

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
FOR THE DISTRICT, MAGISTRATE, AND METROPOLITAN COURTS
PROPOSAL 2020-014**

March 3, 2020

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rules 5-201, 6-202, and 7-202 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 2, 2020, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

5-201. Methods of prosecution.

A. **Commencement of prosecution.** A prosecution may be commenced by the filing of:

- (1) a complaint;
- (2) an information; or
- (3) an indictment.

B. **Complaint.** A complaint is a sworn written statement of the facts, the common name of the offense and, if applicable, a specific section number of New Mexico Statutes which defines the offense. Complaints shall be substantially in the form approved by the court administrator.

C. **Information.** An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. It may be filed only in the district court. Informations shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses upon whose testimony the information is based. An information shall be filed within thirty (30) days after completion of a preliminary examination or waiver thereof ~~[unless such time is extended by the court upon motion of the district attorney]~~ if a defendant is not in custody, and within ten (10) days if a defendant is in custody. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice.

D. **Indictments.** An indictment is a written statement returned by a grand jury containing the essential facts constituting the offense, common name of the offense and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. All indictments shall be signed by the foreman of the grand jury. Indictments shall be substantially in the form prescribed by the court administrator. The names of all witnesses upon whose testimony an indictment is based shall appear on the indictment.

Committee commentary. — The Complaint. This rule governs complaints filed in the district court. In almost all cases a complaint will be filed in the magistrate court and will be governed by Rule 6-201. If the complaint charges a petty misdemeanor or misdemeanor, the magistrate will have jurisdiction to try the case. *See* Section 35-3-4A NMSA 1978. If the complaint charges a capital, felonious or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const., art. 2, § 14. *See State v. Marrujo*, 79 N.M. 363, 443 P.2d 856 (1968). If the complaint charges a crime which is not within the magistrate court jurisdiction, the magistrate may only:

- (1) determine initially if there is probable cause upon which to confine the defendant;
- (2) advise the defendant of his rights at the first appearance;
- (3) set and review conditions of release; and
- (4) conduct preliminary examinations. *See* Section 35-3-4 NMSA 1978.

Under this rule, Rule 6-201 NMRA and Rule 7-201 NMRA, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes which defines the offense. Two decisions of the court of appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In *State v. Raley*, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974), the court held that the initials "D.W.I." were insufficient to state the common name of the offense. In *State v. Nixon*, 89 N.M. 129, 548 P.2d 91 (Ct. App. 1976), the court held that it is not necessary to charge a specific subsection of the statutes. In both cases the court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 of the present magistrate rules governing technical defects in the pleadings. *See also* Rule 5-204 NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. *See State v. Bailey*, 62 N.M. 111, 305 P.2d 725 (1957). *See also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). In that event the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. *See* Paragraph C of Rule 5-601 NMRA and commentary. After the preliminary hearing, the defendant can then be tried upon the information filed prior to the preliminary hearing. *State v. Nelson*, 63 N.M. 428, 321 P.2d 202 (1958).

If the prosecution has been commenced by the filing of a complaint in the magistrate court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must

conform to the bind-over order of the magistrate. *State v. Melendrez*, 49 N.M. 181, 159 P.2d 768 (1945). It does not have to conform to the complaint which initiated the prosecution in the magistrate court. *State v. Vasquez*, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1968).

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield, Criminal Procedure under the Federal Rules § § 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he must be prepared to meet; (2) whether he is accurately apprised of the charge so as to know if he is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States constitution. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-49, 8 L. Ed. 2d 240, 250 (1962). *Compare State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973), with *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

This rule must also be read in conjunction with Rule 5-204 and Paragraphs A and B of Rule 5-205. Paragraphs A and B of Rule 5-205 identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors and omissions. In addition, the court of appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice due to that failure. *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Paragraph C of this rule requires that the information be signed by the district attorney. *See* N.M. Const., art. II, § 14. This requirement can be met by the signature of an assistant district attorney. *See* Section 36-1-2 NMSA 1978. The constitution also indicates that the information may be filed by the attorney general. *See also* Section 8-5-3 NMSA 1978. The deputy or an assistant attorney general would have the same authority as the attorney general. *See* Section 8-5-5 NMSA 1978.

