Edward L. Chávez

May 15, 2020

Chief Justice Judith K. Nakamura
c/o Joey Moya, Chief Clerk
New Mexico Supreme Court
237 Don Gaspar Avenue
Santa Fe, New Mexico 87501

Re: Initial Report of the Ad Hoc Committee to Review Pretrial Release and Detention Procedures

Dear Chief Justice Nakamura:

Thank you for the opportunity to serve as Chair of the Ad Hoc Committee to Review Pretrial Release and Detention Procedures. The Committee members have been thoughtful, openminded and industrious. I also want to acknowledge Kelly Bradford, Aja Oishi and Cecilia Perry who have been very helpful to me throughout the work of the Committee. This letter shall serve as the report of the Committee. I want to preface my discussion of proposed rule amendments with some of the history of the Committee so that the Court will have context for how we went about fulfilling the responsibility entrusted to us by the Court.

Creation of Ad Hoc Committee to Review Pretrial Release and Detention Procedures

The New Mexico Supreme Court created the sixteen-member Ad Hoc Committee to Review Pretrial Release and Detention Procedures and charged the Committee with the responsibility "to review and make any recommendations the committee deems advisable for improving the pretrial detention procedure based on data-driven input." The Committee was required to submit an initial report to the Court on or before March 31, 2020, which could include proposed amendments to the rules governing pretrial detention proceedings in Bernalillo County or statewide as the Committee deems advisable. The deadline was extended to May 15, 2020 because the March 13, 2020 meeting was cancelled due to the COVID-19 pandemic.

The Court also required the Committee to "circulate to every District Court Criminal Justice Coordinating Council any proposed rule amendment regarding pretrial detention that the committee considers recommending to this Court and

shall solicit and consider coordinating council input before the committee votes on the proposed rule amendment to submit for the Court's consideration".

The voting members of the Committee are:

Edward L. Chávez, Chair (votes only in the event of a tie)
Chief Judge Stan Whitaker, Second Judicial District Court, who designated Joy Willis
Judge James Martin, Third Judicial District Court
Chief Judge Sandra Engel, Metropolitan Court (Judge Henry Alaniz attended one meeting as her designee)
Second Judicial District Attorney Raúl Torrez, who designated James Grayson
Fifth Judicial District Attorney Dianna Luce (Henry Valdez attended one meeting as her designee)
LOPD Chief Ben Baur, who designated Jonathan Ibarra
APD Chief Mike Geier (Damon Martinez also attended meetings with Chief Geier)
Matt Garcia
Secretary Mark Shea, who designated Jason Greenlee
Senator Sander Rue
Senator Jacob Candelaria
Representative Dayan Hochman-Vigil
Representative Bill Rehm
Professor Leo Romero
Richard Pugh (Matt Coyte attended the first two meetings for Mr. Pugh)

January 17, 2020 First meeting

On January 2, 2020, prior to entry of the Order creating the Committee, I emailed the members who agreed to serve on the Committee an outline of what the Court would expect from the Committee. In the email I encouraged the members to submit their concerns with how the current pretrial detention system is working in their district, and to suggest rule changes that could improve the pretrial detention system.

I described the goal of the Committee's first meeting—to try to articulate perceived problem(s) with the current pretrial detention system—and explained that once we have clear statements of the problem(s) we would collect data to determine if the problem(s) exist and then pursue ways in which to solve the problems with possible rule changes. To accomplish this goal, I asked each

member to introduce themselves during the first meeting and to answer two questions: 1) what problem(s) do you believe exist with the current pretrial detention system? and 2) what data do you have that could contribute to the Committee's deliberations?

Problems perceived to exist

Committee members described the following as problems which they or their constituents perceived exist with the pretrial detention system.

1. In most magistrate courts neither the prosecutor nor the defense attorney is present during the first appearance and because the magistrate does not have authority to detain, the judge must release the accused even if the judge believes the accused could be a danger to the community.
2. There are times when the prosecution does not file a pretrial detention (PTD) motion and the judge believes a court should take a closer look at whether the accused could be a danger to a person or the community.
3. Courts should have authority to issue bench warrants when there is probable cause to believe a defendant committed certain offenses while on release.
4. Courts at times are considering whether to revoke or modify a defendant's conditions of release when at the same time the prosecutor has filed a pretrial detention motion on new charges. The rules should specify which motion must be considered first.
5. Judges dismiss PTD motions for technical reasons such as the font size.
6. Some judges refuse to allow proffers despite *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201, which permits proffers.
7. New Mexico does not identify the crimes most closely associated with risk to the public, does not have a decision-making framework, and needs to improve the quality and uniformity of pretrial detention rulings.
8. The rules do not specify for how long a defendant must be detained despite a finding that they pose a danger to the community.
9. Pro Tempore judges deny PTD motions more often than sitting judges and are not accountable to the Judicial Performance Evaluation Commission or the voters.
10. Parties should be allowed to exercise a peremptory excusal.
11. "Expedited trial setting" is not defined and there should be deadlines.
12. A prosecutor can delay the release of a defendant for up to nine days by simply filing a PTD motion.
13. A district court decides a PTD motion and either detains the defendant or enters conditions of release and then must send the case back to a lower court. This has proven to be inefficient because the lower court is reluctant to or cannot modify conditions of release.

14. Courts do not consider past criminal history when deciding a PTD motion.
15. Courts do not consider the past history of a defendant failing to appear or failing to follow conditions of release when deciding a PTD motion.
16. Courts consider dangerousness but do not consider a defendant's previous failure to appear or whether they have interfered with the judicial process.

Data

The Administrative Office of the Courts (AOC), the Second Judicial District Court, the Administrative Office of the District Attorneys (AODA), and the Second Judicial District Attorney's Office advised the Committee that they gather data that could inform the decisions of the Committee. Jonathan Ibarra also keeps data on every PTD motion filed in the Second Judicial District Court. The University of New Mexico Institute for Social Research (ISR) has independently analyzed data from the Second Judicial District Court and the Metropolitan Court. However, the data they analyzed was only through March 2019.

Appendix A is a list of questions relevant to the Committee's work. Appendix B is a list of data questions asked of AOC, the Second Judicial District Court, the AODA and the Second Judicial District Court. ISR also answered questions posed by the Committee that were relevant to two major proposed rule changes. One proposed rule would require the automatic scheduling of detention hearings for certain violent crimes or if the defendant was flagged by a Public Safety Assessment (PSA) tool as being at risk for committing a future violent crime. Another proposed rule would create a presumption of dangerousness if the prosecutor established probable cause that a defendant committed certain crimes. All of the data which the Committee received has been posted on the Supreme Court website, available at https://nmcourts.gov/ad-hoc-pretrial-release-committee.aspx

February 27, 2020 Meeting

The Committee's second meeting was a full day of presentations by national experts on bail reform. This meeting was broadcast live on the judiciary's YouTube channel and is archived on the Court's website. The February Agenda, which is attached as Appendix C, details the topics discussed with the experts. The Committee was allowed to ask questions specific to the pretrial detention system in New Mexico and proposed rule changes that the Committee intended to consider for recommendation to the Supreme Court.

May 12, 2020 Meeting

The Committee's third meeting was for the purpose of discussing and voting on proposed changes to 15 different rules. The rules under consideration were Rules 5-106, 5-301, 5-401, 5-403, 5-409, 6-401, 6-403, 6-409, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401 and 8-403 NMRA. The rules that were approved by the Committee appear behind the page labelled Appendix H.

Rule 5-106 Peremptory challenge to a district judge. The proposed amendment would have allowed the parties to excuse a judge who is assigned to preside over a detention hearing, consistent with a party's right to excuse a judge for actual or perceived unfairness. Proponents contended that the rate of granting or denying pretrial detention motions varies significantly from judge to judge which calls into question perceived unfairness. Opponents of the proposed amendment contended that allowing excusal of judges is impractical because of the short timeframe in which pretrial detention hearings must be scheduled, and because of how both the prosecutor's offices and public defender's offices coordinate appearances for pretrial detention hearings. The seven-vote majority rejected the proposed rule change. The Committee also rejected the proposed amendment to **Rule 5-409(M)** which would also have allowed the peremptory challenge of a district judge assigned to hear a pretrial detention motion.

Rule 5-301 First appearance; explanation of rights. The Committee approved adding the language "or the possibility of pretrial detention" to Rule 5-301(D)(3). If the Court adopts this rule change a judge will now have to advise the defendant that they have a right to bail but also risk being detained pending their trial. This change was also approved to **Rules 6-501(A)(3) and 7-501(A)(3)**.

Rule 5-401(G)(2). One proposal to amend Rule 5-401(G) NMRA would require the court to schedule a PTD hearing if the defendant is charged with certain crimes or a PSA tool flags the case for potential new violent criminal activity. The proposed amendment addresses the concern that judges do not have authority to detain a defendant until the prosecutor files a PTD motion even when the judge believes the defendant could pose a danger to the community. Prosecutors and defense attorneys often do not appear at the defendant's first appearance in rural districts because of resource limitations. Initial hearings under Rules 6-501 and 7-501are usually held within 24 hours of when the defendant was taken into custody. If the defendant remains in custody the magistrate and metropolitan court judges must enter an order prescribing conditions of release in accordance with Rules 6-401and 7-401. The latter rules require a hearing as soon as practicable but not later than three days after the defendant's arrest if the defendant is in a local detention center, and five days if the defendant is not being held in a local detention center.

Committee members expressed concern that lower courts routinely interpret these rules to require them to impose conditions of release during the initial appearance. If the prosecution does not file a PTD motion the judge must release the defendant even if the facts and circumstances known to the judge raise the concern that the defendant could pose a danger to the community. Some judges in Bernalillo County have also expressed concern with releasing a defendant when facts and circumstances suggest that a pretrial detention hearing is warranted.

The Committee agrees that the concern in rural New Mexico is legitimate and must be addressed. The Committee rejected the rule amendment that was originally proposed. Ultimately the Committee approved an amendment to Rule 5-401(G)(2)&(3) which gives district court judges the discretion to schedule a PTD hearing when the defendant is charged with certain crimes or a PSA tool flags the case as a risk for new violent criminal activity.

