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 2022-010

March 7, 2022

The Rules of Criminal Procedure for New Mexico State Courts Committee has recommended new Rule 5-302.1 NMRA, recompiled Rules 5-302.2 and 5-302.3 NMRA, and recompiled and amended Rules 6-202.1 and 7-202.1 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.

[NEW MATERIAL]
5-302.1. Exceptions to rules of evidence for preliminary examinations.

A. **Exceptions to hearsay rule.** In any preliminary examination, the following categories of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a safe house; or

(2) a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, if the report is of an analysis conducted by:

(a) the New Mexico State Police crime laboratory;
(b) the scientific laboratory division of the Department of Health;
(c) the Office of the Medical Investigator; or
(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;

B. **Exception to authentication rule.** In any preliminary examination, a proffer by counsel is sufficient to meet the authentication and identification requirements of Rule 11-901(A) NMRA with regard to a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report;

C. **Exception for controlled substance field tests.** In any preliminary examination, the results of a field test conducted for the detection of controlled illegal substances shall not be excluded based on objections to the scientific accuracy or reliability of the field test.

D. **Certification.** Evidence admitted under the exceptions established by this rule must include a certification form approved by the Supreme Court.

E. **Copies.** A legible copy of the certification form and report was mailed to the defendant or his counsel at least four (4) days before the preliminary examination if the defendant is in custody and at least ten (10) days before the preliminary hearing if the defendant is not in custody.

F. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

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

Committee commentary. — Rule 11-803(4) NMRA excepts statements made for and reasonably pertinent to medical diagnosis or treatment from the rule against hearsay, regardless of whether the declarant is available as a witness. This exception includes statements made to a Sexual Assault Nurse Examiner (SANE) for medical diagnosis or treatment. The committee did not include statements made to a SANE or other medical professional in the exceptions established by this rule because those statements are already addressed by Rule 11-803(4) NMRA.

Additionally, Rule 11-803(2) NMRA excepts statements considered excited utterances from the rule against hearsay, regardless of whether the declarant is available as a witness. The committee did not include such statements in the exceptions established by this rule because those statements are already addressed by Rule 11-803(2). The exception in Paragraph (B) of this rule allows for authentication of the 911 recording or CAD transcript without calling a dispatcher of other police employee to testify to lay that foundation.

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

[RECOMPILED]

[~~5-302A~~]5-302.2. Grand jury proceedings.

A. **Notice to target; timing.**

(1) ***Content.*** The prosecuting attorney assisting the grand jury shall notify the target of a grand jury investigation in writing that he or she is the target of an investigation. The writing shall notify the target of

(a) the nature of the alleged crime being investigated;

(b) the date of the alleged crime;

(c) any applicable statutory citations;

(d) the target's right to testify;

(e) the target's right not to testify;

(f) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury; and

(g) the target's right to the assistance of counsel during the grand jury investigation. Target notices shall be substantially in the form approved by the Supreme Court.

(2) ***Notice and time.*** A prosecuting attorney shall use reasonable diligence to notify a person in writing that the person is a target of a grand jury investigation. The target and the target's attorney shall be notified in writing no later than four (4) business days before the scheduled grand jury proceeding if the target is incarcerated. The target and the target's attorney shall be notified in writing no later than ten (10) business days before the scheduled proceeding if the target is not incarcerated.

(3) ***Notice not required.*** Notice shall not be required if, prior to the grand jury proceeding, the prosecuting attorney secures a written order of the grand jury judge determining by clear and convincing evidence that notification may result in flight by the target, result in obstruction of justice, or pose a danger to another person, other than the general public.

B. **Evidence.**

(1) ***Lawful, competent, and relevant evidence.*** All evidence presented shall be lawful, competent, and relevant, but the Rules of Evidence shall not apply.

(2) ***Exculpatory evidence.*** The prosecuting attorney shall alert the grand jury to all lawful, competent, and relevant evidence that disproves or reduces a charge or accusation or that makes an indictment unjustified and which is within the knowledge, possession, or control of the prosecuting attorney.