Section 20 of Article 20 of the New Mexico Constitution contains language which would indicate that the accused must waive an indictment if the state proceeds by information. However, it has been held that Section 14 of Article 2 of the constitution, the section allowing prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See State v. Flores*, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

For interpretation of the common name and specific statute section provisions of the information, see the discussion of the elements of a complaint, above.

The Indictment. For the law governing the grand jury procedure and return of indictments, *see* Section 31-6-1 NMSA 1978 et seq. The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. *See e.g.*, *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974). The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a complaint in the magistrate court. *See State v. Peavler*, 88 N.M. 125, 537 P.2d 1387 (1975); *State v. Ergenbright*, 84 N.M. 662, 506 P.2d 1209 (1973); *State v. Burk*, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). This practice was recognized by the supreme court in the adoption of Paragraph E of Rule 6-202 which provides that if the defendant is indicted prior to the preliminary examination, the magistrate shall take no further action.

6-202. Preliminary examination.

A. Time.

(1) ***Time limits.*** A preliminary examination shall be scheduled and held within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody, of whichever of the following events occurs latest:

- (a) the first appearance;
- (b) if an evaluation of competency has been ordered, the date an order is filed in the magistrate court finding the defendant competent to stand trial;
- (c) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date the arrest warrant is returned to the court;
- (d) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;
- (e) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the magistrate court stating that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program; or
- (f) if the defendant is arrested upon a bench warrant for failure to comply with conditions of release or if the defendant's pretrial release is revoked under Rule 6-403 NMRA, the date the defendant is remanded into custody, provided that in no event—a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule.

(2) ***Extensions.*** Upon a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only upon a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. The time enlargement provisions in Rule 6-104 do not apply to a preliminary examination.

(3) ***Dismissal without prejudice.*** If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant.

B. Procedures. If the court determines that a preliminary examination must be conducted, the following procedures shall apply.

(1) ***Counsel.*** The defendant has the right to assistance of counsel at the preliminary examination.

(2) ***Discovery.*** The prosecution shall promptly make available to the defendant any tangible evidence in the prosecution's possession, custody, and control, including records, papers, documents, and recorded witness statements that are material to the preparation of the defense or that are intended for use by the prosecution at the preliminary examination. The prosecution is under a continuing duty to disclose additional evidence to the defendant as such evidence becomes available to the prosecution.

(3) ***Subpoenas.*** Subpoenas shall be issued for any witnesses required by the prosecution or the defendant.

(4) **Cross-examination.** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses.

(5) **Rules of Evidence.** The Rules of Evidence apply, subject to any specific exceptions in the Rules of Criminal Procedure for the Magistrate Courts.

C. **Recording of examination.** A recording shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the recording shall be filed with the clerk of the district court with the bind-over order. Any party may request a duplicate of the recording from the district court within six (6) months following the preliminary examination.

D. **Findings of court.**

(1) If, upon completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice all felony charges for which probable cause does not exist and discharge the defendant as to those offenses.

(2) If the only remaining charges are within magistrate court trial jurisdiction, the court shall either conduct an arraignment immediately on the remaining charges or shall hold an arraignment within the time limits set forth in Rule 6-506(A) NMRA, and the case shall then proceed under the Rules of Criminal Procedure for the Magistrate Courts.

(3) If the court finds that there is probable cause to believe that the defendant committed one or more offenses not within magistrate court trial jurisdiction, the court shall bind the defendant over for trial in the district court. All misdemeanor offenses charged in the complaint shall be included in the bind-over order.

E. **Transfer to district court.**

(1) If the defendant is bound over for trial by the magistrate court, the district attorney shall file the following with the magistrate court:

(a) a copy of the information filed in district court; and

(b) if an order is entered by the district court extending the time for filing an information, a copy of such order.

(2) When a copy of the information filed in district court is filed in the magistrate court, the magistrate court shall at that time transfer the magistrate court record, along with the bind-over order, to the district court.

(3) If an information is not timely filed in the district court in accordance with the requirements of Rule 5-201(C), the magistrate court, upon motion or of its own initiative, shall dismiss the charges without prejudice within two (2) days of the expiration of the applicable filing deadline.

F. **Effect of indictment.** If the defendant is indicted prior to a preliminary examination for the offense pending in the magistrate court, the district attorney shall forthwith advise the magistrate court, and the magistrate court shall take no further action in the case, provided that any conditions of release set by the magistrate court shall continue in effect unless amended by the district court.

