule allows for witnesses to appear by audio-visual communication under compelling circumstances. For the purposes of this Subparagraph, compelling circumstances may include a witness who resides out of state or is too ill or injured to appear in person. The judge in these proceedings will have the discretion to decide what rises to the level of compelling circumstances for witnesses requesting to appear by audio-visual communication.

If any misdemeanor offenses are included in the bind-over order but not set forth in the criminal information, the district court should dismiss those charges without prejudice under Rule 5-201(C) NMRA.

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

7-202. Preliminary examination.

A. **Time.**

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

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

[~~(b)~~] (c) if an evaluation of competency has been ordered, the date an order is filed in the metropolitan court finding the defendant competent to stand trial;

[~~(c)~~] (d) if the defendant is arrested [~~for failure to appear~~] or surrenders [~~in this state for failure to appear~~] on any warrant, the date the [~~arrest warrant~~] defendant is returned to the court;

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

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

(f) [~~if the defendant is arrested upon a bench warrant for failure to comply with~~] the date the conditions of release [~~or if the defendant's pretrial release is~~] are revoked or modified under Rule 7-403 NMRA[~~, the date the defendant is remanded into custody, provided that in no event a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule~~] that result in the defendant's continued detention or release.

(2) ***Extensions.*** [~~Upon~~] On a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only [~~upon~~] on a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. An extension for exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 7-104 NMRA do not apply to a preliminary examination.

(3) ***Dismissal without prejudice.*** If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant. A dismissal under this subparagraph shall not prevent the prosecution from proceeding either by indictment or criminal information in the district court.

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

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

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

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

(4) ***Cross-examination.*** The witness shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses. The court may under compelling circumstances allow witnesses to appear by

two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.

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

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

D. **Findings of court.**

(1) If, [~~upon~~] on completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice all felony charges for which probable cause does not exist and discharge the defendant as to those offenses. A finding of no probable cause shall not prevent the prosecution from proceeding either by indictment or criminal information filed in the district court.

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

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

E. **Transfer to district court.**

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

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

(b) if an order is entered by the district court extending the time for filing an information, a copy of [~~such~~] that order.

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

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

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

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

shall transfer any bond to the district court. Unless the proceedings are remanded to the metropolitan court, all further action relating to the bond shall be taken in the district court.
[As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective _____.]

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

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

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

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

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

examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B of this rule is not intended to be a comprehensive list of the defendant's rights at the preliminary examination.

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

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

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

Subparagraph B(4) of this rule allows for witnesses to appear by audio-visual communication under compelling circumstances. For the purposes of this Subparagraph, compelling circumstances may include a witness who resides out of state or is too ill or injured to appear in person. The judge in these proceedings will have the discretion to decide what rises to the level of compelling circumstances for witnesses requesting to appear by audio-visual communication.

If any misdemeanor offenses are included in the bind-over order but not set forth in the criminal information, the district court should dismiss those charges without prejudice under Rule 5-201(C) NMRA.

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

1 message

Smith, Caitlin <caitlin.smith@lopdnm.us> Mon, Mar 14, 2022 at 4:58 PM
Reply-To: caitlin.smith@lopdnm.us
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Hi all,

I am attaching a comment on some of the proposed rule changes.

Caitlin C.M. Smith

Appellate Attorney

Law Offices of the Public Defender

(505) 395-2830

LOPD NEW MEXICO LAW OFFICES OF THE PUBLIC DEFENDER

Comment on proposed rules 03.14.2022.pdf
116K

March 14, 2022

Sally A. Paez, Deputy Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504

Dear Ms. Paez:

I writing to share comments on several of the rule changes proposed by the Supreme Court on March 7, 2022. My comments are based on my perspective as an appellate attorney with the Law Offices of the Public Defender, but the comments below are my own and do not represent the department as a whole.

Proposal 2022-009:

Rule 5-201

The proposed change to Rule 5-201(C) would add two sentences: "Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses."

This is a helpful change. It avoids the problem in which defendants prepare for preliminary hearing based on the charges in the information, then wind up with additional charges added by the judge, even though there was no notice of them. This change ensures that defendants have notice of the charges that will be bound over, and it is consistent with the values of due process.

Rules 6-202 & 7-202

The proposal would add the following language to Rules 6-202(D)(1) and 7-202(D)(1): "A finding of no probable cause shall not prevent the prosecution from proceeding either by indictment or criminal information filed in the district court."