(3) ***Evidence and defenses submitted by target.*** If the target submits written notice to the prosecuting attorney of exculpatory evidence as defined in Subparagraph (2) of this paragraph, or a relevant defense, the prosecuting attorney shall alert the grand jury to the existence of the evidence.

(a) *Form of submission*. The target's submission shall consist of a factual and non-argumentative description of the nature of any tangible evidence and the potential testimony of any witnesses, along with the names and contact information of any witnesses necessary to provide the evidence. The target shall provide its submission to the prosecuting attorney by letter substantially in accordance with Form 9-219 NMRA ("Grand Jury Evidence Alert Letter").

(b) *Cover letter*. The target's submission to the prosecuting attorney shall be accompanied by a cover letter, which will not go to the grand jury. The cover letter may include proposed questions and should include any contextual information, any arguments as to the propriety or significance of the requested evidence and defenses, and any other matters that may be helpful to the prosecutor or the grand jury judge.

(c) *Timing*. The target's written notice of evidence shall be provided to the prosecuting attorney no less than forty-eight (48) hours in advance of the scheduled grand jury proceeding.

(4) ***Review of prosecutor's decision not to alert grand jury to target's evidence or defenses.*** The prosecuting attorney assisting the grand jury may only be relieved of the duty to alert the grand jury to the target's evidence or defenses by obtaining a court order prior to the grand jury proceeding. The prosecuting attorney shall file a motion under seal with the grand jury judge, with written notice to the target, stating why the target's submitted evidence is not exculpatory as defined in Subparagraph (2) of this paragraph or stating why the grand jury should not be instructed on the target's requested defenses. A copy of the target's grand jury evidence alert letter and cover letter shall be attached to the motion. The target may file under seal a response to the motion, and, if no response is filed, the grand jury judge may ask the target for a written response, to be filed under seal, and may convene a hearing. The burden is on the prosecuting attorney to show that the proposed evidence is not exculpatory as defined in Subparagraph (2) of this paragraph. The grand jury judge will give the prosecuting attorney clear direction on how to proceed before the grand jury, making a record of the decision.

C. **Instructions to grand jury.**

(1) ***Elements and defenses.*** The prosecuting attorney who is assisting the grand jury shall provide the grand jurors with instructions setting forth the elements of each offense being investigated and the definitions of any defenses raised by the evidence.

(2) ***Other instructions.*** The prosecuting attorney shall provide the grand jury with other instructions which are necessary to the fair consideration by the grand jury of the issues presented.

D. **Extensions of Time.** The times set forth in this rule may be changed by the grand jury judge upon written motion demonstrating that an extension is necessary in order to assure compliance with the requirements of this rule.

E. **Record.** All proceedings in the grand jury room shall be recorded, except that the deliberations of the grand jury shall not be recorded. Copies of any documentary evidence and any target's Grand Jury Evidence Alert Letter which was presented to the grand jury shall be made part of the record.

F. **Review by the district court.**

(1) ***Supervisory authority.*** The district court has supervisory authority over all grand jury proceedings.

(2) ***Scope of review.*** Failure to follow the procedures set forth in this rule shall be reviewable in the district court. The weight of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

[Adopted by Supreme Court Order No. 10-8300-015, effective for target notices filed on or after May 14, 2010; as amended by Supreme Court Order No. 18-8300-004, effective April 23, 2018; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — Under Paragraph B(4) of this Rule, the grand jury judge must carefully consider any filings in the case and consider the options before ruling on a prosecutor's request to be relieved of the duty to alert the grand jury to the target's evidence or defenses. The

options available to the grand jury judge in considering such a request under Paragraph B(4) include requesting a response from the defense, holding a hearing on the prosecutor's request, or ruling on the request without a hearing.

There is no pre-indictment right of appeal from a decision of the grand jury judge under Section 31-6-11(B) NMSA 1978. *See Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 40-41. Nevertheless, "in an extreme case, a party may still seek review in [the Supreme] Court through an extraordinary writ proceeding." *Id.* ¶ 41. A party seeking an extraordinary writ should be aware of "the high standard and discretionary nature associated with granting such relief" and the writ petition should be filed without undue delay. *See id.*

[Adopted by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

[RECOMPILED]

[~~5-302B~~]5-302.3. Citizen grand jury proceedings.