G. **Bail bond.** Unless the defendant is discharged, the magistrate court shall retain jurisdiction over the defendant and the bond until an information or indictment is filed in the district court or until twelve (12) months after the preliminary examination, whichever occurs first.

If the defendant is indicted or an information is filed, the magistrate court shall transfer any bond to the district court. Unless the proceedings are remanded to the magistrate court, all further action relating to the bond shall be taken in the district court.

[As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Under Subparagraph (A)(2), the district court may extend the time limits for holding a preliminary examination if the defendant does not consent only upon a showing of exceptional circumstances beyond the control of the state or the court. “‘Exceptional circumstances,’ . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the trial; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for.” *See* Committee commentary to Rule 6-506 NMRA.

Article II, Section 14 of the New Mexico Constitution guarantees that the state cannot prosecute a person for a “capital, felonious or infamous crime” without filing either a grand jury indictment or a criminal information. If the state is going to proceed by criminal information, the defendant is entitled to a preliminary examination. *See* N.M. Const. art. II, § 14. At the preliminary examination, “the state is required to establish, to the satisfaction of the examining judge, two components: (1) that a crime has been committed; and (2) probable cause exists to believe that the person charged committed it.” *State v. White*, 2010-NMCA-043, ¶ 11, 148 N.M. 214, 232 P.3d 450.

If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an indictment, “the State can choose whether to proceed by indictment or information”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude “multiple attempts to show probable cause” because “it is settled law that jeopardy does not attach pretrial”). *Cf.* Fed. R. Crim. P. 5.1(f) (“If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.”).

Discharging the defendant means relieving the defendant of all obligations to the court that originated from a criminal charge. Thus, to discharge a defendant the court must release the defendant from custody, relieve the defendant of all conditions of release, and exonerate any bond.

In *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236, the Supreme Court held that a defendant does not have a constitutional right of confrontation at the preliminary examination, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to the extent *Mascarenas* held otherwise. Paragraph B of this rule was amended in 2014 to clarify

that *Lopez* did not affect the other rights and procedures that apply to preliminary examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B of this rule is not intended to be a comprehensive list of the defendant’s rights at the preliminary examination.

First, *Lopez* did not alter the prosecution’s duty to provide discovery, as available, to the defendant. *See Mascarenas*, 1969-NMSC-116, ¶ 14 (holding that if the state is going to call a witness to testify at the preliminary examination, then the defendant has a right to inspect any prior statements or reports made by such witness that are in the possession of the prosecution). However, the defendant’s right to discovery prior to the preliminary examination is limited to what is available and in the prosecutor’s immediate possession. For example, the defendant does not have a right to discover a laboratory report that has not been prepared and is not ready for use at the preliminary examination.

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the “Rules of Evidence generally govern proceedings in preliminary examinations” but explaining that Rule 6-608(A) NMRA “provides a specific exception to our hearsay rule for admissibility” of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state’s witnesses. Thus, although Rule 6-608(A) may permit the state to use a laboratory report at the preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right “to call witnesses to testify as to the matters covered in such report.” Rule 6-608(B). And the preliminary examination remains “a critical stage of a criminal proceeding” at which “counsel must be made available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

[Adopted by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

7-202. Preliminary examination.

A. Time.

(1) ***Time limits.*** A preliminary examination shall be scheduled and held within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody, of whichever of the following events occurs latest:

- (a) the first appearance;
- (b) if an evaluation of competency has been ordered, the date an order is filed in the metropolitan court finding the defendant competent to stand trial;
- (c) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date the arrest warrant is returned to the court;
- (d) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;
- (e) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the metropolitan court stating that the preprosecution diversion

program has been terminated for failure to comply with the terms, conditions, or requirements of the program; or

(f) if the defendant is arrested upon a bench warrant for failure to comply with conditions of release or if the defendant's pretrial release is revoked under Rule 7-403 NMRA, the date the defendant is remanded into custody, provided that in no event a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule.

(2) **Extensions.** Upon a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only upon a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. The time enlargement provisions in Rule 7-104 do not apply to a preliminary examination.

(3) **Dismissal without prejudice.** If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant.

B. **Procedures.** If the court determines that a preliminary examination must be conducted, the following procedures shall apply.

(1) **Counsel.** The defendant has the right to assistance of counsel at the preliminary examination.