This language is in tension with *State v. White*, 2010-NMCA-043, 232 P.3d 450. *White*, ¶ 16, says that it is improper for the State to bring a case to preliminary hearing before two judges in a row and "allow one magistrate to overrule another magistrate on the issue of probable cause after a review of the same evidence." *White* addressed successive preliminary hearings before co-equal judges, while the proposed rule would apply to preliminary hearings in different courts, but the principle behind *White* should still apply: prosecutors should not be permitted to bring the same evidence to a second judge in the hope of getting a different outcome.

I suggest either eliminating the proposed language or replacing it with "A finding of no probable cause shall not prevent the prosecution from proceeding in the district court either by indictment or, if additional evidence is produced, by information."

Proposal 2022-014:

The proposed new Rule 11-404(B)(3) would require prosecutors not only to notify defendants that they will be using 404(B) evidence, but also to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."

This is an excellent change that addresses a real problem. When I review trial records, I often see 404(B) notices that say the prosecution plans to use the evidence to establish "motive, opportunity, intent, preparation, plan, knowledge, absence of mistake, lack of accident, or any other permissible purpose." That kind of broad notice does not give the defense a theory of admissibility to which it can respond, nor does it allow the trial court to assess the issue with any confidence during motions in limine.

By requiring the prosecution to articulate a purpose for 404(B) evidence, this rule should reduce surprises and improve the quality of argument around 404(B) issues in the trial courts.

Thank you for your consideration of these suggestions.

Sincerely,

/s/Caitlin Smith

Caitlin C.M. Smith
Appellate Attorney
Law Offices of the Public Defender

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] comments to rule proposals 2022-009 and 2022-010

1 message

Kelly, Anne <akelly@nmag.gov> Tue, Apr 5, 2022 at 12:08 PM
Reply-To: akelly@nmag.gov
To: nmsupremecourtclerk@nmcourts.gov

Good morning, Sally.

Attached please find a letter regarding Rule Proposals 2022-009 and 2022-010.

Best regards,
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)

4-5-2022 NMAG comments to NMSC (1).pdf
154K

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

April 5, 2022

Sally Paez, Acting Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
Via email only to nmsupremecourtclerk@nmcourts.gov

Re: Comments to Proposals 2022-010 & 2022-009

Dear Ms. Paez,

I wish to submit public comment to the two above-mentioned proposed amendments to the Supreme Court's Rules of Practice and Procedure, both of which were published March 7, 2022.

1. **Proposal 2022-010**

I wish to express my strong support for Proposal 2022-010, which creates new rules expanding the exceptions to the Rules of Evidence that apply to preliminary examinations in limited jurisdiction courts. Specifically, I am in favor of the provision permitting a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a children's advocacy center to be introduced at preliminary hearings, regardless of whether the victim is available to testify.

Without belaboring the point, it has long been the position of this office that subjecting child victims and/or child witnesses to a multitude of intense public hearings is unduly traumatic and unnecessary. If a child makes an inculpatory statement to a forensic interviewer, the State should be permitted to introduce that statement at a preliminary hearing. Nothing in this proposal limits a criminal defendant's ability to scrutinize the child's statement to the interviewer at the preliminary hearing, nor does the proposal limit a criminal defendant's subsequent ability to

interview the child prior to trial or to have that child testify in person at a public trial. This proposal strikes a proper balance between ensuring a criminal defendant's due process rights are respected while protecting vulnerable child victims from repeatedly reliving their trauma.

2. **Proposal 2022-009**

I first question the proposed changes to Rules 5-302(A)(1), 6-202(A)(1), and 7-202(A)(1), which all provide that a preliminary examination must be concluded and a disposition entered within the time limits of these rules. This will prove problematic for the State if, for instance, a complex, multi-day preliminary hearing begins eight days after a triggering event for an in-custody defendant. What happens if the State is still presenting its evidence after the tenth day? The proposal does not address this situation. The State should not be penalized for beginning a hearing within time limits, but failing to end within time limits because of a detail-oriented presentation.

I am in favor of the portion of Proposal 2022-009 permitting State or defense witnesses to appear by audio-visual communication under "compelling circumstances," as well as the corresponding inclusion in the Committee Commentary giving judicial officers the discretion to decide what rises to the level of "compelling circumstances" for witnesses requesting to appear by audio-visual communication.