A. **Citizen petition to convene a grand jury.** Under Article II, Section 14 of the New Mexico Constitution, the district court shall order a grand jury to convene upon the filing of a petition signed by not less than the greater of two-hundred (200) registered voters or two percent of the registered voters of the county. A petitioner may use Form 9-200 NMRA.

B. **Verification of petition.** The district court has the responsibility to make a factual determination that a citizen petition to convene a grand jury meets the requirements of Article II, Section 14 by verifying the signatures contained in the petition. The district court may verify the signatures by any number of methods, including but not limited to

(1) requiring each signatory to provide an address of record;

(2) verifying other identifying information such as dates of birth and social security numbers;

(3) a handwriting comparison by a qualified witness; or

(4) obtaining testimony from questionable signatories.

C. **Convening a citizen-petition grand jury.** If the district court determines that the petition meets the requirements of Article II, Section 14, the court shall convene a grand jury in accordance with Sections 31-6-1 to -15 NMSA 1978, unless the district court elects to submit the matter to a grand jury that has already been convened, and shall direct the grand jury to make inquiry into all potential violations of law described in the petition that the judge determines are proper subjects of grand jury investigation, pursuant to Section 31-6-9 NMSA 1978.

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; 5-302B recompiled and amended as 5-302.3 by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — In *Convisser v. Ecoversity*, 2013-NMSC-039, ¶ 1, 308 P.3d 125, the New Mexico Supreme Court held that "determining whether a grand jury petition is supported by the requisite number of 'registered voters' is a judicial function calling for the exercise of judicial discretion . . . ." Under Article II, Section 14, "a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county . . . ." The easiest way to verify whether a petition meets this requirement is to require signatories to

provide an address. *See Convisser*, 2013-NMSC-039, ¶ 26 (stating that other states with citizen-initiated grand jury provisions most commonly verify signatories through the use of voter addresses). However, voters addresses are not required. The district court may use other verification aids such as dates of birth, social security numbers, handwriting comparisons by qualified witnesses, or testimony from questionable signatories. *See id.* ¶ 27.

If the district court determines that the petition meets the requirements of Article II, Section 14, the district attorney or his assistants, unless otherwise disqualified, shall attend and conduct the grand jury. *See* NMSA 1978, § 31-6-7(C) (2001). If a district attorney is disqualified for ethical reasons or other good cause under Paragraph C, the district attorney may appoint a practicing member of the state bar to act as special assistant district attorney who shall have authority to act only in the specific case or matter for which the appointment was made. *See* NMSA 1978, § 36-1-23.1 (1984). If the district attorney's office fails or refuses to act under Paragraph C, the attorney general is authorized to act on behalf of the state. *See* NMSA 1978, § 8-5-3 (1933).

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; 5-302B recompiled and amended as 5-302.3 by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

[RECOMPILED]

~~[6-608. Controlled substance test and autopsy reports; preliminary hearings.]~~ 6-202.1. Exceptions to rules of evidence for preliminary examinations.

A. [~~**Admissibility**~~**]** **Exceptions to hearsay rule.** In any preliminary [~~hearing~~]examination, the following categories of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: [~~a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, is not excluded by the hearsay rule, even though the declarant is available as a witness, if:~~

(1) [~~the report is of an analysis conducted by:~~] a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a safe house; or

~~[(a) the New Mexico State Police crime laboratory;~~

~~(b) the scientific laboratory division of the Department of Health;~~

~~(c) the Office of the Medical Investigator; or~~

~~(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;~~]

[~~(2) the report is regular on its face and is attached to a certification form approved by the Supreme Court; and~~]

[~~(3)~~] (2) ~~a legible copy of the certification form and report was mailed to the defendant or his counsel at least ten (10) days before the preliminary hearing.~~] a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the

presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, if the report is of an analysis conducted by:

(a) the New Mexico State Police crime laboratory;

(b) the scientific laboratory division of the Department of Health;

(c) the Office of the Medical Investigator; or

(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;

B. **Exception to authentication rule.** In any preliminary examination, a proffer by counsel is sufficient to meet the authentication and identification requirements of Rule 11-901(A) NMRA with regard to a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report;

C. **Exception for controlled substance field tests.** In any preliminary examination, the results of a field test conducted for the detection of controlled illegal substances shall not be excluded based on objections to the scientific accuracy or reliability of the field test.

