

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

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

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

11 (1) The prosecutor shall immediately deliver a copy of the motion to

12 (a) the detention center holding the defendant, if any;

13 (b) the defendant and defense counsel of record, or, if defense counsel  
14 has not entered an appearance, the local law office of the public defender or, if no local office  
15 exists, the director of the contract counsel office of the public defender.

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

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

22 C. **Case pending in magistrate or metropolitan court.** If a motion for pretrial  
23 detention is filed in the magistrate or metropolitan court and a probable cause determination has

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

11       **D. Case pending in district court.** If a motion for pretrial detention is filed in the  
12 district court and probable cause has not been found under Article II, Section 14 of the New Mexico  
13 Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203 NMRA, Rule 6-204(B)  
14 NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district court shall determine probable  
15 cause in accordance with Rule 5-301 NMRA. If the district court finds no probable cause, the  
16 district court shall order the immediate personal recognizance release of the defendant under Rule  
17 5-301 NMRA and shall deny the motion for pretrial detention without prejudice.

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

19           (1)       ***Defendant in custody when motion is filed.*** If a detention center receives a  
20 copy of a motion for pretrial detention, the detention center shall distribute the motion to any  
21 person designated by the district, magistrate, or metropolitan court to release defendants from  
22 custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408  
23 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a

1 defendant pursuant to such designation is terminated upon receipt of a detention motion until  
2 further court order.

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

9 F. **Pretrial detention hearing.** The district court shall hold a hearing on the motion  
10 for pretrial detention to determine whether any release condition or combination of conditions set  
11 forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the  
12 community. Upon the request of the prosecutor, the district court shall set the matter for a  
13 preliminary examination to be held concurrently with the motion for pretrial detention and, for  
14 cases pending in the magistrate or metropolitan court, shall provide notice to the magistrate or  
15 metropolitan court that the preliminary examination is to be held in the district court.

16 (1) ***Time.***

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

- 20 (i) the filing of the motion for pretrial detention; or  
21 (ii) the date the defendant is arrested as a result of the motion for  
22 pretrial detention.

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

4                           (i)     for up to three (3) days if in the motion for pretrial detention  
5 the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing;

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

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

9                           (iv)  upon stipulation of the parties.

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

12                       (2)     *Initial disclosures.*

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

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

17                       (ii)  all exculpatory evidence known to the prosecutor.

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

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

8           (4)     ***Prosecutor's burden.*** The prosecutor must prove by clear and convincing  
9 evidence that no release conditions will reasonably protect the safety of any other person or the  
10 community.

11           (5)     ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the  
12 presentation and consideration of information at the hearing. The court may make its decision  
13 regarding pretrial detention based upon documentary evidence, court records, proffer, witness  
14 testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof  
15 presented at the hearing.

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

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

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

- 1 (c) the history and characteristics of the defendant;
- 2 (d) the nature and seriousness of the danger to any person or the  
3 community that would be posed by the defendant's release;
- 4 (e) any facts tending to indicate that the defendant may or may not  
5 commit new crimes if released;
- 6 (f) whether the defendant has been ordered detained under Article II,  
7 Section 13 of the New Mexico Constitution based on a finding of dangerousness in another  
8 pending case or was ordered detained based on a finding of dangerousness in any prior case; and
- 9 (g) any available results of a pretrial risk assessment instrument  
10 approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer  
11 to the recommendation in the instrument but shall make an independent determination of  
12 dangerousness and community safety based on all information available at the hearing.

13 **G. Order for pretrial detention.** The court shall issue a written order for pretrial  
14 detention at the conclusion of the pretrial detention hearing if the court determines by clear and  
15 convincing evidence that no release conditions will reasonably protect the safety of any other  
16 person or the community. The court shall file findings of the individualized facts justifying the  
17 detention as soon as possible, but no later than three (3) days after the conclusion of the hearing.