Best regards,

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

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 04/05/2022, 1:49 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Tue, Apr 5, 2022 at 1:49 PM
Reply-To: "cpayne@newmexicolegalgroup.com" <cpayne@newmexicolegalgroup.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name:	Cynthia Payne
Phone Number:	505-843-7303
Email:	cpayne@newmexicolegalgroup.com
Proposal Number:	22-009
Comment:	The proposed change to 5-302(A)(1)(F) is concerning in that it allows a new 60 day time limit to begin if conditions of release are revoked or modified. In practical terms, this would allow the court to modify conditions of release, for example, 45 days into the time limits and thus begin a new 60 day time limit if the person is out of custody. There is also nothing to prevent an additional modification at some point into the new 60 day date, thus again enlarging the 60 day time limit. I doubt that is the intent of the proposed change but that is how it reads. The proposed language of 5-302(B)(4) is also troublesome in proposing that the court may "under compelling circumstances" allow witnesses to appear via video. A more appropriate standard should perhaps be exceptional circumstances.

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comment on Rule 7-202

1 message

Fricke, Michael, OSI <Michael.Fricke2@state.nm.us> Wed, Apr 6, 2022 at 8:33 AM
Reply-To: michael.fricke2@state.nm.us
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Dear Ms. Garcia,

I have experienced arguments at the Second Judicial District Court that Metropolitan Court conditions of release lapse between the filing of the information in District Court and the arraignment/conditions of release hearing in District Court. These arguments arise from the current version of Rule 7-202. Though paragraph F provides that Metro Court conditions of release "continue in effect" after indictment, there is no parallel provision for informations filed after a bindover. (Paragraph G only provides that the bond will be transferred). I suggest that the following sentence be added to the end of paragraph 7-202(E)(2): "After the bind-over order is filed in metropolitan court, any conditions of release set by the metropolitan court shall continue in effect unless amended by the district court."

Sincerely,

Michael Fricke

Michael Fricke

Attorney III

Office of Superintendent of Insurance

Criminal Division

6200 Uptown Blvd, Suite 130

Albuquerque, NM 87110

(505) 819-7250

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Metro Court Comments on Proposed Rule Amendments 2022-009 and 2022-012

1 message

Amber Garcia <metramg@nmcourts.gov> Wed, Apr 6, 2022 at 11:47 AM
Reply-To: metramg@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov
Cc: Artie Pepin <aocawp@nmcourts.gov>

Greetings,

Please see the attached letter from Metropolitan Court Chief Judge Maria I. Dominguez.

Respectfully,

Amber Garcia, Paralegal
Office of General Counsel
Bernalillo County Metropolitan Court
401 Lomas Blvd NW
Albuquerque, NM 87102
PH: 841-8103

Comment on Proposal 2022-009 to Supreme Court 4-6-22.pdf
108K

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

April 6, 2022

VIA EMAIL
Elizabeth A. Garcia, Clerk of the Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: *Comment on Proposal 2022-009: Preliminary examination timing and witness testimony (amendments to Rule 7-202 NMRA); Proposal 2022-012: Redaction of Witness Information (new Rule 7-504.1 NMRA)*

Dear Ms. Garcia:

On behalf of the Metropolitan Court, we appreciate the opportunity to comment on the proposed amendments to Rules 7-202 and new Rule 7-504.1 NMRA.

1. *Proposal 2022-009: Preliminary examination timing and witness testimony (amendments to Rule 7-202 NMRA)*

Because Metropolitan Court does not have jurisdiction to dispose of a felony case, the Court recommends the following amendment to Rule 7-202(A) NMRA:

A. **Time**
(1) **Time limits.** A preliminary examination shall be scheduled and held with findings of the Court issued within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody…

While not part of the proposed amendments, we note that Rule 7-202 NMRA does not address the continuation of Metropolitan Court's conditions of release during the period of time between when a preliminary hearing is held or waived and the filing of a bind-over order and information in the district court. Therefore, Metropolitan Court proposes the following amendment to Rule 7-202(E) NMRA:

E. **Transfer to district court.**

(2) When a copy of the information is filed in the district court, the condition of release set by the metropolitan court shall continue in effect unless amended by the district court. When the copy of the information filed in district court is filed in the metropolitan court, the metropolitan court shall at that time transfer the metropolitan court record, along with the bind-over order, to the district court.

2. *Proposal 2022-012; Redaction of Witness Information (new Rule 7-504.1 NMRA)*

The proposed definition of "protected personal identifier information" in new Rule 7-504.1 NMRA mirrors the definition in Rules 3-112 and 7-113 NMRA on the Public Inspection and Sealing of Court Records. But, with the stated goal in the committee commentary of protecting victims and witnesses from identify theft, we propose that consistent with Section 14-2-6(E), NMSA 1978 ("Inspection of Public Records Act"), the definition of protected personal identifier information include the entire social security number.

