

5-409. Pretrial detention.

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.

D. Case pending in district court. If a motion for pretrial detention is filed in the district court and probable cause has not been found under Article II, Section 14 of the New Mexico Constitution or Rule [5-208](#)(D) NMRA, Rule [5-301](#) NMRA, Rule [6-203](#) NMRA, Rule [6-204](#)(B) NMRA, Rule [7-203](#) NMRA, or Rule [7-204](#)(B) NMRA, the district court shall determine probable cause in accordance with Rule [5-301](#) NMRA. If the district court finds no probable cause, the district court shall order the immediate personal recognizance release of the defendant under Rule [5-301](#) NMRA and shall deny the motion for pretrial detention without prejudice.

E. Detention pending hearing; warrant.

(1) *Defendant in custody when motion is filed.* If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule [5-401](#)(N) NMRA, Rule [5-408](#) NMRA, Rule [6-401](#)(M) NMRA, Rule [6-408](#) NMRA, Rule [7-401](#)(M) NMRA, or Rule [7-408](#) NMRA. All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.

(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.

G. Order for pretrial detention. The court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. The court shall file written findings of the individualized facts justifying the detention as soon as possible, but no later than two (2) days after the conclusion of the hearing.

H. Order setting conditions of release. The court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule [5-401](#) NMRA. The court shall file written findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than two (2) days after the conclusion of the hearing.

I. Further proceedings in magistrate or metropolitan court. Upon completion of the hearing, if the case is pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate or metropolitan court may modify the order setting conditions of release upon a showing of good cause, but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court.

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.

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