(2) **Discovery.** The prosecution shall promptly make available to the defendant any tangible evidence in the prosecution's possession, custody, and control, including records, papers, documents, and recorded witness statements that are material to the preparation of the defense or that are intended for use by the prosecution at the preliminary examination. The prosecution is under a continuing duty to disclose additional evidence to the defendant as such evidence becomes available to the prosecution.

(3) **Subpoenas.** Subpoenas shall be issued for any witness required by the prosecution or the defendant.

(4) **Cross-examination.** The witness shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses.

(5) **Rules of Evidence.** The Rules of Evidence apply, subject to any specific exception in the Rules of Criminal Procedure for the Metropolitan Courts.

C. **Recording of examination.** A recording shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the recording shall be filed with the clerk of the district court with the bind-over order. Any party may request a duplicate of the recording from the district court within six (6) months following the preliminary examination.

D. **Findings of court.**

(1) If, upon completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice all felony charges for which probable cause does not exist and discharge the defendant as to those offenses.

(2) If the only remaining charges are within metropolitan court trial jurisdiction, the court shall either conduct an arraignment immediately on the remaining charges or shall hold an arraignment within the time limits set forth in Rule 7-506(A) NMRA, and the case shall then proceed under the Rules of Criminal Procedure for the Metropolitan Courts.

(3) If the court finds that there is probable cause to believe that the defendant committed one or more offenses not within metropolitan court trial jurisdiction, it shall bind the defendant over for trial in the district court. All misdemeanor offenses charged in the complaint shall be included in the bind-over order.

E. Transfer to district court.

(1) If the defendant is bound over for trial by the metropolitan court, the district attorney shall file the following with the metropolitan court:

(a) a copy of the information filed in the district court; and
(b) if an order is entered by the district court extending the time for filing an information, a copy of such order.

(2) When a copy of the information filed in district court is filed in the metropolitan court, the metropolitan court shall at that time transfer the metropolitan court record, along with the bind-over order, to the district court.

(3) If an information is not timely filed in the district court in accordance with the requirements of Rule 5-201(C), the metropolitan court, upon motion or of its own initiative, shall dismiss the charges without prejudice within two (2) days of the expiration of the applicable filing deadline.

F. Effect of indictment. If the defendant is indicted prior to a preliminary examination for the offense pending in the metropolitan court, the district attorney shall forthwith advise the metropolitan court and the metropolitan court shall take no further action in the case, provided that any conditions of release set by the metropolitan court shall continue in effect unless amended by the district court.

G. Bail bond. Unless the defendant is discharged, the metropolitan court shall retain jurisdiction over the defendant and the bond until an information or indictment is filed in the district court or until twelve (12) months after the preliminary examination, whichever occurs first. If the defendant is bound over for trial by the metropolitan court or indicted, the metropolitan court shall transfer any bond to the district court. Unless the proceedings are remanded to the metropolitan court, all further action relating to the bond shall be taken in the district court. [As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

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If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an indictment, “the State can choose whether to proceed by indictment or information”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude “multiple attempts to show probable cause” because “it is settled law that jeopardy does not attach pretrial”). *Cf.* Fed. R. Crim. P. 5.1(f) (“If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.”).

Discharging the defendant means relieving the defendant of all obligations to the court that originated from a criminal charge. Thus, to discharge a defendant the court must release the defendant from custody, relieve the defendant of all conditions of release, and exonerate any bond. In *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236, the Supreme Court held that a defendant does not have a constitutional right of confrontation at the preliminary examination, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to the extent *Mascarenas* held otherwise. Paragraph B of this rule was amended in 2014 to clarify that *Lopez* did not affect the other rights and procedures that apply to preliminary examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B of this rule is not intended to be a comprehensive list of the defendant’s rights at the preliminary examination.

First, *Lopez* did not alter the prosecution’s duty to provide discovery, as available, to the defendant. *See Mascarenas*, 1969-NMSC-116, ¶ 14 (holding that if the state is going to call a witness to testify at the preliminary examination, then the defendant has a right to inspect any prior statements or reports made by such witness that are in the possession of the prosecution). However, the defendant’s right to discovery prior to the preliminary examination is limited to what is available and in the prosecutor’s immediate possession. For example, the defendant does not have a right to discover a laboratory report that has not been prepared and is not ready for use at the preliminary examination.