Under the approved rule, a district judge could schedule a PTD hearing in felony cases when any one of four conditions are met: (1) the charges involve the use of a firearm; (2) the charges involve the use of a deadly weapon resulting in great bodily harm or death; (3) the possible penalty is life without parole; or (4) a PSA tool flags the defendant for the possibility of new violent criminal activity. However, if the prosecutor does not file a PTD motion the detention hearing automatically becomes a hearing on conditions of release.

Proponents of the rule believe that the rule will help solve the problem, particularly in rural New Mexico, because it will allow the prosecution more time to assess the merits of a PTD motion, is limited to violent offenses, and will not enlarge the time a defendant is kept in custody under current rules. Proponents also believe the proposed rule is constitutional because the prosecution must still file a PTD motion for a detention hearing to occur.

Opponents of the rule—while acknowledging the existence of the problem in rural New Mexico—were not sure this rule provides a solution. Opponents believed it will enlarge the time a defendant is held in custody, does not address the difficulty of determining when a deadly weapon was used, and will result in many more detention hearings.

I prepared a memorandum attached as Appendix D that analyzes data provided by ISR which was intended to address the originally proposed amendment, but is also relevant to the approved rule. The memorandum discusses the three conditions set forth in the original proposed rule and what the data shows with respect to the safety rate, the court appearance rate and the effect of adopting the rule on court resources.

The Committee discussed how to amend magistrate and metropolitan court rules that would grant the same discretion to magistrate and metropolitan court judges. The Committee tabled the proposed changes to Rules 6-409 and 7-409

because the proposed changes would have authorized lower courts to schedule district court detention hearings. The Committee concluded that because scheduling belongs exclusively to the district court the proposed changes would be unworkable, and that amendments to Rule 6-401 are also necessary to incorporate the criteria in Rule 5-401(G)(2). The Committee asks permission of the Court to allow it to continue to work to resolve what it considered to be a serious issue that can be addressed by rule.

One possible solution is to authorize magistrate and metropolitan court judges to schedule a pretrial release hearing after the initial appearance but within the three-day limit under Rules 6-401and 7-401when a defendant is charged with a felony: (1) involving the use of a firearm; (2) involving the use of a deadly weapon resulting in great bodily harm or death; (3) with the possible penalty being life without parole; or (4) a PSA tool flags the defendant for the possibility of new violent criminal activity. Of course, the court will have to make a probable cause determination within 48 hours of the defendant's arrest, when the defendant is in custody and the arrest was made without a warrant. *See* Rules 6-203 and 7-203 NMRA; *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that any significant pretrial restraint on liberty requires a prompt judicial determination of probable cause); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that a judicial determination "of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*").

Rule 5-401(L) Expedited trial scheduling for defendant in custody. One proposal to amend Rule 5-401(L) would define what constitutes an "expedited priority scheduling" for defendants who are detained. Proponents expressed concern that the rule does not specify what is meant by "expedited" and therefore cases could languish. The following deadlines were recommended: for misdemeanors, either 90 days from arraignment or 45 days from the order setting conditions of release, whichever is later; for simple felony cases, within 180 days of arraignment or 90 days from the order setting conditions of release, whichever is later; for intermediate felony cases, within 270 days of arraignment or 135 days of the order setting conditions of release, whichever is later; for complex felony cases, within 365 days of arraignment or 180 days of the order setting conditions of release, whichever is later. Opponents did not believe hard deadlines are warranted. The Second Judicial District Court stated that as a result of the Case Management Order (CMO), Rule LR2-308 NMRA, time to disposition had been on average five and one-half months, until recently when the court relaxed the CMO deadlines which increased the average time to disposition to a little over seven months. A three-vote majority of the Committee rejected the amendment. The Committee also rejected proposed amendments to **Rules 5-403, 5-409(K), 6-**

401(K), 6-403(I), 7-401(K), 8-401(J) and 8-403(I) which proposed similar deadlines.

Rule 5-403 Issuance of summons or bench warrant. A proposed amendment to this rule would have required a judge to issue a bench warrant if the judge found probable cause that the defendant committed a crime punishable by more than one year, the crime was committed in another state, or the crime is one listed in Rule 5-408(B)(2) NMRA. The proponents contended that the summons should not be the preferred method for revocation or modification hearings under these circumstances. A friendly amendment was accepted to allow the judge to exercise discretion in deciding whether to issue a bench warrant. Opponents pointed out that the judge already has the discretion and perhaps this is more a judge's training issue. The Committee rejected the proposed amendment.

Rule 5-403(I) Expedited trial scheduling for defendant in custody. The proposed amendment requires the district court to hold a status review hearing in a case in which the defendant was held for more than one year. Proponents contend that a defendant should not be held for more than one year without a judge being alerted. Opponents argued that adoption of the proposed amendment would suggest it is okay to hold a defendant for a year. A one-vote majority approved the rule.

Rule 5-403(K)(4) Transmission of district court order to magistrate, metropolitan, or municipal court. The proposed amendment requires the district court to transmit an order revoking a defendant's release to a lower court within one day. Proponents contend that by simply requiring the district court to "promptly" transmit the orders, orders are delayed for days which impedes the jurisdiction of the lower courts. There was no further discussion and a four-vote majority of the Committee approved the amendment.

Rule 5-403(M) Concurrent expedited motion for pretrial detention under Rule 5-409. The proposal would have added a new Paragraph M to this rule to prioritize a revocation of conditions of release hearing over a PTD hearing. The proposal would also require the court to proceed with the PTD hearing if the judge in the revocation hearing issues conditions of release which could result in the actual release of the defendant. The Committee discussed the complexity of managing the rule and a five-vote majority rejected the proposed amendment.

Rule 5-409(B) Motion for pretrial detention. The proposed amendment would have deleted the requirement that specific facts be included in the PTD motion. The proponents were concerned with judges denying motions because the facts

were not sufficiently specific, or for technical formatting issues. The proponents argued that "specificity" is a vague standard. Opponents contend that specific facts provide notice to a defendant and that Rule 5-120 NMRA already requires that motions state with particularity the grounds for the motion. A five-vote majority rejected the proposed rule.

Rule 5-409(C) Case pending in magistrate or metropolitan court. The language proposed by the Chair referenced Rule 5-401(G)(2), which was approved by the Committee. However, the Committee rejected the proposed language because of the need to work on lower court rules regarding the substance of Rule 5-401(G)(2).

Rule 5-409(C) Case pending in magistrate or metropolitan court. Another proposal to amend this section would terminate completely the jurisdiction of the magistrate or metropolitan court once a PTD motion is filed. The proponents contend that remanding to the lower courts has created problems in particular with lower court judges not wanting to amend conditions of release imposed by the district court. The proponents also contend that because a new number is assigned to the case upon transfer to the district court, any changes to conditions of release made by a lower court have to be reviewed by the district court judge because the case number now has an LR designation. In addition, because district courts can hold preliminary hearings it is not efficient to remand to the lower courts. Opponents contended that this proposed amendment would shift considerable work to the district court and they dispute the alleged complications that are created by the LR designation. A one-vote majority approved the change.

Rule 5-409(F) Initial hearing. The proposal to add a new Paragraph F requiring an initial hearing within 24 hours of the filing of a PTD motion to address numerous issues was withdrawn by the proponent without objection.

Rule 5-409(F) Pretrial detention hearing. The proposed amendment would add a sentence requiring the district court to rule on the merits of the PTD motion at the hearing. The proponents expressed concern with judges denying PTD motions based on form over substance. Examples included denying motions due to font size, or because the prosecutor had cut and pasted information from the police report into the body of the motion. Opponents of the proposed amendment contended that judges properly exercise their discretion and their discretion should not be removed because of a few isolated cases. Opponents also highlighted data which indicates that prosecutors do not appeal very many denials of PTD motions. A one-vote majority approved the proposed addition.

Rule 5-409(F)(5) Evidence. The proposal adds a sentence that summarizes what a district court judge may consider when ruling on a PTD motion consistent with *Torrez*, 2018-NMSC-005. Proponents contend that some judges refuse to accept proffers of evidence and insist on witness testimony. Opponents argued the language is unnecessary because of this Court's opinion in *Torrez* and the committee commentary to Rule 5-409(F), which discusses the *Torrez* holding. A five-vote majority approved the addition.

Rule 5-409(F)(7) proposed rebuttable presumptions. The proposed amendment would have added a new subparagraph (F)(7) to create a presumption that a defendant was dangerous and that no conditions of release would reasonably protect the public if the prosecution established probable cause that the defendant committed one or more enumerated offenses, subject to rebuttal by the defendant. The proposed rebuttable presumptions are attached as Appendix E. The proponents contended that the safety rate (percentage of released defendants who do not reoffend) in New Mexico, which is 70% to 83% depending on whose report one considers, is far below safety ratings in other jurisdictions—some of which have safety ratings as high as 90%. The proponents argued that adding rebuttable presumptions would improve public safety in New Mexico because the proposed presumptions identify the crimes and offenders who are most likely to commit violent crimes while on release pending their trials. The presumptions are based on legislative judgments about the seriousness of offenses and dangers posed by certain classes of defendants. In addition, the proponents contended that adding presumptions would improve the quality and uniformity of pretrial detention rulings.

Proponents contended that adding rebuttable presumptions would not violate Article II, Section 13 of the New Mexico Constitution because Article II, Section 13 simply adopts the minimum standards of proof required by the Due Process Clause of the federal Constitution and presumptions do not shift the burden of persuasion to the defendant, only the burden of production is shifted. *See United States v. Jessup*, 757 F.2d 378, 389 (1st Cir. 1985).

James Grayson, who represented the Second Judicial District Attorney during the meeting, also pointed out that their office has a rigorous procedure for reviewing the potential dangerousness of a defendant before deciding whether to file a PTD motion. He reported that his office files a PTD motion in only 12.5% of felony cases although all defendants accused of committing a felony can be subject to a PTD motion. He explained that if the rebuttable presumption rule were adopted the office would continue to evaluate the dangerousness of defendants before deciding to file a PTD motion even in cases where the alleged offense involved one or more rebuttable presumption offenses. Therefore, he believed that

the concern that many more pretrial detention hearings would be required is not warranted.

