

### **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 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 an 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.

(3) The court may not grant or deny the motion for pretrial detention without a hearing.

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. Upon the request of the prosecutor, the district court shall set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention and, for cases pending in the magistrate or metropolitan court, shall provide notice to the magistrate or metropolitan court that the preliminary examination is to be held in the district court.

(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 if in the motion for pretrial detention the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing;

(ii) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the extension;

(iii) upon the defendant filing a waiver of the time limit; or

(iv) upon stipulation of the parties.

(c) *Notice.* The court shall promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion.

(2) ***Initial disclosures.***

(a) The prosecutor shall promptly disclose to the defendant prior to the hearing

(i) all evidence that the prosecutor intends to rely on at the hearing, and

(ii) all exculpatory evidence known to the prosecutor.

(b) Except in cases where the hearing is held within two (2) business days after the filing of the motion, the prosecutor shall disclose evidence under this subparagraph at least twenty-four (24) hours before the hearing. At the hearing the prosecutor may offer evidence or information that was discovered after the disclosure deadline, but the prosecutor must promptly disclose the evidence to the defendant.

(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.

(6) ***Factors to be considered.*** The court shall consider any fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community, including but not limited to the following:

(a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(e) any facts tending to indicate that the defendant may or may not commit new crimes if released;

(f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and

(g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available 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 findings of the individualized facts justifying the detention as soon as possible, but no later than three (3) 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 findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than three (3) 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

(1) information exists that was not known to the movant at the time of the hearing or circumstances have changed subsequent to the hearing, and

(2) the information or changed circumstance 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.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019.]

**Committee commentary. —**

**Paragraph A** — In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in “capital offenses when the proof is evident or the presumption great.” As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed. *See State v. Ameer*, 2018-NMSC-030.

Although this rule does not provide the district court with express sanction authority, the district court retains inherent authority to “impose a variety of sanctions on both litigants and attorneys in order to regulate [the court’s] docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*, 2017-NMSC-017, ¶ 19, 394 P.3d 959 (“Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration.”). “Extreme sanctions such as dismissal are to be used only in exceptional cases.” *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation marks and citation omitted), *modified on other grounds by Le Mier*, 2017-NMSC-017. *Cl.* Rule 5-206 NMRA (providing that an attorney may be subject to appropriate disciplinary action for violating the rule); Rules 5-501(H), 5-502(G), 5-503.2(B), 5-505(B) NMRA (sanctions for discovery violations); Rule 5-511 NMRA (sanctions for burdening a person subject to a subpoena).

**Paragraph B** — Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant’s arrest under Rule 5-208(D) NMRA.

**Paragraph C** — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction to set or amend the conditions of release. The filing of the motion does not, however, stay the case in the magistrate or metropolitan court. Nothing in this rule shall prevent timely preliminary examinations from proceeding while the detention motion is pending.

**Paragraphs C and D** — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

**Paragraph F** — Paragraph F sets forth procedures for pretrial detention hearings. The court must “make three categories of determinations” at a pretrial detention hearing: “(1) which information in any form carries sufficient indicia of reliability to be worthy of consideration, (2) the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial, and (3) whether any potential pretrial release conditions will reasonably protect the safety of others.” *State v. Groves*, 2018-NMSC-006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

Subparagraph (F)(1)(b)(i) authorizes an extension of time if the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing.

Subparagraph (F)(3) describes the defendant’s rights at the hearing. “[T]he Due Process Clause of the New Mexico Constitution requires that a defendant’s protections at a pretrial detention hearing include ‘the right to counsel, notice, and an opportunity to be heard.’” *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 88, 410 P.3d 201 (quoting *State v. Brown*, 2014-NMSC-038, ¶ 20, 338 P.3d 1276 ). “Due process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial detention hearing.” *Id.* The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing.

Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified that “neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings.” 2018-NMSC-005, ¶ 110. The court may rely on “credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information” in determining whether the prosecutor has met its burden under Article II, Section 13. *Id.* ¶ 3. In doing so, the court should exercise “sound judicial discretion in assessing the reliability and accuracy of information presented in support of detention, whether by proffer or direct proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion to find proffered or documentary information insufficient to meet the constitutional clear and convincing evidence requirement in the context of particular cases.” *Id.* ¶ 3.

Subparagraph (F)(6) lists factors that the court may consider in assessing whether the prosecutor has met its burden of proving by clear and convincing evidence that the defendant may be likely to pose a threat to the safety of others if released pending trial and whether any potential pretrial release conditions will reasonably protect the safety of others. These factors include the nature and circumstances of the charged offense and the defendant’s history and characteristics. *See State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining that the defendant’s past conduct can help the court assess whether the defendant poses a future threat of danger). In *State v. Ferry*, the Supreme Court explained that “the nature and circumstances of a defendant’s conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the [prosecutor’s] burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community.” 2018-NMSC-004, ¶ 6, 409 P.3d 918. If the prosecutor meets this initial burden, the prosecutor must also demonstrate by clear and convincing evidence that “no release conditions will reasonably protect the safety of any other person or the community.” *Id.* “For example, the [prosecutor] may introduce evidence of a defendant’s defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims’ family members; or inability or refusal to abide by

conditions of release in other cases.” *Id.*

**Paragraph I** — If the district court issues a detention order under Paragraph G of this rule, the magistrate or metropolitan court cannot release the defendant while the case is pending. The magistrate or metropolitan court should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.

