

5-302. Preliminary examination.

A. Time.

(1) ***Time limits.*** A preliminary examination shall be scheduled and held with a disposition entered, unless an extension under Subparagraph (A)(2) of this rule is granted, 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 not arrested ~~[upon]~~ on a bench warrant, ~~[for failure to comply with]~~ the date the conditions of release ~~[or if the defendant's pretrial release is]~~

are revoked 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]~~ which results in the defendant's continued detention.

(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]~~ 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 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 motion and for cause shown, the]~~ The court may remand the case to the magistrate or metropolitan court for a preliminary examination unless a motion for pretrial detention has been

1 filed or a preliminary examination has been previously conducted in the magistrate or metropolitan
2 court.

3 [As amended, effective June 1, 1999; as amended by Supreme Court Order No. 14-8300-020,
4 effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme
5 Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31,
6 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or
7 filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-022,
8 effective for all cases pending or filed on or after December 31, 2022.]

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

13 If a preliminary examination is commenced within the time limits of Subparagraph (A)(1)
14 of this rule, but completion of the hearing requires extension into a second day that falls outside
15 the time limits, the district court may grant an extension to complete the disposition of the
16 preliminary examination under [Under] Subparagraph (A)(2) of this rule.[, the] The district court
17 may extend the time limits for commencing and holding a preliminary examination if the defendant
18 does not consent only [upon] on a showing of exceptional circumstances beyond the control of the
19 state or the court. ““Exceptional circumstances,” . . . would include conditions that are unusual or
20 extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately
21 preceding the commencement of the trial; or other circumstances that ordinary experience or
22 prudence would not foresee, anticipate, or provide for.” See Committee commentary to Rules 6-
23 506 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]~~ 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]~~ that 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 was amended and recompiled as Rule 6-202.1 NMRA in

2022, “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~~] the report.” [~~Rule 6-608(B); accord Rule 7-608(B) NMRA~~] Rule 6-202.1(F) NMRA; accord Rule 7-202.1(F) 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~~] Rule 5-601(C) NMRA.

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. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]