Opponents cite to a draft report, attached as Appendix F, which summarizes data relevant to rebuttable presumptions to argue that the data establishes that the offense with which the defendant is charged is not in and of itself predictive of future dangerousness. According to data analyzed by ISR, there were 1,537 cases in the Second Judicial District in which the defendant was charged with one or more of the proposed rebuttable presumption offenses from January 2017 (when PTD motions were authorized) through March 2019. The Second Judicial District Attorney filed 735 PTD motions in these cases and did not file a motion in 802 such cases. The ISR data indicates that the safety rate when a PTD motion was denied and the defendant was actually released is 84% and the court appearance rate is 82.8%. The safety rate in the 802 cases when a PTD motion was not filed and the defendant was actually released is 89% and the court appearance rate is 86.8%. *See* Appendix G for a bullet presentation of the data relevant to rebuttable presumption offenses.

The Second Judicial District Court schedules pretrial detention hearings for 30 minutes. The court would have needed 4,015 additional hours, or 50 additional days, to hear the 802 cases had the district attorney filed PTD motions in those cases. Opponents believe a PTD hearing would be required in all cases when a defendant is charged with a rebuttable presumption offense because the burden of persuasion for the prosecution is merely probable cause.

Opponents also expressed concern that judges would interpret presumptions to mean that defendants accused of committing a rebuttable presumption offense must always be detained.

A four-vote majority rejected the proposed rule.

Rule 5-409(G) Order for pretrial detention. The proposed addition would have specified that the pretrial detention order shall remain in effect until all felony charges had been disposed of unless modified under Paragraph K, which allows for the reconsideration of conditions of release. Proponents contended that this language would clear up existing confusion as to how long the order is to remain in effect. Opponents were concerned that lower courts would feel constrained to keep conditions of release in place even if the case evolved into a misdemeanor case. A two-vote majority rejected the proposed addition.

Rule 5-409(I) Further proceedings in magistrate or metropolitan court. If the court adopts the proposed change to Rule 5-409(C), which terminates the jurisdiction of the lower courts upon the filing of a PTD motion, the proposed

amendment to 5-409(I) would require an order closing the lower court case. The alternative discussed by the Committee is to delete Rule 5-409(I) altogether.

Rule 5-409(M) Judicial discretion; disqualification and excusal. As previously noted, the Committee rejected the proposal to allow a peremptory challenge to a district court judge. An additional proposed amendment would have added language prohibiting a pro tempore judge from presiding over a pretrial detention hearing without the specific authorization of the Chief Justice of this Court. Proponents cited to the variability in rulings by pro tem judges, and the fact that they are neither accountable to the Judicial Performance Evaluation Commission nor the voters. Opponents contend that it would put a strain on the workload of sitting judges if this rule were passed, and it seemed inconsistent to allow a pro tem judge to preside over the actual trial of a defendant but to prohibit that judge from presiding over a pretrial detention hearing. A four-vote majority rejected the proposed rule.

Rule 6-409(A) Pretrial detention, Scope. The proposed amendment would have amended the language explaining the scope of the rule to accommodate the Committee's vote which approved proposed Rule 5-401(G). Although the Committee voted by a 12-vote majority to approve this change, further discussion revealed the need for the Committee to address other necessary changes to magistrate and metropolitan court rules if the Court adopts the proposed amendment to Rule 5-401(G). The Committee requests the opportunity to continue working on necessary revisions to these rules.

Rule 6-409(D) Determination of motion by district court. In order to be consistent with the Committee's one-vote majority approval of Rule 5-409(C), this rule must be amended to terminate the magistrate court's jurisdiction once a PTD motion is filed.

Rule 6-409(E) Further proceedings in magistrate court. In order to be consistent with the Committee's one-vote majority approval of Rule 5-409(C), this rule must be amended to terminate the magistrate court's jurisdiction once a PTD motion is filed. An alternative is to delete Rule 6-409(E) as no longer necessary.

Rule 7-409(D) Determination of motion by district court. In order to be consistent with the Committee's one-vote majority approval of Rule 5-409(C), this rule must be amended to terminate the metropolitan court's jurisdiction once a PTD motion is filed.

Rule 7-409(E) Further proceedings in metropolitan court. In order to be consistent with the Committee's one-vote majority approval of Rule 5-409(C), this rule must be amended to terminate the metropolitan court's jurisdiction once a pretrial detention motion is filed. An alternative is to delete Rule 6-409(E) as no longer necessary.

Conclusion

The New Mexico Statistical Analysis Center of ISR published a report dated October 2019 titled "Bail Reform, Baseline Measures". They followed defendants in Chaves, Doña Ana, Luna, and Santa Fe counties between January 1, 2015 and December 31, 2016 who were booked on a felony offense, *see id.* pg. 3, which occurred before New Mexico's bail reform. 4,275 individuals met the criteria and of those 3,709 were released pending their trials. *Id.* pg. 7. The majority posted a bond, and only 9% were released on their own recognizance. The safety rate (percentage who did not reoffend while released) for those individuals was 74% and the court appearance rate was 77.6%. *See id.* pg. 21.

ISR analyzed the safety rate for defendants accused of a proposed rebuttable presumption offense and who were flagged as a risk of committing new violent criminal activity. The review occurred for cases arising after New Mexico's bail reform. ISR was asked to analyze these rates because two significant proposals focused on these categories of defendants, hypothesizing that they are the ones responsible for new violent criminal activity.

The overall safety rate for defendants accused of a proposed rebuttable presumption offense, which includes defendants released because a PTD motion was denied and because a PTD motion was not filed, is 87.5%. The overall court appearance rate for this category of defendants is 86.8%. The safety rate for defendants flagged as a risk for committing a new violent crime is 81.7% and the court appearance rate for this group is 78.3%.

The data at least with respect to these groups suggests that District Attorney Torrez's rigorous review of defendants for dangerousness has been effective and the screening process required by a PTD hearing has also produced safety rates for these categories of defendants that exceed the safety rates before the PTD motion practice was permissible. This data also suggests that the bail reform efforts undertaken after the 2016 amendment to Article II, Section 13 have resulted in an overall increase to public safety. Yet, there is always room for improvement. The Court along with its criminal justice partners should continue to mine data to see how New Mexico can improve the safety of the people in New Mexico.

The Committee believes that allowing a district court judge the discretion to schedule a PTD hearing in cases where a PTD motion has not been filed, and allowing magistrate and metropolitan court judges the discretion to set a pretrial

release hearing after the initial appearance, will allow prosecutors the opportunity to examine or reexamine the merits of filing a PTD motion. This may further improve the safety rate in New Mexico. Only the consistent collection of valid and reliable data, with the analysis of an independent organization such as ISR, will be able to answer the question.

Finally, this Court's pursuit of funding to improve pretrial services throughout New Mexico, its insistence that pretrial services adhere to best practices, and its continued evaluation of these programs will also be essential if we are going to successfully enhance the safety of the people of New Mexico.

Again, thank you for allowing me the opportunity to work with this Ad Hoc Committee.

Sincerely,

s/

Edward L. Chávez.

APPENDIX A

The Committee was interested in obtaining data that would answer the following questions:

1. What charges or circumstances are present in which a majority of the time a recommendation of detention would be appropriate?
2. What charges are present in which the majority of the time an increase in release conditions would be appropriate?
3. How many proposed rebuttable presumption offenses (RPO) were filed since pretrial detention (PTD) motions became permissible?
4. How many PTD motions did the DA file involving one or more proposed RPOs?
5. How many motions were granted?
6. How many motions were denied? Of those cases:
    a. What conditions of release did the court impose on the defendant?
    b. How many defendants who were released due to the denial of a PTD motion were charged with committing a new crime?
    c. What types of offense(s) was the defendant accused of committing?
    d. What was the failure to appear (FTA) rate?
7. When the DA did not file a motion to detain even though the offense included one or more RPOs:
    a. What conditions of release were imposed on defendant?
    b. How many defendants were charged with committing a new crime?
    c. What level of offense was the defendant accused of committing?
    d. What was the FTA rate?
8. How many cases were red flagged for potential new violent criminal activity (NVCA) by the Arnold Tool?
9. How many PTD motions filed by the DA involved a defendant who was flagged as a risk for NVCA?
10. How many of the NVCA were released?
    a. What was the level of recommended supervision?
    b. What level of supervision was ordered?
    c. Did they violate conditions?
    d. How many of the NVCA failed to appear?
    e. How many of the NVCA committed a new offense?
    f. What level of offense?
11. Does the data support a rule that would require all cases flagged as a risk for NVCA to be scheduled for a detention hearing?

12. How many cases involve defendants charged with a felony and the defendant was using a deadly weapon?
    a. How many were released?
        i. What were the conditions of release?
    b. How many were detained?
13. Would the data support a rule that required all cases where the accused used a deadly weapon during the commission of a felony to be scheduled for a detention hearing?
14. How difficult is it to determine whether a deadly weapon was used during the commission of a felony?
15. What is the length of time between when defendant is detained and
    a. When trial is scheduled?
    b. Plea or disposition?
    c. Trial on the merits?
16. How many cases result in the prosecutor putting a detention hold on the defendant and the DA later elects not to pursue detention?
    a. What is the length of time before the defendant is released?
    b. How many times are charges dismissed by the prosecutor?
    c. How many times does a prosecutor decline to prosecute a case?
    d. How many times are charges dismissed for lack of probable cause by the court?
17. What is the average time between filing of a PTD motion and the detention hearing?
18. How many cases are remanded to a lower court at the conclusion of a detention hearing in district court?
    a. In how many of those cases was the lower court asked to change conditions of release?
    b. In how many of those cases did the lower court
        i. Increase conditions of release?
        ii. Decrease conditions of release?
        iii. Make no change?
19. In how many cases where the defendant was detained did it take longer than one year to dispose of the case? Of those cases, how many were resolved:
    a. By plea and disposition?
    b. Dismissal of charges by the prosecutor?
    c. Dismissal of charges by the court?
    d. Trial on the merits?
20. In how many cases does the district court have both a motion to revoke conditions of release and a PTD motion?