We appreciate the opportunity to share these concerns and our suggestions for changes. As always, please feel free to contact us 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>

[nmsupremecourtclerk-grp] Proposed Amendments to Supreme Court Rules of Practice and Procedure

1 message

Richard Flores <RFlores@da.state.nm.us> Wed, Apr 6, 2022 at 1:36 PM
Reply-To: rflores@da.state.nm.us
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Good afternoon. Below please find comments regarding some of the proposed amendments. Thank you.

Proposal 2022-009-Preliminary examination timing.

- We are in agreement with the proposed amendment because it is clear that the time for commencement of the preliminary hearing "starts again" for new time. This will help when State is unable to proceed on a particular day.
- It seems, though, that the issue of time on a refiled criminal complaint requiring preliminary examination in Magistrate Court has not been addressed. This omission results in the application of the default magistrate time rule 6-506.1 (D), which treats refiled felony complaints as a continuation of the original case, rather than a new case, which means that if the time ran on the 60 day rule, the case cannot be refiled in Magistrate Court.
- *Findings of court.*
    - This is great. If a case is not bound over at the Magistrate level, the State can continue the case in District Court, i.e., a second chance to present evidence before a District Court Judge.

Proposal 2022-009-Witness testimony.

- We are in agreement with the proposed amendment. Defendants do not have confrontation rights at preliminary hearings, and the burden can be oppressive for victims and witnesses, especially, in stolen vehicle cases, for example, where the victims may live far away and have been deprived of transportation. Further, it will likely help in cases involving the elderly and costs associated with out of state witnesses.

Proposal 2022-010-Evidence at Preliminary Examination.

- Very good changes. Would even like to see it go further; for example, allow written reports from medical professionals as well at preliminary hearings.

Proposal 2022-012-Redaction of witness information.

- Proposed rule is meant to protect victims and witnesses and is a step in the right direction; however, as we understand the proposal, it relies on the defense attorney to redact the protected information prior to its release to the defendant. We have doubt that said redaction will occur prior to release.

Proposal 2022-019-Aggravated fleeing a law enforcement officer.

- Definitely in favor of this amendment to the UJIs. With this amendment, no other person(s) have to be put in specific danger. Previously, "others" had to be present to prosecute. With this change, prosecution for this charge can be based on the driving and failing to stop and possible endangerment.

Thank you for your time and attention to these matters.

Sincerely,

Richard D. Flores

4th Judicial Chief Deputy District Attorney

PO Box 2025

Las Vegas, NM 87701

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 04/06/2022, 4:31 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Wed, Apr 6, 2022 at 4:31 PM
Reply-To: "tucdajm@nmcourts.gov" <tucdajm@nmcourts.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name:	Albert Mitchell
Phone Number:	5754614422
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Proposal Number:	2022-009
Comment:	The proposed changes to 6-202 D(1) and 7-202 D(1) seem to result in the DA being able to lose at prelim and still file at District Court. If that is the intent why have prelims? Albert Mitchell

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on proposed Criminal Rules

Chief Judge Marie Ward <albdmcw@nmcourts.gov> Wed, Apr 6, 2022 at 5:12 PM
Reply-To: albdmcw@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

Attached are correspondence regarding the above referenced proposed Rules on behalf of the Second Judicial District Court.

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Marie C. Ward
Chief Judge
Second Judicial District Court
5100 2nd Street NW
Albuquerque, NM 87107
(505)841-7392

2 attachments

Letter to Ms. Gacia commentary Criminal Rules.pdf
41K

Letter.Supreme.Court.Rule.Comments.Judge Loveless.pdf
154K

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

MARIE C. WARD
CHIEF JUDGE

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April 6, 2022

Elizabeth Garcia, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: Comments on Proposed Rule Changes regarding Preliminary Examinations and the Redaction of Witness or Victim Information
[Rule 5-201 NMRA (Methods of Prosecution); Rule 5-302 NMRA (Preliminary Examination); Rule 6-202 and 7-202 NMRA(Preliminary Examinations); Proposed Rule 5-302.1 NMRA (Exceptions to the Rules of Evidence for Preliminary Examinations); Proposed Rule 5-5-02-1 NMRA (Discovery; Redaction of Witness or Victim Information)].

