

### **5-403. Revocation or modification 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 if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.

(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 5-401 NMRA;

or

- (3) revoke the defendant's release, if the court
  - (a) finds that there is either
    - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
    - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
  - (b) finds that there is clear and convincing evidence that either
    - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
    - (ii) 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.

**G. Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

**H. Review of conditions.** If the court enters an order setting new or additional conditions of release, the defendant may file a motion to review the conditions under Rule 5-401(H) NMRA. If, upon disposition of the motion, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

**I. 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.

**J. Appeal.** If the court revokes the defendant's release, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.

**K. Petition for review of revocation order issued by magistrate, metropolitan, or municipal court.** If the magistrate, metropolitan, or municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph.

(1) ***Petition; requirements.*** The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** Upon the filing of the petition, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The case shall proceed in the magistrate, metropolitan, or municipal court while the petition is pending.

(3) ***District court review.*** The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release in accordance with Rule 5-401 NMRA.

(4) ***Transmission of district court order to magistrate, metropolitan, or municipal court.*** The district court shall promptly transmit the order to the magistrate, metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

(5) ***Appeal.*** If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

**L. Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release or detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from reviewing a lower court's order revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended 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.** — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant’s bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev’d on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigii*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is reviewing a lower court’s order setting or revoking conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph L of this rule 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.

The 1975 amendment to Rule 5-402 NMRA makes it clear that this rule may be invoked while the defendant is appealing a conviction. *See* Rule 5-402 NMRA and commentary.

[As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## COMPILER'S AMENDMENT NOTES

**The 2018 amendment**, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, effective for all cases pending or filed on or after February 1, 2019, extended the period of time within which the court must hold an initial hearing when the defendant is not being held in the local

detention center; authorized the court to revoke the defendant's release if the court finds that there is probable cause to believe that the defendant committed a crime; in Subparagraph D(1), after "as practicable, but", added "if the defendant is in custody, the hearing shall be held", and after "the defendant is detained", added "if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center"; in Subparagraph F(3), added new subparagraph designations "(a)" and deleted former subparagraph designation "(a)"; in Subparagraph F(3)(a), added new Subparagraph F(3)(a)(i) and new subparagraph designation "(ii)"; added new subparagraph designation "(b)", in Subparagraph F(3)(b), added new subparagraph designation "(i)" and redesignated former Subparagraph F(3)(b) as Subparagraph F(3)(b)(ii); and after subparagraph designation "(b)", added "finds that there is clear and convincing evidence".

**The 2017 amendment**, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified the procedures for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release, and revised the committee commentary; in the rule heading, added "or modification" and "orders"; and deleted former Paragraphs A through D and added new Paragraphs A through L.

**The 2013 amendment**, approved by Supreme Court Order No. 13-8300-046, effective December 31, 2013, changed the references to paragraphs of Rule 5-401 NMRA that specify conditions of release; and in Subparagraph (1) of Paragraph A, after "Paragraph", deleted "A" and adds "B" and after "B or", deleted "C" and added "D".

## COMPILER'S ANNOTATIONS

**Cross references.** — For encouraging violation of bail as a misdemeanor, see Section 30-22-18 NMSA 1978.

**Due process right to hearing on revocation of bail.**— Where the State alleged that defendant violated the conditions of defendant's pretrial release by harassing the victim and by using drugs; the district court ordered defendant to submit to a urinalysis test; the pretrial services employee who administered the test reported to the court that defendant had tested positive for opiates; the district judge personally examined the test strip and agreed with findings of the pretrial services employee; based on that evidence, the district court found that defendant had violated the conditions of defendant's release and revoked bail and remanded defendant back into custody; the district court denied defendant's request for a full evidentiary hearing; defendant was denied any opportunity to examine witnesses, to present any evidence in opposition to the State's motion to revoke bail; to show any mitigating circumstances that might continue defendant's release from custody, or to defend against the revocation of bail; and the district court did not consider any alternatives to incarceration or whether additional conditions of release would adequately protect the community, the State's witnesses, and assure defendant's appearance at trial, defendant was denied defendant's procedural due process right to an adequate hearing prior to revocation of bail and remand into custody. *State v. Segura*, 2014-NMCA-037.

**This rule grants broad latitude to the trial court** to revoke the release of an accused person if circumstances arising after the initial release indicate the release should not be continued. Exercise of that discretion provides no basis for disqualification. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159.

**Revocation proper although defendant had not been charged, arrested, indicted or bound over for any crime** allegedly committed while he was released. *State v. David*, 1984-NMCA-119, 102 N.M.

138, 692 P.2d 524.

**Law reviews.** — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For comment, "The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 8A Am. Jur. 2d Bail and Recognizance §§ 1, 14, 31, 77, 92, 104, 106, 143, 144, 146 to 148 .

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.