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the “Rules of Evidence generally govern proceedings in preliminary examinations” but explaining that Rule 6-608(A) NMRA, which is

identical to Rule 7-608(A) NMRA, “provides a specific exception to our hearsay rule for admissibility” of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state’s witnesses. Thus, although Rule 7-608(A) may permit the state to use a laboratory report at the preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right “to call witnesses to testify as to the matters covered in such report.” Rule 7-608(B). And the preliminary examination remains “a critical stage of a criminal proceeding” at which “counsel must be made available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

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Comments regarding proposal 2020-014

SUPREME COURT OF NEW MEXICO
FILED

Ricardo Berry <RBerry@da.state.nm.us>

MAR - 6 2020

Mar 6, 2020 11:03 AM

Posted in group: nmsupremecourtclerk



Honorable Clerk of the New Mexico Supreme Court;

Below is my comment regarding the proposed rule changes, specifically proposal 2020-014 creating a penalty when a criminal information is not filed within 30 days. Thank you for your attention to this matter.

The proposed rule change is premised on an incorrect assessment of the law, namely, that there is no remedy for a failure by the district attorney to file a criminal information within 30 days. The remedy that has always existed for this situation, however, is a speedy trial motion. If the delay in filing the criminal information is prejudicial to the defendant then there is a violation of the right to speedy trial and the court may dismiss the case. While it is certainly preferable that criminal information be filed as soon as possible there can be occasions when it may not be possible to do it within the 30 days. Under those rare circumstances the proposed rule change would simply create a windfall for defendants who likely would suffer no prejudice by a late filing. As such, the proposed rule change simply creates a technicality that favors form over substance. I urge the Court to reject the proposed change to Rule 5-201 - it's not broke, please don't fix it. Thank you for your consideration.

Ricardo Berry

Deputy District Attorney

Office of the 7th Judicial District Attorney

(575) 835-0052

(575) 835-0054 - fax

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MAR 23 2020



May 23, 2020

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

RE: Proposal 2020-014; Rules 5-201 and 6-202 NMRA

Please accept for consideration the following comments which are strictly my own and do not represent any views of the district court for which I work.

Rule 5-201 (C)

I recommend against adoption of the last sentence that is proposed which states: "If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice."

This proposed language does not make sense within the context of the district court. The district court has no jurisdiction over a criminal case -- indeed has no criminal case -- until a *Criminal Information* is filed in the district court. I believe this is true even though a magistrate court judge has signed a bind-over order in the magistrate court case. There being no *Criminal Information* and no criminal case in the district court, I do not think the district court has the jurisdiction to dismiss a complaint that is pending in the magistrate court for the state's failure to meet its filing deadline. Not by mere rule, at least. The district court would acquire jurisdiction through the granting of a petition for a writ of superintending control, perhaps, but I would ask the Committee to consider whether the district court even has the jurisdiction to do what is proposed.

Aside from jurisdictional considerations, as a practical matter: 1) The district court will not know that the state has missed its deadline for filing a *Criminal Information*. 2) There being no criminal case open in the district court, there is no criminal case number for a defendant to use to file a motion to dismiss the complaint in the magistrate court and no district court case in which a district court judge could enter an order of dismissal.

Rule 6-202 (E)(3)

I recommend adoption of the proposal to add subsection (E)(3), although I do suggest different language as noted below.

I think the decision to dismiss a complaint filed in the magistrate court (for the state's failure to meet the deadlines proposed in 5-201 (C)) properly lies with the magistrate court. We know that under 6-202 (E) the district attorney files in the magistrate court a

Comments proposal 2020-014
March 23, 2020
Page 2

copy of the *Criminal Information* the district attorney has filed in the district court. The magistrate court will thus be apprized whether the *Criminal Information* has been filed within the deadlines. And if not, the magistrate court will have a case in which to docket a defendant's motion to dismiss and a case in which the magistrate court judge can docket an order dismissing the complaint, either sua sponte or pursuant to a defendant's motion.

I recommend language in 6-202 (E)(3) that makes it clear that a magistrate court judge has the authority to dismiss a complaint in the magistrate court even after the magistrate court judge has signed a bind-over order (but before a *Criminal Information* has been filed in the district court). Also, I think additional guidance for the inevitable situation of a late-filed *Criminal Information* would be helpful to the magistrate court.