18 **H. Order setting conditions of release.** The court shall deny the motion for pretrial  
19 detention if, on completion of the pretrial detention hearing, the court determines that the  
20 prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence.  
21 At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions  
22 of release under Rule 5-401 NMRA. The court shall file findings of the individualized facts

1 justifying the denial of the detention motion as soon as possible, but no later than three (3) days  
2 after the conclusion of the hearing.

3           **I. Further proceedings in magistrate or metropolitan court.** Upon completion of  
4 the hearing, if the case [is] was pending in the magistrate or metropolitan court, the district court  
5 shall promptly transmit to the magistrate or metropolitan court [~~a copy of either the order for~~  
6 ~~pretrial detention or the order setting conditions of release. The magistrate or metropolitan court~~  
7 ~~may modify the order setting conditions of release upon a showing of good cause, but as long as~~  
8 ~~the case remains pending, the magistrate or metropolitan court may not release a defendant who~~  
9 ~~has been ordered detained by the district court]~~ an order closing the magistrate or metropolitan  
10 court case.

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

13           **K. Successive motions for pretrial detention and motions to reconsider.** On  
14 written motion of the prosecutor or the defendant, the court may reopen the detention hearing at  
15 any time before trial if the court finds that

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

18                   (2) the information or changed circumstance has a material bearing on whether  
19 the previous ruling should be reconsidered.

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

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

6 [Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or  
7 after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases  
8 pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-  
9 013, effective for all cases pending or filed on or after November 23, 2020.]

10           **Committee commentary.** —

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

18           Although this rule does not provide the district court with express sanction authority, the  
19 district court retains inherent authority to “impose a variety of sanctions on both litigants and  
20 attorneys in order to regulate [the court’s] docket, promote judicial efficiency, and deter frivolous  
21 filings.” *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995-NMSC-033, ¶ 11, 120  
22 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*,  
23 2017-NMSC-017, ¶ 19, 394 P.3d 959 (“Where discovery violations inject needless delay into the

1 proceedings, courts may impose meaningful sanctions to effectuate their inherent power and  
2 promote efficient judicial administration.”). “Extreme sanctions such as dismissal are to be used  
3 only in exceptional cases.” *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25  
4 (internal quotation marks and citation omitted), *modified on other grounds by Le Mier*, 2017-  
5 NMSC-017. *Cf.* Rule 5-206 NMRA (providing that an attorney may be subject to appropriate  
6 disciplinary action for violating the rule); Rules 5-501(H), 5-502(G), 5-503.2(B), 5-505(B) NMRA  
7 (sanctions for discovery violations); Rule 5-511 NMRA (sanctions for burdening a person subject  
8 to a subpoena).

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

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

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

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

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

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

19           Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention  
20 hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified  
21 that “neither the United States Constitution nor the New Mexico Constitution categorically  
22 requires live witness testimony at pretrial detention hearings.” 2018-NMSC-005, ¶ 110. The court  
23 may rely on “credible proffers and other summaries of evidence, law enforcement and court

1 records, or other nontestimonial information” in determining whether the prosecutor has met its  
2 burden under Article II, Section 13. *Id.* ¶ 3. In doing so, the court should exercise “sound judicial  
3 discretion in assessing the reliability and accuracy of information presented in support of detention,  
4 whether by proffer or direct proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion  
5 to find proffered or documentary information insufficient to meet the constitutional clear and  
6 convincing evidence requirement in the context of particular cases.” *Id.* ¶ 3.

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

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

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

14           **Paragraph K** — The district court may rule on a motion under Paragraph K with or  
15 without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for  
16 pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 (“District  
17 courts have plenary power over their interlocutory orders and may revise them . . . at any time  
18 prior to final judgment.” (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶  
19 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

20           **Paragraph L** — Either party may appeal the district court’s ruling on the detention motion.  
21 Under Article II, Section 13, an “appeal from an order denying bail shall be given preference over  
22 all other matters.” *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232

1 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section  
2 2 of the New Mexico Constitution).

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

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