21. How many cases involved charges which authorized a sentence of life in prison without parole?
22. What is an acceptable release rate?
23. What is an acceptable success/failure rate?
    a. No new criminal activity
    b. No new violent criminal activity
    c. No failure to appear

APPENDIX B

The Committee asked for the following data from the Administrative Office of the Courts, the Second Judicial District Court, and the Administrative Office of the District Attorneys:

1. What felony charges were filed in each judicial district regardless of whether a pretrial detention (PTD) motion was filed.
    a. How many cases involve defendants charged with a felony and the defendant was using a deadly weapon?
    b. How many cases involved charges which authorized a sentence of life in prison without parole?
2. The number of PTD motions that were filed.
3. The charges that were pending in those cases when a PTD motion was filed.
    a. How many cases involve defendants charged with a felony and the defendant was using a deadly weapon?
    b. How many cases involved charges which authorized a sentence of life in prison without parole?
4. The length of time between filing the PTD motion and the pretrial detention hearing.
5. How many cases result in the prosecutor putting a detention hold on the defendant and later electing not to pursue detention?
    a. What is the length of time before the defendant is released?
    b. How many times are charges dismissed by the prosecutor?
    c. How many times are charges dismissed for lack of probable cause by the court?
    d. What are the charges in these cases?
6. The court disposition of the PTD motion.
    a. Number granted.
    b. Number denied.
    c. Conditions of release when detention denied.
7. For those actually released after a PTD motion was denied
    a. The public safety assessment tool (PSA) recommendation (for the Second Judicial District)
    b. The number of those who fail to appear (FTA)
        i. Type of offense in the case in which the PTD motion was filed
        ii. Conditions of release imposed when the court denied the PTD motion
        iii. Whether the defendant was detained or what their conditions of release were for the re-arrest

    c. The number of those who were accused of new criminal activity
        i. Type of offense in the case in which the PTD motion was filed
        ii. Conditions of release imposed when the court denied the PTD motion
        iii. Category of new criminal activity (e.g., misdemeanor, 4th, 3rd, 2nd, 1st degree felony)
        iv. Whether the defendant was detained or what their conditions of release were for the re-arrest
8. Time to disposition from order detaining the defendant to disposition of the case.
    a. First trial setting
    b. Actual trial on the merits
    c. Plea or other disposition
9. Number of cases that were dismissed by the prosecution
    a. When a PTD motion was filed
    b. When a PTD motion was not filed
    c. For each category the reason for the dismissal
    d. Number of cases refiled
10. Number of cases where the prosecution did not indict or pursue a preliminary hearing (regardless of the filing of a PTD motion)
11. Number of appeals of PTD orders.
12. Length of time for appellate disposition of the PTD appeals.
13. Number cases where a PTD motion was granted and an interlocutory appeal (not regarding detention) was filed.
14. Length of time to disposition of interlocutory appeal.
    a. Specify whether Court of Appeals or Supreme Court
15. Number of guilty pleas to the highest offense charged.
    a. Number of guilty pleas to crimes involving the use of a deadly weapon as the highest charge
16. Number of guilty pleas to lower offenses.
    a. Number of guilty pleas to crimes involving the use of a deadly weapon that was not the highest charge
17. Number of convictions of highest offense charged following a trial on the merits.
18. Number of convictions of lesser included offenses charged following a trial on the merits.
19. Number of mistrials.
20. Number of cases flagged by a PSA as NVCA?
21. Number of PTD motions filed when a PSA flagged NVCA?

22. Number of defendants flagged as NVCA that were released despite a PTD motion being filed?
    a. PSA recommendation for conditions of release.
    b. Conditions of released imposed on the defendant.
    c. Number of defendants released who FTA.
    d. Number of defendants that engaged in new criminal activity.
        i. Level of new offense that was charged
23. Number of defendants flagged as NVCA but NO PTD motion was filed.
    a. PSA recommendation for conditions of release.
    b. Conditions of release imposed on the defendant.
    c. Number of defendants released who FTA.
    d. Number of defendants that engaged in new criminal activity.
        i. Level of new offense that was charged.
24. How many cases are remanded to a lower court at the conclusion of a detention hearing in district court?
    a. In how many of those cases was the lower court asked to change conditions of release?
    b. In how many of those cases did the lower court
        i. Increase conditions of release?
        ii. Decrease conditions of release?
        i. Make no change?
25. In how many cases where the defendant was detained did it take longer than one year to dispose of the case? Of those cases, how many were resolved:
    a. By plea and disposition?
    b. Dismissal of charges by the prosecutor?
    c. Dismissal of charges by the court?
    d. Trial on the merits?

In how many cases does the district court have both a motion to revoke conditions of release and a PTD motion?

APPENDIX C

Criminal Justice and Public Safety
Task Force February
27, 2020
9:00 a.m.-5:00 p.m.
State Bar of New Mexico Modrall Room

9:00- Justice Ed Chavez
Opening Remarks
Introductions

9:30- Tim Schnacke
Legal and Historical Foundations of Pretrial Justice
This discussion is focused on helping people understand how the history and the law are combing to force change in every American state, just as was done in New Mexico through the *Brown* decision as well as changes to the New Mexico Constitution and the court rules. Specifically, it provides the background necessary for evaluating the elements and boundaries of release/detain models (including the New Mexico model), for making changes to those models, and for using evidence-based, data-driven, or "best" practices to effectuate those models. It will also cover, very broadly, the notion of "risk assessment" in the bail/no bail process. Some of this will be in educational-presentation form, but there will be ample time for discussion and questions.

11:15 Break

11:30- Tim Schnacke
Specific Issues, Questions, and Potential Solutions to Perceived Problems with New Mexico Law
This discussion will more narrowly focus on the New Mexico model, limitations or advantages of that model based on the previous session, and include a more detailed analysis of the current state constitutional framework and court rules, including proposed amendments. To the extent that people feel it necessary to better understand pretrial assessment of probabilities of success, including assessment using an actuarial tool, we can begin by talking about the details of the current law, but postpone specific discussion of a legal model incorporating such a tool until later in the afternoon.

12:30- Lunch

1:30- Spurgeon Kennedy
Pretrial Risk: What it is and What it isn't

This session will examine the research behind pretrial risk assessments and data from jurisdictions implementing validated risk instruments to answer the following questions:

- What is pretrial risk?
- How common is the potential for risk within most defendant populations?
- How good are we at assessing risk?
- What factors are the most predictive of pretrial risk?
- Is a risk assessment an appropriate tool to determine pretrial detention?
- Can we make risk assessment race, gender, and ethnically neutral?

3:15 Break

3:30- Spurgeon Kennedy
Public Safety Assessment
This session also will focus on the Arnold Ventures, LLC's Public Safety Assessment (PSA), and the opportunities and challenges in incorporating that risk assessment into a local bail decision-making system.

4:30- Justice Ed Chavez
Discussion on Next Steps and Closing Remarks

5:00 Adjourn

APPENDIX D

Data relevant to the proposed rule that would automatically schedule hearings for certain crimes? ***NOTE: THIS ANALYSIS DOES NOT ADDRESS WHETHER THE PROPOSED RULE FOR AUTOMATICALLY SCHEDULING PTD HEARINGS IS CONSTITUTIONAL UNDER ART II, § 13.***

One proposal to amend Rule 5-401(G) NMRA would require the court to schedule a pretrial detention (PTD) hearing if the defendant is charged with certain crimes or a public safety assessment (PSA) tool flags the case for potential new violent criminal activity. The proposed amendment attempts to address the fact that magistrates do not have authority to detain a defendant even when they believe a defendant could pose a danger to the community, which is of particular concern in rural areas where the prosecution and defense attorneys often do not appear at the initial hearing. In Bernalillo County some have expressed the same concern because the prosecution must request a hearing before a defendant may be detained pending trial.

The proposed amendment reads, in relevant part,

> (2) The court shall schedule a detention hearing within the time limits set forth in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and defendant when
>
> (a) The defendant is charged with a felony offense
>
> (i) involving the use of a deadly weapon during the commission of the felony,
>
> (ii) which authorizes a sentence of life in prison without parole, or
>
> (iii) A public safety assessment tool flags potential new violent criminal activity for the defendant;

(3) If the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under Rule 5-401 and issue an order setting conditions of release.

Proposed Rule 5-401(G).

Under the proposed rule, a judge would schedule a pretrial detention hearing in felony cases when any one of three conditions were met: (1) the charges involved the use of a deadly weapon; (2) the possible penalty was life without parole; (3) a PSA tool flagged the defendant for the possibility of new violent criminal activity. *Id.* However, if the prosecutor does not file a motion to detain the hearing becomes a hearing on conditions of release.

In February of 2020, members of the Ad Hoc Committee submitted data from their respective organizations that is intended to drive the Committee's decision-making process. The data that are relevant to the proposed amendment to Rule 5-401(G) that are discussed in this memo are taken from the reports of the University of New Mexico Institute for Social Research (ISR) dated January 2020, ISR Report dated February 12, 2020, the report from the Second Judicial District Court Judicial Supervision & Diversion Program submitted February 24, 2020, the letter from the Administrative Office of the District Attorneys (AODA) dated February 21, 2020, and the letter from the Second Judicial District Attorney's Office dated February 21, 2020.

This memo summarizes data relevant to whether the proposed amendment to Rule 5-401(G)(2)(a) could improve pretrial detention procedures by improving public safety and reducing failures to appear.

CONDITION 1: FELONY OFFENSE INVOLVING THE USE OF A DEADLY WEAPON

Before discussing the data, it is important to consider a practical limitation on a judge's ability to implement proposed Rule 5-401(G)(2)(a)(i): namely, judges may not be able to accurately determine whether a charge "involv[es] the use of a deadly weapon" during an initial hearing. There are several reasons for this. First, it is difficult to define which charges involve a deadly weapon unless there is some indication of the use of a deadly weapon in the language of the criminal statute. Even the definition of "deadly weapon" is susceptible to interpretation. *See, e.g.*, *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868 (analyzing at length multiple possible meanings of "deadly weapon" depending on use). NMSA 1978, Section 30-1-12(B) (1963) defines deadly weapon as

> any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted.

In addition, it is not readily apparent from the citation of a statute that the alleged actions of the defendant involved the use of a deadly weapon. Many statutes may be violated with or without the use of a deadly weapon. *See, e.g.*, NMSA 1978, § 30-16-2 (1973) (robbery can be committed with or without a deadly weapon); NMSA 1978, § 30-3-5 (1969) (aggravated battery, same); NMSA 1978, § 30-3-13 (1995) (aggravated assault against a household member, same); and NMSA 1978, § 30-16-4 (1963) (aggravated burglary, same).