Dear Ms. Garcia:

Thank you for the opportunity to provide commentary on the proposed changes to the above-referenced rules. I am the Chief Judge of the Second Judicial District Court. The Second Judicial District Court Criminal Court Division consists of eleven (11) District Court Judges. The Criminal Division of the SJDC (the "Second" or "District Court") has identified certain portions of the amended and proposed Rules which it suggests could be revised or clarified going forward. Presiding Criminal Division Judge Brett Loveless has provided thoughtful and detailed commentary on the proposed rules changes.

On behalf of the Second, please consider the suggestions and commentary set forth in more detail in the letter from Judge Brett Loveless included herein.

Thank you for your consideration.

Respectfully,

Marie C Ward

Marie Ward
Chief Judge, Second Judicial District

State of New Mexico
Second Judicial District

BRETT R. LOVELESS
DISTRICT JUDGE

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April 6, 2022

Elizabeth Garcia, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
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Re: *Comments on Proposed Rule Changes regarding Preliminary Examinations and the Redaction of Witness or Victim Information*

Dear Ms. Garcia:

The Criminal Division of the Second Judicial District Court (the "Second" or "District Court") appreciates the New Mexico Supreme Court's opportunity to provide comments on the proposed changes to the Rules.

The Second has identified certain portions of the amended and proposed Rules which it suggests could be revised or clarified going forward.

1. Comments on Amended Rule 5-201 NMRA (Methods of Prosecution)

The Second suggests that Rule 5-201(C) should clarify the process regarding the filing of an Information and holding the subsequent preliminary hearing.

> C. Information. An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. It may be filed only in the district court. Informations shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses on whose testimony the information is based. On completion of a preliminary examination or acceptance of a waiver thereof by the district court, an information shall be filed within thirty (30) days if a defendant is not in custody, and within ten (10) days if a defendant is in custody. Any offenses that are included in the bindover order but not set forth in the criminal

> information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.

This Rule has historically seemed to suggest that complaints may also be filed in District Court. *See* Rule 5-201 Committee Commentary on the Complaint. However, complaints are used to open felony cases in magistrate and metropolitan courts and the Committee Commentary seems to recognize that fact by discussing the procedures in magistrate courts throughout the commentary.

Informations—or Indictments—are used to open cases in district courts. As noted in the commentary on the Information section to the Rule:

> This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. In that event the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. After the preliminary hearing, the defendant can then be tried on the information filed prior to the preliminary hearing. (Internal citations omitted.)

Taken together, the commentary and Rule suggest that the standard course of the preliminary examination will be either: (1) that a Complaint is filed in magistrate or metropolitan court and the preliminary examination will be held in that court which will then file a bind-over order and an Information will then be filed to open the district court case; or (2) that an Information will be filed in district court and the district court will remand the case to magistrate or metropolitan court for preliminary examination which will then enter a bind-over order.

However, there is a third possibility that the Rule does not seem to contemplate but which regularly happens—that the Information is filed in district court and district court holds the preliminary examination and files a bind-over order.

The Second has been voluntarily conducting preliminary examinations using this process since 2015. After the changes in Rule 5-409 NMRA, the Second is now required to hold more preliminary examinations because upon the transfer from magistrate or metropolitan court, the lower court loses jurisdiction, and a detention case transfer cannot be remanded for preliminary examination. Instead, that preliminary examination takes place in district court and occurs after the filing of the Information rather than before the filing of the Information.

While the Second has submitted commentary on Amended Rule 5-409 that suggests that the lower court should not lose jurisdiction to hold the preliminary examination in cases where a detention motion is filed and the Second reiterates that suggestion, as it stands now, the lower court does not have jurisdiction to hold the preliminary examination upon the filing of a detention motion. If that is to remain true, then the Second suggests that Rule 5-201 and its commentary should be modified to recognize the process for cases that remain in district courts for preliminary examinations. The Rule, as written, could be read to require two Informations be filed in this instance—one before the preliminary examination (as complaints are not used to open district court cases) and one after the preliminary examination (as the Rule requires an Information to be filed after the preliminary examination).

2. Comments on Amended Rule 5-302 NMRA (Preliminary Examination)

The Second suggests several revisions to Rule 5-302.

