

5-408. Pretrial release by designee. (2017)

A. Scope. This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person's first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. Minor offenses; release on recognizance.

(1) Persons eligible. A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) Exceptions. A person arrested for any of the following offenses is not eligible for release under this paragraph:

- (a) battery under Section 30-3-4 NMSA 1978;
- (b) aggravated battery under Section 30-3-5 NMSA 1978;
- (c) assault against a household member under Section 30-3-12 NMSA 1978;
- (d) battery against a household member under Section 30-3-15 NMSA 1978;
- (e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;
- (f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;
- (g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;
- (h) stalking under Section 30-3A-3 NMSA 1978;
- (i) abandonment of a child under Section 30-6-1(B) NMSA 1978;
- (j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;
- (k) enticement of a child under Section 30-9-1 NMSA 1978;
- (l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;

(m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;

(n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;

(o) violating an order of protection under Section 40-13-6 NMSA 1978; or

(p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

C. Pretrial release based on risk assessment. A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. Pretrial release under release on recognizance program. A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court.

E. Type of release and conditions of release set by judge. A person who is not eligible for pretrial release by a designee under Paragraph B, Paragraph C, or Paragraph D of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA.

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

Committee commentary. — Under NMSA 1978, Section 31-3-1 and Rule 5-401(N) NMRA, the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. In the past, some courts have used fixed secured bond schedules tied to the level of the charged offense, rather than any individual flight risk of the arrestee, a practice that has been specifically prohibited by new Subparagraph (E)(1)(d) of Rule 5-401 NMRA (as reflected in the 2017 amendment), and that has constitutional implications. See, e.g., Memorandum and Opinion Setting out Findings of Fact and Conclusions of Law, ODonnell v. Harris Cty., No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017); Opinion, Jones v. City of Clanton, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015).

The provisions in this new rule provide more detailed guidance for courts for authorizing release by designees, who are generally detention center or court employees, and contains several situations in which release by designees can be authorized, none of them including fixed secured bond schedules.

Paragraph B of this rule sets out a statewide standard method of automatic release by designees in cases involving minor offenses, where no exercise of discretion is required on the part of the designee. Subparagraph (B)(2) identifies certain offenses excepted from automatic release under Subparagraph (B)(1), including the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA

1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery, enticement of a child, violating an order of protection, and driving under the influence of intoxicating liquor or drugs.

Paragraph C of this rule will independently permit a designee to release an arrestee if specifically authorized to be released through use of a Supreme Court-authorized risk assessment instrument.

Paragraph D of this rule provides flexibility for individual courts to operate their own Supreme Court-authorized release on recognizance programs that may rely on individualized discretionary assessments of arrestee eligibility by designees, in addition to the release authority authorized in Paragraphs B and C of this rule, so long as they are exercised within the parameters of Court-approved programs.

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