

**NEW MEXICO SUPREME COURT  
AD HOC PRETRIAL RELEASE COMMITTEE MEETING  
March 21, 2018; 1:00 p.m. - 5:00 p.m.  
State Bar Center, Albuquerque NM, and by phone**

*To attend by phone, please use this phone number and passcode:*

**Toll free number: 1-800-747-5150**

**Access code: 0652946**

**AGENDA:**

**Welcome and announcements.**

- 1. Roll call.**
- 2. Approve meeting notes from March 1, 2018 meeting.**
- 3. Review and discuss the proposed amendments to Rule 5-409 NMRA drafted after March 1, 2018 meeting, as follows:**
  - (a) Paragraph (B) - change proposed by Prof. Romero (Materials, p. 3 )**
  - (b) Paragraph (F) - change proposed by Prof. Romero per *Groves*, ¶ 29 (Materials, p. 5)**
  - (c) Paragraph (F)(4) - change proposed by Prof. Romero (Materials, p. 7)**
  - (d) Paragraph (G) - change proposed by Prof. Romero (Materials, pp. 9-10 )**
  - (e) Paragraph (I) - change proposed by Judge Hall (Materials, p. 10)**
  - (f) Commentary to Paragraph (F) - Committee voted to revise and needs to review proposed language (Materials, p. 13)**
  - (g) Commentary to Paragraph (F)(3) - LOPD proposal (Materials, pp. 13-14)**
  - (h) Commentary to Paragraph (F)(5), (6) - Committee voted to revise and needs to review proposed language (Materials, pp. 14-16)**
  - (i) Commentary to Paragraph (I) - change proposed by Judge Hall (Materials, p. 16)**

**For agenda items 4-7, please refer to Summary of Proposals, March 1 Materials, pp. 8-21.**

- 4. Comments to Rule 5-409 remaining for the Committee to consider**
  - (a) Paragraph (B), Motion for pretrial detention.**
  - (b) Paragraph (E)(1), Defendant in custody when motion is filed.**
  - (c) (New) Paragraph (F), Initial hearing.**
  - (d) Paragraph (G), Order for pretrial detention; and (H), Order setting conditions of release**
  - (e) Paragraph (J), Expedited trial scheduling.**
  - (f) Paragraph (K), Successive motions for pretrial detention and motions to**

**reconsider**  
**(G) Paragraph (L), Appeal.**

- 5. Review of comments related to Rule 5-401 NMRA.**
- 6. Review of comments related to Rule 5-403 NMRA.**
- 7. Review of comments related to Rule 5-408 NMRA.**
- 8. Other business.**

**Next meeting: April 11, 2018 at 1:00 p.m., State Bar Center, Albuquerque, New Mexico**

1 **5-409. Pretrial detention.**

2 A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section  
3 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and  
4 this rule, the district court may order the detention pending trial of a defendant charged with  
5 a felony offense if the prosecutor files a written motion titled “Expedited Motion for Pretrial  
6 Detention” and proves by clear and convincing evidence that no release conditions will  
7 reasonably protect the safety of any other person or the community.

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

12 (1) The prosecutor shall immediately deliver a copy of the motion to  
13 (a) the detention center holding the defendant, if any;  
14 (b) the defendant and defense counsel of record, or, if defense  
15 counsel has not entered an appearance, the local law office of the public defender or, if no  
16 local office exists, the director of the contract counsel office of the public defender.

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

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

14           D.       **Case pending in district court.** If a motion for pretrial detention is filed in  
15 the district court and probable cause has not been found under Article II, Section 14 of the  
16 New Mexico Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203  
17 NMRA, Rule 6-204(B) NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district  
18 court shall determine probable cause in accordance with Rule 5-301 NMRA. If the district  
19 court finds no probable cause, the district court shall order the immediate personal  
20 recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion

1 for pretrial detention without prejudice.

2 E. **Detention pending hearing; warrant.**

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

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

16 F. **Pretrial detention hearing.** The district court shall hold a hearing on the  
17 motion for pretrial detention to determine whether the defendant may be likely to pose a  
18 threat to the safety of others if released pending trial and whether any release condition or  
19 combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety  
20 of any other person or the community.

1 (1) *Time.*

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

5 (i) the filing of the motion for pretrial detention; or

6 (ii) the date the defendant is arrested as a result of the  
7 motion for pretrial detention.

8 (b) *Extensions.* The time enlargement provisions in Rule 5-104  
9 NMRA do not apply to a pretrial detention hearing. The court may extend the time limit for  
10 holding the hearing as follows:

11 (i) for up to three (3) days if in the motion for pretrial  
12 detention the prosecutor requests a preliminary hearing to be held immediately before the  
13 detention hearing;

14 \_\_\_\_\_ (ii) for up to three (3) days upon a showing that  
15 extraordinary circumstances exist and justice requires the [~~delay~~] extension;

16 [~~(i)~~](iii) upon the defendant filing a written waiver of  
17 the time limit; or

18 [(iii)](iv) upon stipulation of the parties.