Because it is not always readily apparent from the title of the crime that a deadly weapon was used, the facts underlying the charge will usually detail whether a deadly weapon was used. These facts often will not be available to the judge from the charging document; rather, it is the prosecutor who has access to these facts. Moreover, it is not the responsibility of the judge to investigate the facts—that responsibility is squarely on the prosecutor. For these reasons, a judge may be unable to determine whether a charge involves the use of a deadly weapon, which calls into question the practicality of this proposed triggering mechanism.

The difficulty determining when a crime involves a deadly weapon is reflected in the data provided by the Second Judicial District Court. *See* Report from Second Judicial Dist. Court Judicial Supervision & Diversion Program to Ad Hoc Comm., Preventive Detention Statistics 4-8 (Feb. 24, 2020) (SJDC Preventive Detention Statistics). For example, the court lists "armed robbery" and "armed

robbery DW" when armed robbery always requires that the defendant be armed with a deadly weapon. *Id.* at 4. However, aggravated battery, aggravated assault against a household member, and aggravated burglary do not always require the use of a deadly weapon. Whether all of these listed crimes involved the use of a deadly weapon is not clear because the court adds DW to the end of crimes which apparently did in fact involve the use of a deadly weapon. *Id.* at 4-8. Both the AODA and the Second Judicial District Attorney acknowledge the difficulty in accurately determining which cases involved the use of a deadly weapon. *See* Letter from Henry R. Valdez, Dir., AODA, to J. Chávez, Ad Hoc Comm. Chair 2 (Feb. 21, 2020) (AODA Report); Letter from Raúl Torrez, Second Judicial District Attorney, to J. Chávez, Ad Hoc Comm. Chair 3 (Feb. 21, 2020) (SJDA Report).

Despite the difficulties in arriving at precise case counts, the data suggests that the use of a deadly weapon does not strongly correlate to the District Attorney's decision to file a PTD motion, at least in the Second Judicial District. (Statewide data on PTD motions are unavailable because the AODA did not yet track PTD motions as of February 2020 when this data set was collected. *See* AODA report, at 3.) In the aggregate, the Second Judicial District Court data lists 1,363 cases in which a PTD motion was filed where the charges signal the

potential use of a deadly weapon. [1] SJDC Preventive Detention Statistics, at 4-8. The Second Judicial District Attorney calculates that 1,772 cases in which a PTD motion was filed involved the use of a deadly weapon. SJDA Report, at 3. Yet the data from AODA indicates that a total of 5,559 felony cases were filed in the Second Judicial District that involved the use of a deadly weapon, as seen in the table below. AODA Report at 1 (aggregated).

[1] The charges included in this analysis are Aggravated Assault DW (289 cases), Armed Robbery (178 cases), Aggravated Battery DW (168 cases), Shooting at or from a Motor Vehicle (81 cases), Aggravated Assault (59 cases), Shooting at a Dwelling or Occupied Building (39 cases), Aggravated Battery GBH DW (23 cases), Armed Robbery DW (17 cases), Shooting at or from a motor vehicle GBH (9 cases), Shooting at or from a motor vehicle (causing personal injury) (2 cases), Attempted Aggravated Battery DW (1 case), Conspiracy to shoot at a dwelling or building (1 case), Aggravated Burglary DW (20 cases), Aggravated Burglary (armed after entry) (3 cases), Aggravated Burglary (armed) (2 cases), Conspiracy to commit shooting at or from a Motor Vehicle (2 cases), Aggravated Battery against Household Member GBH DW (72 cases), Aggravated Assault HHM DW (65 cases), First-degree murder (80 cases), Felon in possession of a firearm (201 cases), Aggravated Assault on a Peace Officer DW (27 cases), Aggravated Battery on a Peace Officer DW (14 cases), Possession of a deadly weapon or Explosive by a Prisoner (4 cases), Conspiracy to Commit Felon in Possession of a Firearm (2 cases), Attempted Aggravated Assault upon a peace officer DW (1 case), Disarming a Police Officer (1 case), Unlawful carrying DW on School Premises (1 case), Criminal Sexual Penetration (Armed DW) (1 case).

DISTRICT	2017		2018		2019	
	# Felony Cases	# with Deadly Weapon	# Felony Cases	# with Deadly Weapon	# Felony Cases	# with Deadly Weapon
1st Judicial DA	2920	505	2783	472	2643	390
2nd Judicial DA	8387	1975	8361	1774	8316	1810
3rd Judicial DA	1689	288	1873	249	1854	309
4th Judicial DA	688	150	659	126	705	157
5th Judicial DA	3132	550	3047	586	2971	670
6th Judicial DA	992	153	938	142	958	129
7th Judicial DA	769	152	828	137	771	134
8th Judicial DA	852	120	950	159	840	129
9th Judicial DA	1193	170	1071	165	1048	174
10th Judicial DA	283	49	257	33	260	47
11th Judicial DA, Div 1	2121	322	2308	332	2240	307
11th Judicial DA, Div 2	785	125	739	124	881	168
12th Judicial DA	1184	198	1121	156	1128	169
13th Judicial DA	2974	470	2980	450	2844	479
TOTAL	**28001**	**5227**	**27961**	**4905**	**27490**	**5072**

Therefore, it appears that out of the 5,559 deadly weapon cases for which the Second Judicial District Attorney could have filed a PTD motion, the District Attorney having vetted the cases for dangerousness filed a PTD motion in those cases between 25% and 32% of the time.[2] The data has not been analyzed to

[2] The discrepancy is based on the source of the data. Using the court's data, 1,363 PTD motions filed in deadly weapon cases / 5,559 deadly weapons cases =

determine the safety rate when a PTD motion was or was not filed and the crime involved the use of a deadly weapon. However, the Second Judicial District Attorney concluded that the safety rate is 70.1% when a PTD motion is denied because 29.9% of defendants were charged with a new crime when not in custody due to the denial of a PTD motion. However, the District Attorney did not analyze the safety rate when a PTD motion is not filed. The Second Judicial District Court concluded that the safety rate is 77% whether the defendant is not in custody because a PTD motion was not filed or because a PTD motion was denied. The Institute for Social Research concluded that the safety rate when a defendant was not in custody due either to the denial of a PTD motion or because a PTD motion was not filed, and in which there was a PSA, is 83.2% because 17.2% of defendants were charged with a new offense while out of custody during the pretrial phase. See ISR Report January 2020, pg. 10. When ISR considered just those closed cases in which a defendant was not in custody because a PTD motion was not filed ISR concluded that the safety rate is 82.6%. *See* ISR Preliminary Responses regarding Rebuttable Presumptions February 12, 2020. Whether the safety rate is 70% or 82.6% when a PTD motion is not filed suggests that the charge alone does not warrant a PTD motion in 70% to 82.6% of the cases.

25%; or, using the District Attorney's data, 1,772 PTD motions filed in deadly weapon cases / 5,559 deadly weapon cases = 32%.

Finally, judicial resources should be considered. If the rule requiring the automatic scheduling of a PTD hearing in cases involving a "deadly weapon" existed from the inception of the PTD motion practice in January of 2017, a minimum of 5,559 hearings would have been scheduled in the Second Judicial District Court assuming a PTD Motion was filed. *See* AODA Report at 1 (aggregate of felony cases filed in Second Judicial District Court involving deadly weapons). Yet during that time, the Second Judicial District Court reports that a total of 3,167 PTD cases were filed. SJDC Preventive Detention Statistics, at 1. Of these motions the Second Judicial District Court reports that 1,363 of the PTD motions that were filed involved a felony with the potential use of a deadly weapon. Therefore, 1,804 PTD motions did not involve a felony with the potential use of a deadly weapon. To have heard all of the deadly weapon-involved cases would have required a minimum of an additional 4,196 PTD hearings (5,559 – 1,363). In the Second Judicial District Court PTD hearings are scheduled for 30 minutes. To accommodate the additional 4,196 cases the court would have had to set aside an additional 2,098 hours to hear these cases. Stated differently the court would have needed an additional 262.25 days to hear these cases (2,098/8). The prosecuting authority under the proposed rule must file a PTD motion or the hearing becomes about conditions of release. One would have to speculate whether automatically scheduling a hearing will result in prosecutors filing more

PTD motions. Instead, the current system which requires prosecutors to evaluate each case for dangerousness based on several criteria and not just the charge is the better practice in the vast majority of cases. The collection of data moving forward from all districts in New Mexico can better answer the question.

CONDITION 2: LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE

AODA reports that a minimum of 386 cases were filed statewide between January 2017 and December 2019 where the potential sentence was life without parole. AODA Report at 2-3 (aggregated). AODA reports these as minimum numbers because some charges only carry a sentence of life without parole if certain aggravating circumstances are found or if the crime is a repeat offense. *Id.* at 2. Again, the AODA data does not tell us how many of these cases were the subject of a PTD motion hearing.

DISTRICT	2017	2018	2019
1st Judicial DA	6	19	5
2nd Judicial DA	47	52	64
3rd Judicial DA	7	7	10
4th Judicial DA	3	0	4
5th Judicial DA	24	16	29
6th Judicial DA	1	2	3
7th Judicial DA	3	1	2
8th Judicial DA	4	2	0
9th Judicial DA	2	0	3
10th Judicial DA	1	0	0
11th Judicial DA, Div 1	2	0	5
11th Judicial DA, Div 2	2	2	5
12th Judicial DA	4	3	6
13th Judicial DA	10	8	22
TOTAL	**116**	**112**	**158**

In the Second Judicial District, the AODA data indicates that a total of 163 cases involved charges which authorized a sentence of life without parole. *Id.* (aggregated). The Second Judicial District Attorney estimates that it filed a PTD motion in 110 cases that involved charges which authorized a sentence of life without parole. SJDA Report at 3. However, that number includes only charges of first-degree murder. *Id.* As the District Attorney notes, other charges may result in sentences of life without parole, such as a second or subsequent conviction of criminal sexual penetration, but those charges were not included in the District

Attorney's data because of the difficulty in collecting the data manually for each case. *Id.*

CONDITION 3: PSA FLAG FOR POTENTIAL NEW VIOLENT CRIMINAL ACTIVITY

The Institute for Social Research was asked to identify the number of closed cases that were flagged for new violent criminal activity. The violent red flag appeared in 2,184 cases. Preliminary Response from Univ. of N.M. Inst. for Soc. Research to Ad Hoc Comm., Priority 2: Red Flag Charges 1 (Feb 13, 2020). The District Attorney filed 611 PTD motions where the case had a red flag. *Id.* If we adopted the rule scheduling a hearing in every case where a red flag appeared we would be adding 1,573 cases to the PTD schedule. The Second Judicial District Court schedules each PTD hearing for 30 minutes. Adding the 1,573 cases, assuming the District Attorney files a PTD motion, would require an additional 786 hours of court time. This seems unnecessary because regardless of whether a PTD motion was filed in cases with a red flag the safety rate was essentially the same—82%. *Id.* at 2. Therefore, the District Attorneys vetting process correctly concluded that a PTD motion was not necessary 82% of the time.