**Paragraph J** — Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”).

**Paragraph K** — The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 (“District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment.” (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

**Paragraph L** — Either party may appeal the district court’s ruling on the detention motion. Under Article II, Section 13, an “appeal from an order denying bail shall be given preference over all other matters.” *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

**Paragraph M** — Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See NMSA 1978, § 38-3-9*. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See N.M. Const. art. VI, § 18; Rule 21-211 NMRA*.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019.]

## COMPILER'S AMENDMENT NOTES

**The 2018 amendment**, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, prohibited the court from granting or denying a motion for pretrial detention without a conducting a hearing, authorized the district court, upon the request of the prosecutor, to set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention, authorized the district court to extend the time limit for holding a pretrial detention hearing for up to three days if the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing, added certain notice provisions, provided an exception to the deadline for evidentiary disclosures, provided factors that the court may consider in making its determination on pretrial detention, extended the time within which the court must file findings of fact justifying the court’s ruling on the detention motion, authorized the court to reopen the detention hearing before trial if circumstances have changed subsequent to the initial hearing, and revised

the committee commentary; added Subparagraph B(3); in Paragraph F, added the last sentence of the introductory paragraph, added new Subparagraph F(1)(b)(i) and subparagraph designation “(ii)” and redesignated former subparagraphs, and added Subparagraph F(1)(c), in Subparagraph F(2), deleted “Discovery” and added “Initial disclosures”, rewrote Subparagraph F(2)(a), added Subparagraph F(2)(b), and added Subparagraph F(6); in Paragraphs G and H, deleted “two (2)” and added “three (3)”; and in Subparagraph K(1), after “time of the hearing”, deleted “and that” and added “or circumstances have changed subsequent to the hearing, and”, and in Subparagraph K(2), after the subparagraph designation, added “the information or changed circumstances”.

## COMPILER'S ANNOTATIONS

**The nature of the evidence required in pretrial detention hearings.** — On a writ of superintending control, where petitioner sought guidance on the nature of the evidence required in pretrial detention hearings authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, the New Mexico Supreme Court ruled that neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings, and under New Mexico Supreme Court procedural rules, judges may consider all reasonably reliable information, without regard to strictures of the formal rules of evidence, in considering whether any pretrial release conditions will reasonably protect the safety of any other person or the community. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005.

**Unlawful use of money to detain.** — Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable for dangerousness in the new due process procedures under the New Mexico Constitution. If a court finds that a defendant is too dangerous to release under any available conditions, the court should enter a detention order. If the court instead finds that a defendant is entitled to release under Article II, Section 13 of the New Mexico Constitution and Rule 5-409 NMRA, the court must not use a money bond to impose pretrial detention. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005.

**Pretrial detention based on history of dangerous conduct and failure to abide by requirements of previous release orders.** — Where defendant and another man stole a van in Albuquerque and attempted to flee pursuing police officers, driving recklessly at extremely high speeds through residential city streets, and where defendant, shown to be the driver of the stolen van by physical evidence and her post-arrest statements to police, crashed the van into another car at an intersection, killing a teenage girl, fatally injuring the girl’s mother, and breaking the leg of the mother’s three-year-old son, and after the crash, defendant and her cohort jumped out of the stolen van and continued their flight from police, stealing another vehicle and succeeding in eluding police, but leaving behind a number of clues that resulted in defendant’s identification and arrest two days later, the district court did not abuse its discretion in granting the state’s motion for pretrial detention, because the factual information about defendant’s current and previous offenses that was relied on by the district court carried strong indicia of reliability, the information supported the conclusion that defendant had uncontrolled propensities to persist in the commission of unlawful and dangerous conduct, and based on defendant’s record of continued criminal activity and dangerous conduct while on previous conditions of release and pattern of refusal to comply with directions of the court and of police, there was clear and convincing evidence supporting a conclusion that no available conditions a court could impose would protect against defendant’s likely future dangerous conduct. *State v. Groves*, 2018-NMSC-006.

**Pretrial detention pending trial.** — The district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor proves by clear and convincing evidence that the defendant poses a future threat to others or the community, and no conditions of release will reasonably



protect the safety of another person or the community. *State v. Ferry*, 2018-NMSC-004.

**Nature and circumstances of defendant's conduct.** — The nature and circumstances of a defendant's conduct in the underlying charged offenses may be sufficient, despite other evidence, to sustain the state's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community. If the state meets this initial burden of proof, the state must still prove by clear and convincing evidence, under Article II, Section 13 of the New Mexico Constitution, that no release conditions will reasonably protect the safety of any other person or the community. *State v. Ferry*, 2018-NMSC-004.

Where defendant was alleged to have participated in the kidnapping, mutilation, and murder of a person and to have tampered with evidence, and where the state filed a motion for pretrial detention which was denied by the district court judge after an evidentiary hearing, it was not clear from the record whether the district judge believed that he was precluded from finding that reliable evidence of the nature and circumstances of the crime can never, in and of itself, be sufficient for the state to meet its burden of proving a defendant's future dangerousness, and therefore the case was remanded for clarification. *State v. Ferry*, 2018-NMSC-004.

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