

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE  
DISTRICT COURTS  
PROPOSAL 2023-012**

**March 24, 2023**

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rule 5-302.2 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:

Elizabeth A. Garcia, Chief Clerk of Court  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 24, 2023**, 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.

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**5-302.2. Grand jury proceedings.**

**A. [Time] Timing upon filing of criminal complaint.**

(1) **Time limits.** Grand jury proceedings 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;

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

(d) if the defendant is arrested or surrenders on any warrant, the date the defendant is returned to the court;

(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) the date the conditions of release are revoked or modified under Rule 5-403 NMRA, that result in the defendant's continued detention or release.

(2) **Extensions.** On a showing of good cause, the court may extend the time limits for holding a grand jury proceeding or 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 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 or grand jury proceeding.

(3) **Dismissal without prejudice.** If a grand jury proceeding or 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-]~~**B. 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-]~~**C. 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.]~~**D. 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. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — Under ~~[Paragraph B(4) of this Rule]~~ Subparagraph (4) of Paragraph C 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)]~~C(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]~~ NMSA 1978, § 31-6-11(B) (2003). *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. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]



New Mexico  
Courts

Amy Feagans <supajf@nmcourts.gov>

## [nmsupremecourtclerk-grp] Comments on Proposed Rule Changes

1 message

**Brett Loveless** <albdbrl@nmcourts.gov>

Mon, Apr 24, 2023 at 5:28 PM

Reply-To: albdbrl@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Hello:

As Presiding Judge of the Criminal Division at the Second Judicial District Court, I offer the following comments on proposed changes to NMRA 5-302.2.

The proposed changes, specifically on extensions of time for grand jury, allow, on a showing of good cause, the court to extend the time limits for holding a grand jury proceeding by up to sixty (60) days if Defendant agrees. If Defendant does not agree, time can only be extended for exceptional circumstances beyond the control of the state or the court and where justice requires. No extension shall exceed 60 days. If the grand jury is not held within time limits, the court shall dismiss the case without prejudice.

I believe the intent of this proposed Rule change is to have the Rule on grand jury extension language mirror the preliminary hearing Rule, NMRA 5-302.

However, I have some concerns with the proposed revisions. The current language for extensions in grand jury proceedings is as follows: "D. Extensions of time. The times set forth in this rule may be changed by the grand jury judge on written motion demonstrating that an extension is necessary in order to assure compliance with the requirements of this rule."

The current limitations in the extensions of time applying to grand jury, which limit extensions to those necessary to assure compliance with the Rule, has operated to severely limit extension requests. Most requests for extensions are for a one-day extension. The proposed language widens this to "good cause," and up to 60-days, with the only limitation being defense's agreement. This distinction is important for a few reasons.

First, unlike with preliminary examinations where the filing of the Information creates a CR case number in District Court, cases brought through grand jury do not receive a District Court CR case number unless and until the case is indicted. Therefore, tracking extensions and the filing of motions/pleadings prior to indictment is done either in the PD/detention case (if one is filed) or in a Miscellaneous case type; both of these case types are more difficult to track and the extension means more time where a case is in District Court, potentially for 120 days, with no actual CR pending case--this is especially problematic if no PD is filed or if the PD is denied. Essentially, the Court would be sitting on a case without an open District Court filing for up to four months.

Second, while preliminary hearings can easily be set up last minute as they are heard by a judge, grand juries are more difficult to hold quickly because they require twelve jurors. Grand juries operate on a set schedule. Moreover, if the judge is asked to grant an extension--potentially up to 60 days-- they would probably need a hearing on the matter to establish (1) good cause and (2) allow the parties to argue how long of an extension would be needed and what is appropriate. The State would have to argue for when it would potentially be able to fit proceeding in the grand jury schedule to ensure that the Court does not grant an extension of such a duration that makes it impossible for the State to bring the case before the grand jury. For example, if the Court grants a defendant's request for a 60-day extension, but the last possible grand jury to fit the case is on day 57, the Court's granting of the extension would essentially operate as an unintentional mandatory dismissal by the Court. This could lead to "gaming" the system.

Currently, most of the requests for extensions are decided on the pleadings in an extremely short window of time (usually the same day) and the requests are generally for a one-day extension. Because the new Rule would most likely practically require that the judge holds a hearing on the matter would mean more last minute matters to find room for on the docket--when CR judges already have many matters requiring last minute hearings (such as detentions, conditions of release, etc.).

Third, it is likely that the requests for extensions would increase significantly because of the broadening to "good cause." Defendant's request for time to meet with his or her client would probably qualify in many instances as "good cause," and because the Rule depends on defense's agreement, it essentially allows the defendant the ability to control when the case is brought before a grand jury. This is problematic because the grand jury schedule is generally dictated by the

availability of grand jurors (in a set schedule) and the State's decision of when/who to indict on what calendar, given limited grand jury resources. This compares with preliminary hearings where Courts can add preliminary hearing time and can do so relatively quickly by adding to one judge's docket--either in the District Court or Metropolitan Court.

Thank you for your consideration.

Brett R. Loveless  
District Court Judge, Div. III