There were 1,784 closed cases in which the red flag appeared. The release rate for cases with a red flag was 55.2% because 985 defendants with a red flag were actually released. The Court Appearance rate for cases with a red flag was

78.3%. The Court Appearance rate for cases without a red flag was 81%. The Court appearance rate for all cases was 80.5%.

The safety rate for cases with a red flag was 81.7%. The safety rate for cases without a red flag was 81.9%. The safety rate for all cases was 81.9%. However, the new violent crime rate for cases with a red flag was 8.6% compared to 3.5% for cases without a red flag and 4.4% for all cases.

APPENDIX E
Proposed Rebuttable Presumption Offenses

(a) *Violent Felonies.*

(i) murder in the first or second degree, as proscribed in Section 30-2-1NMSA 1978;

(ii) voluntary manslaughter, as proscribed in Section 30-2-3 NMSA 1978;

(iii) assault with intent to commit a violent felony in the second or third degree, as proscribed in Section 30-3-3, Section 30-3-9.2, Section 30-3-14, and Section 30-22-23 NMSA 1978;

(iv) aggravated battery in the third degree, as proscribed in Section 30-3-5, Section 30-3-9, Section 30-3-9.1, 30-3-9.2, Section 30-3-16, and Section 30-22-25 NMSA 1978;

(v) habitual domestic abuse, as proscribed in Section 30-3-17 NMSA 1978;

(vi) kidnapping in the first or second degree, as proscribed in Section 30-4-1 NMSA 1978;

(vii) child abuse resulting in death or great bodily harm, as proscribed in Section 30-6-1 NMSA 1978;

(viii) aggravated criminal sexual penetration or criminal sexual penetration in the first, second or third degree, as proscribed by Section 30-9-11 NMSA 1978;

(ix) robbery in the first or second degree, as proscribed in Section 30-16-2 NMSA 1978;

(x) aggravated arson in the second degree, as proscribed in Section 30-17-6 NMSA 1978; or

(xi) human trafficking of a child in the first or second degree, as proscribed by Section 30-52-1 NMSA 1978.

(b) *Firearms.* The defendant was armed with a firearm or had a firearm readily available during the commission of the charged felony offense that prompted the detention hearing. A firearm is any weapon that will or is designed to or may readily

be converted to expel a projectile by the action of an explosive. A firearm is readily available if it is on the defendant's person or in an area to which the defendant has quick and easy access.

(c) *Great Bodily Harm.* The defendant inflicted great bodily harm, as defined in Section 30-1-12 NMSA 1978, or death of a person during the commission of the charged felony offense that prompted the detention hearing.

(d) *Criminal History, Pending Cases, Witness Intimidation, Post-Conviction Supervision.*

(i) the defendant was convicted within the past five years of a felony offense listed in subsection (F)(7)(a) of this section or a felony offense committed under the circumstances contained in Subsection (F)(7)(b) or Subsection (F)(7)(c) of this section;

(ii) the defendant committed the charged felony offense that prompted the detention hearing while pending trial or sentencing for a felony offense listed in Subsection (F)(7)(a) of this section or a felony offense committed under the circumstances contained in Subsection (F)(7)(b) or Subsection (F)(7)(c) of this section;

(iii) the defendant intimidated, dissuaded, or threatened retaliation against a witness or victim of the charged felony offense that prompted the detention hearing or against a juror or other member of the criminal justice system; or

(iv) the defendant committed the charged felony offense that prompted the detention hearing while on probation, parole or other post-conviction supervision for a felony offense listed in Subsection (F)(7)(a) of this section or a felony offense committed under the circumstances contained in Subsection (F)(7)(b) or Subsection (F)(7)(c) of this section.

APPENDIX F

What does the data tell us about the proposed rebuttable presumption offenses? ***NOTE: THIS ANALYSIS DOES NOT ADDRESS WHETHER THE PROPOSED RULE FOR REBUTTABLE PRESUMPTIONS IS CONSTITUTIONAL UNDER ART II, § 13.***

The Eight Amendment to the United States Constitution provides that "**[e]xcessive bail shall not be required**, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* (emphasis added).

By contrast Article II, Section13 of the New Mexico Constitution provides:

> **All persons shall, before conviction, be bailable** by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.
>
> A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

Id. (As amended November 4, 1980, November 8, 1988, and November 8, 2016)(emphasis added).

Article II, Section 13 creates a presumption that all persons accused of committing a felony are bailable, except the category of capital (death penalty eligible) defendants. The prosecuting authority can overcome this presumption by requesting a hearing and proving "by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community." *Id.* Rule 5-409(F)(6) NMRA sets forth several factors for the judge to consider when ruling on a pretrial detention motion. The first factor is "the nature and circumstances of the offense charged, including whether the offense is a crime of violence." *Id.*

If the court denies the motion and the defendant commits any new offense, including a misdemeanor offense, or willfully fails to abide by conditions of release such as failing to appear at scheduled hearings, the defendant's conditions of release may be revoked or modified. *See* Rule 5-403 NMRA.

The Second Judicial District Attorney proposes a rule that creates a presumption for certain enumerated offenses subject to rebuttal by the defendant. The contention is that adopting this rebuttable presumption rule will identify the crimes most closely associated with the risk to the public, and will improve the quality and uniformity of pretrial detention rulings. The argument for the constitutionality of such a rule is that only the burden of production is shifted to the defendant not the burden of persuasion, thereby satisfying due process requirements.

The rule reads in relevant part

> Subject to rebuttal by the defendant, evidence or offers of proof establishing probable cause for any of the following shall be deemed prima facie proof that the defendant poses a danger to any other person or to the community and that release conditions will not reasonably protect the safety of any other person or the community.

Proposed Rule 5-409(F)(7).

The University of New Mexico Institute for Social Research (ISR) was asked to review Bernalillo County data and to 1) identify the number of times the district attorney did or did not file a pretrial detention (PTD) motion when the defendant was charged with one or more proposed rebuttable presumption offenses; 2) specify the disposition of the motion; 3) when the motion was denied to specify what conditions of release were imposed by the court; 4) for those defendants who were actually released to state how many were charged with committing a new crime; and 5) the level of the new crime.

According to the ISR report dated February 12, 2020, there were 1,537 cases involving a defendant charged with a proposed rebuttable presumption offense. The District Attorney filed a PTD motion in 735 such cases and *did not* file a PTD motion in 802 such cases.

RESULTS WHEN A PTD MOTION WAS FILED. Of the 735 PTD motions that were filed 49 were withdrawn, and another 26 were either nolle prosecuted, dismissed, or the defendant was sentenced. The court had to decide 660 PTD motions. The court granted 335 motions and denied 325 motions. Of the 325

motions that were denied only 279 defendants were *actually* released.[1] The release rate is 42% (279/660). The Second Judicial District release rate is lower than other jurisdictions that have rebuttable presumption offenses. The New Mexico Federal District Court's release rate is 43.5% which is slightly below the national federal court rate of 44.5%. *William Hicks, Chief of Federal Probation and Pretrial Services*. New Jersey's release rate is 82%. *NJ pretrial detention statistics 2019*. The District of Columbia's release rate is 95%. *Spurgeon Kennedy, National Association of Pretrial Services Agencies.*

Regarding the safety rate—which is the number of defendants released pending trial who are not charged with committing a new crime—forty-five (45) of the 279 defendants who were released pending trial were charged with committing a new crime. This translates to a safety rate of 84%.

No new charge - 234
First degree felony – 0
Second degree felony – 3
Third degree felony – 6
Fourth degree felony – 20
Misdemeanor – 10
Petty Misdemeanor 6

[1] The difference in the numbers of denied motions and the actual release of the defendant can be explained by the fact that the defendant is already being detained under Rule 5-403, or because of a prior violation of probation or parole which required re-incarceration of the defendant, a federal hold, or a hold from another jurisdiction.

WHEN PTD MOTION NOT FILED. The *ISR 2.12.2020 Report* states the district attorney did not file a PTD motion in 802 cases where the defendant was accused of committing a rebuttable presumption offense. It is reasonable to presume that these 802 defendants would have been detained pending a PTD hearing if there was a rebuttable presumption rule. This would be particularly true if the court also adopts the proposed rule that would dispense with the motion requirement. The courts would also have to schedule 802 additional hearings. Pretrial detention hearings in the Second Judicial District Court are scheduled for 30 minutes. Therefore, to accommodate 802 more hearings, the court would have needed to allocate an additional 401 hours of court time. Stated differently the court would have needed 50 additional days.

Regarding the 802 cases in which the defendant was charged with committing one or more rebuttable presumption offenses, 640 defendants were released. *ISR 2.12.2020 Report Supplement 3.24.2020*. Seventy (70) of these defendants were charged with committing a new offense, which makes the safety rate for this group 89%.

No new charge – 570
First degree felony – 0
Second degree felony – 3
Third degree felony – 11
Fourth degree felony – 32
Misdemeanor – 17
Petty Misdemeanor – 7

The overall safety rate for those who were accused of committing a rebuttable presumption offense and were actually released is 87.5%. (100 – (115/919)). According to this data, the offense with which the defendant is accused is not in and of itself predictive of future dangerousness.

The court appearance rate for defendants charged with one or more rebuttable presumption offenses and who were released following the denial of a Pretrial Detention Motion is 82.8%. *ISR 2.12.2020 Report Supplement* pg. 3. The court appearance rate for those 640 defendants who were released because a PTD motion was not filed is 88.4%. *ISR 2.12.2020 Report Supplement 3.24.2020*. The overall court appearance rate for defendants released after being charged with committing a rebuttable presumption offense is 86.8%. (100 – (122/(279 + 640))

OVERALL SAFETY RATE AND COURT APPEARANCE RATE.