I would thus propose: “(3) Even though the defendant is bound over for trial, if an information has not been filed in the district court within the deadlines set forth in Rule 5-201 (C), the magistrate court, upon motion in the magistrate court or on its own motion, shall dismiss the complaint without prejudice within two (2) days of the expiration of the applicable filing deadline. In the event the magistrate court has not dismissed a complaint and the district attorney files an information in the district court outside of the deadlines set forth in Rule 5-201 (C), the magistrate court shall not dismiss the complaint but shall transfer the magistrate court record to the district court as required in this subsection (E).”

The matter of a *Criminal Information* filed outside the deadlines should be resolved at the level of the district court. Thus, I return to,

Rule 5-201 (C)

A last sentence that would make sense in 5-201 (C) would be: “If an information is filed outside these deadlines, the information shall be dismissed without prejudice.”

Thank you for your consideration of these comments.

Submitted by:

Marjorie Christensen, Esq.
aztdmcj@nmcourts.gov
505-334-6151

Comment to Rule Proposal 2020-014

Sri Mullis <SMullis@da.state.nm.us>

Apr 16, 2020 1:47 PM

Posted in group: **nmsupremecourtclerk**

Mr. Moya,

On behalf of Fifth Judicial District Attorney, Dianna Luce, the following comment to Proposal 2020-014 is submitted:

The proposed change should be rejected. It creates a penalty of dismissal when a criminal information is filed late, and creates a new deadline for the filing of a criminal information when a defendant is in custody. A defendant who is in custody at the time of bind-over is likely a no-bond defendant that the district court deemed a flight risk, and/or a defendant whose release would endanger the public. The proposed change increases the risk that dangerous defendants would be released to the community and may flee and commit additional crimes. Adoption of the rule would also increase judicial and state resources spent in order to re-file the case, hold an additional arraignment, bond hearing, and preliminary hearing.

The time requirements in the current Rule 5-201 serve to protect a defendant's right to a speedy trial. If a delay in the filing of the criminal information causes prejudice to a defendant, the district court may dismiss the case. Prejudice is a factor in determining whether a defendant is entitled to the extreme result of dismissal of his case when there is a violation of a discovery rule or right to speedy trial, and at minimum, should be a factor in determining whether a case should be dismissed for a time violation. Rather, the proposed change allows defendants a windfall when no prejudice results from the late filing of a criminal information.

Thank you,

Sri Mullis

Sri Mullis

Fifth Judicial District Attorney's Office

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Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>

Fri, Apr 17, 2020 at 9:51 AM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name

Frank DePalma

Phone Number

5752632272

Email

frank.depalma@lopdm.us

Proposal Number

2020-014

Comment

Hi,

I like the language, it makes everything more clear. From a practice standpoint, I file motions for untimely filings, where they are then set for a hearing (at times after the arraignment), the arraignment is conducted where I am then asking to abate the plea. It's a waste of time. It should just be dismissed on motion, keep it moving.

This will clean things up and result in some quicker procedural dismissals, which in theory should be healthy for the judicial economy of the District Courts.

Thank you,

Frank DePalma

LOPD-Hobbs

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comments on proposed rule changes

Charles Knoblauch <quidproquo@zianet.com>

Apr 17, 2020 2:31 PM

Posted in group: **nmsupremecourtclerk**

Proposal 2020-014

This amendment appears to be a good in granting a remedy for the non-feasance of the district attorney on abiding by the rules. There have been too many instances of prosecutors acting as though they are above the rules.

Proposal 2020-015

This amendment rectifies a long standing problem wherein an accused is arrested and jailed without knowing his charges. It is a not uncommon scenario for a defendant to contact a lawyer from jail and ask for advice. Without the defendant having the charging document in hand, counsel is left with merely guessing as to what the charges might be and their severity when attempting to advise the defendant. Further, paragraph E is greatly needed to ensure the arresting officer actually removes an arrest warrant from the system—too often someone is released from custody only to find that his warrant is still active and then suffers another arrest.

Proposal 2020-019

You need to go back to the drawing board on this UJI. The addition of “intent” to the knowingly might work.

Please review the statute.

Proposal 2020-021

I like this new UJI. It may put a bit of pressure on prosecuting authorities to be a bit more careful in handling evidence.