First, the Amended Section A(1) adds the language "with a disposition entered" to the time provisions requiring the preliminary examination be held within 10 or 60 days. Especially in 10-day cases, there are good reasons why a preliminary examination might start on day 10 but not be concluded until day 11. For example, the preliminary examination might run longer than expected or the court's prior docket could necessitate a later start because other settings run over; in either instance, the court would likely continue the proceeding the following day. In essence, this change would require the court to schedule preliminary hearings to happen at least a couple days prior to the deadline to ensure that there was no possibility that the proceeding would run over. While this is not necessarily an issue in 60-day cases, it can become a problem in 10-day cases, especially as District Court is now required to hear all preliminary examinations where a detention motion was filed.

Second, Section A(1)(f) appears to delete necessary language ("the date the conditions of release").

Third, Section B(4) adds the following language: "The court may under compelling circumstances allow witnesses to appear by two-way visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge." The Second suggests that the compelling circumstance language be deleted; instead, the court should have discretion to make that determination without having to find a compelling circumstance, a standard which is unclear. Alternatively, the Second suggests revising this section to require the party requesting a remote appearance to provide notice and the reasons for it and allowing the parties to litigate that issue before the judge.

Fourth, the Second suggests that Section E be revised to allow remand to the lower court for preliminary examination without motion. This provision is especially important now that district

courts must currently hear the preliminary examinations on all detention cases. District courts need the ability to *sua sponte* remand non-detention cases to lower courts for preliminary examination.

3. Commentary to Amended Rules 6-202 and 7-202 NMRA (Preliminary Examination)

The Second, after conferring with some of its justice partners, suggests that some clarifying language be added regarding conditions of release into sections Rules 6-202 and 7-202.

One issue that has arisen in this jurisdiction is the question of conditions of release between the time of the bind-over from metropolitan court, the filing of the Information in District Court, and the arraignment. While Section F (Effect of Indictment) states that "conditions of release set by the metropolitan court shall continue in effect unless amended by the district court," after an Indictment is filed, no such provision is currently in the Rule regarding cases that proceed via Information rather than Indictment. That has led to some confusion surrounding what conditions of release, if any, apply after the filing of the Information and prior to arraignment.

The Second suggests that language be added to Section E (Transfer to District Court) that mirrors the language in Section F on conditions of release. Section E(4) could read: "On the filing of an information in district court, the metropolitan court's conditions of release shall continue in effect unless amended by the district court."

4. Commentary to Proposed Rule 5-302.1 NMRA (Exceptions to the Rules of Evidence for Preliminary Examinations)

This new proposed Rule outlines exceptions to the rules of evidence in preliminary examinations and the Second's commentary primarily concerns Section A(1) of that Rule.

The Second suggests that the terms "forensic" and "safe house" in Section A(1) will invite a significant amount of litigation extremely early in the case, prior to the preliminary examination. Because these terms are not defined in the Rule, parties will make arguments about what constitutes a forensic interview and what qualifies as a safe house. Are there standards that apply to render something a forensic interview? Would an interview by a school counselor, treating psychologist, CYFD social worker, or police officer qualify as a forensic interview? Would testimony in another court proceeding—such as abuse and neglect—be admissible? Often child abuse cases involve a parent and defense might have access to the child to interview them in a safe environment. Would a defense investigator's interview of the child be admissible under this Rule? The Second notes that the problem of defining what constitutes a safe house may also be exacerbated in smaller jurisdictions that may not have a dedicated and validated space for children to be interviewed.

While the Second understands that the intent of this Rule is to avoid requiring children who have been traumatized to testify at preliminary examinations, the lack of definitions in the Rule could result in children being required or encouraged to give multiple statements. It therefore suggests that the Rule be modified to provide specific definitions.

5. Commentary to Proposed Rule 5-502.1 NMRA (Discovery; Redaction of Witness or Victim Information)

The Second already uses a process somewhat similar to what is outlined in proposed Rule 5-502.1 through the filing of a temporary order because the issue of redaction of personal information had become an on-going source of contention between the parties.

While the Second has no substantive comments in terms of suggested changes to this proposed Rule, it does note that this Rule conflicts with some other Rules besides Rules 5-501 and 5-502 NMRA, which this Rule modifies. For example, Rule 5-503(E) NMRA requires that the notice of deposition state the name and address of each person to be examined. Rule LR2-308(C)(1) NMRA also requires witness information including address and phone number to be provided and requires a motion to withhold contact information be filed. Rule 5-508 NMRA requires that the parties provide each other with witness lists that contain addresses of the witnesses. Finally, generally, subpoenas—which include the address of the witness—are filed with the court.

Thank you for your consideration.

Sincerely,

Brett R. Loveless
Presiding Criminal Court Judge
Second Judicial District Court