D. **Certification.** Evidence admitted under the exceptions established by this rule must include a certification form approved by the Supreme Court.

E. **Copies.** A legible copy of the certification form and report was mailed to the defendant or his counsel at least four (4) days before the preliminary examination if the defendant is in custody and at least ten (10) days before the preliminary hearing if the defendant is not in custody.

[~~B.~~]F. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

[As amended, effective January 1, 1987; January 1, 1995; Rule 6-608 NMRA recompiled and amended as Rule 6-202.1 NMRA by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

Committee commentary. — Rule 11-803(4) NMRA excepts statements made for and reasonably pertinent to medical diagnosis or treatment from the rule against hearsay, regardless of whether the declarant is available as a witness. This exception includes statements made to a Sexual Assault Nurse Examiner (SANE) for medical diagnosis or treatment. The committee did not include statements made to a SANE or other medical professional in the exceptions established by this rule because those statements are already addressed by Rule 11-803(4) NMRA.

Additionally, Rule 11-803(2) NMRA excepts statements considered excited utterances from the rule against hearsay, regardless of whether the declarant is available as a witness. The committee did not include such statements in the exceptions established by this rule because those statements are already addressed by Rule 11-803(2). The exception in Paragraph (B) of this rule allows for authentication of the 911 recording or CAD transcript without calling a dispatcher of other police employee to testify to lay that foundation.

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

[RECOMPILED]

[~~7-608. Controlled substance test and autopsy reports; preliminary hearings.~~] 7-202.1. Exceptions to rules of evidence for preliminary examinations.

A. [~~**Admissibility**~~] **Exceptions to hearsay rule.** In any preliminary [~~hearing~~]examination, the following categories of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: [~~a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, is not excluded by the hearsay rule, even though the declarant is available as a witness, if:~~

(1) [~~the report is of an analysis conducted by:~~] a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a safe house; or

[~~(a) the New Mexico State Police crime laboratory;~~

~~(b) the scientific laboratory division of the Department of Health;~~

~~(c) the Office of the Medical Investigator; or~~

~~(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;~~]

[~~(2) the report is regular on its face and is attached to a certification form approved by the Supreme Court; and~~] a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report;

[~~(3)~~](2) [~~a legible copy of the certification form and report was mailed to the defendant or his counsel at least ten (10) days before the preliminary hearing.~~] a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, if the report is of an analysis conducted by:

(a) the New Mexico State Police crime laboratory;

(b) the scientific laboratory division of the Department of Health;

(c) the Office of the Medical Investigator; or

(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;

B. **Exception to authentication rule.** In any preliminary examination, a proffer by counsel is sufficient to meet the authentication and identification requirements of Rule 11-901(A) NMRA with regard to a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report;

C. **Exception for controlled substance field tests.** In any preliminary examination, the results of a field test conducted for the detection of controlled illegal substances shall not be excluded based on objections to the scientific accuracy or reliability of the field test.

D. **Certification.** Evidence admitted under the exceptions established by this rule must include a certification form approved by the Supreme Court.

E. **Copies.** A legible copy of the certification form and report was mailed to the defendant or his counsel at least four (4) days before the preliminary examination if the defendant is in custody and at least ten (10) days before the preliminary hearing if the defendant is not in custody.

[~~B.~~]F. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

[As amended, effective January 1, 1987; January 1, 1995; Rule 7-608 NMRA recompiled and amended as Rule 7-202.1 NMRA by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

Committee commentary. — Rule 11-803(4) NMRA excepts statements made for and reasonably pertinent to medical diagnosis or treatment from the rule against hearsay, regardless of whether the declarant is available as a witness. This exception includes statements made to a Sexual Assault Nurse Examiner (SANE) for medical diagnosis or treatment. The committee did not include statements made to a SANE or other medical professional in the exceptions established by this rule because those statements are already addressed by Rule 11-803(4) NMRA.