Charles E. Knoblauch

Attorney at Law

1412 Lomas Blvd. NW

Albuquerque, NM 87104

(505) 842-0392



Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>

Fri, Apr 17, 2020 at 2:05 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name

Mitchell Mender

Phone Number

5757692246

Email

mitch.mender@gmail.com

Proposal Number

2020-014

Comment

The proposed amendment to NMRA 5-201 as laid out in 2020-014 is extreme and overly burdensome to the judicial system. This rule change should not be approved. When a criminal information is not filed within the time limits, it happens because of a clerical mistake within the office of the District Attorney. It is delayed usually due to a mistake in the office, not because there is a legal defect in the case. Forcing the Courts to dismiss a case when a criminal information is slightly delayed due to a clerical error is asinine and will create more work for the Law enforcement agencies, the courts, and the prosecutor's office; when the case must be refiled again. Importantly, all these agencies are already overworked, understaffed and underpaid all throughout the State and the dockets are overcrowded. Forcing a dismissal based on a clerical error when there is NO showing of prejudice to the defendant is quite frankly ridiculous and unacceptable.

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Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>

Fri, Apr 17, 2020 at 1:50 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your Name
Douglas Wilber

Phone Number
5052192866

Email
douglas.wilber@lopdm.us

Proposal Number
2020-014

Comment
comment attached

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Comment on proposal.docx



Comment on proposal.docx

13K

It is important to have a consequence for the prosecution's failure to file the information in a timely manner. It is a critical issue for someone who is in custody, because once the case is bound over, the Magistrate or Metropolitan Court loses jurisdiction. Then that defendant is simply in limbo until the prosecution gets around to filing, at which point the defendant finally has an opportunity to see a District Court judge and raise any issues that need to be addressed, including conditions of release.

I would ask for a much shorter filing deadline than ten days when a defendant is in custody. That is two weeks—meaning an individual can be in custody for a total of four weeks prior to even being *eligible* for an arraignment in district court. Speedy trial is not the issue here. As every prosecutor is well aware, no defendant can raise and win a speedy trial issue after “only” a couple of months have passed, even if detained without a properly-initiated case. There is almost never a legitimate reason *not* to file the information on the next business day with District Court. What this time gap does is conceal delays from any rules that govern timelines in District Court, including LR2-308, which generally begins at arraignment. The issue is actually a failure to prosecute: if a case is worthy of prosecution, then file it!

As some comments have noted, defendants in custody have been (if detained legally) found to be dangerous or a flight risk. If the prosecution has sought detention or a bond and been successful, then the prosecution absolutely should prioritize that case, and be prepared to file a piece of paper after prevailing at a preliminary hearing.

This proposed Rule eliminates the ability of the prosecution to allow defendants—human beings—to slip through the cracks. Eliminating pointless delays also serves legitimate victims of crime and the community. The criminal justice system should not devolve into a bureaucracy that allows people to disappear. Further, a rule without a consequence is meaningless. Even rules that allow for sanctions quickly become mere suggestions when courts decline to impose the available sanctions. I would propose that the Rule here require the information to be filed within three (3) business days when the defendant is in custody. Expediently drafting and filing an information based on the court's bind over of a felony case should not be a task beyond the powers of any of the prosecutors in this State.

Douglas Wilber

SUPREME COURT OF NEW MEXICO
FILED

APR 17 2020



comment on proposed rule 5-201

Rein, Jeff <Jeff.Rein@lopdm.us>

Apr 17, 2020 4:38 PM

Posted in group: **nmsupremecourtclerk**

Comment on 5-201 proposed changes.

It has been my experience that grand jury indictments are typically filed within 24 hours of the grand juror's decision, excepting weekends and holidays. I have thought about the timing for filing of an Information in the proposed revision to 5-201 and I cannot imagine the circumstances in which a prosecutor needs 10 days to file an Information on an incarcerated defendant and 30 days for a defendant out of custody. It is incredibly difficult, if not impossible, to raise any issue concerning the defendant before a magistrate or Metropolitan court judge when the Information has been approved but not filed in district court. The district court judge does not yet have authority to review any issue in the case and the lower court judge will consistently decline to rule stating that they no longer have authority to decide a substantive motion. The proposed time periods make no sense except to encourage the delay of constitutional protections.

Perhaps there is a good reason for a delay in filing an Information. If this Court believes some time is needed, I suggest that the time period to file an Information for an in-custody defendant be 48 hours, and five days for an out of custody defendant. Additionally, the consequence of a dismissal without prejudice for failure to follow the rules provides a clear directive and consequences if the rules are not followed. That's what criminal justice is all about.

Jeff Rein

Jeff Rein

LOPD

505 Marquette N.W.

Albuq., NM 87102

505-369-3570