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

1 motion.

2 (2) **Discovery.** At least twenty-four (24) hours before the hearing, the  
3 prosecutor shall provide the defendant with all evidence relating to the motion for pretrial  
4 detention that is in the possession of the prosecutor or is reasonably available to the  
5 prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The  
6 prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but  
7 the prosecutor must provide prompt disclosure to the defendant prior to the hearing.

8 (3) **Defendant's rights.** The defendant has the right to be present and to  
9 be represented by counsel and, if financially unable to obtain counsel, to have counsel  
10 appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to  
11 compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing,  
12 and to present information by proffer or otherwise. If the defendant testifies at the hearing,  
13 the defendant's testimony shall not be used against the defendant at trial except for  
14 impeachment purposes or in a subsequent prosecution for perjury.

15 (4) **Prosecutor's burden.** The prosecutor must prove by clear and  
16 convincing evidence that the defendant may be likely to pose a threat to the safety of others  
17 if released pending trial and that no release conditions will reasonably protect the safety of  
18 any other person or the community.

19 (5) **Evidence.** The New Mexico Rules of Evidence shall not apply to the  
20 presentation and consideration of information at the hearing. The parties may proceed by

1 proffer, documentary submission, witness testimony, other relevant evidence, or any  
2 combination thereof. New Mexico court records may be considered without certification.

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

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

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

11 (c) the history and characteristics of the defendant, including

12 (i) the defendant's character, physical and mental  
13 condition, past conduct, history relating to drug or alcohol abuse, and criminal history;

14 (ii) whether, at the time of the current offense or arrest, the  
15 defendant was on probation, parole, or other release pending trial, sentencing, or appeal for  
16 any offense under federal, state, or local law; and

17 (iii) whether the defendant has a history of violations of  
18 probation, parole, or conditions of release in the ten (10) years preceding the current charges;

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



1 safety of others if released pending trial and that no release conditions will reasonably protect  
2 the safety of any other person or the community. The court shall file written findings of the  
3 individualized facts justifying the detention as soon as possible, but no later than two (2)  
4 days after the conclusion of the hearing.

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

12 I. **Further proceedings in magistrate or metropolitan court.** Upon  
13 completion of the hearing, if the case is pending in the magistrate or metropolitan court, the  
14 district court shall promptly transmit to the magistrate or metropolitan court a copy of either  
15 the order for pretrial detention or the order setting conditions of release. If the district court  
16 has issued an order for pretrial detention, the magistrate or metropolitan court shall not  
17 release the defendant as long as felony charges remain pending. If the district court has issued  
18 an order setting conditions of release, the magistrate or metropolitan court shall enforce the  
19 conditions set by the district court. Upon either the dismissal of all felony charges or at the  
20 conclusion of a preliminary examination under Rule 6-202 NMRA or Rule 7-202 NMRA,

1 ~~the~~[The] magistrate or metropolitan court may modify the order setting conditions of release  
2 upon a showing of good cause~~[, but as long as the case remains pending, the magistrate or~~  
3 ~~metropolitan court may not release a defendant who has been ordered detained by the district~~  
4 ~~court]~~.

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

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

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

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

1 [Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed  
2 on or after July 1, 2017; as amended by Supreme Court Order No. \_\_\_\_\_, effective  
3 for all cases pending or filed on or after \_\_\_\_\_.]

4 **Commentary.** —

5 **Paragraph A** - In addition to the detention authority for dangerous defendants authorized  
6 by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court  
7 conceivably could be faced with a request to detain under the preexisting exception to the  
8 right to pretrial release in “capital offenses when the proof is evident or the presumption  
9 great.” As a result of the repeal of capital punishment for offenses committed after July 1,  
10 2009, this provision will be applicable only to offenses alleged to have been committed prior  
11 to that date for which capital punishment may be imposed.

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

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

20 **Paragraphs C and D** - Federal constitutional law requires a “prompt judicial determination

1 of probable cause” to believe the defendant committed a chargeable offense, before or within  
2 48 hours after arrest, in order to continue detention or other significant restraint of liberty.  
3 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause  
4 does not relieve the prosecutor from proving the grounds for pretrial detention by clear and  
5 convincing evidence.

