

KEY PROVISIONS OF NM RELEASE AND DETENTION RULES

Rule 5-401 (Procedures for Judicial Release and Detention Decisions):

A. Hearing.

(1) **Time.** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

- (a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or
- (b) first appearance or arraignment, if the defendant is not in custody.

(2) **Right to counsel.** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to pretrial release; recognizance or unsecured appearance bond.

Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose nonmonetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be considered in determining conditions of release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;
- (2) the weight of the evidence against the defendant;
- (3) the history and characteristics of the defendant, including
 - (a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
- (5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-monetary conditions of release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

- (1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;
- (2) maintain employment, or, if unemployed, actively seek employment;
- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;
- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;
- (10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- (11) submit to a drug test or an alcohol test on request of a person designated by the court;
- (12) return to custody for specified hours following release for employment, schooling, or other limited purposes;
- (13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured bond. If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any nonmonetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) *Factors to be considered in setting secured bond.*

- (a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.
- (b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.
- (c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.
- (d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) *Types of secured bond.* If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the

appearance of the defendant.

(a) *Percentage bond.* The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) *Property bond.* The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 6-401.1 NMRA.

(c) *Cash or surety bond.* The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 6-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order setting conditions of release; findings regarding secured bond.

(1) *Contents of order setting conditions of release.* The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) *Written findings regarding secured bond.* The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Pretrial detention. If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

H. Case pending in district court; motion for review of conditions of release.

(1) Motion for review. If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release. . . .

Rule 5-403 (Procedures for Modification or Revocation of Release Orders):

A. Scope. In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for revocation or modification of conditions of release.

- (1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.
- (2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of summons or bench warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial hearing.

- (1) The court shall hold an initial hearing as soon as practicable, but no later than three (3) days after the defendant is detained.
- (2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.
- (3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary hearing.

- (1) Time. The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.
- (2) Defendant's rights. The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at completion of evidentiary hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 6-401 NMRA; or
- (3) revoke the defendant's release, if the court finds by clear and convincing evidence that
 - (a) the defendant has willfully violated a condition of release and that no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (b) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

Rule 5-408 (Procedures for Early Pre-Judicial Release by Authorized Designees):

A. Scope. This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person's first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. Minor offenses; release on recognizance.

(1) Persons eligible. A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) Exceptions. A person arrested for any of the following offenses is not eligible for release under this paragraph:

- (a) battery under Section 30-3-4 NMSA 1978;
- (b) aggravated battery under Section 30-3-5 NMSA 1978;
- (c) assault against a household member under Section 30-3-12 NMSA 1978;
- (d) battery against a household member under Section 30-3-15 NMSA 1978;
- (e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;
- (f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;
- (g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;
- (h) stalking under Section 30-3A-3 NMSA 1978;
- (i) abandonment of a child under Section 30-6-1(B) NMSA 1978;
- (j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;
- (k) enticement of a child under Section 30-9-1 NMSA 1978;
- (l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;
- (m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;
- (n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;
- (o) violating an order of protection under Section 40-13-6 NMSA 1978; or
- (p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

C. Pretrial release based on risk assessment. A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. Pretrial release under release on recognizance program. A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court. . . .

Rule 5-409 (Procedures for Pretrial Detention fo Dangerous Defendants):

A. Scope. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled “Expedited Motion for Pretrial Detention” and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. Motion for pretrial detention. The prosecutor may file a written expedited motion for pretrial detention at any time in both the court where the case is pending and in the district court. The motion shall include the specific facts that warrant pretrial detention.

(1) The prosecutor shall immediately deliver a copy of the motion to

(a) the detention center holding the defendant, if any;

(b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

C. Case pending in magistrate or metropolitan court. If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court’s jurisdiction to set or amend conditions of release shall then be terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial release until the case is remanded by the district court following disposition of the detention motion under Paragraph I of this rule. . . .

E (2) Defendant not in custody when motion is filed. If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant’s arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. Pretrial detention hearing. The district court shall hold a hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community.

(1) Time.

(a) Time limit. The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

- (i) the filing of the motion for pretrial detention; or
- (ii) the date the defendant is arrested as a result of the motion for pretrial detention.
- (b) Extensions. The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court may extend the time limit for holding the hearing as follows:
 - (i) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the delay;
 - (ii) upon the defendant filing a written waiver of the time limit; or
 - (iii) upon stipulation of the parties.
- (2) Discovery. At least twenty-four (24) hours before the hearing, the prosecutor shall provide the defendant with all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing.
- (3) Defendant's rights. The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.
- (4) Prosecutor's burden. The prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.
- (5) Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing. . . .

J. Expedited trial scheduling for defendant in custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

K. Successive motions for pretrial detention and motions to reconsider. On written motion of the prosecutor or the defendant, the court may reopen the detention hearing at any time before trial if the court finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on whether the previous ruling should be reconsidered.

L. Appeal. Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

M. Judicial discretion; disqualification and excusal. Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.