

## Opinion No. 70-95

December 14, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** E.E. Chavez, Chief Deputy District Attorney First Judicial District Santa Fe, New Mexico

### QUESTIONS

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Should indictments returned by a grand jury be returned in open court before a district judge or may the grand jury have the indictments filed directly in the district court clerk's office without first presenting them in open court?

#### CONCLUSION

The grand jury may have the indictments filed directly in the district court clerk's office.

### OPINION

#### {\*169} ANALYSIS

Section 41-5-5, N.M.S.A., 1953 Comp. (1969 Supp.) provides "Indictments shall be returned by the grand jury within twenty-four (24) hours following the day when the indictment is voted. Indictments may be filed and prosecution and trial had thereon without regard to court terms." This section is the only section directly dealing with the return of indictments and does not say where the indictment should be returned. However, we feel that Section 41-6-44, N.M.S.A., 1953 Comp., by implication, allows that the indictment be filed directly with the district court clerk. This section provides: "All indictments, informations and the records thereof shall be in the custody of the clerk of the court to which they are presented, and shall not be inspected by any person other than the judge, the clerk, the attorney general and the district attorney until the defendant is in custody or has been admitted to bail."

Any other interpretation of Section 41-5-5, *supra*, would create a burden upon the district courts which the legislature did not intend. To require the district court to convene every time an indictment is returned in order to have it presented to the court would be unreasonable. The unreasonableness of such a construction is evident when you recognize the fact that not a single judicial district within the State of New Mexico has a district judge at each county seat. Thus, an interpretation of Section 41-5-5 which would require the filing of the indictment in open court within twenty-four (24) hours would require a judge, in many instances, to travel to a county within his district where the grand jury was meeting every other day in order to accept indictments.

The only factor to be considered in filing the indictment directly with the district court clerk is one of insuring that it was received within twenty-four (24) hours after it was voted. This could be simply solved by a certification from the grand jury foreman on each indictment which would state the time and date of voting. Then, when it was filed with the district court clerk, it would be stamped as to the time it was returned. Thus, the record would be clear that the indictment had been returned within the twenty-four (24) hour period.

By: Ray Shollenbarger

Assistant Attorney General