There were 6,194 closed cases where the defendant was actually released pending trial either because a PTD motion was not filed, or the court denied the PTD motion and there was a pretrial assessment. *ISR 01.2020 Report*, pg. 10. The overall safety rate is 83.2% (100 – 16.8). *Id*. pg. 10. Violent crimes account for 11.7% of the new crimes (122 violent crimes out of 1,041). *Id*. pg. 11. The overall court appearance rate is 81.9% (1,121 out of 6,194 failed to appear). *Id.* pg. 10.

A PTD motion was **not** filed in 7,439 closed cases. *ISR 2.12.2020 Report Preliminary Responses re Rebuttable Presumptions* pg. 3. Five thousand three

hundred sixteen (5,316) defendants were actually released pending trial because a PTD motion was not filed. Of the 5,316 released defendants 710 were charged with a new non-violent crime and 214 were charged with a new violent crime. The Safety rate for this group is 82.6% (100 – ((710 + 214)/5,316)).

No new charge – 4,392
First degree felony – 8
Second degree felony – 39
Third degree felony – 80
Fourth degree felony – 319
Unknown felony – 157
Misdemeanor – 221
Petty Misdemeanor –100

The court appearance rate for these cases is 81.2%. *Id.*

EFFECT ON NUMBER OF COURT HEARINGS IF THE PROPOSED REBUTTABLE PRESUMPTION RULE IS ADOPTED

One other consideration is whether adopting a rebuttable presumption rule will result in more hearings. If we look at the data provided by ISR it is reasonable to presume that because the prosecutor's burden of proof is "probable cause," any defendant charged with a rebuttable presumption offense will be detained pending a pretrial detention hearing. A PTD hearing may not be scheduled for up to nine (9) days from when the PTD motion is filed depending on the circumstances. In Bernalillo County the average is 4.46 days from the date a PTD motion is filed and the date the PTD hearing is held. *Second Judicial District Court Preventive Detention Statistics*, pg. 1. Defendants who are in custody will remain in custody an

average of 4.46 days, at a daily incarceration cost of approximately $110.00 in Bernalillo County. In addition, the Second Judicial District Court time to disposition had improved to an average of five and one-half months from charge to disposition since the case management order was implemented, until recent changes to the CMO resulted in an average time to disposition of about 7 months.

The prosecuting authority did not file a PTD motion in 802 cases where the defendant was accused of one or more proposed rebuttable presumption offenses. Again, it is reasonable to presume that these 802 defendants would have been detained pending a PTD hearing if there was a rebuttable presumption rule because of the low threshold burden on the prosecution to show probable cause. This would be particularly true if the court also adopts the proposed rule that would dispense with the motion requirement. Had the rebuttable presumption rule been in place the courts would have scheduled 802 additional hearings. Pretrial detention hearings in the Second Judicial District Court are scheduled for 30 minutes. To accommodate 802 more hearings, the court would have needed to allocate an additional 401 hours of court time. Stated differently the court would have needed 50 additional days.

APPENDIX G
Data and Proposed Rebuttable Presumption Offenses

CASES WHERE DEFENDANT CHARGED WITH PROPOSED REBUTTABLE PRESUMPTION OFFENSES

- 1,537 cases in which the defendant was charged with one or more of the proposed rebuttable presumption offenses
- ***735 motions to detain were filed***
- Court decided 660 PTD motions
- Court granted 335 motions
- Court denied 325 motions
- Of the 335 motions that were denied only 279 defendants were actually released
- The **release rate** when a PTD motion was denied and the defendant was actually released is 42% (279/660)
    - NM release rate is lower than other jurisdictions which have rebuttable presumption offenses
        - NM Federal District Court release rate is 43.5%, slightly lower than national federal court rate which is 44.5%
        - New Jersey's release rate is 82%
        - District of Columbia's release rate is 95%
- **Safety rate** for defendants charged with a rebuttable presumption offense and PTD motion was denied is 84% (45/279)
    - No new charge – 234
    - First degree felony – 0
    - Second degree felony – 3
    - Third degree felony – 6
    - Fourth degree felony – 20
    - Misdemeanor – 10
    - Petty Misdemeanor – 6
- **Court appearance rate** for defendants charged with one or more proposed rebuttable presumption offenses and the PTD motion was denied is 82.8%

802 motions to detain were not filed when the offense was a proposed rebuttable presumption offense.

- 640 of the 802 defendants were actually released
    - Release rate is 79.8%
- Safety rate for those actually released and no PTD motion was filed is 89% (70/640)

    - No new charge – 570
    - First degree felony – 0
    - Second degree felony – 3
    - Third degree felony – 11
    - Fourth degree felony – 32
    - Misdemeanor – 17
    - Petty Misdemeanor – 7
- Court appearance rate for defendants charged with one or more proposed rebuttable presumption offenses and PTD motion not filed is 88.4%
- The overall safety rate for defendants accused of committing a proposed rebuttable presumption offense and who were actually released is 87.5% (100 minus (115 charged with a new crime divided by 919 actually released))
- The overall court appearance rate for defendants accused of committing a proposed rebuttable presumption offense and who were actually released is 86.8% (122 failed to appear divided by 919 actually released)

OVERALL RATES FOR ALL CRIMES

- Overall **safety rate** for all crimes *when a PSA performed* and defendant actually released whether PTD motion not filed or denied is 83.2% (100 minus (1,041 charged with new crime divided by 6,194 who were actually released))
    - 273 of the 1,041 defendants were charged with committing a new violent crime
- **The overall court appearance rate** for all crimes *when a PSA performed* and defendant actually released whether PTD motion not filed or denied is 81.9% (1,121 out of 6,194 failed to appear)

OVERALL RATES FOR ALL CRIMES AND PTD MOTION NOT FILED

- **Safety rate when** DA did not file a PTD motion and defendant actually released is 82.6% (100 minus (924 defendants charged with a new crime divided by 5,316 actually released when PTD motion not filed))
    - 214 of the 924 defendants were charged with committing a new violent crime
- **Court appearance rate** when DA did not file a PTD motion and defendant was actually released is 81.2% (999 defendants failed to appear divided by 5,316 actually released)

EFFECT ON NUMBER OF COURT HEARINGS IF REBUTTABLE PRESUMPTION RULE ADOPTED

- 802 cases where defendant was accused of committing a rebuttable presumption offense and PTD motion not filed
- Court schedules 30 minutes for each PTD hearing
- 401 additional hours needed to hear these cases (802 divided by 2)
- 50 additional days required (401/8 hours)

APPENDIX H

5-301. Arrest without warrant; probable cause determination; first appearance.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a magistrate, metropolitan, or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier. The court may not extend the time for making a probable cause determination beyond forty-eight (48) hours. Saturdays, Sundays, and legal holidays shall be included in the forty-eight (48) hour computation, notwithstanding Rule 5-104(A) NMRA.

B. **Conduct of determination.** The determination that there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed with sufficient facts to show probable cause for detaining the defendant.

C. **Probable cause determination; conclusion.**

(1) ***No probable cause found.*** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall order the immediate personal recognizance release of the defendant from custody pending trial.

(2) ***Probable cause found.*** If the court finds that there is probable cause that the defendant committed an offense, the court shall make such finding in writing. If the court finds probable cause, the court shall review the conditions of release. If no conditions of release have

been set and the offense is a bailable offense, the court may set conditions of release immediately or within the time required under Rule 5-401 NMRA.

D. **First appearance; explanation of rights.** Upon the first appearance of a defendant before a court in response to summons or warrant or following arrest, the court shall inform the defendant of the following:

(1) the offense charged;

(2) the penalty provided by law for the offense charged;

(3) the right to bail or the possibility of pretrial detention;

(4) the right, if any, to trial by jury;

(5) the right, if any, to the assistance of counsel at every stage of the proceedings;

(6) the right, if any, to representation by an attorney at state expense;

(7) the right to remain silent, and that any statement made by the defendant may be used against the defendant; and

(8) the right, if any, to a preliminary examination.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 13-8300-041, effective for all cases pending and filed on or after December 31, 2013; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Paragraphs A through C of this Rule address probable cause for pretrial detention under the Fourth Amendment to the United States Constitution, rather than

probable cause for prosecution under Article II, Section 14 of the New Mexico Constitution. This rule will govern those cases in which all of the magistrate or metropolitan court judges are unavailable for probable cause determinations or for first appearance proceedings. If a magistrate or metropolitan judge is not available, a district court judge will make probable cause determinations for all persons arrested for felonies or misdemeanors. Since most persons accused of a crime will be taken before a magistrate or metropolitan court for the initial appearance, Rules 6-203 and 7-203 NMRA govern probable cause determinations in the courts of limited jurisdiction.

Under the Fourth Amendment to the United States Constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also* Rule 5-210 NMRA and committee commentary. In *Gerstein*, the Supreme Court explained that when a suspect is arrested and detained without a warrant, there must be a judicial determination of probable cause by a neutral and detached magistrate "promptly after arrest." 420 U.S. at 125. In *Riverside*, the court held:

Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against

the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities. Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

* * *

Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process-such as bail hearings and arraignments-may be chosen. Even then, every effort must be made to expedite the combined proceedings.

500 U.S. at 56-58.

There is every reason to believe that the standard set forth in the Riverside decision will be strictly construed by the federal courts. All federal circuit courts except one has held that *Gerstein* requires that the probable cause determination must ordinarily be made within twenty-four hours

of arrest. For a discussion of these cases, see the dissenting opinion of Justice Scalia in *Riverside*, 500 U.S. at 63.

A probable cause determination proceeding is not to be confused with a first appearance hearing or a preliminary hearing. The determination of probable cause for detention is not required to be an adversarial proceeding and may be held in the absence of the defendant and of counsel. *See Gerstein*, 420 U.S. at 119-22 (concluding that a probable cause determination does not need to be "accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses").