Additionally, Rule 11-803(2) NMRA excepts statements considered excited utterances from the rule against hearsay, regardless of whether the declarant is available as a witness. The committee did not include such statements in the exceptions established by this rule because those statements are already addressed by Rule 11-803(2). The exception in Paragraph (B) of this rule allows for authentication of the 911 recording or CAD transcript without calling a dispatcher of other police employee to testify to lay that foundation.

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

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 03/07/2022, 2:48 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Mon, Mar 7, 2022 at 2:48 PM
Reply-To: "lcrmllf@nmcourts.gov" <lcrmllf@nmcourts.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name:	Linda Flores
Phone Number:	5755252951
Email:	lcrmllf@nmcourts.gov
Proposal Number:	2022-010
Comment:	FYI: There is a typo on the last sentence of 5-302.1 under the second paragraph of Committee Commentary. it should read, ... or other police employee to testify... . It is written as of other police employee...

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>

[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>

[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.

--
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
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Letter.Supreme.Court.Rule.Comments.Judge Loveless.pdf
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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
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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

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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

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 04/07/2022, 6:15 pm

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Wed, Apr 6, 2022 at 6:15 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
Phone Number:	5052221099
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Proposal Number:	2022-010
Comment:	comment attached
Upload:	Proposed-Preliminary-Hearing-Rule-Change-Comment-04062022.pdf

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April 6, 2022

TO: Sally A. Paez, Deputy Clerk of Court
New Mexico Supreme Court

FROM: Adolfo Mendez, Chief of Policy and Planning

RE: Public Comment on 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 2022-010, Dated March 7, 2022

We commend the Court's attempt to temper the strict application of the rules of evidence at preliminary examinations. As currently structured, primarily due to the strict application of the rules of evidence and defendants' penchant for knowingly failing to appear at the settings, preliminary examinations are both extremely frail logistically and extremely resource intensive in terms of the number of officers, witnesses, and victims needed for their success. In Bernalillo County, preliminary examinations are only successful (meaning there was a waiver of the hearing, or that the hearing actually took place and resulted in a determination of no probable cause or probable cause) about half of the time. The most prevalent reason for hearing failures is, by far, the defendant's failure to appear. This is distantly followed by other logistical issues such as court resets or the inability of an officer or witness to attend a hearing. While this proposed rule change may provide some modest relief, it does not go far enough to shore up the preliminary examination's logistical fragility. Accordingly, we urge the Court to add hearsay exceptions tailored to supporting the function of preliminary examinations.

Specifically, we urge the Court to model preliminary examination hearsay exceptions on Arizona's Rule of Criminal Procedure 5.4(c) which states:

> (c) Evidence. A magistrate must base a probable cause finding on substantial evidence, which may include hearsay in the following forms:
>
> (1) a written report of an expert witness;

> (2) documentary evidence, even without foundation, if there is a substantial basis for believing that foundation will be available at trial and the document is otherwise admissible; or
>
> (3) a witness's testimony about another person's declarations if such evidence is cumulative or if there are reasonable grounds to believe that the declarant will be personally available for trial.

Such an approach is supremely reasonable in the context of a preliminary examination for three important reasons. First, the burden of proof in a preliminary examination is low in that a judge must only find that a felony has been committed and that probable cause exists that the defendant committed it. This is far short of the burden necessary at trial, where the strict application of the rules of evidence is necessary to meet the higher burden. Second, as to documentary evidence and another person's declarations, the availability to lay a foundation or to have the declarant available at trial supports the reliability of the hearsay evidence at the preliminary examination. Lastly, at the preliminary examination the evidence is presented to a judge. Unlike a jury which may not be able to evaluate the reliability of hearsay evidence, a judge is especially suited to the task. The risk of entrusting a judge with the evaluation of hearsay evidence is very low.

Permitting such hearsay evidence would fundamentally improve the criminal justice system by: (1) addressing the fragility of the preliminary examinations to logistics, thereby ensuring that more examinations successfully fulfill their function and resolve on their merits; (2) reducing the produral burden on victims of crime when they are already dealing with the impact of the crime in their lives; and (3) reducing the number of officers who need to be in a courtroom instead of patrolling the streets.