6 **Paragraph F** - Paragraph F sets forth procedures for pretrial detention hearings. The court  
7 must “make three categories of determinations” at a pretrial detention hearing: “(1) which  
8 information in any form carries sufficient indicia of reliability to be worthy of consideration,  
9 (2) the extent to which that information would indicate that a defendant may be likely to pose  
10 a threat to the safety of others if released pending trial, and (3) whether any potential pretrial  
11 release conditions will reasonably protect the safety of others.” *State v. Groves*,  
12 2018-NMSC-006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

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

15 Subparagraph (F)(3) describes the defendant’s rights at the hearing. “[T]he Due  
16 Process Clause of the New Mexico Constitution requires that a defendant’s protections at a  
17 pretrial detention hearing include ‘the right to counsel, notice, and an opportunity to be  
18 heard.’ ” *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 88, 410 P.3d 201 (quoting  
19 *State v. Brown*, 2014-NMSC-038, ¶ 20, 338 P.3d 1276). “Due process requires a meaningful  
20 opportunity to cross-examine testifying witnesses or otherwise challenge the evidence

1 presented by the state at a pretrial detention hearing.” *Id.* The defendant shall be entitled to  
2 appear and participate personally with counsel before the judge conducting the detention  
3 hearing, rather than by any means of remote electronic conferencing.

4 Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial  
5 detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme  
6 court clarified that “neither the United States Constitution nor the New Mexico Constitution  
7 categorically requires live witness testimony at pretrial detention hearings.”  
8 2018-NMSC-005, ¶ 110. The court may rely on “credible proffers and other summaries of  
9 evidence, law enforcement and court records, or other nontestimonial information” in  
10 determining whether the prosecutor has met its burden under Article II, Section 13. *Id.* ¶ 3.  
11 In doing so, the court should exercise “sound judicial discretion in assessing the reliability  
12 and accuracy of information presented in support of detention, whether by proffer or direct  
13 proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion to find proffered or  
14 documentary information insufficient to meet the constitutional clear and convincing  
15 evidence requirement in the context of particular cases.” *Id.* ¶ 3. [~~Like other types of~~  
16 proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the  
17 court is responsible “for assessing the reliability and accuracy” of the information presented.  
18 *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial  
19 detention hearing the judge “retains the responsibility for assessing the reliability and  
20 accuracy of the government’s information, whether presented by proffer or by direct proof”);

1 *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the  
2 discretion of the detention hearing court to determine whether a pretrial detention order may  
3 be supported in an individual case by documentary evidence, proffer, one or more live  
4 witnesses, or other forms of information the court deems sufficient); *see also United States*  
5 *v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the  
6 sentencing judge considers has sufficient indicia of reliability to support its probable  
7 accuracy, the information may properly be taken into account in passing  
8 sentence.”), *aff’d* 719 F.2d 887 (7th Cir. 1983); *State v. Guthrie*, 2011 NMSC-014, ¶¶ 36-39,  
9 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court  
10 should focus on the reliability of the evidence); *State v. Vigil*, 1982 NMCA-058, ¶ 24, 97  
11 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for  
12 accuracy or reliability lacked probative value).]

13 \_\_\_\_\_ Subparagraph (F)(6) lists factors that the court may consider in assessing whether the  
14 prosecutor has met its burden of proving by clear and convincing evidence that the defendant  
15 may be likely to pose a threat to the safety of others if released pending trial and whether any  
16 potential pretrial release conditions will reasonably protect the safety of others. These factors  
17 include the nature and circumstances of the charged offense and the defendant’s history and  
18 characteristics. *See State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining  
19 that the defendant’s past conduct can help the court assess whether the defendant poses a  
20 future threat of danger). In *State v. Ferry*, the Supreme Court explained that “the nature and

1 circumstances of a defendant’s conduct in the underlying charged offense(s) may be  
2 sufficient, despite other evidence, to sustain the [prosecutor’s] burden of proving by clear and  
3 convincing evidence that the defendant poses a threat to others or the community.”  
4 2018-NMSC-004, ¶ 6, 409 P.3d 918. If the prosecutor meets this initial burden, the  
5 prosecutor must also demonstrate by clear and convincing evidence that “no release  
6 conditions will reasonably protect the safety of any other person or the community.” *Id.* “For  
7 example, the [prosecutor] may introduce evidence of a defendant’s defiance of restraining  
8 orders; dangerous conduct in violation of a court order; intimidation tactics; threatening  
9 behavior; stalking of witnesses, victims, or victims’ family members; or inability or refusal  
10 to abide by conditions of release in other cases.” *Id.*

11 Subparagraph (F)(7) provides for a permissive inference based on certain findings.  
12 Specifically, Subparagraph (F)(7) creates a permissive inference if the defendant committed  
13 a felony while on conditions of release for a previous felony, and either the charged felony  
14 or previous felony involved violence.

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

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

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

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

19 [Commentary adopted by Supreme Court Order No. 17-8300-005, effective for all cases  
20 pending or filed on or after July 1, 2017; as amended by Supreme Court Order No.

**DISTRICT COURT CRIMINAL  
RULE 5-409**

**Committee Discussion Draft  
March 21, 2018**

1 \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]