Prior to amendments in 2013, Paragraph C of this Rule required the court to dismiss the complaint without prejudice if the court found no probable cause. However, as explained supra, the sole purpose of a probable cause for detention determination is to decide "whether there is probable cause for detaining the arrested person pending further proceedings." *Gerstein*, 420 U.S. at 120 (emphasis added). Accordingly, in 2013, this Rule was amended to clarify that a court should not dismiss the criminal complaint against the defendant merely because the court has found no probable cause for detention.

New Mexico statute also requires that every "accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." NMSA 1978, § 31-1-5(B) (1973). This language was apparently derived from Rule 5(a) of the Federal Rules of Criminal Procedure. *See generally* 1 *Wright, Federal Practice and Procedure*, § 74 (1969).

The committee did not set forth a test for probable cause determinations as this is a matter of developing case law. The test for probable cause determinations under the New Mexico Constitution for arrest and search warrants based upon information from informants is a higher standard than the United States Supreme Court "totality of circumstances" test under the Fourth

Amendment of the United States Constitution. *See Massachusetts v. Upton*, 466 U.S. 727, 732 (1984); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). New Mexico has continued to follow the United States Supreme Court decisions of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), out of which was derived a two-pronged test of: (1) revealing the informant's basis of knowledge; and (2) providing facts sufficient enough to establish the reliability or veracity of the informant. *See State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30.

This rule does not attempt to spell out what rights the accused may have in every situation; hence, for example, the rule provides that the accused is told of his right "if any" to a trial by jury. On the right to a jury trial for criminal contempt, *see Bloom v. Illinois*, 391 U.S. 194 (1968) and *Taylor v. Hayes*, 418 U.S. 488 (1974).

The right to assistance of counsel at every critical stage of the proceeding is fairly clear under New Mexico practice and procedure. *See State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247 ("There is no dispute that a criminal defendant charged with a felony has a constitutional right to be present and to have the assistance of an attorney at all critical stages of a trial. U.S. Const. amends. VI and XIV; N.M. Const. art II, § 14."); *see also* NMSA 1978, § 31-15-10(B) (2001). The only question remaining for the judge handling the first appearance is whether the accused is entitled to representation at state expense. The court must inform a person who is charged with any crime that carries a possible sentence of imprisonment and who appears in court without counsel of the right to confer with an attorney, and, if the person is financially unable to obtain counsel, of the right to be represented by counsel at all stages of the proceedings at public expense. *See* NMSA 1978, § 31-15-12 (1993); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for

any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Smith v. Maldonado*, 1985-NMSC-115, ¶ 10, 103 N.M. 570, 711 P.2d 15 (same).

Assuming that the accused is appearing before the court on a felony complaint, the defendant is entitled to be advised of the right to a preliminary hearing to determine probable cause for prosecution. *See* N.M. Const. art. II, § 14.

[As revised, effective November 1, 1991; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending and filed on or after December 31, 2013.]

5-401. Pretrial release.

A. **Hearing.**

(1) ***Time.*** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

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

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

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

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

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) *Percentage bond*. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) *Property bond*. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5-401.1 NMRA.

(c) *Cash or surety bond*. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings regarding secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice

(2) ***Written findings regarding secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.**

(1) If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

(2) The court may schedule a detention hearing within the time limits set forth in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and defendant when

(a) The defendant is charged with a felony offense

(i) involving the use of a firearm;

(ii) involving the use of a deadly weapon resulting in great bodily harm or death,

(iii) which authorizes a sentence of life in prison without the possibility of parole, or

(b) A public safety assessment tool flags potential new violent criminal activity for the defendant.

(3) If the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under this rule and issue an order setting conditions of release.

H. **Case pending in district court; motion for review of conditions of release.**

(1) ***Motion for review.*** If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is thereupon released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial

release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

J. **Record of hearing.** A record shall be made of any hearing held by the district court under this rule.

K. **Cases pending in magistrate, metropolitan, or municipal court; petition for release or review by district court.**

(1) ***Case within magistrate, metropolitan, or municipal court trial jurisdiction.*** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition under this paragraph 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.

(4) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** Upon the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(a) set a hearing no later than 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) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly transmit to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

M. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. **Release from custody by designee.** The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. **Bind over to district court.** For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

P. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

R. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a

judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or 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 January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; 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. _____, effective _____.]

Committee commentary. — This rule provides "the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution." *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142.

This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6-401 NMRA, the Rules of

Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions

of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated

to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule Rule 5-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Paragraph F also requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may

file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

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

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief

district court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant's first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court upon notice from the district attorney that an information or indictment has been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in district court with respect to matters of pretrial release. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release 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"); *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).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R 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.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

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. On the written motion of the prosecutor or the defendant, or on the court's own motion, the court

shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

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 within one (1) day, 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; as amended by Supreme Court Order No. _____, effective _____.]

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. Vigil*, 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.]

5-409. Pretrial detention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) ***Time.***

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

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

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

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

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

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

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

(iv) upon stipulation of the parties.

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

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

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

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

(ii) all exculpatory evidence known to the prosecutor.

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

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

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

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

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

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

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

(c) the history and characteristics of the defendant;

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

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

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

(g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

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

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

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

I. **Further proceedings in magistrate or metropolitan court.** Upon completion of the hearing, if the case [~~is~~] was pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court [~~a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate or metropolitan court may modify the order setting conditions of release upon a showing of good cause, but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court~~] an order closing the magistrate or metropolitan court case. {NB: **Alternative is to delete this paragraph altogether.}**

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

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

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

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

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

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

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

Committee commentary. —

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6-409. Pretrial detention.

A. **Scope.** This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the magistrate and district court while a case is pending in the magistrate court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 6-401 NMRA, under Article II, Section 13 and Rule 5-409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled "Expedited Motion for Pretrial Detention" and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a written expedited motion for pretrial detention at any time in both the magistrate court and in the district court. The motion shall include the specific facts that warrant pretrial detention.

C. **Determination of probable cause.** If a motion for pretrial detention is filed in the magistrate court and a probable cause determination has not been made, the magistrate court shall determine probable cause under Rule 6-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. **Determination of motion by district court.** If probable cause has been found, the magistrate court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate court's jurisdiction [~~to set or amend conditions of release~~] shall then be terminated, and the district court shall acquire exclusive jurisdiction over [~~issues of pretrial release until the case is remanded~~

~~by the district court following disposition of the detention motion under Paragraph E of this rule~~] the case.

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

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

Committee commentary. —

Paragraph C — Federal constitutional law requires a "prompt judicial determination of probable cause" to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — Upon the filing of a motion for pretrial detention and a finding of probable cause, the magistrate court is deprived of jurisdiction to set or amend the conditions of release. The filing of the motion does not, however, stay the case in the magistrate court. Nothing in this rule shall prevent timely preliminary examinations from proceeding while the detention motion is pending.

Paragraph E — If the district court issues a detention order under Rule 5-409 NMRA, the magistrate court cannot release the defendant while the case is pending. The magistrate court

should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA.

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

6-501. Arraignment; first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

(1) the offense charged;

(2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;

(3) the right to bail or the possibility of pretrial detention;

(4) the right, if any, to the assistance of counsel at every stage of the proceedings;

(5) the right, if any, to representation by an attorney at state expense;

(6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;

(7) the right, if any, to a jury trial;

(8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;

(9) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms,

including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act, NMSA 1978, Sections 29-11A-1 to -10.

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint, under Rule 6-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Insanity or incompetency.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense,", after setting conditions of release, the action shall be transferred to the district court. If a question is raised about the defendant's competency to stand trial, the court shall proceed under Rule 6-507.1 NMRA.

D. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea or waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. **Felony offenses; preliminary examination.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination the court shall proceed to conduct such an examination in accordance with Rule 6-202 NMRA.

F. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 6-401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective _____.]

7-409. Pretrial detention.

A. **Scope.** This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the metropolitan and district court while a case is pending in the metropolitan court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 7-401 NMRA, under Article II, Section 13 and Rule 5-409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled "Expedited Motion for Pretrial Detention" and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a written expedited motion for pretrial detention at any time in both the metropolitan court and in the district court. The motion shall include the specific facts that warrant pretrial detention.

C. **Determination of probable cause.** If a motion for pretrial detention is filed in the metropolitan court and a probable cause determination has not been made, the metropolitan court shall determine probable cause under Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. **Determination of motion by district court.** If probable cause has been found, the metropolitan court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The metropolitan court's jurisdiction [~~to set or amend conditions of release~~] shall then be terminated, and the district court shall acquire exclusive jurisdiction over [~~issues of pretrial release until the case is remanded~~

~~by the district court following disposition of the detention motion under Paragraph E of this rule~~] the case.

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

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

Committee commentary. —

Paragraph C — Federal constitutional law requires a "prompt judicial determination of probable cause" to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — Upon the filing of a motion for pretrial detention and a finding of probable cause, the metropolitan court is deprived of jurisdiction to set or amend the conditions of release. The filing of the motion does not, however, stay the case in the metropolitan court. Nothing in this rule shall prevent timely preliminary examinations from proceeding while the detention motion is pending.

Paragraph E — If the district court issues a detention order under Rule 5-409 NMRA, the metropolitan court cannot release the defendant while the case is pending. The metropolitan court

should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 7-202(A)(3) or (D)(1) NMRA.

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

7-501. Arraignment; first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

(1) the offense charged;

(2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;

(3) the right to bail or the possibility of pretrial detention;

(4) the right, if any, to the assistance of counsel at every stage of the proceedings;

(5) the right, if any, to representation by an attorney at state expense;

(6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;

(7) the right, if any, to a jury trial;

(8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;

(9) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms,

including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [29-11A-1 NMSA 1978].

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint under Rule 7-302, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Defense of insanity.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense," after setting conditions of release, the action shall be transferred to the district court.

D. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea of not guilty or a waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. **Felony offenses; preliminary examination.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district

court. If the defendant does not waive preliminary examination, the court shall proceed to conduct such an examination in accordance with Rule 7-202 NMRA of these rules.

F. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 7-401 NMRA of these rules.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of his right to assistance of counsel at every stage of the proceedings and his right to be represented by an attorney at state expense if he is indigent. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The defendant may waive counsel so long as the waiver is knowingly, voluntarily, and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 1977-NMSC-111, 91 N.M. 207, 572 P.2d 935; *North Carolina v. Butler*, 441 U.S. 369 (1979).

[As amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]