

7-202. 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 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 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 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]~~ 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 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 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 and conditions of release set by the metropolitan court shall continue in effect unless or until evaluated by the district court.

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.

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

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

12 [As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by
13 Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after
14 December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases
15 pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-
16 8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by
17 Supreme Court Order No. _____, effective for all cases pending or filed on or after December
18 31, 2022.]

19 **Committee commentary.** — If a preliminary examination is commenced within the time
20 limits of Subparagraph (A)(1) of this rule, but completion of the hearing requires extension into a
21 second day that falls outside the time limits, the metropolitan court may grant an extension to
22 complete the disposition of the preliminary examination under [~~Under~~] Subparagraph (A)(2) of
23 this rule.[; ~~the~~] The [~~district~~] metropolitan court may extend the time limits for holding a

preliminary examination if the defendant does not consent only ~~upon~~ on 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~~] 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.

1 Additionally, the Rules of Evidence remain generally applicable to preliminary
2 examinations, subject to specific exceptions for certain types of evidence not admissible at trial.
3 *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the “Rules of Evidence generally govern proceedings
4 in preliminary examinations” but explaining that Rule 6-608(A) NMRA, amended and recompiled
5 as Rule 6-202.1(A) NMRA in 2022, which is identical to Rule 7-608(A) NMRA, amended and
6 recompiled as Rule 7-202.1(A) NMRA in 2022, “provides a specific exception to our hearsay rule
7 for admissibility” of certain types of written laboratory reports).

8 The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-
9 examine the state’s witnesses. Thus, although [~~Rule 7-608(A)~~] Rules 5-302.1, 6-202.1, and 7-202.1
10 NMRA may permit the state to use a laboratory report at the preliminary examination without
11 calling the laboratory analyst as a witness, the defendant retains the right “to call witnesses to
12 testify as to the matters covered in such report.” [~~Rule 7-608(B)~~] Rule 7-202.1(F) NMRA. And the
13 preliminary examination remains “a critical stage of a criminal proceeding” at which “counsel
14 must be made available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509,
15 684 P.2d 1174.

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

1 If any misdemeanor offenses are included in the bind-over order but not set forth in the
2 criminal information, the district court shall dismiss those charges without prejudice under Rule
3 5-201(C) NMRA.

4 [Adopted by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or
5 after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all
6 cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No.
7 _____, effective for all cases pending or filed on or after December 31, 2022.]